

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

FOOD LION, LLC, ET AL.,	)	
Plaintiffs,	)	
	)	
v.	)	No. 2:07-CV-188
	)	
DEAN FOODS COMPANY, ET AL.,	)	
Defendants.	)	

ORDER

This matter is before the Court on the plaintiffs’ objection, [Doc 637], to the United States Magistrate Judge’s “Order Regarding Motion Doc. 1090,” [Doc. 623], which denied plaintiffs’ motion to exclude the testimony of defendants’ expert Dr. Joseph P. Kalt. The plaintiffs’ challenged the admissibility of Dr. Kalt’s testimony on a number of bases, including his use of the Producer Price Index (“PPI”) in his regression model. Magistrate Judge Inman found that Dr. Kalt’s testimony was admissible, [Doc. 623]. The plaintiffs now object to Magistrate Judge Inman’s order by arguing that the Magistrate Judge gave improper deference to Dr. Kalt’s use of PPI data and that PPI is not the proper data set to use. The defendants have responded, [Doc. 646], and the plaintiffs have replied, [Doc. 654]. For the reasons that follow, the objection of the plaintiffs, [Doc. 637], is overruled and the magistrate judge’s order, [Doc. 623], is AFFIRMED AND ADOPTED by this Court and made the order of the Court.

The Court reviews the magistrate judge’s order to determine whether the order is “clearly erroneous or contrary to law” when reviewing a non-dispositive preliminary matter. 28 U.S.C. § 636(b)(1)(A), *United States v. Curtis*, 237 F.3d 598, 603 (6th Cir. 2001). The district court must

have a “firm conviction that a mistake has been committed” in order to modify or set aside the magistrate judge’s order. *United States v. Ellis*, 497 F.3d 606, 611 (6th Cir. 2007).

Here, the plaintiffs’ essentially argue that Dr. Kalt’s testimony should be excluded because he used a nationwide PPI data set in his regression model to determine whether the alleged conspiracy caused damages to the plaintiffs. Dr. Kalt concluded that the damages suffered by the plaintiffs were in fact not damages caused by an alleged conspiracy but instead were the normal effects of a nationwide trend in milk pricing. The plaintiff argues that the magistrate judge improperly applied the standard from *In re Scrap Metal Antitrust Litigation*, 527 F. 3d 517 (6th Cir. 2008) to Dr. Kalt’s use of PPI by giving Dr. Kalt’s data choice “unquestioning deference.”

Under *Scrap Metal*, the court must ensure that the expert’s choice of data rests on a reliable foundation and is not unsupported speculation. *Id.* at 529-30. However, the accuracy of the expert’s opinion is a question of the evidence’s weight, not admissibility. *Id.* at 531. The plaintiffs correctly point out that the court in *Scrap Metal* accepted the expert’s data choice because that is what industry participants used. *Id.* However, that is not the *only* method to establish that a data choice is acceptable. The Sixth Circuit in *Scrap Metal* held that where the expert offered a “foundation for how and why he analyzed” the data like he did, the opinion was admissible. *Id.*

In his expert report and deposition, Dr. Kalt explained the reasons he elected to use the PPI data set in this particular economic regression model and that he had considered all potential biases when choosing this data set. Therefore, there is support in the record for Dr. Kalt’s choice of data set. Any potential flaws of using PPI may be taken up during cross-examination. The

plaintiff's remaining objections to the magistrate judge's order are merely restatements of their objection to allowing Dr. Kalt to testify using his PPI-based regression model. These arguments may be taken up during cross-examination and are not proper for a *Daubert* challenge.

The plaintiffs have failed to show that the magistrate judge's order is "clearly erroneous or contrary to law." Therefore, it is hereby ORDERED that the plaintiffs' appeal of the United States Magistrate Judge's order is DISMISSED and the order, [Doc. 623], is AFFIRMED.

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE