2017 WL 1037233 (C.A.3) (Appellate Brief)
United States Court of Appeals, Third Circuit.

In re: Processed Egg Products Antitrust Litigation.
KRAFT FOODS GLOBAL, INC., Kellogg Company, General Mills, Inc., and Nestlé USA, Inc., Plaintiffs-Appellants,
v.
UNITED EGG PRODUCERS, INC., United States Egg Marketers, Inc., Rose Acre Farms, Inc., Ohio Fresh Eggs, LLC., Michael Foods, Inc., R.W. Sauder, Inc., and Cal-Maine Foods, Inc., Defendants-Appellees.

No. 16-3795.
March 7, 2017.

Appeal from Summary Judgment Order of the United States District Court for the astern District of Pennsylvania, Case Nos. 2-08-md-02002 and 2-12-cv-00088
Honorable Gene E.K. Pratter

Opening Brief of Plaintiffs-Appellants

Richard P. Campbell (Illinois #0378089), James T. Malysiak (Illinois #1746081), Michael T. Brody (Illinois #06187223), Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456, (312) 222-9350, Counsel for Plaintiffs-Appellants.

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Kraft Foods Global, Inc., Kellogg Company, General Mills, Inc., and Nestlé USA, Inc. ("Kraft Plaintiffs") allege that defendants violated Section One of the Sherman Act, 15 U.S.C. § 1, by conspiring to reduce the output of eggs, thereby directly increasing market prices for shell eggs and egg products. The Kraft Plaintiffs' claims are based entirely on their purchases of egg products from the defendants.

The district court had jurisdiction over the Kraft Plaintiffs' action pursuant to 28 U.S.C. §§ 1331 and 1337. The Kraft Plaintiffs' case, originally filed in the Northern District of Illinois, was transferred to the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation for coordinated pretrial proceedings with other cases involving similar claims ("MDL 2002").

On September 6, 2016, the district court granted summary judgment to defendants, holding that no plaintiff in the multidistrict proceedings had standing to assert price-fixing claims based on purchases of egg products. Joint Appendix ("JA") 3 (Summary Judgment Order); JA 4-11 (Summary Judgment Opinion ("S.J. Op."). Because the Kraft Plaintiffs asserted antitrust claims based exclusively on purchases of egg products, the district court's ruling was a final order terminating the Kraft Plaintiffs' case. The Kraft Plaintiffs timely filed a Notice of Appeal on October 4, 2016. JA 1. This Court has jurisdiction under 28 U.S.C. § 1291.

***2** On October 6, 2016, this Court directed the parties to address the finality of the dismissal order. Court of Appeals Document No. ("App. Doc. No.") 003112429168. The Kraft Plaintiffs responded that while their case is one of several cases transferred to MDL 2002 for consolidated pretrial proceedings, the cases were not consolidated for other purposes and each case therefore retained its separate identity. App. Doc. No. 003112439511. The Kraft Plaintiffs demonstrated that finality for appeal is determined for each separate case in an MDL on its own circumstances. The Kraft Plaintiffs relied on *Gelboim v. Bank of America Corp.*, in which the Supreme Court held that a decision dismissing the plaintiff's claims in their entirety, as here, is appealable even if other cases in the MDL proceeding remain pending in the district court. 135 S. Ct. 897, 902 (2015). Defendants-Appellees agreed this Court has jurisdiction. App. Doc. No. 003112438882.

On January 9, 2017, the Court directed the parties to address appellate jurisdiction in their briefs for decision by the merits panel. App. Doc. No. 003112506327. Applying *Gelboim* to the circumstances here, this Court has appellate jurisdiction under § 1291 because all of the Kraft Plaintiffs' claims were dismissed by the district court's final order.

STATEMENT OF THE CASE

A. The Parties

The multidistrict proceeding from which this appeal originates involves antitrust price-fixing class actions by direct and indirect purchasers of shell eggs and egg products, and individual antitrust actions by the purchasers (referred to as "direct action plaintiffs" or "DAPs") of those same products. ECF No. 462 (Case Management Order No. 15). "Shell eggs" are whole eggs sold primarily to grocery stores for resale to consumers, and "egg products" are egg whites and yolks in liquid, dried, or frozen form sold primarily to food manufacturers as ingredients. JA200 (Kraft Plaintiffs' Second Amended Complaint ("Kraft SAC"); JA586-587, 596-597 (Baye Report).

The plaintiffs in this case - Kraft Foods Global, Inc., Kellogg Company, General Mills, Inc., and Nestlé USA, Inc. - filed an individual case based upon their purchases from defendants of egg products used in the Kraft Plaintiffs' food-manufacturing operations. They allege that the defendants engaged in a conspiracy that reduced the supply of eggs, compared to what the supply would have been in a competitive market, and thereby caused market prices for both shell eggs and egg products to increase above competitive levels. JA198-294 (Kraft SAC).

***7** The remaining Defendants are Cal-Maine Foods, Inc., Michael Foods, Inc., Rose Acre Farms, Inc., Ohio Fresh Eggs, LLC, R.W. Sauder, Inc., United Egg Producers, Inc. ("UEP") (the egg producers' trade association), and United States Egg Marketers, Inc. ("USEM") (an entity controlled by UEP that manages the export of eggs for egg producers). JA209-233 (Kraft SAC). [2]

B. The Egg Output Reduction Conspiracy

The Kraft Plaintiffs claim defendants conspired to limit the output of eggs to increase market prices of egg products. JA247-65. The defendants' egg-products summary judgment motion does not contest the Kraft Plaintiffs' conspiracy allegations. Defendants' motion is based solely on their contention that the Kraft Plaintiffs rely on an invalid umbrella theory of antitrust damages. ECF Nos. 1233, 1312 (Defs. S.J. Br. and Reply Br.). The district court's egg-products ruling does not address any issue concerning the alleged conspiracy. JA4-11. All plaintiffs in the multidistrict proceeding have alleged an output-reduction conspiracy, and the district court denied summary judgment motions in which defendants Michael Foods, Rose Acre Farms, R.W. Sauder, Inc., and Ohio Fresh Eggs contended that they did not engage in conspiracy. ECF No. 1444 (Dist. Ct. Conspiracy S.J. Op.).

***8** The conspiracy had the effect of raising the market prices of egg products, as reported by the "Urner Barry" publication, which is the generally recognized index of shell-egg and egg-product market prices. JA591-593 (Baye Report). The higher Urner Barry market prices for egg products were used to set the prices the Kraft Plaintiffs paid for the egg products they purchased from defendants. JA639-648, 650-658 (Baye Report).

The Kraft Plaintiffs contend that the conspiracy reduced egg production below the competitive level primarily through the "UEP Certified Program," a program coordinated by the defendants through the United Egg Producers ("UEP") trade association. JA247-255 (Kraft SAC). The Kraft Plaintiffs also allege that the defendants reduced the egg supply through uneconomic exports and short-term measures designed to lower production, such as reducing the "chick hatch" to lower the number of layer hens producing eggs and engaging in "early molting" to take hens out of production prematurely. JA255-262 (Kraft SAC). Simply put, defendants conspired to raise shell egg and egg products prices by

reducing the number of laying hens, thereby reducing the egg supply and, given the inelasticity of demand, increasing shell-egg and egg-products market prices. JA262-265 (Kraft SAC).

Although publicly described as an animal welfare program, the UEP Certified Program ("Program") was designed by defendants to constrict egg supply ***9** with the purpose of increasing shell-egg and egg-products market prices. Prior to adopting the Program, the UEP Marketing Committee reported that "if the egg industry did not voluntarily adjust the supply side of our business, very quickly, … prices would be at record low figures and all those producing eggs would realize severe financial losses." ECF No. 1274 at 47-48 (DAPs' Counter-Statement of Facts in Opp. S.J. Mtn on Liability & Damages). Recognizing that increased flock size results in lower prices, defendants adopted restrictions designed to result in "fewer birds" and a "higher market." *Id.* at 51.

The defendants adopted three main measures in the Program to reduce the size of the flock of laying chickens, thus reducing supply and increasing prices. First, the UEP required participants (including all egg-producing defendants) to increase the cage space for each hen, which had the immediate effect of reducing the number of egg-laying chickens. Second, the Program prohibited "backfilling" - the replacement of a hen that had died with a new hen. This rule had the effect of further reducing flock size. Third, defendants adopted the "100% Rule" under which participants were required to comply with the Program requirements for all their egg production, both those intended for marketing as shell eggs and those intended to be sold as egg products. JA247-255 (Kraft SAC).

To be certified as complying with the Program, participants had to pass a periodic audit which gave dispositive weight to the Program's supply reduction ***10** provisions (cage-space increases and ban on backfilling) and little weight to purported welfare requirements that did not reduce supply. JA251-253 (Kraft SAC); ECF No. 1274 at 58-59 (DAPs' Counter-Statement of Facts in Opp. S.J. Mtn on Liability & Damages).

The conspiracy was intended by defendants to raise market prices for both shell eggs and egg products. From the outset of the Program, the 100% Rule applied to all eggs produced by Program participants whether marketed as shell eggs or egg products. *Id.*, ECF No. 1274 at 58-59.

The Kraft Plaintiffs demonstrated through their economic expert's opinions that the conspiracy substantially increased the prices of egg products that the Kraft Plaintiffs purchased from defendants during the conspiracy period. JA639-648, 650-658 (Baye Report).

C. Pretrial Proceedings

The Kraft Plaintiffs filed their Complaint on December 12, 2011 in the Northern District of Illinois. (Case No. 1:11-cv-08808, N.D. Ill.) On December 28, 2011, the Judicial Panel on Multidistrict Litigation transferred the case to the Eastern District of Pennsylvania for coordinated pretrial proceedings with other cases alleging an output-reduction conspiracy by the nation's leading egg producers. ECF No. 605. The other cases included class actions on behalf of direct purchasers of shell eggs and egg products and indirect purchasers of shell ***11** eggs, and other individual actions by grocery chains and food manufacturers. ECF Nos. 20 (Case Management No. 4); 462 (Case Management Order No. 15).

After completing fact and expert discovery, the parties filed summary judgment motions. Certain defendants moved for summary judgment on liability, asserting there was insufficient evidence of a conspiracy to reduce the supply of eggs. ECF Nos. 1227 (Ohio Fresh Eggs), 1228 (Michael Foods), 1230 (R.W. Sauder, Inc.), 1238 (Rose Acre Farms). The district court denied the defendants' motions, concluding that plaintiffs had presented sufficient evidence of the output-reduction conspiracy to create disputed fact issues and that a trial of plaintiffs' claims was required. ECF No. 1444 (S.J. Op.). The district court also rejected defendants' affirmative defense that they are immunized from antitrust liability under the Capper-Volstead Act, 7 U.S.C. §§ 291-292, with respect to their actions as UEP members. *Id.*

D. Defendants' Motion for Summary Judgment on Egg Products

The defendants moved for summary judgment on all egg-product claims on the sole ground that such claims are purportedly based on the umbrella theory of antitrust damages which this Court rejected in *Mid-West Paper*, 596 F.2d at 583-87. ECF No. 1233. [3] Defendants contended that even though the Kraft Plaintiffs ***12** asserted claims for overcharges for egg products purchased directly from the defendants, the Kraft Plaintiffs' claims rely on the umbrella theory because some of the egg products they bought from defendants were made from eggs that the defendants acquired from suppliers that were not conspirators.

The relationship can be illustrated as follows:

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE
TABLE

The Kraft Plaintiffs alleged that both shell eggs and egg products, shown in the gray box, were price-fixed goods because the defendants' conspiracy was designed to raise the market prices of shell eggs and egg products by reducing egg ***13** supply. As shown in the diagram, the Kraft Plaintiffs purchased only egg products, a price-fixed good, and their claims relate *exclusively* to egg products purchased directly from the defendants. There were other producers that were not in the conspiracy (the box on the right). Their sales are not at issue.

Defendants argued that the Kraft Plaintiffs lack antitrust standing because the egg products the Kraft Plaintiffs purchased from defendants were processed with eggs that came from two sources: Some were produced by defendants' own flocks; others, shown in the diagram with a dotted line between the two boxes, were processed by defendants from eggs those defendants purchased from producers that did not participate in the conspiracy. Defendants contended that the fact that some of the eggs used in the egg products the Kraft Plaintiffs purchased from the defendants were produced by non-conspirators meant the Kraft Plaintiffs are seeking to recover "umbrella damages." ECF No. 1233 at 3, 12-16 (Defs. S.J. Br.). In response, the Kraft Plaintiffs explained that they did not seek umbrella damages because their damage claims were for overcharges on a price-fixed good - egg products - purchased directly and entirely from the conspiring defendants. ECF No. 1268 at 3-12.

Because this appeal concerns defendants' summary judgment motion - which the district court granted - the Kraft Plaintiffs describe in detail below the evidence presented by the parties on that motion.

***14 E. The Kraft Plaintiffs Suffered Direct Injury From the Conspiracy**

The Kraft Plaintiffs relied on economic evidence from Dr. Michael R. Baye of the Indiana University Kelley School of Business. Dr. Baye previously served as the Director of the Bureau of Economics at the U.S. Federal Trade Commission, which was the most senior FTC economist position. JA565 (Baye Report). [4] Defendants did not contest Dr. Baye's qualifications or opinions - either through an *in limine* motion under Federal Evidence Rule 702 or a challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). JA374 (Certain Defs. Response to DAPs' Counter Statement of Facts ("Defs. Resp. DAPs' CSF"). Dr. Baye addressed (1) the relevant product market, (2) the impact of the alleged supply reduction conspiracy on market prices for shell eggs and egg products, (3) the increase caused by the conspiracy in Urner Barry-reported market prices for egg products purchased by the Kraft Plaintiffs from the defendants, and (4) the amount of the Kraft Plaintiffs' overcharge damages. JA596-654.

Relevant Product Market. Dr. Baye determined that "Eggs," including both shell eggs sold to grocery stores and egg products sold to food manufacturers, are a relevant product market and that the United States is the relevant geographic ***15** market. JA596-598 (Baye Report); JA375 (Defs. Resp. DAPs' CSF ¶ 1). As the UEP's senior vice president noted, the egg market is just "one pie." JA382 (Defs. Resp. DAPs' CSF ¶ 14). The defendants admitted as much: Michael Foods' Form 10-K for FY 2013 states that "processed egg products compete with shell eggs." JA395 (Defs. Resp. DAPs' CSF ¶ 37).

Impact of Defendants' Actions on Egg Supply. Dr. Baye analyzed whether the defendants' supply-reduction conspiracy had a significant effect on egg supply. He determined that the conspiracy reduced flock size and egg production by significant amounts as supply restrictions were phased in:

Period	Reduction in Flock Size (compared to flock size "but for" the restriction)
Aug. 2002 - Jan. 2004	0.2%
Feb. 2004 - July 2005	1.3%
Aug. 2005 - Jan. 2007	3.3%
Feb. 2007 - July 2008	6.5%
Aug. 2008 - Dec. 2012	6.7%

JA622-623.

Based on the discovery record, Dr. Baye also found that the demand for eggs is highly inelastic, which means that a relatively small reduction in the egg supply results in a large increase in egg prices. JA583-584, 587-588, 614, 634-636, 650-653. Through econometric methods, Dr. Baye determined that that the demand ***16** for each of 68 specific types of shell eggs and egg products involved in this case is highly inelastic, and he estimated elasticity for each product. JA634-636, 650-653.

Effect on Price. Given the inelasticity of egg demand, the conspiracy to reduce the egg supply caused the Kraft Plaintiffs to pay substantial overcharges for egg products, all of which were bought directly from the defendants - primarily Michael Foods and Rose Acre Farms. JA309, 313 (DAPs' Response to Defs. Statement of Facts ¶¶ 8, 17, 18); 634-648, 650-658 (Baye Report). Dr. Baye determined how much of the overall increases in the Urner Barry prices for egg products resulting from the conspiracy were charged to the Kraft Plaintiffs. JA639-647. That amount varied from no overcharge to the full amount of the increase. JA398-409 (Baye Report backup file); 415-416 (S.J Hearing Transcript). Dr. Baye found the overcharges varied for each of the Kraft Plaintiffs' purchases because of differences in the timing of their purchases, the types of egg products purchased, and other contract terms. JA644-648 (Baye Report).

Damages. Dr. Baye accounted for the possibility that each Kraft Plaintiff was insulated from increases in market prices and incurred no damages. JA644-648, 654-658. Based on his methodology, Dr. Baye estimated the following minimum damages for the Kraft Plaintiffs: Kraft: $71.9 million, General Mills: $10.1 million; Kellogg: $10.8 million; and Nestlé: $19.8 million; or an aggregate $111.6 million. JA655. Dr. Baye calculated these overcharges based on the Kraft ***17** Plaintiffs' actual purchases of egg products from the defendants. JA 646-647, 656. None of the Kraft Plaintiffs' damages calculated by Dr. Baye are based on purchases from non-conspirators. JA395 (Defs. Resp. DAPs' CSF ¶ 38).

F. Defendants' Egg Products Were Made With Their Own Egg Production and Eggs Acquired from Non-Conspirators

Rose Acre. In 2007, 87.3% of the egg products Rose Acre sold were made with eggs it produced internally. The remaining 12.7% were processed using eggs Rose Acre acquired from outside suppliers. In 2009 and 2012, Rose Acre produced approximately 95% of the eggs used for the egg products it sold and acquired approximately 5% externally. JA368-369 (Defs. Responses to DPPs' Counter Statement of Facts ¶ 21).

Michael Foods. Defendant Michael Foods is the largest processed egg producer in the industry. In 2008, 39% of Michael Foods' Egg Division sales consisted of "industrial" egg products sold to food manufacturers, such as the Kraft Plaintiffs. JA666-667, 676 (Burtis Report) [5] ; JA386 (Defs. Resp. DAPs' CSF ¶ 20).

In 2008, Michael Foods' Egg Products Division purchased 74% of its egg requirements from other companies and 26% was sourced internally. Other years were similar: In 2011, approximately 27% of the Division's egg need was ***18** produced internally; and in 2013, 25% was produced internally. A portion of the eggs it obtained externally were obtained from other defendants. In 2008, for example, approximately 13% of Michael Foods' external supply used for egg products (which equals 9.6% of the total supply) was purchased from other defendants or affiliates of defendants. JA393-394 (Defs. Resp. DAPs' CSF ¶¶ 33-35); JA367-369 (Defs. Responses to DPPs' Counter Statement of Facts ¶¶ 27-31). Therefore, 35.6% of the eggs in Michael Foods' egg products in 2008 were produced by defendants.

G. The District Court's Egg-Products Summary Judgment Decision

The district court granted defendants' summary judgment motion with respect to the individual claims of the direct purchaser plaintiff ("DPP") class representatives and the direct action plaintiffs, including the Kraft Plaintiffs, based on their purchases of egg products. As is relevant to the Kraft Plaintiffs, the district court made the following rulings:

1. The district court first found the Kraft Plaintiffs' egg-products claims "at odds with the 'umbrella' damages rule." JA4. The court concluded that because some of the eggs used in making the egg products purchased by the Kraft Plaintiffs from defendants were acquired by defendants from non-conspirators, the overcharges that the Kraft Plaintiffs sought to recover for those egg-products ***19** purchases were umbrella damages and provide no basis for antitrust standing. JA9-10.

2. The district court treated shell eggs as the only price-fixed product. Thus, the district court viewed the Kraft Plaintiffs' claims based on their direct purchases of egg products from defendants as, in part, indirect purchases of shell eggs from defendants' suppliers, some of whom were not conspirators. JA9. Viewing the transactions in that manner, the district court held that the Kraft Plaintiffs' claims are barred by *Mid-West Paper* which rejected the umbrella damages theory and by *Illinois Brick* which held that only direct purchasers of the price-fixed product have valid Sherman Act price-fixing claims. In support of that holding, the district court found the Kraft Plaintiffs had failed to establish that the defendants profited from their sale of egg products to the Kraft Plaintiffs. *Id.* The district court also held that the Kraft Plaintiffs can recover only for purchases of eggs produced through the UEP Certified Program, but that they had no means of determining whether the egg products they purchased were made with Certified eggs or non-Certified eggs. JA10.

3. *Mid-West Paper*'s umbrella damages rule and the *Illinois Brick* direct-purchaser rule are antitrust standing doctrines. In *Associated General Contractors of California, Inc., v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Supreme Court provided a comprehensive method for assessing antitrust ***20** standing, which the Kraft Plaintiffs asked the district court to apply. The district court declined to address the argument, which it characterized as a "detour." JA10 n.4.

4. Although the defendants had not argued that Dr. Baye's economic opinions were inadmissible under Federal Evidence Rule 702 and *Daubert*, the district court nonetheless rejected Dr. Baye's opinion that he had "isolated the effects of the

conspiracy on the prices of egg products." JA9-10. In the district court's view, Dr. Baye "cannot have done so without any analysis whatsoever of the non-conspirator egg producers' pricing decisions and without any knowledge of which eggs went into which egg products, and in what proportion." *Id.*

As demonstrated below, these rulings are incorrect.

SUMMARY OF ARGUMENT

The district court's summary dismissal of the Kraft Plaintiffs' egg-products claims should be reversed for four reasons.

First, the Kraft Plaintiffs do not seek umbrella damages. Instead, their damages result from their direct purchases of price-fixed goods from conspiring defendants. The district court incorrectly assumed that shell eggs are price-fixed products but egg products are not. Based on that erroneous factual assumption, the district court treated the Kraft Plaintiffs' claims as based upon indirect purchases of the price-fixed product - shell eggs - some of which were produced by non- ***21** conspirators. The district court's assumption is unfounded. The Kraft Plaintiffs provided admissible evidence that the relevant product market is shell eggs *and* egg products. The Kraft Plaintiffs' economics expert explained that shell eggs and egg products are in the same relevant product market and that the market prices of both shell eggs and egg products were directly increased by the supply-reduction conspiracy. The evidence showed the Kraft Plaintiffs were overcharged in their purchases of egg products from defendants. Whether egg products are price-fixed products is a factual issue that is material and disputed, and which cannot be resolved at summary judgment.

Second, the district court incorrectly applied *Illinois Brick* based on the same mistaken assumption that the Kraft Plaintiffs' claims rely on indirect purchases of shell eggs from the defendants' suppliers. To the contrary, the claims are for direct damages flowing from the conspiracy's impact on the price of egg products.

Third, the district court erred in not applying the *Associated General Contractors* test to assess antitrust standing. The Kraft Plaintiffs satisfy all five of its factors: The egg-supply reduction conspiracy directly caused the Kraft Plaintiffs to pay significantly more for egg products; the Kraft Plaintiffs paid overcharges to defendants, precisely the type of injury which the antitrust laws were intended to remedy; the Kraft Plaintiffs' damages are based on direct purchases of price-fixed products from defendants; there are no other victims better ***22** able to seek redress for the overcharges the Kraft Plaintiffs paid defendants for egg products; and there is no potential for duplicative recovery or need for apportionment of damages.

Fourth, the district court erred by excluding Dr. Baye's opinions. The defendants did not challenge Dr. Baye's opinions. Yet the district court erroneously held *sua sponte* - without an *in limine* hearing, briefing, or argument - that Dr. Baye's opinions should not be considered because he failed to analyze the prices that the defendants paid their suppliers for eggs used in the egg products sold to the Kraft Plaintiffs and that he had not traced "price-fixed" Certified eggs to the egg products bought by the Kraft Plaintiffs. Those issues arise only because of the district court's erroneous assumption that shell eggs are the only price-fixed product. Because the Kraft Plaintiffs' claims are based on their *direct* purchases of egg products from the defendants, defendants' purchase of materials from third parties is irrelevant.

***1** *Corporate Disclosure Statement and Statement of Financial Interest*

No. 16-3795

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION

v.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

***2** Pursuant to Rule 26.1 and Third Circuit LAR 26.1, *General Mills, Inc.* makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not Applicable.

/s/James T. Malysiak

(Signature of Counsel or Party)

October 12, 2016 Dated:

1** ***Corporate Disclosure Statement and Statement of Financial Interest

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If additional space is needed, please attach a new page.

***2** Pursuant to Rule 26.1 and Third Circuit LAR 26.1, *The Kellogg Company* makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not Applicable.

/s/James T. Malysiak

(Signature of Counsel or Party)

Dated: *October 12, 2016*

1** ***CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

No. 16-3795

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION

v.

Instructions

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3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

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If additional space is needed, please attach a new page.

***2** Pursuant to Rule 26.1 and Third Circuit LAR 26.1, makes the following disclosure: *KRAFT FOODS GLOBAL, INC.* Pursuant to Rule 26.1 and Third Circuit LAR 26.1, makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: In 2012, Kraft Foods Global, Inc. changed its name to Kraft Foods Group, Inc. In 2015 Kraft Foods Group, Inc. merged with H.J. Heinz Company, becoming Kraft Heinz Foods Company, which has succeeded to the rights of Kraft Foods Global, Inc.'s cause of action in this litigation.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Kraft Heinz Foods Company is a wholly owned subsidiary of The Kraft Heinz Company, a Delaware corporation. The Kraft Heinz Company is publicly traded.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

Berkshire Hathaway, Inc., a publicly traded corporation, owns at least 10% of the shares of The Kraft Heinz Company.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not Applicable.

/s/James T. Malysiak

(Signature of Counsel or Party)

Dated: *October 12, 2016*

1** ***Corporate Disclosure Statement and Statement of Financial Interest

No. 16-3795

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION

v.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

***2** Pursuant to Rule 26.1 and Third Circuit LAR 26.1, *Nestlé USA, Inc.* makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: Nestlé USA, Inc., is a subsidiary of Nestlé Holdings, Inc., which is a subsidiary of NIMCO US., Inc. which is a subsidiary of Nestlé S.A., a Swiss company that is a publicly owned corporation trading on the Swiss stock exchange.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Nestlé S.A.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not Applicable.

/s/James T. Malysiak

(Signature of Counsel or Party)

Dated: *October 12, 2016*

***3 STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Did the district court err by holding that the defendants are entitled to summary judgment because the Kraft Plaintiffs' damage claims are based on the umbrella theory of antitrust damages rejected by this Court in *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3rd Cir. 1979)?
Raised Below in Motion of Certain Defendants for Summary Judgment Order Dismissing All Damages Claims Based on Purchases of Egg Products ("Defs. S.J. Mtn") (ECF No. 1233); [1] *objected to* in Direct Action Plaintiffs' Memorandum of Law in Opposition To Motion of Certain Defendants For Summary Judgment Dismissing All Damages Claims Based on Purchases of Egg Products ("DAPs' Br. Opp. S.J. Mtn") (ECF No. 1268); *ruled on* by the district court at JA4-11 (S.J. Op.).

2. Did the district court err by treating the Kraft Plaintiffs as indirect purchasers of shell eggs and dismissing their egg products claims under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)?
Not Raised Below by the defendants in their summary judgment motion or supporting briefs (ECF Nos. 1233, 1312); *argued* in DAPs' ***4** Br. Opp. Egg Products S.J. Mtn (ECF No. 1268 at 6); *ruled on* by the district court at JA6-7 (S.J. Op.).

3. Did the district court err in granting summary judgment to defendants, based on its umbrella damages holding and its interpretation of *Illinois Brick*, despite disputed factual issues concerning the relevant product market and whether the alleged supply-reduction conspiracy raised the prices of egg products bought by the Kraft Plaintiffs from defendants, which were material to both issues?
Not Raised Below by the defendants in their summary judgment motion or supporting briefs (ECF Nos. 1233, 1312); *argued* in DAPs' Br. Opp. S.J. Mtn (ECF No. 1268 at 11-13); *not ruled on* by the district court in S.J. Op. (JA4-11).

4. Did the district court err in finding that the Kraft Plaintiffs lack antitrust standing even though they satisfy all the factors identified in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983)?
Not Raised Below by the defendants in their summary judgment motion or supporting briefs (ECF Nos. 1233, 1312); *argued* in DAPs' Br. Opp. S.J. Mtn (ECF No. 1268 at 6-11); *declined to rule on* by the district court in S.J. Op. (JA10 n.4).

***5** 5. Did the district court abuse its discretion by *sua sponte* rejecting the Kraft Plaintiffs' economic expert's opinions concerning the relevant product market and the impact of the alleged output reduction conspiracy on the prices that the Kraft Plaintiffs paid the defendants for egg products?
Not Raised Below by the defendants in their summary judgment motion or supporting briefs (ECF Nos. 1233, 1312); *not argued* in DAPs' Br. Opp. S.J. Mtn (ECF No. 1268); *ruled on sua sponte* by the district court in S.J. Op. (JA7).

STATEMENT OF RELATED CASES AND PROCEEDINGS

The Kraft Plaintiffs have not previously sought review in this Court. Two other appeals from MDL 2002 have been filed in this Court. Each sought interlocutory review of Rule 23 class certification issues which are not present in this appeal.

In Appeal No. 15-8094, the indirect purchaser class plaintiffs sought permission to appeal under Federal Rule of Civil Procedure 23(f) from the district court's denial of certification of a class of indirect purchasers of shell eggs. That appeal has been held by this Court pending the district court's resolution of the indirect purchaser class plaintiffs' motion to certify a class for injunctive relief.

In Appeal No. 15-8095, defendants Michael Foods, Inc., Ohio Fresh Eggs, LLC, R.W. Sauder, Inc., and Rose Acre Farms, Inc. sought permission to appeal ***6** under Federal Rule of Civil Procedure 23(f) from the district court's certification of a class of direct purchasers of shell eggs. This Court denied review.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THE KRAFT PLAINTIFFS' CLAIMS AS BASED ON THE UMBRELLA THEORY OF DAMAGES.

A. The Standard of Review Is *De Novo*.

The district court's legal ruling that the Kraft Plaintiffs' claims are based on the umbrella theory of damages is subject to *de novo* review. *Norfolk S. Ry. Co. v.* ***23** *Basell USA Inc.*, 512 F.3d 86, 91 (3d Cir. 2008); *Fraternal Order of Police, Lodge 1 v. City of Camden*, 842 F.3d 231, 238 (3d Cir. 2016).

B. The Kraft Plaintiffs' Claims Are Based on Direct Purchases of Egg Products From Conspirators, Not on Umbrella Damages.

The district court dismissed the Kraft Plaintiffs' egg-product claims as based on the umbrella theory of price-fixing damages that this Court rejected in *MidWest Paper*: "[T]he Court concludes that Plaintiffs are indeed at odds with the 'umbrella' damages rule[.]" JA4. When plaintiffs seek "umbrella damages," they contend that the conspiracy raised prices throughout the market, creating a market price "umbrella," and that the defendants should be held liable for the overcharges that plaintiffs paid to non-conspiring sellers who charged the inflated market prices. *See generally* Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* ¶ 347 (4th ed. 2013). The umbrella theory has no relevance here. The Kraft Plaintiffs' claims are based entirely on their direct purchases of price-fixed egg products from conspiring defendants.

In *Mid-West Paper*, plaintiffs complained of price-fixing in the sale of consumer paper bags. In addition to suing defendants for overcharges for direct purchases from defendants, plaintiffs sued for damages based on their purchases from non-defendants who did not participate in the conspiracy but who allegedly charged plaintiffs the conspiracy-inflated market price for consumer bags. ***24** 596 F.2d at 587. This Court held that the plaintiffs lacked antitrust

standing to recover such umbrella damages. A plaintiff attacking a price-fixing conspiracy may claim only those damages resulting from the plaintiff's purchases from conspirators. *Id.* at 583-86. [6]

This Court recently explained its *Mid-West Paper* holding: "[T]he plaintiff, who was not a customer of any member of the conspiracy, lacked antitrust standing to sue the conspiracy members even though it paid higher prices as a result of the conspiracy." *In re Modafinil Antitrust Litigation*, 837 F.3d 238, 264 (3d Cir. 2016). This Court concluded that "the customer of a competitor of conspiracy members was not 'one whose protection is the fundamental purpose of the antitrust laws.'" *Id.* (quoting *Mid-West Paper*, 596 F.2d at 583). This Court explained that the parties *who bought directly from the defendants* were the appropriate plaintiffs to enforce the antitrust laws through private actions. *Id.* at 264-65. [7]

25** The inapplicability of the umbrella theory in this case becomes obvious when the parties' relationship is illustrated. ***If the Kraft Plaintiffs were claiming damages for egg products they purchased from non-conspirators at an inflated price, as shown in the diagram below with the dotted umbrella arrow, ***then*** their claims would be subject to this Court's prohibition on "umbrella damages":

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE
TABLE

Here, ***however***, the Kraft Plaintiffs are not claiming overcharge damages on egg products purchased from non-conspirators: The dotted umbrella arrow does ***not*** illustrate the Kraft Plaintiffs' claims. The Kraft Plaintiffs' damage claims in this case relate solely to overcharges on egg products they purchased directly from conspirators (*i.e.*, the solid vertical arrow on the left side of the diagram). The ***26** district court thus erred in applying *Mid-West Paper* to bar the Kraft Plaintiffs' claims.

C. The Claims Are Not Based on the Theory that the Conspiracy Caused All Egg Prices to Increase.

The district court's umbrella theory holding is based on a mischaracterization of the Kraft Plaintiffs' claims. The district court stated that, "[a]t the end of the day, Plaintiffs are relying on the theory that the conspiracy raised prices for all eggs, even those produced by non-conspirators," which it stated was a "quintessential restatement of the umbrella theory." JA9.

The district court's statement is incorrect. The Kraft Plaintiffs do not contend that the egg-product prices they paid to defendants increased simply because egg prices were raised by the conspiracy. Instead, as the economic evidence submitted by the Kraft Plaintiffs establishes, the conspiracy raised the reported market prices for both shell eggs and egg products in the same manner. JA639-658 (Baye Report). Whether the conspiracy raised shell-egg or egg-products prices charged by non-conspirators is irrelevant to the Kraft Plaintiffs' claims. What is relevant is that the conspiracy raised the prices the Kraft Plaintiffs paid the defendants for egg products.

***27** 1. Economic Evidence Demonstrates the Direct Effect of the Conspiracy Was to Increase the Prices the Kraft Plaintiffs Paid Defendants for Egg Products.

The Kraft Plaintiffs submitted economic evidence that the conspiracy directly caused egg and egg-product market prices to increase in the same manner. Specifically, Dr. Baye found empirically that the supply-reduction conspiracy raised the market price for each of 68 varieties of shell eggs and egg products as reported by Urner Barry. JA650-658. Dr. Baye calculated the price elasticity separately for each of the 68 products and then calculated the market price increase caused by the conspiracy for each product. JA632-636, 650-653. Dr. Baye did not assume that because some egg market prices went up, *all* egg prices and egg-product prices went up. Rather, he analyzed each price separately and allowed for the

possibility that market prices were not raised by the conspiracy. His analysis was "data-driven" and "do[es] not assume that the alleged conspiracy resulted in anticompetitive effects on supply and prices." JA616. His damage estimates "allow for the possibility that each plaintiff was insulated from increases in market prices." JA568-569.

Dr. Baye's next step was to determine whether those conspiracy-inflated market prices for egg products were actually charged by the defendants to the Kraft Plaintiffs. JA644-646. Dr. Baye found that, in varying degrees (which he termed the "adjustment factor"), most of the egg-product prices paid by the Kraft Plaintiffs ***28** were raised by the conspiracy. In some transactions, 100% of the price increase was paid by the Kraft Plaintiffs. In other transactions, the overcharges were less than 100% of the increases. In still other transactions, the Kraft Plaintiffs paid no overcharge and incurred no damages. JA645-646. The average adjustment factor for all DAP transactions is 74%. JA646. *See also* JA400 (Baye Report Backup providing the adjustment factors for individual DAPs, including the Kraft Plaintiffs.) Because Dr. Baye calculated the Kraft Plaintiffs' damages by looking at egg products they directly purchased from the conspiring defendants, Dr. Baye never relied on price increases that may have been charged by non-conspirators, and he made no determination of the egg-product prices charged by non-conspirators. JA639-642. Dr. Baye's methodology further confirms that the Kraft Plaintiffs' claimed damages are not based on the umbrella theory.

2. The District Court Erroneously Assumed Only Shell Eggs Were Price-Fixed.

A fundamental error by the district court is its unfounded assumption that only shell eggs were price-fixed. The district court ignored the Kraft Plaintiffs' contention, which was supported by Dr. Baye's unchallenged opinions, that the relevant product market included both shell eggs and egg products. JA596-598. Dr. Baye found that the market prices of both shell eggs and egg products were directly raised by the alleged conspiracy - they were both price-fixed goods affected by defendants' output restraints. JA634-636, 650-653.

***29** In ruling on the defendants' motion for summary judgment, the district court appears to have erroneously accepted defendants' contention that "all the wrongful conduct alleged by Plaintiffs took place in the shell egg market, as opposed to the egg products market." JA8. The district court then stated what it understood to be the Kraft Plaintiffs' price-fixing claims: "Plaintiffs' theory of the case is that Defendants conspired to reduce the supply of eggs. This, in turn, raised the price of eggs, and consequently, the price of egg products." JA9.

The district court misstated the Kraft Plaintiffs' claims. The Kraft Plaintiffs do not contend that the conspiracy took place in the "shell egg market." As alleged by the Kraft Plaintiffs and supported by Dr. Baye's opinions, the conspiracy reduced egg production which thereby reduced of the supply of eggs available for sale as shell eggs to grocery stores *and* as liquid, frozen, and dried egg products to food manufacturers. JA610-632. The supply-reduction conspiracy raised the market prices of both shell eggs and egg products in the very same manner. JA632-639, 650-653.

Once egg products are correctly considered a price-fixed good for purposes of summary judgment, there is no umbrella damages issue. The Kraft Plaintiffs' claims are based solely on their direct egg-product purchases from conspiring defendants, not on purchases from non-conspirators as in *Mid-West Paper.*

***30 3. There Is No Basis for the District Court's Limitation of the Relevant Product Market to UEP Certified Eggs.**

The district court also appears to have found that the Kraft Plaintiffs lacked standing to recover damages for egg products they bought from defendants absent proof that those egg products were made with eggs produced through the UEP Certified Program. JA4, 9-10. Although the district court did not explain why it believed the relevant product market is limited to Certified eggs, presumably the court's rationale is that, because producers of non-Certified eggs did not participate in the UEP Certified Program, they cannot be conspirators. The court erroneously reasoned that, because Michael Foods and Rose Acre sold egg products made with non-Certified eggs acquired from their suppliers and also

with their own Certified eggs, the Kraft Plaintiffs cannot prove that all the egg products they bought from Michael Foods and Rose Acre were made with Certified eggs and therefore lack standing as to all of their egg-products purchases.

This reasoning fails because the question whether Certified eggs are a separate product market from non-Certified eggs involves disputed fact issues. The Kraft Plaintiffs submitted Dr. Baye's opinions that the relevant product market included *all* shell eggs and egg products and that the conspiracy raised the reported market prices of all shell eggs and egg products. JA596-597, 634-636, 550-653. Dr. Baye noted that, "[a]ccording to a UEP press release, by 2008, 95 percent of the eggs produced in the U.S. came from producers participating in the UEP ***31** Certified program." JA589. That large market share gave the defendants the ability to raise market prices by reducing supply through the Certified Program. Dr. Baye explained that "economic theory indicates that the UEP's reach is sufficiently large that its actions could significantly impact egg production and the prices of shell eggs and egg products." JA590.

Thus, the district court's treatment of Certified eggs as a separate product market and its apparent view that the conspiracy's direct price effects were limited to Certified eggs have no record support and are contradicted by the Kraft Plaintiffs' economic evidence.

4. The District Court Mistakenly Attributed the Direct Purchaser Class's Contentions to the Kraft Plaintiffs.

Most of the district court's opinion deals with the arguments and expert opinions offered by the class plaintiffs, not the Kraft Plaintiffs. JA2, 4-5, 10. The district court appears to have been heavily influenced by the views it developed in denying the direct-purchaser plaintiffs' motion to certify a sub-class of egg-products purchasers. The umbrella damages issue was first raised in connection with that motion. ECF No. 1349 at 52-57 (Amended Opinion denying DPP Class Certification Motion for egg-products subclass). The class relied on the economic opinions of Dr. Gordon Rausser, but Dr. Rausser's approach differs fundamentally from Dr. Baye's methodology and opinions. The district court appears to have understood that, based on Dr. Rausser's analysis, the egg-products class argued ***32** that the conspiracy directly raised all shell-egg prices and that egg-product prices were raised because they are made with shell eggs. Without ruling on the issue, the district court noted that the class may have relied on an approach similar to the rejected umbrella damages theory. *Id.* at 57 n.22.

In opposing defendants' egg-products summary judgment motion in the class case, the direct-purchaser class representatives relied again on their argument and Dr. Rausser's opinions that the conspiracy raised all shell-egg prices, and egg-product prices therefore increased because egg products are made with shell eggs. ECF No. 1281 at 1-2, 4-6, 11-12 (DPPs' Br. Opp. S.J Mtn). In contrast, Dr. Baye demonstrated empirically that the conspiracy *directly* raised the market prices reported by Urner Barry for both shell eggs and egg products in the same manner, and he determined the amount of Kraft Plaintiffs' overcharges based on their specific egg-product purchases from defendants. The district court failed to acknowledge the differences between the opinions of Dr. Rausser and Dr. Baye and erroneously held that neither the class representatives nor the Kraft Plaintiffs have standing because the conspiracy did not directly raise egg-products prices.

5. The District Court's Rejection of the Kraft Plaintiffs' Market Definition Ignores Key Factual Disputes.

The district court's decision granting summary judgment is based on its implicit factual conclusion that shell eggs were the only price-fixed product and egg products were in a separate product market. But that issue involves disputed ***33** facts. As its opinion reveals, the district court did not engage in the Rule 56 process of determining which material facts are disputed and which are undisputed. The parties supported their summary judgment arguments with detailed factual statements, counterstatements of fact, and responses to those factual assertions. [8] The district court's opinion does not refer to them. JA4-11.

Under Rule 56, a district court must view the facts in the light most favorable to the nonmoving party and draw all reasonable inferences and resolve all doubts in favor of the nonmoving party. *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007); *Doe v. Cnty. of Centre*, 242 F.3d 437, 446 (3d Cir. 2001). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The district court did the opposite. It uncritically accepted defendants' theory of the case and rejected or ignored the Kraft Plaintiffs' economic evidence that egg products were directly price-fixed by the conspiracy.

One of the prime purposes of the Rule 56 summary judgment procedure "is to isolate and dispose of factually unsupported claims." ***34** *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). A district court deciding a summary judgment motion must, therefore, determine whether there is a need for trial - "whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Liberty Lobby*, 477 U.S. at 250. Here, that would require acknowledging that the economic evidence submitted by the Kraft Plaintiffs establishes material factual disputes precluding summary judgment.

The district court did not analyze the facts. Deciding that shell eggs are the only price-fixed product involves defining the relevant product market, which is a disputed factual issue. *See In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 735 (8th Cir. 2014) (holding that defendants' summary judgment motion must be denied because of factual disputes concerning the relevant product market and whether defendants committed an antitrust violation); *Thompson v. Metro. Multi-List Inc.*, 934 F.2d 1566, 1573-74 (11th Cir. 1991) (because "[t]he parameters of a given market are questions of fact," summary judgment is inappropriate if there are material fact disputes).

To support their egg-products summary judgment motion, defendants submitted no evidence establishing that shell eggs produced for sale to grocery stores form a separate relevant product market from eggs produced for sale as egg products to food manufacturers. Nor did the defendants submit evidence ***35** establishing that the alleged conspiracy did not directly raise egg-products prices in the same manner that it raised shell egg prices. The defendants' statement of supposedly undisputed facts takes no position on these critical relevant product market and antitrust injury issues. JA306-316 (DAPs' Response to Defendants' Statement of Undisputed Facts).

In opposition to summary judgment, the Kraft Plaintiffs addressed those factual issues. The Kraft Plaintiffs submitted Dr. Baye's opinions on the key standing issues, which showed shell eggs and eggs products are within the same relevant market. JA375-376 (Certain Defendants' Responses to DAPs' Counter-Statement of Undisputed Facts ("Defs. Resp. DAPs' CSUF")); JA596-598 (Baye Report). The effect of the conspiracy was to limit egg output by reducing hen-flock size and thereby egg production, which decreased the supply available for the two distribution channels: shell eggs for sale to grocery stores and egg products sold to food manufacturers. JA376-378, 381-382 (Defs. Resp. DAPs' CSUF); JA616-632 (Baye Report). Because demand for shell eggs and egg products is highly inelastic, the supply reduction caused substantial price increases for all 68 varieties of products involved in this case and resulted in higher than competitive prices for the Kraft Plaintiffs' egg-product purchases from defendants. JA379-382 (Defs. Resp. DAPs' CSUF); JA632-648, 650-653 (Baye Report). The overcharges ***36** paid by the Kraft Plaintiffs total at least $111.6 million during the damages period. JA655.

Defendants stated that, for summary judgment purposes, they do not challenge the validity of Dr. Baye's opinions. JA374 (Defs. Resp. DAPs' CSUF). But in response to the Kraft Plaintiffs' counterstatement of relevant summary judgment facts, the defendants disputed Dr. Baye's key opinions, including his opinion that shell eggs and egg products are in the same relevant product market. JA375-383 (Defs. Resp. DAPs' CSUF). At best, defendants' factual submissions create disputed issues of material fact, which preclude summary judgment. The district court ignored these factual disputes and erroneously granted summary judgment to the defendants.

D. The Profitability of Defendants' Egg-Product Sales Is Irrelevant Because the Kraft Plaintiffs' Damages Are the Price Overcharges.

The district court supported its ruling that the Kraft Plaintiffs sought umbrella damages by holding that, to establish antitrust standing, the Kraft Plaintiffs must show that the defendants profited from their sales of egg products to the Kraft Plaintiffs. JA8-9. The district court erred in misapplying this Court's discussion of "profit" in *Mid-West Paper* to this case. The defendants' profitability is irrelevant to the Kraft Plaintiffs' antitrust standing because their damages will be measured by the price overcharges they paid defendants.

***37** In *Mid-West Paper*, this Court determined that it would be contrary to antitrust policy to assess price-fixing overcharge damages against defendants based upon plaintiffs' purchases from non-conspiring third-party sellers. Such damages, the Court explained, would be "well in excess of their illegally-earned profits." 596 F.2d at 586. Relying on the unfairness of assessing treble damages against a defendant based on sales by non-conspiring third parties at the conspiracy-inflated market price, the district court held that the Kraft Plaintiffs cannot establish antitrust standing because they had not shown that the conspiring defendants profited from their sale of egg products to the Kraft Plaintiffs: "Plaintiffs … have not shown that it was the Defendants who reaped ill-gotten gains from the egg-products sales, nor can they show this, at least without more data." JA9. The district court hypothesized that the "profits" on the conspirators' sales to the Kraft Plaintiffs may not have been earned by the conspirators. Instead, profits on those sales may have been earned by non-conspiring suppliers who charged "umbrella" prices in supplying the eggs that the defendants used for the egg products bought by the Kraft Plaintiffs. *Id.*

The district court's reasoning reflects an erroneous view of price-fixing damages. In a price-fixing case, the plaintiffs' damages are the overcharges they paid the conspirators, not the conspirators' profits on those sales. The Supreme Court explained in ***38** *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 489, 494 (1968), that "the amount of the overcharge" is the measure of damage. To the Supreme Court, profit is irrelevant: "Our conclusion is that [plaintiff] proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that [defendant] had overcharged it during the damage period and showed the amount of the overcharge." *Id.* at 494. This overcharge damage remedy was reaffirmed in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977), where the Supreme Court stated plaintiffs "are permitted to recover the full amount of the overcharge." This Court in *Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, 424 F.3d 363, 374 (3d Cir. 2005), similarly characterized overcharges as "the standard method of measuring damages in price enhancement cases." Here, the Kraft Plaintiffs met this burden with proof of the overcharges they paid the defendants.

Since the focus in a price-fixing case is on the amount of the overcharge and not the profits or losses of the seller, the district court erred by requiring the Kraft Plaintiffs submit proof that the defendants profited from their overcharged sales to the Kraft Plaintiffs. There is no authority supporting the district court's decision. Even if there were a legal requirement that antitrust plaintiffs prove that the defendants obtained "ill-gotten gain" through the antitrust violations, the more than $100 million in overcharges that the Kraft Plaintiffs paid the defendants should suffice. Moreover, Dr. Baye determined from his review of the evidence that ***39** defendants profited on their overcharged sales to the Kraft Plaintiffs. JA604-606 (Baye Report). Conspiring defendants priced their egg-product sales to the Kraft Plaintiffs based on the Urner Barry market price indices, but they typically purchased eggs externally on a different basis. Dr. Baye found that Michael Foods and Rose Acre "purchased eggs from other suppliers at prices that were typically determined by long-term contracts that, either fully or partially, insulated them from increases in market prices." JA605. Unlike the Kraft Plaintiffs, the prices defendants paid "do not change when Urner Barry egg prices change" or do not increase by the full amount of the Urner Barry increase. *Id.* [9] For example, in 2008, only 33% of Michael Foods' purchases of liquid eggs were based on market prices. JA684-685 (Burtis Report). It is hardly surprising that defendants, knowing that their output-reduction conspiracy would raise egg market prices, would ensure the prices *they paid* their suppliers for eggs they used in their egg products would usually not be based on conspiracy-inflated market prices. But defendants could

then take advantage of higher market prices in their sales to their egg products customers, including the Kraft Plaintiffs. JA761 (Baye Reply Report).

*40 II. THE KRAFT PLAINTIFFS' DAMAGES ARE BASED ON DIRECT PURCHASES FROM DEFENDANTS, AND THEREFORE *ILLINOIS BRICK* DOES NOT APPLY HERE.

A. The Standard of Review Is *De Novo*. This Court's "review of the District Court's grant or denial of summary judgment is plenary, and [the Court] appl [ies] the same standard that the District Court applied in determining whether summary judgment was appropriate." *Norfolk S. R.R. v. Basell USA Inc.*, 512 F.3d 86, 91 (3d Cir. 2008).

B. The Kraft Plaintiffs Are Not Indirect Purchasers.

In its summary judgment ruling, the district court analogized the Kraft Plaintiffs' claims to an indirect purchase of shell eggs. JA9-10. Any conclusion that the Kraft Plaintiffs' claims run afoul of the *Illinois Brick* rule barring federal price-fixing claims by indirect purchasers of the price-fixed product is incorrect.

In *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that, with certain exceptions irrelevant here, only a direct purchaser - the customer who purchased the price-fixed good from the defendant - has standing to bring a federal antitrust price-fixing case to recover damages. If the illegal overcharge is passed on by the direct purchaser (for example, a retailer) to an indirect purchaser (a consumer), that indirect purchaser lacks federal antitrust standing to sue for damages, even if the indirect purchaser paid some or even all of the illegal overcharge. *Id.* at 744-47.

***41** The Kraft Plaintiffs are direct purchasers of egg products from the defendants and have standing to sue to recover the illegal overcharges they paid to the defendants. If the Kraft Plaintiffs "passed on" some or all of the egg overcharges to their customers through increased prices for food products, those indirect purchasers lack federal antitrust standing under *Illinois Brick* to recover the overcharges from the defendants.

In this case, some of the eggs used by defendants for their egg products came from non-conspirators, and the district court appeared to limit the product market to UEP Certified shell eggs. Based on these conclusions, the court treated the Kraft Plaintiffs' direct purchases of egg products as indirect purchases of shell eggs:

> Plaintiffs' theory of damages with respect to egg products sounds like a combination of an "umbrella damages" theory and an *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), problem: Attempting to link the raw egg prices of non-conspirators to the conspiracy is, under *Mid-West Paper*, too attenuated, and recovering overcharges when the Plaintiffs have not presented evidence that the Defendants, and not the non-conspirators, pocketed those overcharges creates a situation in which Plaintiffs are seeking recovery of pass-through overcharges, something prohibited by *Illinois Brick.*

JA9-10.

This conclusion contradicts evidence that egg products and shell eggs were both directly price-fixed through defendants' output reduction conspiracy. JA632- ***42** 648, 650-653 (Baye Report). Consequently, the district court's *Illinois Brick* ruling improperly ignored disputed fact issues precluding summary judgment.

The district court also erred in stating that the Kraft Plaintiffs are "[a]ttempting to link the raw egg prices of non-conspirators to the conspiracy." JA9. The Kraft Plaintiffs are doing no such thing. The Kraft Plaintiffs' claims are based on Dr. Baye's five-step analysis showing overcharges in the particular products they directly purchased:
(1) The alleged conspiracy reduced hen-flock size and egg production. JA616-632 (Baye Report).

(2) The reduced flock size reduced the quantity of eggs available to be sold as shell eggs or as egg products. JA735 (Baye Reply Report).

(3) The 68 varieties of shell eggs and egg products had different demand price elasticities. JA632-636, 650-653 (Baye Report).

(4) Based on the extent of the supply reduction and the demand price elasticities, Dr. Baye determined the percentage increase in the price of each of the 68 varieties of shell eggs and egg products caused by the conspiracy. JA632, 650-653 (Baye Report).

(5) Defendants imposed overcharges on the Kraft Plaintiffs' direct egg-product purchases from defendants. JA639-647, 654-658 (Baye Report); JA400-409 (Baye Report Backup).

***43** Nowhere in this process does Dr. Baye attempt to, or need to, "link raw egg prices of non-conspirators to the conspiracy." JA9. There is no *Illinois Brick* issue in this case.

III. THE KRAFT PLAINTIFFS HAVE ANTITRUST STANDING FOR THEIR EGG-PRODUCT CLAIMS.

A. The Standard of Review is *De Novo*.

The plenary standard of review applies to the district court's conclusion that the Kraft Plaintiffs lack antitrust standing. *Norfolk S. Ry. Co. v. Basell USA Inc.*, 512 F.3d 86, 91 (3d Cir. 2008); *Fraternal Order of Police, Lodge 1 v. City of Camden*, 842 F.3d 231, 238 (3d Cir. 2016).

B. The Supreme Court Established the Standard for Antitrust Standing in *Associated General Contractors*.

The district court held the Kraft Plaintiffs lacked standing under the Sherman Act to sue for the illegal overcharges they paid to the defendants. The district court did not analyze antitrust standing under the standards established by the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). Indeed, the district court expressly declined to address this controlling case. In a footnote, the district court stated: "The [Kraft Plaintiffs] also detour into the general principles of antitrust standing. Because they cannot distinguish their damages theory from ***44** prohibited umbrella damages, however, a discussion of general standing issues is unnecessary here." JA10 n.4.

Determining the antitrust standing issue through the *AGC* test is anything but a "detour." In fact, the district court's analysis of so-called umbrella issues under a different analytical framework is the real detour. This Court recently explained that the issue decided in *Mid-West Paper*, which it characterized as a "pre-*AGC* case," was whether plaintiffs who bought from non-conspirators under a price umbrella created by the conspiracy are the appropriate parties to enforce the antitrust laws through treble-damages recoveries. *In re Modafinil Antitrust Litigation*, 837 F.3d 238, 264 (3d Cir. 2016). This Court emphasized that this "directness" issue, although important, is only one of "many factors [that] go into th[e] determination" of antitrust standing under *AGC*. *Id.* at 263. Under the circumstances here, the district court erred by applying *Mid-West Paper*, rather than *AGC*, to determine standing.

AGC articulated a five-part test to implement the policy that antitrust standing should not be subject to "artificial limitations" but should instead be interpreted "in accordance with its plain language and its broad remedial and deterrent objectives." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472-73 (1982). This Court has summarized the five factors in the Supreme Court's test as follows:

> ***45** (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1165-66 (3d Cir. 1993). All five factors unquestionably support the Kraft Plaintiffs' standing to recover overcharges based on their direct purchases of egg products from defendants.

Consideration of standing is independent of the merits. In deciding the antitrust standing issue, a court must assume that the alleged antitrust violation occurred. "To test standing in a private suit … the court should assume the existence of a violation and then ask whether the … standing elements are shown." Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* ¶ 335 (4th ed. 2013). Here, that means that the Court must assume that the defendants conspired to reduce the egg supply and thereby raise the prices of shell eggs and egg products. The standing issue is whether, having purchased egg products from defendants at prices inflated by the conspiracy, the Kraft Plaintiffs suffered antitrust injury.

***46 1. There Is a Causal Connection Between the Antitrust Violation and the Kraft Plaintiffs' Injury.**

The Kraft Plaintiffs' economic expert, Dr. Baye, showed that the conspiracy limited egg production and directly raised the prices that the Kraft Plaintiffs paid defendants for egg products. Dr. Baye first found that the price of each of 68 types of shell eggs and egg products reported by Urner Barry increased significantly as the result of the reduction in egg production caused by the conspiracy. JA632-637, 650-653 (Aye Report). Dr. Baye then estimated how much of those overcharges were included in the prices that the Kraft Plaintiffs paid defendants for egg products. JA639-647, 654-658. Thus, the Kraft Plaintiffs have submitted evidence that the defendants agreed to limit egg production to raise egg-product prices, the resulting output limitation caused egg-product prices to increase, and the Kraft Plaintiffs paid defendants more than $100 million in illegal overcharges.

2. The Kraft Plaintiffs' Injury Is of the Type the Antitrust Laws Were Intended to Address.

The Kraft Plaintiffs' claimed damages through price-fixed overcharges on their direct purchases of egg products from defendants. These damages are precisely the type of injury that the Sherman Act was specifically designed to redress. "[D]irect purchasers are singled out as the group whose protection is the fundamental purpose of the antitrust laws in … non-predatory price-fixing ***47** conspiracies and, through them, the objectives of the treble damage action are fulfilled." *Mid-West Paper*, 596 F.2d at 585 (internal quotation marks omitted).

3. The Kraft Plaintiffs' Injury Was Directly Caused by the Conspiracy.

As explained above, Dr. Baye has found that defendants' conspiracy to limit egg production had a substantial impact on the prices paid by the Kraft Plaintiffs for the egg products they purchased directly from defendants.

4. No Victims of the Alleged Antitrust Violations Have More Direct Injuries.

There are no "more direct" victims of the conspiracy than the Kraft Plaintiffs. Indeed, if the Kraft Plaintiffs do not have standing to recover damages based on their egg-product purchases from defendants, then defendants would escape liability and retain more than $100 million in illegal overcharges they received from the Kraft Plaintiffs.

5. There Is No Potential for Duplicative Recovery or Need for Complex Apportionment of Damages.

There can be no duplicative recovery or any need for a complex apportionment of damages with respect to the Kraft Plaintiffs' claims based on their purchases of egg products from defendants. No other party has any claim based on the Kraft Plaintiffs' transactions. Because the Kraft Plaintiffs have the only claims based on their purchases of egg products from defendants, there is no need for "complex apportionment" of damages.

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***48** Under the five-factor *AGC* test, the Kraft Plaintiffs have antitrust standing to recover overcharge damages based on their direct purchases of egg products from defendants. The district court's decision not to use the *AGC* factors to determine the Kraft Plaintiffs' antitrust standing and its misapplication of the umbrella theory are "artificial limitations" on Sherman Act remedies that the Supreme Court has sought to avoid. *See McCready*, 457 U.S. at 472.

C. The Kraft Plaintiffs Have Standing Even Under the District Court's Flawed Analysis.

Even if the district court's erroneous limitation of the relevant product market to Certified shell eggs were correct, which it is not, there is still no justification for granting summary judgment to the defendants.

First, standing is supported by all the *AGC* factors even if the only directly price-fixed products were shell eggs. In particular, Dr. Baye has demonstrated the directness of the injury the Kraft Plaintiffs incurred because of the conspiracy, and there are no other parties with claims based on the Kraft Plaintiffs' purchases.

Second, the Kraft Plaintiffs have standing under *McCready* because the overcharges they paid are "inextricably intertwined with the injury the conspirators sought to inflict" through the UEP Certified Program, which expressly included eggs intended for sale as shell eggs and as egg products. ***49** *McCready*, 457 U.S. at 484. Here the Kraft Plaintiffs' injury "flows from that which makes defendants' acts unlawful." *Id.*

Third, defendants concede that substantial percentages of the egg products they sold during the damages period came from their own flocks and those of other conspirators. Rose Acre, a defendant that sold substantial amounts of egg products to the Kraft Plaintiffs, used its own eggs for approximately 87% to 95% of its egg products sold during the damages period.[10] JA369 (Certain Defendants' Responses to DPPs' Counter-Statement of Undisputed Facts). Moreover, in 2008, Michael Foods, the nation's leading egg-product seller, used its own eggs for approximately 26% of the egg products it sold. Another 9.6% were obtained from other current or former defendants, which means that 35.6% of Michael Foods' egg products that year came from defendants' own flocks. JA367-369. In addition to Michael Foods' 26%, another 20.7% of the eggs used for Michael Foods' egg products came from other Certified producers - 46.7% in total. *Id.*, JA358.[11]

***50** Despite these facts, the district court held, without legal support, that antitrust standing is established only through an exact tracing of Certified eggs into the egg products bought by plaintiffs. JA10. But there is no such tracing requirement in *AGC.* Moreover, this Court's discussion in *Rossi v. Standard Roofing*, 156 F.3d 452, 483-84 (3d Cir. 1998), distinguishes the fact of damage (which is the antitrust injury required for standing) from the dollar amount of damages:

To recover damages, an antitrust plaintiff must prove causation, described in our jurisprudence as "fact of damage or injury." … It is not necessary to show with total certainty the amount of damages sustained, just that the antitrust violation caused the antitrust injury suffered by the plaintiff....

Once causation is established, the jury is permitted to calculate the actual damages suffered using a "'reasonable estimate, as long as the jury verdict is not the product of speculation or guess work.'" *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1176 (3d Cir. 1993) (citing *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983)).

Here, antitrust injury is established by Dr. Baye's analysis which determined the overcharges the Kraft Plaintiffs paid defendants because of the conspiracy. Dr. Baye specifically noted that his findings are not dependent on egg products being in the same product market as Certified eggs. JA598 (Baye Report).

***51** Thus, even the district court's unexplained and unsupportable limitation of the relevant product market to Certified shell eggs provides no basis for finding that the Kraft Plaintiffs lack standing.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY REJECTING DR. BAYE'S OPINIONS.

A. The Standard of Review Is Abuse of Discretion.

The abuse of discretion standard of review applies to the district court's decision rejecting the opinions of Dr. Baye, the Kraft Plaintiffs' economics expert. *See Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417 (3d Cir. 1999).

B. The District Court Had No Legal or Factual Grounds for Rejecting Dr. Baye's Opinions.

The district court's *sua sponte* rejection of the opinions of Dr. Baye, the Kraft Plaintiffs' economic expert, is a separate reason why the summary judgment order should be reversed. The defendants did not challenge Dr. Baye's opinions either through a *Daubert* motion or through their summary judgment motion. JA5 ("[N]o party has challenged the admissibility of [Dr. Baye's] expert report or testimony."). [12] Nevertheless, the district court did not examine Dr. Baye's opinions and rejected them *in a single sentence*:

***52** As much as the DAPs insist that their expert has isolated the effects of the conspiracy on the prices of egg products, he cannot have done so without any analysis whatsoever of the non-conspirator egg producers' pricing decisions and without any knowledge of which eggs went into which egg products, and in what proportion.

JA10. The district court's rejection of Dr. Baye's opinion is incorrect, both substantively and procedurally.

1. Substantive Errors.

The district court criticized Dr. Baye for not analyzing two issues that arise from the district court's erroneous application of the umbrella theory. Neither issue is relevant to the summary judgment motion.

First, Dr. Baye did not analyze "the non-conspirator egg producers' pricing decisions." JA10. But that issue is irrelevant once egg products are correctly understood to be price-fixed products just as much as shell eggs. Dr. Baye correctly analyzed egg-product prices in determining the Kraft Plaintiffs' overcharge damages. The prices that defendants paid their suppliers have no bearing on defendants' antitrust liability, or the Kraft Plaintiffs' damages or their antitrust standing. The damages that the Kraft Plaintiffs seek to recover are the overcharges they paid the defendants.

***53** Second, the district court stated that Dr. Baye formed his opinions "without any knowledge of which eggs went into which egg products, and in what proportion." JA10. But again, no egg tracing is required because Dr. Baye determined that that all shell eggs and egg products are in the same relevant product market and were impacted by the conspiracy in the same manner. Dr. Baye used econometric methods to estimate how much the conspiracy had raised market prices for all varieties of egg products and how much of those illegal price increases were actually charged to the Kraft Plaintiffs in their purchases of egg products from the defendants.

Thus, the district court's two substantive criticisms of Dr. Baye's opinions are invalid.

2. Procedural Errors.

The district court also committed reversible procedural errors in the manner in which it rejected Dr. Baye's opinions. The district court appears to have held Dr. Baye's opinions inadmissible under Federal Rule of Evidence 702(b), which permits expert proof if "the testimony is based on sufficient facts or data." The district court concluded that Dr. Baye's analysis is unacceptable because Dr. Baye did not know how much the defendants paid their egg suppliers and which eggs went into which egg products. JA10.

***54** The district court erred, first, by not holding a hearing with respect to the factual basis for Dr. Baye's opinions. In *Padillas*, this Court noted that:
[I]f the [district] court was concerned with the factual dimensions of the expert evidence, as we said in *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1240 (3d Cir. 1993), "it should have held an *in limine* hearing to assess the admissibility of the [report]," giving plaintiff an opportunity to respond to the court's concerns. …

An *in limine* hearing will obviously not be required whenever a *Daubert* objection is raised to a proffer of expert evidence. Whether to hold one rests in the sound discretion of the district court. But when the ruling on admissibility turns on factual issues, as it does here, at least in the summary judgment context, failure to hold such a hearing may be an abuse of discretion. We hold that in this case, it was.

186 F.3d at 417-18. *See also Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184, 188 (1st Cir. 1997) ("Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage.").

Second, the district court failed to follow the requirements of Federal Rule of Civil Procedure 56(f)(2) by deciding an issue not raised by the parties without giving notice so that the issue could be fully briefed and argued before a decision was made. Rule 56(f)(2), adopted in 2010, codified prior case law. *See, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so ***55** long as the losing party was on notice that she had to come forward with all of her evidence."). [13]

This Court has treated similar errors as grounds for reversal. In *Armour v. County of Beaver*, 271 F.3d 417 (3d Cir. 2001), this Court reversed the district court's summary judgment for the defendants. This Court did not review the merits of the summary judgment order "because the District Court did not, prior to its ruling, notify the parties that the issue would be addressed." *Id.* at 434. *See also* 10A Charles Alan Wright et al., *Federal Practice & Procedure Civil* § 2720.1 (4th ed. 2017) ("[I]f the court determines to enter summary judgment on a ground not presented or argued by the parties, the failure to give the losing party an opportunity to defend against that ground provides a ground for reversal.").

The district court's procedural errors contributed to its substantive errors. Without briefing and argument concerning Dr. Baye's opinions, the district court failed to appreciate their fundamental legal significance for the Kraft Plaintiffs'

***56** antitrust standing or the disputed factual issues that the opinions created. As a result, the district court abused its discretion in rejecting Dr. Baye's opinions.

CONCLUSION

Because the district court granted summary judgment based on legal error, disregarded material disputed fact issues, and erroneously excluded Dr. Baye's opinions, the Kraft Plaintiffs respectfully request that this Court reverse the decision below and remand the case for trial.

Dated: March 7, 2017

Respectfully Submitted,

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Appendix not available.

Footnotes

2 Claims against other defendants have been resolved by agreement. Stipulations and Orders for Dismissal, ECF Nos. 901 (National Food Corp.), 911 (NuCal Foods, Inc.), 913 (Midwest Poultry Services, LP), 995 (Sparboe Farms, Inc.), 1004 (Hillandale Farms of Pa., Inc., et al.), 1224 (Daybreak Foods, Inc.).

3 The defendants' egg-products summary judgment motion was also directed at the individual egg-products claims of certain of the direct purchaser class representatives (egg-products class certification having previously been denied) and the claims of two other direct action plaintiffs (Conopco, Inc. and H.J. Heinz Company, L.P.). However, the plaintiffs in those cases also assert shell-egg claims which have not been dismissed. As a result, the district court's egg-products ruling in those cases is not a final order.

4 The full text of Dr. Baye's Report and several exhibits are included in the Joint Appendix at 561-658. Dr. Baye's full Report, including his curriculum vitae, is filed as Exhibit 2 in ECF No. 1275.

5 Dr. Michelle Burtis, an economist, submitted an expert report on behalf of Michael Foods. JA659-729.

1 "ECF No." refers to the PACER document number in the multidistrict proceeding MDL No. 2002, Case No. 08-md-2002.

6 This Court has limited its holding in *Mid-West Paper* to price-fixing cases. For example, in *In re Modafinil Antitrust Litigation*, 837 F.3d 238 (3d Cir. 2016) , this Court cautioned that when plaintiffs complain of market exclusion, "all market customers should have antitrust standing to sue those engaged in the allegedly anticompetitive conduct because all suffer equally from the foreclosure of choice." *Id.* at 264-65. *See also In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1167-68 (3d Cir. 1993) (market-exclusion damages are not umbrella damages for purposes of antitrust standing).

7 The only other umbrella theory case cited by the district court (JA6-7) - *In re Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1338-41 (9th Cir. 1982) - similarly involved plaintiffs' purchases from non-conspiring sellers.

8 DAPs' Response to Defendants' Statement of Undisputed Facts (JA306-316); DPPs' Response to Defendants' Statement of Undisputed Facts (JA317-342); Certain Defendants' Responses to DPPs' Counter-Statement of Undisputed Facts (JA343-372); Certain Defendants' Responses to DAPs' Counter-Statement of Undisputed Facts (JA373-397).

9 Other evidence was submitted showing that Michael Foods profited from the higher shell-egg and egg-product market prices caused by the conspiracy. JA361-362 (Certain Defendants' Responses to DPPs' Counter-Statement of Undisputed Facts).

10 The district court ignored these high percentages for Rose Acre's use of its own produced eggs for the egg products it sold and instead said that "Rose Acre purchased as many as 21.6% of its eggs for egg products from outside suppliers, including non-Defendants." JA2. The correct percentage appears to be 26.89%, but that was in 2001, nearly four years before the damages period in this case even began. JA368-369 (Certain Defendants' Responses to DPPs' Counter-Statement of Undisputed Facts).

11 In 2008, approximately 28% of Michael Foods' external egg supply came from Certified producers. JA358. Given that Michael Foods bought 74% of its egg supply in 2008, the total amount of its egg supply that was supplied by external Certified producers was therefore 20.7%.

12 The defendants asserted that Dr. Baye's opinions should not be considered "facts" for summary judgment purposes. JA375-382, 388-389, 391-392 (Defs. Resp. DAPs' CSUF). But that incorrect argument was ignored by the district court. *See Fed. Labs., Inc. v. Barringer Research Ltd., Inc.*, 696 F.2d 271, 274 (3d Cir. 1982) ("A court may not … resolve 'disputed and relevant factual issues on conflicting affidavits of qualified experts,' *Ethyl Corp. v. Borden, Inc.*, 427 F.2d 206, 210 (3d Cir. 1970). Nor is it at liberty to disbelieve the good faith statements of experts contained in depositions or affidavits and presented by the non-moving party.").

13 The 2010 Advisory Committee Note for Rule 56(f) explains that "Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant a motion on legal or factual grounds not raised by the parties; or consider summary judgment on its own. In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c)."

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