IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION	**MDL No. 2002** **Case No: 08-md-02002**
THIS DOCUMENT APPLIES TO: *ALL DIRECT ACTION PLAINTIFF ACTIONS*	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' RULE 50 MOTIONS

Defendants, pursuant to Federal Rule of Civil Procedure 50, have moved for judgment as a matter of law in their favor on all claims by all plaintiffs. Doc. No. 2070, 2071, 2072.[1] At trial, Plaintiffs have presented sufficient evidence from which the jury could reasonably conclude that in violation of Section 1 of the Sherman Act, Defendant UEP orchestrated an illegal conspiracy to restrict the supply of shell eggs in the United States for the purpose of increasing shell egg prices, and that Defendants USEM and Rose Acre also knowingly participated in this conspiracy.[2] Further, Plaintiffs have also presented sufficient evidence from which the jury could reasonably conclude that each individual Plaintiff was injured by this conspiracy in the form of being overcharged for shell eggs that it bought from one or more co-conspirators, the exact sort of injury the Sherman Act is intended to prevent. Therefore, the jury could reasonably

[1] Because of the substantial overlap between the Defendants' motions, including cross-references, the Plaintiffs provide an omnibus response in opposition to all three motions in this filing.

[2] Plaintiffs note that the Court has previously considered many of the issues raised by Defendants, including on summary judgment, and more recently in the context of the *James* hearing regarding co-conspirator statements. The Court's prior decisions regarding the relevant issues were based on the discovery record, but as detailed below, Plaintiffs have now presented a trial record on which the Court should hold that a reasonable jury could conclude that the alleged conspiracy did in fact occur, and that the Defendants and their alleged co-conspirators did in fact knowingly participate in the conspiracy.

conclude that each individual Plaintiff has standing to bring its claim for damages and equitable relief against the Defendants pursuant to the Clayton Act.

Accordingly, the Defendants' Rule 50 motions should be denied, and the issue of Defendants' liability to the Plaintiffs should be determined by the jury.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 50 provides:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

F.R.C.P. 50(a)(1). The standard of review for a motion for judgment as a matter of law under Rule 50 is "whether, viewing the evidence in the light most favorable to the non-movant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *Eddy v. Virgin Islands Water & Power Auth.*, 369 F.3d 227, 230 (3d Cir. 2004); *Accurso v. Infra-Red Servs.*, No. 13-7509, 2018 U.S. Dist. LEXIS 25907, at *4-5 (E.D. Pa. Feb. 15, 2018). "In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, [or] determine the credibility of witnesses." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993); *Accurso*, 2018 U.S. Dist. LEXIS 25907 at *5.

SUBSTANTIVE LEGAL STANDARD

Section 1 of the Sherman Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 1. The required elements of a Section 1 claim are (1) an

agreement (2) to restrain trade unreasonably. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010).

In determining whether a single conspiracy exists, the Third Circuit Court of Appeals has focused on "(1) whether there was a common goal among the conspirators; (2) whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators; and (3) the extent to which the participants overlap in the various dealings." *United States v. Fattah*, 914 F.3d 112, 168 (3d Cir. 2019). However, as the Court has repeatedly held in this litigation, "[a]ntitrust law has never required identical motives among conspirators, and even reluctant participants have been held liable for conspiracy." *In re Processed Egg Products Antitrust Litig.*, 821 F. Supp. 2d 709, 719 (E.D. Pa. 2011) (citations and quotation marks omitted) (alterations in original).

Instead, in order to participate in such a conspiracy, the Court has previously held that the entity must have "knowledge of the conspiracy's illicit purpose when [it] performs acts which further that illicit purpose." *United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975) (collecting cases); *see In re Wellbutrin XL Antitrust Litig.*, 133 F. Supp. 3d 734, 769 (E.D. Pa. 2015) (citing *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1242-43 (3d Cir. 1993)). "The Supreme Court has explained that a party progresses from mere knowledge of an endeavor to intent to join it when there is informed and interested cooperation, stimulation, instigation. And there is also a stake in the venture which, even if it may not be essential, is not irrelevant to the question of conspiracy." *In re Vitamins Antitrust Litig.*, 320 F. Supp. 2d 1, 17 (D.C. Cir. 2004) (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (quotation marks omitted)); *see In re Magnesium Oxide Antitrust Litig.*, No. 10-5943, 2011 WL 5008090, at *17 (D.N.J. 2011)). However,

"[k]nowledge of all particular aspects, goals, and participants of a conspiracy" is not necessary to establish an entity's involvement in a conspiracy. *United States v. Adams*, 759 F.2d 1099, 1114 (3d Cir. 1985) (citing *Blumenthal v. United States*, 332 U.S. 539,558 (1947)); *see Magnesium Oxide*, 2011 WL 5008090, at *17 (D.N.J. Oct. 20, 2011) (noting that a meeting of minds or a conscious commitment to a common scheme "does not require a showing that [the defendant] knew of or participated in every transaction in furtherance of or related to the alleged conspiracy") (collecting cases).

Once the agreements are established, a restraint that is not *per se* unreasonable is analyzed under the "Rule of Reason" burden-shifting framework, which seeks to determine whether the restraint's harmful effects are outweighed by any procompetitive justifications and, if so, whether there are less restrictive alternatives." *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 829-30 (3d Cir. 2010).[3] A plaintiff can satisfy its initial burden of showing harmful effects in one or both of two ways: actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market; or proof that the co-conspirators had market power, plus some evidence that the challenged restraint harms competition. *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285, n.7 (2018).

A private plaintiff suing under the Clayton Act must also prove antitrust standing, which requires that its injury be of the type the antitrust laws were intended to prevent, and that it flows from that which makes defendants' acts unlawful. *See West Penn Allegheny Heath Sys., Inc. v. UPMC*, 627 F.3d 85, 101 (3d Cir. 2010). The alleged injury must also be caused by the illegal

[3] The jury could also reasonably conclude that the Defendants participated in a horizontal conspiracy to reduce supply and raise prices that was *per se* unlawful, meaning they would be treated as anticompetitive by their very nature, such that they are deemed violations of the Sherman Act without further proof of actual harmful effects which outweighed any procompetitive benefits. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (horizontal price-fixing via conspiracy to manipulate supply held *per se* illegal).

conduct, but the Third Circuit's causation standard is satisfied by a showing that "the illegality is . . . a material cause of the injury." *In re Linerboard Antitrust Litigation*, 497 F. Supp. 2d 666, 675-76 (E.D.Pa. 2007) (quoting *Danny Kresky Enter. Corp. v. Magid*, 716 F.2d 206, 209-10 (3d. Cir. 1983)).

STATEMENT OF FACTS

Viewing the trial evidence in the light most favorable to the Plaintiffs, and giving them the advantage of every fair and reasonable inference, the jury could reasonably determine that Defendants UEP, USEM, Rose Acre, and their conspirators all participated in a single conspiracy to reduce domestic shell egg supply and to increase shell egg prices. As described further below, the evidence sufficiently supports a conclusion that the co-conspirators used at least three general tactics to help accomplish this purpose: (1) a series of short-term egg supply reduction measures, (2) a long-term plan to reduce the supply of eggs under the pretext of an "animal welfare program," and (3) exporting eggs at a loss.

A. The inception of the conspiracy

The trial evidence shows that the stage was set for the conspiracy long before it officially began.

As early as 1999, UEP and its members were facing a period of great oversupply in egg production that drove the cost of egg products down. *See* United Voices Newsletter at 2 (July 5, 1999) (PX0024) ("Industry losing $25 million per day"). In order to increase profit margins, UEP and its co-conspirators settled upon a conspiratorial scheme to reduce domestic egg supply as a means to increase domestic egg prices. Through its "United Voices" newsletters—the UEP-produced publication dispersed to UEP members bi-weekly—UEP urged its members to review their supply demand needs as a first step to maximizing economic returns. Soon thereafter, UEP also recommended that its members do their part to reduce the egg supply. *See* United Voices

Newsletter at 2 (July 5, 1999) (PX0024) (noting that "[i]t's up to the individual producers to make [the] decision" whether they would "make the necessary adjustments to bring supply more in balance with demand"). UEP's general urging of reductions of supply were soon followed by UEP's encouragement and instruction to participate in a broad supply-reducing conspiracy through three means: various short-term measures, the certified animal welfare program, and exporting eggs at a loss.

B. Short-Term Supply Reduction Measures

Facing oversupply throughout the egg industry, UEP turned first to short-term measures—including the early molting and slaughtering of hens—as a means to quickly reduce the egg supply. Through its "United Voices" newsletters, UEP implored its members to "do [their] part in early molting and early slaughter" to "adjust[] the supply side of the business" and ensure higher prices. *See* United Voices Newsletter at 2 (Apr. 19, 1999) (PX0013). In this same newsletter, UEP Chairman Ken Looper also urged members to "do [their] part and make [the] industry profitable for everyone" through the "total disappearance" of 201.1 million old hens. *Id.* at 1.

In May 1999, the UEP Board approved both of the short-term supply-reducing measures recommended by the Marketing Committee. PX0018. UEP continued to heavily encourage its members to participate in additional molting and slaughtering initiatives. *See, e.g.*, United Voices Newsletter at 1 (June 7, 1999) (PX0021) ("(1) Continue to molt hens at 60 weeks of age for the next 5 weeks. (2) Continue to slaughter or dispose of hens 5 weeks earlier than normal for the next 5 weeks.").

At least some members did as instructed. *See* United Voices Newsletter at 1 (June 7, 1999) (PX0021). Finally, Board members were further "urged to maintain their supply reduction programs." UEP Board of Dir. Meeting Minutes (Feb. 24, 2000) (PX0039).

UEP also knew early on that these short-term measures would not be enough on their own to achieve long-term supply reduction. *See* United Voices Newsletter at 3 (Aug. 2, 1999) (PX0027) ("Extra birds must be removed from the nation's flock permanently. An early molt is only a stopgap way of correcting the problem. Egg producers must be encouraged to take a hard look at the profitability of maintaining each of their older flocks during periods of extremely low prices."). UEP's communications suggest that the plan would only work if the members worked together. The jury could reasonably determine from this evidence that the UEP-orchestrated short-term early molt and slaughter efforts were methods employed to advance a broader agreement to reduce the supply of eggs.

C. Certified Animal Welfare Program

The jury could reasonably conclude from the trial evidence that UEP adopted "animal welfare" guidelines and created its Certified Program as a means to reduce egg supply, with the animal welfare justification being merely pretextual.

Disgruntled by the economic downturn in the egg market and realizing that short-term fixes would not be enough to alleviate his "concern[s] with the current economic conditions," UEP Chairman Ken Looper sought to develop a "supply program for board review." UEP Board of Dir. Meeting Minutes (May 12-13, 1999) (PX0018). UEP created a Scientific Advisory Committee to recommend suggestions that the UEP's Producer Committee would later draft into UEP's animal welfare guidelines. Letter from Gene Gregory to UEP Members (Nov. 13, 2000) (PX0057) ("The scientific recommendations were presented to UEP's Board of Directors for approval. A Producer Committee for Animal Welfare was formed [to] . . . turn the scientific report into a set of husbandry guidelines for the industry."). But the jury could reasonably conclude that the UEP used its Scientific Advisory Committee, and the resulting guidelines, solely to lend artificial legitimacy to UEP's subsequent Certified Program.

Among the Scientific Advisory Committee members was poultry specialist Donald Bell, an early advocate for implementing various supply-reducing measures into the poultry industry. In the early 1990s, Mr. Bell advocated for various supply reducing methods in the poultry industry. In a report dated April 15, 1994, Mr. Bell stated that "[t]he U.S. has no way to control its flock size other than through the persuasive influence of trade associations such as UEP. . . . Remember - in the egg industry, 'more means less' - it always has and it will always be so." Don Bell, An Eggs Economic Update at 4 (Apr. 15, 1994) (PX0005).

Gene Gregory, at the time the Senior Vice President of the UEP, solicited from Mr. Bell a "12-month Supply Plan to Meet the Market Needs That Provides a Reasonable Return on Investment" and welcomed "any additional ideas." Letter from Gene Gregory to Don Bell and Lee Schrader (July 1, 1999) (PX0022). In response, Mr. Bell wrote that "[c]orrection in the size of the nation's layer flock can be attained by one of several ways":

> 1. A sensible industry-wide growth policy must be adhered to. This requires industry-wide commitment to a "reasonable" growth rate at no more than 3 million hens per year.
> 2. Extra birds must be removed from the nation's flock permanently. An early molt is only a stop-gap way of correcting the problem. . . .
> 3. A 2-3% reduction in chick purchases would help to lower the future flock size, but the results would be slow.
> 4. An industry-wide policy of a minimum floor space allowance would result in a more ideal national flock size. It is currently estimated that 15-20% of the nation's birds are housed at less than 48 square inches. If 48 square inches were adopted as the minimum space allowance, millions of extra birds would be eliminated.

Letter from Don Bell to Gene Gregory (July 2, 1999) (PX0023). In this letter, Mr. Bell explained that short-term methods, such as the early molting program already implemented, would fail to provide UEP's desired long-term supply reduction effects. Instead, Mr. Bell

focused on executing a longer-term solution to alleviate the UEP's economic woes, in the form of requiring larger cage spaces per hen.

On Mr. Bell's recommendation, UEP's efforts then largely focused on reducing egg supply by requiring an increase in cage space per hen. After receiving Mr. Bell's guidance, UEP conducted a survey of its members to see whether they were interested in participating in a "supply adjustment program" adopting the methods suggested by Mr. Bell. United Voices Newsletter at 3 (Aug. 2, 1999) (PX0027). When encouraging its members to complete this survey, UEP reproduced Mr. Bell's suggested methods to "correct[] ... the nation's flock size" in a United Voices newsletter. United Voices Newsletter (Aug. 2, 1999) (PX0027). UEP received overwhelmingly positive responses from those members who responded: sixty-eight members representing approximately 90 million laying hens—about 30% of the UEP members—responded to this survey. Of the responding members, the vast majority responded positively. UEP Marketing Call (Nov. 22, 1999) (PX0031).

Backed by the support of its members, UEP's various relevant committees, on which representatives of competing egg producers served, focused their efforts upon bringing this long-term plan to fruition.

On May 15, 2000, the Animal Welfare Committee met to accept the recommendations and goals of the Scientific Advisory Committee and commit to creating official animal welfare guidelines ("2000 Guidelines"). *See* UEP Animal Welfare Committee Meeting (May 15, 2000) (PX0044). Participation in the UEP Certified Program requires compliance with these guidelines. The Committee committed to increasing cage space per hen despite acknowledging that (1) it was not in any individual producers' economic self-interest to do so; (2) most or all of the producers in the industry would have to commit to justify the program; (3) the program

would be perceived as a "pro-welfare" industry decision; and (4) "[a]n increase in space allowance would inevitably reduce the layer population and thereby reduce the surplus production problems affecting the industry over the past 20 years." *Id*. The 2000 Guidelines were updated in 2002, and then annually thereafter.

The UEP also first implemented its UEP Certified Program (then known as the Animal Care Certified Program) in 2002. *See* United Voices Newsletter at 2 (April 8, 2002) (PX0120) (explaining that the UEP Board passed various resolutions regarding the 100% Rule and the scoring of the Certified Audit). The UEP Certified Program, as distinct from the guidelines, was created by the egg producers sitting on the Animal Welfare Committee, not the Scientific Advisory Committee, and then adopted by the UEP Board. *See, e.g.*, Nov. 26, 2019 Trial Tr. at 57:8-13 (Dr. Armstrong noting that the audits were not developed by the SAC).

Over the next few years, the UEP, by and through the egg producers sitting on the Animal Welfare Committee and Audit Subcommittee, continued to modify the UEP Certified Program, adding the 100% Rule, a prohibition on backfilling, and a points-based pass/fail audit system to enforce compliance. The jury could reasonably conclude that all of these additional elements of the UEP Certified Program, which were not recommended by the Scientific Advisory Committee, are sufficient evidence that the UEP and its co-conspirators intended the UEP Certified Program to have a supply-reducing effect, with the animal welfare guidelines recommended by the Scientific Advisory Committee serving only as a pretextual justification. *See* Nov. 26, 2019 Trial Tr. at 107:6-7; 114:5-117:8 (Dr. Armstrong testifying that the audit, prohibition on backfilling and 100% Rule are nowhere to be found in the SAC's recommendations).

On the 100% Rule, the jury could reasonably conclude that the egg producers' customers, both individually and through trade organizations such as the FMI and NCCR, were not demanding a rule that all eggs sold to other customers must also be produced in accordance with the UEP Certified Program. *See*, *e.g.*, Nov. 21, 2019 Trial Tr. at 25:2-8 (Dr. Hollingsworth (FMI): "Q. What power did FMI have to force – to force producers, for instance, to follow this policy? A. We – we have no power to do that. Q. Did this policy require, for instance, producers to be 100% compliant with what FMI wanted? A. No. We – we – that was between the retailers and the suppliers. We had no – nothing to do with that."); Nov. 21, 2019 Trial Tr. at 67:16-25 (Dr. Hollingsworth (FMI): Q. Do you understand that the Certified Program had a 100% rule in it? A. Yes. Q. And it also required or allowed a member to use a seal? A. Yes. Q. Did FMI ever endorse the Certified Program? A. No, we did not."); Nov. 20, 2019 Trial Tr. at 172:5-9 (Karen Brown (FMI): Q. With that in mind, did you ever – did you or FMI ever endorse the 100% rule? A. Not to my knowledge. We endorsed their – our experts endorsed their guidelines. We did not get into endorsing the execution of their program."); Nov. 19, 2019 Trial Tr. 19:1-13 (James Wilson (Publix): "Q. Did there come a time when you personally became aware of something referred to as the 100% rule? A. In preparing for this case. Q. And in what circumstance was that. A. I learned about the 100% rule and how they were not – or all egg suppliers to be UEP Certified had to produce 100% of their eggs as UEP Certified eggs. Q. Did you care if a producer of eggs Publix purchased from sold uncertified eggs to other customers. A. No, sir."); Nov. 15, 2019 Trial Tr. 70:2-13 (James Rohr (Giant Eagle): "Q. We've talked a little bit about the UEP certification. Are you familiar with the UEP Certified Program? A. Yes. Q. Was it important to you during your time as director of dairy? A. No. Q. When you were the director of dairy, had you ever heard of something called the 100% Rule? A. No.").

Instead, consistent with the practices in other agricultural industries, and in fact in the egg industry prior to the UEP Certified Program's adoption of the 100% Rule, the UEP members' customers and related trade organizations were, at most, interested in having a set of "best practices" guidelines that they could use when negotiating contracts with their own specific vendors. *See, e.g.*, Nov. 21, 2019 Trial Tr. at 68:3-8 (Dr. Hollingsworth (FMI): Q. Were the guidelines and the certification program different in the FMI's view? A. Yes. The guidelines were the actual practices, the best practices. The certification program seemed to be a marketing tool where if – if somebody was deemed to have met the guidelines, then they would somehow be recognized for that."); Nov. 18, 2019 Trial Tr. at 88:12-21 (Lynn Marmer (Kroger): "Q. And she next writes that: If our endorsed best practices are embraced by the producer groups, great. If not, we will be releasing them anyway to the public and to the retail community for voluntary use with their suppliers. Do you see that? A. Yes. Q. Was Kroger okay with what Ms. Brown was saying there in that sentence I just read? A. Yes, we were.").

Finally, the jury could reasonably conclude that the real reason that the UEP and the relevant egg producers adopted the 100% Rule was to maximize the impact of the UEP Certified Program on the supply of eggs, including by removing the threat that disinterested customers would purchase non-UEP Certified eggs instead, which in turn would remove the incentive for competing producers to hold out against joining the supply reducing conspiracy. December 2, 2019 Trial Tr. at 78:14-25 (Dr. Baye: "Q. What do you mean by 'tip the market"? A. Well, once you get a critical mass of buyers buying certified eggs, it makes it very difficult for a supplier that's not providing certified eggs to exist. And in particular, with the 100% rule, if a supplier signs a contract with, say, Kroger for certified eggs, then that supplier with the 100% rule is precluding itself from selling other markets. So you effectively gobble up not only the business

from Kroger with certified eggs, you're shutting off a channel through which other types of eggs could be produced that don't have the certification label. And that's, as a matter of economics, a restraint of trade."); Letter from John Mueller (Sparboe) to UEP (Nov. 5, 2003) (PX0691) ("Additionally we feel that, ultimately, the UEP mandate (it truly is not voluntary) of a 100% participation in the production of standards to the Animal Welfare Program may be tantamount to an unfair trade practice.").

On the backfilling ban, the jury could reasonably conclude that the backfilling ban was originally sought by the UEP and the relevant egg producers because it would be an effective means of increasing the market-wide supply reduction effect of the UEP Certified Program. United Voices Newsletter at 2 (August 12, 2004) (PX0243) ("A year later, and while the ACC program was never a supply management program, the 'backfill' provision (in my opinion) is contributing or even causing some of the disorderly marketing and poor egg prices that we are currently experiencing . . . It is your program . . . I do think you should eliminate or severely limit any 'backfill' provisions and return to the favorable market conditions we enjoyed this past spring."). To the extent that the Scientific Advisory Committee, at the behest of Dr. Armstrong, subsequently attempted to provide a scientific justification for the backfilling ban, the jury could reasonably conclude this was not the real reason that the producers sought the ban, nor was it in fact scientifically justified. *See* Nov. 26, 2019 Trial Tr. at 29-52. Finally, the jury could reasonably conclude that the UEP's actual implementation of the backfilling provision—as an automatic fail of the audits, but with an exception for catastrophic events provided that the producer still reduced the flock size by 10 percent—was sufficient confirmation that the true purpose of the backfilling ban as implemented was to increase the effectiveness of the supply reduction caused by the UEP Certified Program. *See* Nov. 26, 2019 Trial Tr. at 52:12-19.

Finally, the jury could reasonably conclude that the points-based pass/fail audit system, designed by the egg producers on the Audit Subcommittee, was further proof that the true purpose of the UEP Certified Program was supply reduction, and that animal welfare concerns as nominally articulated by the Scientific Advisory Committee in the form of recommendations were merely used by the UEP and the relevant egg producers as a pretext. Producers such as Rose Acre, serving on the Audit Subcommittee, discussed that despite the many specific provisions in the guidelines recommended by the Scientific Advisory Committee, they could set the points in the audit to provide for opting out of specific guidelines which they found inconvenient, while still remaining UEP Certified. *See* Letter from KY Hendrix to others at Rose Acre (March 14, 2002) (PX 109) (KY Hendrix to others at Rose Acre: "Included in this letter is an example audit from the UEP that the animal welfare committee will be going over on March 26, 2002. I want each of you to give me some advice that I can compile together to support RAF stance. This audit is only a sample and you can add or take away anything you want to. They want us to come up with a point system similar to an ASI audit from meaning that some items will carry more weight than others."); Letter from KY Hendrix to RA Complex Managers (May 31, 2005) (PX 709) (KY Hendrix wrote to Rose Acre complex managers: "Body weights need to be monitored daily during the fast. This is something that I have fought since the beginning and I have finally given up on. It will cost us 5 points if we keep doing what we are doing currently. If we lose 5 points I am not too worried as long as we pass with 170 or greater. 170 points is the least points you can get and still pass.").

The foreseeable practical consequence of this sort of audit system was that the UEP could effectively enforce supply-reducing measures such as the cage-space requirements[4] and the backfilling ban, while leaving unenforced the various other animal welfare provisions nominally recommended by the Scientific Advisory Committee. Indeed, because the points that could be deducted were so low for certain categories, and the same point limit applied no matter how many violations occurred, UEP Certified producers could, and did, commit violations that had profoundly negative consequences for the welfare of all of their laying hens in a house, knowing that they would still remain UEP Certified as a result of the points system. Rose Acre Audit (June 24, 2008) (PX 459) (Rose Acre audit showing that Rose Acre lost 5 points for having excessive dead birds in cages); Rose Acre Audit (August 30, 2005) (PX 694) (Rose Acre audit showing Rose Acre lost 10 points for having excessive ammonia levels); *see also generally* Nov. 20, 2019 Trial Tr. (Dr. Christine Fraser testifying about the scale of abuse at Quality Egg of New England, and John Glessner of QENE testifying that QENE nonetheless never lost Certified status).

In fact, some individuals on the Scientific Advisory Committee expressed concern with this scoring system which emphasized the supply-reducing measures. E-mail from Jeff

[4] The jury could further reasonably conclude that even the cage-space requirements were not enforced as an animal welfare measure, but only as a supply reduction measure. The UEP and the relevant producers adopted a "house average" rule, which allowed the producers to comply with the cage-space requirements on a house by house basis, but did not require them to do so on a cage by cage basis. 2006 UEP Guidelines (2006) (PX0729). The "house average" rule ensured that the flock-reducing impact of the cage space requirements would be exactly as envisioned by Don Bell, the UEP, and the relevant producers. But it did not prevent producers from providing an arbitrarily large number of actual chickens with less cage space than recommended by the Scientific Advisory Committee, as long as the overall house average was met. Nov. 26, 2019 Trial Tr. at 88:12-89:5. In fact, the jury could reasonably conclude that this "house average" rule alone is sufficient to prove that the true purpose of the cage-space requirement, as implemented by the UEP and the relevant producers, was supply reduction and not animal welfare.

Armstrong to SAC Members (March 13, 2003) (PX 223) (Dr. Armstrong wrote an e-mail to others on the SAC: "Here is another point that I (Jeff) plan to make to the Producer Committee . . . We believe it would be a serious mistake for producers to simply disregard this recommendation by saying they will give up points in the audit. Your responsibility should be to meet the UEP Animal Husbandry guidelines regardless of the number of points . . . ."). Dr. Armstrong raised concerns about the audit with Gene Gregory, and Dr. Armstrong was quickly told to mind his own business. PX 181 (Letter from Gene Gregory to Dr. Jeff Armstrong: "We did not envision the [Scientific Advisory] Committee doing a critique and making suggested changes to the audit procedures. We believe these are decisions to be made by USDA, ARPAS, and UEP. The committee should have been more respectful. The committee should focus upon the science and not how or when the industry implements or audits the program.").

From this evidence, the jury could reasonably conclude that UEP's implementation of the UEP Certified Program, as designed by the egg producers sitting on the Animal Welfare Committee and Audit Subcommittee, and as distinct from the guidelines produced by the Scientific Advisory Committee, was a critical part of their conspiracy to restrict egg supply and increase egg prices.

D. Egg Exports at A Loss

The jury could reasonably conclude that UEP, USEM, and the USEM members exported eggs at a loss in order to reduce the domestic supply of eggs and increase domestic egg prices. At the behest of UEP's management, USEM members exported domestic eggs to international markets. Mr. Gregory first urged UEP members in a letter dated February 2000 to participate in an export program "[i]in order to maximize the impact upon the domestic price for eggs." *See* Letter from UEP to UEP Members (Feb. 1, 2000) (PX0035). Through its newsletters, UEP

similarly urged members to participate in subsequent export orders for this purpose. United Voices Summary Exhibit (Feb. 20, 2000) (PX0767 at 12).

Mr. Gregory also linked these exports to other alleged conspiratorial actions, writing to the UEP's members:

> In order to correct our over-supply problem and return to long-term profits for the industry, we must maintain our supply managements programs of reducing the flock size and reducing out chick hatch placements during 2000. Don't be mislead [sic] by short term price increases as a result of filling export orders. Do not plan your production based upon the potential of exporting large volumes. These export orders are a tremendous benefit but certainly not the final solution to our over-supply problem.

PX0035. UEP advertised commitment to export orders to remove domestic eggs as a means "to improve the domestic price." United Voices Newsletter at 2 (Mar. 20, 2000) (PX0767 at 12).

The jury could also reasonably conclude that the USEM did in fact repeatedly export eggs at a loss, and that the exports at a loss did at least temporarily cause increases in domestic egg prices. Nov. 15, 2019 Trial Tr. at 154:20-155:22 (Linda Reickard testimony). However, although UEP acknowledged the short-term price benefits that these exports at a loss provided, as noted above it further called for members to engage in long-term plans of reducing the nation's flock size.

Therefore, the jury could reasonably conclude that USEM exports managed by UEP were not a completely independent violation of the Sherman Act, but rather were part of a conspiracy by UEP, USEM, and various egg producers to reduce egg supply and drive up domestic egg prices.

E. Economic impact of the conspiracy

The jury could reasonably conclude from the trial evidence, and particularly the well-qualified and credible expert testimony of Professor Baye, that the conspiracy described above

restricted egg supply and increased egg prices, including the prices paid by the Plaintiffs. *See* Dec. 2, 2019 Trial Transcript ("Dec. 2 TT") at 28:20-22 and 109:11-14.

Plaintiffs purchased at least $3.5 billion of eggs and egg products from the named conspirators. *See* Dec. 2 TT at 117:15-21; *see also* Dec. 2 TT at 118-122 (explaining which co-conspirators each DAP purchased eggs from during the relevant time period). According to the evidence, introduced to the jury through Professor Baye, the certified program alone caused the prices Plaintiffs paid for these eggs and egg products to increase on average at least 13%. Dec. 2 TT at 110:18-22. In fact, the price of certain of the eggs and egg products purchased by Plaintiffs from the named conspirators increased by more than 50%. *Id*.

Professor Baye's testimony also establishes that the exports coordinated through the USEM had the effect of eliminating eggs from the U.S. market resulting in an increase in egg prices of 2.57%-9.53% for at least 6 of the months between October 2006 and June of 2008.

In addition, Professor Baye testified that he observed short term measures in the record that also would have likely impacted price. Dec. 2 TT at 152:7-11. While Professor Baye was not able to reliably measure the amount of the increase caused by short term measures, he concluded that the short term measures were likely to have impacted price resulting in fact of injury. Dec. 2 TT at 133. The admitted documentary evidence supports this conclusion as well. PX0059, Dec. Nov. 7 TT at 63:18-64:17.

ARGUMENT

From the trial evidence, the jury could reasonably find the facts summarized above, and then conclude that the Plaintiffs have met their burden as to all of the elements required by the Sherman Act and Clayton Act.

A. The Defendants' Participation in Agreements

The jury could reasonably conclude that the conspiracy described above was implemented through many different agreements, often between direct competitors, in unreasonable restraint of trade. First, the short-term supply measures were not only urged on the UEP's members by the UEP, those members were also asked to "commit" to implementing those measures. *See, e.g.*, Letter from Gene Gregory to Dolph Baker (Nov. 29, 2004) (D-666) (showing that Cal-Maine made an intention to implement short-term measures and that UEP was asking Cal-Maine to return a signed letter showing Cal-Maine followed through with its supply reduction commitment). Second, the UEP Certified Program required a signed application by participating producers, who expressly agreed to comply with the program's requirements, including participating in audits. *See, e.g.*, Rose Acre Certification Form ("The company commits to meeting the space allowance guideline as detailed below . . . . The company agrees to be audited annually . . . . The company must recognize that passing the audit is necessary in order to maintain the certification status). Third, the USEM export at a loss program required participants to agree to either supply eggs themselves, knowing they would be sold abroad at a loss, or to pay a share of the USEM's losses when it made up the desired export quantity with eggs it bought at higher domestic prices. United Voices Summary Exhibit (Feb. 14, 2007) (PX0767 at 38).

This is not, therefore, a case where the relevant agreements were successfully hidden and must be inferred only from circumstantial evidence (although there is ample circumstantial evidence as well). Instead, the trial evidence has laid bare the agreements that support each component of the conspiracy, and the main issues for the jury to determine are which entities participated in those agreements, and whether they were unlawful.

(1) The UEP's central role in the conspiracy

The jury could reasonably conclude that Defendant UEP knowingly participated in all aspects of the supply-reduction conspiracy on the basis of the trial evidence previously summarized. In short, the UEP was intimately involved in all three aspects of the conspiracy, and UEP officers communicated both among each other and to other UEP members about the supply-reducing purposes of these measures. From this trial evidence, the jury could reasonably conclude UEP, including through its officers, sought and obtained agreements to all of the short-term measures, the restrictive aspects of the UEP Certified Program, and exports at a loss, for the purpose of reducing supply and increasing prices.

(2) USEM knowingly supported the conspiracy with exports at a loss

The jury could reasonably conclude that USEM knew that it was arranging exports at a loss for the purpose of supporting UEP's overall supply-reducing conspiracy. USEM and UEP entered into a renewable management agreement in which UEP agreed "to provide management services and the staff necessary to provide an export program and marketing conference calls for the members of USEM." UEP-USEM Management Agreement, Ex. D, § 2 (Sept. 8, 2000) (PX0053). The agreement provides the following language in its Membership section:

> Upon execution of this Agreement and during the term hereof, UEP shall solicit its members to become members of USEM for participation in the Export Program and Marketing Conference Calls. As a condition of membership, the applicant (current UEP or USEM member or any other qualified egg producer) must sign a new membership agreement and agree to an export commitment. USEM members shall not be required to pay annual dues providing they are dues paying members of UEP. Any member that is not a UEP member will be required as a condition of membership to pay USEM membership dues equal to those of UEP's dues rate schedule. Membership dues paid directly to USEM will be received in USEM's bank account.

Id. at § 5. The agreement otherwise states that both entities are independent Capper-Volstead Cooperatives, that UEP is not an agent of USEM, *id*. at § 12, and that "UEP shall not participate in or have any responsibility for USEM activities or decisions in connection with its shell egg export or marketing conference call programs," *id*. at § 9. These provisions, however, do not shield USEM from being knowledgeable (1) that Mr. Gregory encouraged UEP members to join USEM as agreed upon in the UEP-USEM contract, *id*. at § 5, nor (2) that Mr. Gregory sent a USEM document to USEM members congratulating them for doing what they "intended and that was to improve domestic prices" through accepting an export order, Letter from Gene Gregory to All USEM Members (Nov. 25, 2002) (PX0150).

Pursuant to the agreement, Mr. Gregory communicated to UEP members in a letter that UEP "assume[d] the management of United States Egg Marketers (USEM) primarily for the purpose of coordinating industry-wide export shipments." Letter from Gene Gregory to UEP Members (Aug. 29, 2000) (PX0051); *see* also Attachment to Letter from Gene Gregory to UEP Members (Aug. 29, 2000) (PX0051) ("Under the management of UEP[,] [UEP] will strive to establish a United State Egg Marketers (USEM) committed shell egg export program for egg producers all across the U.S."). To stress the importance of becoming a USEM member and committing to coordinated exports, Mr. Gregory explained:

> We are hopeful that all UEP members including those not previously committed will recognize the benefit of the industry having a legal means by which we can collectively move eggs from the domestic supply to improve domestic prices.

Id. The attachment explained that "[t]he intent of taking a large volume export order for a short period of delivery is to reduce the domestic supply and thereby increase the domestic price of eggs." *Id*. It further explained: "The primary reason to be a supporter of the export effort is to help improve your egg price and thereby create a greater return to your business." *Id* (emphasis

in original); *see also id* ("A substantial order usually tightens supply and results in a higher market for all eggs sold domestically."). Mr. Gregory stressed that industry-wide involvement was required for the export program to work as intended. *See id.* ("The success of any program is the involvement of the industry and therefore we call upon every egg producer to become involved.").

Through its "United Voices" newsletters, UEP updated its members on the UEP's Export Committee's decisions to reject one and accept two export orders. These newsletters again referenced supply reduction and its effect on prices. In an effort to solicit "[a]ny [UEP] member that is supportive of these initiatives to improve domestic prices through cooperative export efforts," UEP suggested it would not have had to deny one export order if only it had greater support of its members. United Voices Newsletter at 1 (June 12, 2000) (PX0047). The other newsletters reported on the approved export orders and commended USEM members that "have done their part to help improve egg prices," thereby "tak[ing] [the] initiative to not only help themselves but to help the entire industry." United Voices Newsletter at 1 (Nov. 4, 2002) (PX0147).

Further, in a memorandum on USEM letterhead addressed to USEM Members, Mr. Gregory stated: "Congratulations! You did what you intended and that was to improve domestic prices with your decision to accept the 250-container export order." Letter from Gene Gregory to All USEM Members (Nov. 25, 2002) (PX0150). Indeed, the jury could reasonably conclude that this USEM letter, on its own and also as supported by other trial evidence, establishes that USEM knew of the illicit purpose behind its agreement with UEP, and how it fit into the UEP's

broader supply reducing conspiracy.[5] Explicit within USEM's "congratulation" to its members for doing what they "intended"—"to improve domestic prices" through its exports—is its intention to facilitate an effort to reduce domestic egg supply as a means to raise domestic egg prices. *Id.* And again, the jury does not need to conclude that Plaintiffs have proven USEM's knowledge of every aspect of the common scheme. The jury therefore could reasonably conclude that the plain language of this letter is sufficient to establish USEM's knowing role in facilitating the exports at a loss, and as part of the UEP's overall supply-reduction plan.

Accordingly, the jury could reasonably conclude that the Plaintiffs have established USEM's knowing participation in the broader conspiracy.

(3) Rose Acre knowingly participated in the conspiracy

Rose Acre's motion for directed verdict on participation grounds is substantively the same as its summary judgment motion. Just as the Court denied Rose Acre's request for summary judgment, it should also deny its request for a directed verdict. There is more than ample evidence in the record—both direct and circumstantial—to demonstrate Rose Acre's

[5] In support of its Motion, USEM also argues that DAPs have offered no proof that they suffered antitrust injury due to USEM exports or that such exports measurably damaged them. First, based on the evidence cited above, the jury could reasonably conclude that USEM was part of a conspiracy that included the challenged aspects of the Certified Program, short-term measures, and coordinated exports. Accordingly, as noted previously, the relevant question is not whether the USEM exports damaged Plaintiffs, but rather whether the Plaintiffs were injured by any of the three anticompetitive acts which constitute the conspiracy that USEM joined. Moreover, Defendants' argument—that "antitrust injury" is lacking because the impact of each individual export was "short-lived"—incorrectly portrays the Export Program as a whole as a one-time or *de minimis* occurrence with a short-term impact. The Export Program was not a one-time event, and there is no reason to treat it as such. *In re Processed Eggs Antitrust Litig.*, 821 F. Supp. 2d 709, 718 (E.D. Pa. 2011) ("[C]haracter and effect of [a Section 1] conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.") (*citing Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). And the issue of whether Professor Baye has offered an opinion on the quantity of damages associated with the Export Program, as opposed to their observable impact on market prices, is not currently before the jury.

knowing participation in Defendants' conspiracy to reduce the supply and increase the price of eggs.

(a) Rose Acre and the UEP Certified Program

Rose Acre joined the UEP—an association made up of its competitors—in February 2002 for the purpose of joining what ultimately became the Certified Program. *See* Nov. 13, 2019 Trial Tr. ("Rust Nov. 13 TT") at 60:21-24; December 4, 2019 Trial. Tr., (Hinton Dec. 4 TT") at 12:3-9. On April 1, 2002, Rose Acre signed a written agreement to officially join the Certified Program. *See* Hinton Dec. 4 TT at 12:10-15; PX0712. When it agreed to the rules of the Program, Rose Acre was fully aware that its competitors were agreeing to the very same rules and requirements. *See* Rust Nov. 13 TT at 70:18-71:12. Since joining the Program in 2002, Rose Acre has continually maintained its Certified status. *See* Hinton Dec. 4 TT at 13:5-7.

Rose Acre's ongoing participation in the Certified Program is—without more—sufficient to deny the present motion. In denying Rose Acre's summary judgment motion, the Court held that the challenged rules of the Program—for example, the backfilling ban, 100% rule, and the auditing system—in conjunction with Rose Acre's agreement to these rules, created a reasonable and plausible inference that Rose Acre had agreed to limit the supply of eggs. *See* 9/28/16 Order, Dkt. No. 1444 at 1, 15-24. Because the same evidence that informed the denial of summary judgment—and more—has been introduced at trial, denial of Defendants' directed verdict motion is likewise appropriate on this basis. *See id.* at 1 ("[T]he Court concludes that similar conduct by all four moving Defendants—mainly

joining and participating in the United Egg Producers ('UEP Certified Program')—constitutes sufficient evidence to frustrate the motions for summary judgment.").[6]

There is of course extensive evidence beyond just Rose Acre's certification demonstrating that it agreed to and knowingly participated in an unlawful scheme to reduce supply and increase its profits. As the jury has heard, Rose Acre was an early participant and leader in the conspiracy, with full knowledge of the Program's anticompetitive purpose and effects. The relevant evidence—deriving from documents and statements by Rose Acre's Chief Executive Officer Marcus Rust, Rose Acre's former CEO Lois Rust, Rose Acre Board Member and Vice President of Sales Gregory Hinton, Rose Acre's former Production Manager KY Hendrix, Rose Acre Chief Financial Officer Gregory Marshall and Rose Acre Vice President of Live Production David Hurd—includes the following:

- Rose Acre's documents and testimony reflecting its knowledge and recognition of the anticompetitive purpose and effects of the Certified Program, as well as the possibility of an alternative program specific to Rose Acre:

    - *March 14, 2002 Letter from KY Hendrix to Marcus Rust and other board members at Rose Acre describing how producers were able to design the rigged audit system and recognizing there were economic motivations behind the Program* (PX0109)

      "Included in this letter is an example audit from the UEP that the animal welfare committee will be going over on March 26, 2002. I want each of you to give me some advice that I can compile together to support RAF stance. This audit is only a sample and <u>you can add or take away anything you want to</u>. They want us to come up with a point system similar to an ASI audit form meaning that <u>some items will carry more weight than others</u>."

[6] Rose Acre cites *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, (1984) and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986), to argue that Plaintiffs must present evidence that "tends to exclude the possibility" that Rose Acre acted independently. This is incorrect. On two prior occasions, this Court has expressly held that the *Monsanto/Matsushita* standards are <u>not</u> applicable to this case. *See* Dkt. No. 1444 at 15; 9/28/2017 Order, Dkt. No. 1550 at 3-5. And they remain inapplicable in light of the trial evidence.

"I don't really know what this whole motive is [behind the Certified Program] but I think there is more to it than Animal Welfare. I think some people think it will make them rich or something."

"I wonder if we should wait and look at this sticker and come up with our own that is similar in design but different showing that our eggs meet our standards which is high already"

- Marcus Rust testimony about KY Hendrix March 14, 2002 letter:

  When asked, Mr. Rust, confirmed that in "in March [2002] before [Rose Acre] joined the UEP, the Certified Program," he was then "aware of KY's Hendrix's concerns [about the motives behind the program]" and discussed those concerns with Lois Rust.

  See Rust Nov. 13 TT at 83:17-22.

- David Hurd testimony about KY Hendrix March 2002 memo:

  When asked, Mr. Rust confirmed that Mr. Hendrix expressed his concerns about the Program to the Rose Acre Board, "but, ultimately, Rose Acre chose to set aside those concerns and joined the Certified Program anyway"

  See David Hurd Trial Tr., December 3, 2019 ("Hurd Dec. 3 TT") at 99:10-100:11.

- *March 27, 2002 Letter from Lois Rust to KY Hendrix questioning the purpose of the Program* (PX0116)

  "Talked to Marcus last night [about the] UEP guidelines. They are good but we are concerned with the what [sic] looks like, the underlying purpose of the whole thing."

- When asked, Mr. Rust confirmed in his trial testimony that he had suspicion UEP "were trying to mange the supply of eggs and raise price as opposed to doing something else" and was concerned "UEP was coordinating producers to restrict supply of eggs to boost prices"

  See Rust Nov. 13 TT at 64:19-22 and 89:15-18.

- *May 6, 2004 email from Gene Gregory to Gregory Hinton and Rose Acre's competitors such as Cal-Maine and Moark discussing the economic benefits of the Program* (PX225):

Gene Gregory advises Mr. Hinton and Rose Acre's competitors that "[t]he Animal Care Certified Program gave us a roadmap for the future like no supply demand program could have".

When asked, Mr. Hinton admitted that, through this email, "Mr. Gregory more or less told [Rose Acre] that he believes the Animal Care Certified Program can be used as a tool for managing supply," yet Rose Acre nonetheless stayed committed to the Program

See Hinton Dec. 4 TT at 41:8-20.

- *January 24, 2006 UEP Board Meeting attended by Marcus Rust where numerous participants other than Rose Acre identify concerns about the UEP Certified Program* (PX-0314)

  ". . . the Certified Program has proven to be deceptive and dishonest to both producers and their customers. Opposes 100% Rule"

  ". . . the [Certified Program] has become a brand, as such franchised, and market restrictive. He recommends the 100% Rule be terminated."

- *February 13, 2008 mail from John Rust to Marcus Rust describing the Program as a scheme to boost prices* (PX0445):

  "I don't think we have anything to be ashamed of by putting as many hens per cage as conditions permit as that is doing what is economically right for consumers . . . rather than trying to restrict cage space to boost prices under the alleged agenda of animal rights."

  "We lose the moral right to argue for the continued right of low cost production costs when we ourselves are manipulating the system under false pretenses."

- Gregory Hinton testimony that he would regularly review issues of United Voices wherein UEP would advise Rose Acre and its competitors that the effect of the Certified Program was to lower supply and increase egg prices

  See Hinton Dec. 4 TT at 35:8-12 and 37:22-38:12.

- Rose Acre's leadership in UEP, active involvement in the development of the Certified Program and support of the 100% rule and backfilling ban:

  - Marcus Rust joined and has continually served on UEP's Board of Directors since 2002. *See* Rust Nov. 13 TT at 61:10-17

  - Marcus Rust served on UEP's Marketing Committee and attended meetings of UEP's Animal Welfare Committee. *See* Rust Nov. 13 TT at 62:16-63:5.

- Gregory Hinton served on UEP's Marketing Committee at the time Rose Acre joined UEP in 2002, was aware of the committee's supply reduction recommendations and attended meetings where these recommendations were made *See* Hinton Dec. 4 TT at 32: 12-17 and 33:18-24.

- Marcus Rust and David Hurd attended a March 2002 UEP Animal Welfare Committee meeting where the committee voted in favor of recommending the 100% Rule to the Board. In the same meeting, the committee moved to recommend various changes to the audit forms concerning the score required to pass the audit and the amount of points allotted to various guideline items. *See* PX0115.

- KY Hendrix served on the UEP's Producer Animal Welfare Committee and on the UEP's Audit Subcommittee. As a member of the Animal Welfare committee, Mr. Hendrix attended committee meetings, including a meeting in October 2002 where the 100% rule was re-confirmed. *See* KY Hendrix Trial Tr. Nov. 15, 2019 ("Hendrix Nov. 15 TT") at 19:9-12, 19:12-22:21;PX0141.

- Rose Acre later benefited from the pre-textual audits it had been involved in designing. For example, a Rose Acre facility could exceed the allowable ammonia levels, could fail to provide adequate access to water nipples and could fail to remove "excessive dead hens from cages" and still easily pass the relevant audits with sufficient points. *See* PX 00416 and PX00459.

- Marcus Rust testified that he voted for the 100% rule *See* Rust Nov. 13 TT at 91:23.

- When asked, Marcus Rust confirmed he was an "advocate of not only the 100% rule, but of tightening the 100% rule" and didn't want competitors to be able to produce certified and non-certified eggs because that would "give them a competitive advantage over Rose Acre" *See* Rust Nov. 13 TT at 92:3-6 and 114:3-7.

- Marcus Rust testified Rose Acre urged the Government not to certify a competing animal welfare program because it did not include a 100% Rule.

  See Rust Nov. 13 TT at 171:6-11 and 175:6-8; PX0609, PX0602.

- March Rust was on the UEP Board of Directors when UEP voted to ban backfilling. *See* Rust Nov. 13 TT at 188:23-189:2.

- KY Hendrix attended a December 2004 Animal Welfare Committee meeting where his committee voted to ban backfilling. *See* PX0260.

- Rose Acre's recognition that its participation in the Program required actions that, if taken independently and without coordination with its competition, would be against Rose Acre's economic self-interest:

    - Marcus Rust testified that, prior to UEP's backfilling ban, Rose Acre had always backfilled at its breaking plants because "it was very good for the producer because it gave you the most economic use of your cage" *See* Rust Nov. 13 TT at 182:6-25.

    - KY Hendrix testified that backfilling was a humane practice and that the Certified Program should have permitted backfilling because of this and because it would "keep [birds] in production". *See* Hendrix Nov. 15 TT at 35:6-36:22.

    - Shortly after joining the UEP Certified Program in 2002, Rose Acre forecasted a reduction of 21.41 percent in its capacity as result of the Program. *See* Hurd Dec. 3 TT at 102:5-12.

    - When asked, Gregory Hinton confirmed that the reason Rose Acre joined UEP was to "participate in what ultimately became the Certified Program" and that he personally recognized that compliance with the Program was going to result in flock size reductions. *See* Hinton Dec. 4 TT at 12:6-9 and 42:1-4; PX0178 PX0403.

    - In August 2007, Rose Acre represented to the U.S. Government that Rose Acre's compliance with the UEP Certified Program had "amounted to a reduction of literally millions of birds from our operation." *See* PX0602, PX0609.

    - Gregory Marshall testified that Rose Acre had to reduce capacity with each phased increase under the Certified Program, and, as late as November 6, 2007, Rose Acre's capacity was down 4 million hens as a result of the Certified Program. *See* Gregory Marshall Trial Tr. December 3, 2019 ("Marshall Dec. 3 TT") at 140:24-141:6; 160:13-16; 161:6-13.

As illustrated above, the jury could reasonably conclude there is more than sufficient trial evidence to substantiate Rose Acre's knowledge of and participation in UEP's conspiratorial plan to reduce supply through the UEP Certified Program.

(b) Rose Acre's participation in the USEM Export Scheme

As with the Certified Program, there is extensive evidence from which the jury could also reasonably conclude that Rose Acre knowingly participated in the scheme to reduce egg supply and increase egg prices through the USEM Export Program. Examples of this evidence include:

- Marcus Rust testified that Rose Acre joined USEM in December 2006, and that Rose Acre's USEM membership was an agreement with other egg producers. *See* Marcus Rust Trial Tr. Nov. 14, 2019 ("Rust Nov. 14 TT") at 5:19-7:2; PX-0430.

- Marcus Rust confirmed Rose Acre participated in the USEM export program pursuant to its agreement. *See* Rust Nov. 14 TT at 7:13-15.

- Gregory Hinton confirmed that Rose Acre was "one of the big players in USEM" and "routinely had the second largest contribution requirement" in USEM. *See* Hinton Dec. 4 TT at 48:16-23.

- Marcus Rust was a USEM Board member and voted to approve USEM exports. *See* Rust Nov. 14 TT at 74:5-13; Hinton Dec. 4 TT at 47:25-48:1.

- Marcus Rust confirmed that the "idea [behind USEM exports] was to remove some eggs that were causing excess supply in the U.S. market which would cause a reduction in prices in the U.S. market" and that he believes a purpose of USEM exports "was to remove surplus from the U.S. market" *See* Rust Nov. 14 TT at 10:21-25 and 12:12-15.

- In August 2007, after joining the USEM program, Marcus Rust expressed concern over the confidentiality of discussions concerning USEM exports and "issues that would stabilize and possibly influence the market." *See* PX0413 This concern about the details of the exports being too widely publicized evidences recognition by Mr. Rust and Rose Acre that the export program was unlawful.

- Gregory Hinton confirmed that the mechanics of the USEM program required Rose Acre to participate in exports regardless of how many surplus eggs Rose Acre had and that, on occasion, Rose Acre was forced to meet its USEM export commitment by buying eggs that it didn't have to spare. *See* Hinton Dec. 4 TT at 48:2-49:9.

- Gregory Hinton confirmed that Rose Acre was aware that the USEM exports Rose Acre participated in would cause domestic market price increases due to the fact that exports removed eggs from the domestic market. Indeed, Mr. Hinton drafted reports to the Rose Acre Board of Directors advising them of these consequences of USEM exports. *See* Hinton Dec. 4 TT at 52:5-53:3; PX-0611.

- There is evidence Rose Acre at times received less for USEM exports than it could have if it had instead sold the eggs domestically. *See* Hinton Dec. 4 TT at 54:7-55:16; PX-0611, PX-0715.

- Gregory Hinton confirmed he received and reviewed United Voices issues that 1) touted the market-wide economic benefits of USEM exports and 2) identified and quantified the individual losses USEM members sustained to achieve the market-wide benefits. Mr. Hinton testified Rose Acre remained "committed to the USEM program year after year" despite receiving these reports. *See* Hinton Dec. 4 TT at 58:3-62:5; PX-0715.

In view of this evidence, the jury could reasonably conclude that Rose Acre agreed to participate in USEM exports—at least some of which were against its individual economic self-interest—knowing their purpose was to reduce domestic egg supply and raise domestic egg prices.

(c) Rose Acre's knowledge of short-term supply measures

Finally, the jury could reasonably conclude that Rose Acre participated in UEP's short-term measures for the purpose of reducing supply. While Rose Acre contends it did not follow UEP's recommendations to reduce supply through early molts, slaughters and reduced chick hatch, this does not equate to non-participation in the scheme. Rose Acre's Gregory Hinton admitted that 1) he served on UEP's Marketing Committee; 2) the Marketing Committee he was a member of made recommendations to UEP members to reduce supply; 3) he was personally at meetings where these recommendations took place; and 4) Rose Acre never objected or withdrew from UEP's Marketing Committee because of these actions. *See* Hinton Dec. 4 TT at 32:12-17; 33:18-34:15. In addition, in March 2006, Marcus Rust attended a Marketing Committee conference call concerning the early molting of flocks and disposing of hens. *See* PX0326. During the conference call, a motion to recommend molting and disposal of spent hens six weeks earlier than previously scheduled passed unanimously, reflecting that Mr. Rust voted in favor of the measure. *Id.* This evidence—all of which is now in the trial record—could lead the jury to reasonably conclude that Rose Acre participated in this aspect of the alleged conspiracy, just as it did the other prongs of the conspiracy.

(d) Rose Acre's attempts to explain away Plaintiffs' evidence are insufficient to prevent the case from going to the jury.

Faced with the substantial record evidence pointing to its participation in the conspiracy, Rose Acre repeats its summary judgment arguments. Specifically, Rose Acre argues that directed verdict should be entered in its favor because: 1) its participation in a trade group and attendance at meetings is not enough to give rise to an inference of a conspiracy; 2) nothing in the Certified Program prohibited expansion, and Rose Acre's alleged expansion and purported rejection of UEP's short-term measures negates an inference that it entered into any supply control agreement; and 3) Rose Acre's actions were a legitimate, lawful response to consumer demand. Each of these arguments—which the Court has heard and rejected before (Dkt. No. 1444 at 24, 28-29)—are once again insufficient reasons to take this case away from the jury.

First, Plaintiffs have presented substantial evidence of Rose Acre's participation in a conspiracy to restrict the supply of eggs that goes beyond the simple fact of Rose Acre's UEP and USEM memberships. Membership and meeting attendance, without more, may not give rise to an inference of a conspiracy. However, in Rose Acre's case, its UEP and USEM membership and participation in meetings is but one small component of the overall record of its participation in the illegal conspiracy. As this Court has already recognized, active involvement by a conspirator creates an inference of knowing participation in a conspiracy. *In re Processed Eggs Antitrust Litig.*, 821 F. Supp. 2d 709, 724 (E.D. Pa. Sep. 26, 2011) ("While mere membership, even when coupled with knowledge of wrongful conduct of the association, is insufficient to establish knowing participation . . . once attendance is coupled with a consistent later act, an inference of knowing participation is permissible.") (citing *Hunt v. Mobil Oil Co.*, 465 F. Supp. 195, 231 (S.D.N.Y.1978); *see also* Dkt. No. 1444 at 20. Such an inference certainly exists here given Rose Acre's extensive conduct in furtherance of the scheme.

Second, with respect to Rose Acre's purported expansion, it is completely irrelevant because Rose Acre has failed to present any evidence indicating such expansion was sufficient to offset the declines in market-wide supply resulting from the conspiracy. *See e.g.*, Marshall Dec. 3 TT at 140:5-9 (confirming he is unable to testify "whether [Rose Acre's] production was sufficient to offset a decline in production market-wide that resulted from the Certified Program"); Dec. 4, 2019 Trial Tr. ("David Dec. 4 TT") at 164:7-10 (Q: So is it –isn't it also true that you do not have an opinion in this case on the impact of the UEP Certified Program on the U.S. egg industry as a whole? A: That's correct.). In fact, Rose Acre acknowledged the opposite; that its expansion would not materially impact overall market output levels. *See* Rust Nov. 13 TT at 148:17-19 ("I guess changing our product would be like me putting my finger in a five-gallon bucket of water. And did the level go up? Yeah a little"); Hurd Dec. 3 TT at 115:19-23 (answering as to whether Rose Acre has the ability to move the national market: "[t]he national market. Probably not.").

Therefore, even if Rose Acre had expanded as it alleges—which Plaintiffs dispute, as explained below—the jury could reasonably conclude that this conduct would not be inconsistent with Rose Acre's alleged agreement to restrict egg supply. Instead, it would merely show that Rose Acre was double-dipping, by first benefitting from the conspiratorially inflated prices on its existing production, and then benefitting even more from such higher prices on its expanded production. As Mr. Marshall agreed at trial, Rose Acre was "making a lot more money on [its] expanded production in 2008 than [it] would have been in 2002." *See* Marshall Nov. 26 TT at 193:4-7. Dr. David echoed these sentiments by agreeing that its possible Rose Acre understood that "prices would go up even with its own flock getting bigger." *See* David Dec. 4 TT at 183:14-21.

In addition to irrelevance, Rose Acre's expansion numbers have been seriously called into question at trial. Rose Acre represented to the jury that it expanded continually and extensively throughout the conspiracy period. Plaintiffs, however, presented contrary evidence showing these numbers were grossly inflated by, *inter alia,* the inclusion of non-commodity eggs, eggs produced from acquired facilities, eggs produced from contract farms and eggs produced from facilities planned and expanded before the conspiracy is alleged to have commenced. *See, e.g.,* Marshall Dec. 3 TT at 142:9-152:12; Hurd Dec. 3 TT at 111:4-112:15, 116:6-118:10. Plaintiffs further established that, even if there was ever any net expansion at Rose Acre, it came very late in the conspiracy. As noted, Rose Acre testified that as late as November 2007—over five years after Rose Acre joined the Certified Program—Rose Acre's net capacity (inclusive of expansion) was still down at least 4 million hens due to the Certified Program. *See* Marshall Dec. 3 TT a 161:6-13. These questions about the scope and timing of Rose Acre's claimed expansions would allow a reasonable jury to discredit their claim that their expansions were inconsistent with their participation in a conspiracy to reduce the marketwide supply of eggs.[7]

[7] Rose Acre cites three cases—*City of Moundridge v. Exxon Mobil Corp.*, 2009 U.S. Dist. LEXIS 123954, *25 (D.D.C. 2009); *In re Citric Acid Antitrust Litig.*, 996 F. Supp. 951, 960 (N.D. Cal. 1998), *aff'd*, 191 F.3d 1090 (9th Cir. 1999), and *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1045 (2d Cir. 1976)—in support of the proposition that conduct inconsistent with a conspiracy negates the inference of a party's participation in it. Rose Acre's reliance on these cases is misplaced because each of the alleged conspiracies was based solely on parallel conduct: *Moundridge* (uniform price movement by gas suppliers); *Citric Acid* (uniform pricing by citric acid production companies) and *Michelman* (similar decisions by fabric suppliers not to sell to a drapery manufacturer). Unlike in those cases, Plaintiffs' claims against Rose Acre are based on much more than parallel conduct, and the jury could reasonably conclude that Rose Acre entered into explicit agreements to participate in programs that were designed to reduce supply, with direct evidence showing supply control was the purpose of the programs, and extensive circumstantial evidence in further support. Thus, even if Rose Acre had meaningfully expanded (which Plaintiffs dispute for the reasons explained above), any such

Third, on the issue of customer demand, the Court has properly considered and rejected this argument. With respect to the law, as the Court has previously held, "the notion that a defendant or group of defendants could conspire to restrain trade is not mutually exclusive with the notion that there are outside pressures encouraging such behavior." *See* Dkt. No. 1444 at 24-25. As for the facts as presented at trial, they simply do not support Defendants' contentions. The record is clear that what the Plaintiffs wanted and what the Defendants gave them were two very different things. *See, e.g.*, Nov. 21, 2019 Trial Tr. at 25:2-8 (Dr. Hollingsworth (FMI): "Q. What power did FMI have to force – to force producers, for instance, to follow this policy? A. We – we have no power to do that. Q. Did this policy require, for instance, producers to be 100% compliant with what FMI wanted? A. No. We – we – that was between the retailers and the suppliers. We had no – nothing to do with that."); Nov. 21, 2019 Trial Tr. at 67:16-25 (Dr. Hollingsworth (FMI): Q. Do you understand that the Certified Program had a 100% rule in it? A. Yes. Q. And it also required or allowed a member to use a seal? A. Yes. Q. Did FMI ever endorse the Certified Program? A. No, we did not."); Nov. 20, 2019 Trial Tr. at 172:5-9 (Karen Brown (FMI): Q. With that in mind, did you ever – did you or FMI ever endorse the 100% rule? A. Not to my knowledge. We endorsed their – our experts endorsed their guidelines. We did not get into endorsing the execution of their program."); Nov. 19, 2019 Trial Tr. 19:1-13 (James Wilson (Publix): "Q. Did there come a time when you personally became aware of something referred to as the 100% rule? A. In preparing for this case. Q. And in what circumstance was that. A. I learned about the 100% rule and how they were not – or all egg suppliers to be UEP Certified had to produce 100% of their eggs as UEP Certified eggs. Q. Did you care if a producer of eggs Publix purchased from sold uncertified

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expansion would not negate the ability of a reasonable jury to conclude that Rose Acre agreed to the conspiracy.

eggs to other customers. A. No, sir."); Nov. 15, 2019 Trial Tr. 70:2-13 (James Rohr (Giant Eagle): "Q. We've talked a little bit about the UEP certification. Are you familiar with the UEP Certified Program? A. Yes. Q. Was it important to you during your time as director of dairy? A. No. Q. When you were the director of dairy, had you ever heard of something called the 100% Rule? A. No."). There is precisely zero evidence that any Plaintiff ever asked Rose Acre to conspire with its competitors to raise prices, and Defendants certainly have not presented any evidence to the jury that a directed verdict would be justified on these grounds.[8]

Lastly, with respect to the short-term supply reduction measures, contrary to Rose Acre's claims, there *is* evidence of Rose Acre's participation. As noted, Rose Acre was aware of and served on the Marketing Committee that recommended the measures, attended the meetings where the recommendations were made and voted in favor of least one such recommendation. *See* PX0326; Hinton Dec. 4 TT at 32:12-17; 33:18-34:15. In any event, a co-conspirator need not participate in every action taken in furtherance of the conspiracy in order to be liable. *See Magnesium Oxide*, 2011 U.S. Dist. LEXIS 121373 at *60; *Tex. Indus., Inc. v. Radcliff Materials, Inc*., 451 U.S. 630, 642–46 (1981). Accordingly, Rose Acre's purported non-participation in this aspect of the conspiracy—which the record contradicts—would not warrant a directed verdict even if it were true.

For the numerous reasons identified herein, the jury could reasonably conclude that Rose Acre knew that the UEP and various of Rose Acre's competing egg producers were engaged in an conspiracy to restrict supply and increase prices through short-term measures, USEM exports, and the challenged aspects of the UEP Certified Program. The jury could further reasonably

[8] The record also supports the conclusion that Rose Acre agreed to join the Certified Program well before any purported customer demands came into play. *See* Hinton Dec. 4 TT at 13:22-18:22, 22:1-30:6.

conclude that Rose Acre knowingly joined and participated in this conspiracy to restrict egg supply and increase egg prices.

(3) The alleged co-conspirators participated in the conspiracy

Defendants argue that there is no evidence that any of the nineteen alleged co-conspirators engaged in a conspiracy to reduce supply. Again, in the summary judgment context, this Court held that given the challenged aspects of the UEP Certified Program, joining and participating in the Certified Program *alone* was enough to show knowing participation, such as to preclude summary judgment. *See In re Processed Eggs Antitrust Litig.*, Civil Action No. 08-md-2002, 2016 WL 5539592, at *1 n. 1.[10] As summarized above, each egg producer that joined the UEP Certified Program was required to abide by the 100% Rule, cage-space requirements (as implemented by the house average rule), and backfilling ban (with only 90% replacement allowed in case of catastrophic events). The jury could reasonably conclude from the trial evidence that any such egg producer would understand that these aspects of the Program would reduce supply. Finally, as noted above, every UEP Certified Program participant was required to go through the annual audit process. The jury could reasonably conclude that the audit point system, including automatic failure for cage-space and backfilling combined with insufficient points to fail for many other guidelines, no matter how serious and widespread the violation, were sufficient to inform egg producers that the UEP was only using animal welfare as a pretext. In short, the jury could reasonably conclude that in light of the specific challenged aspects of the UEP Certified Program, any egg producer that joined the

[10] Similarly, in the context of the *James* hearing, the Court considered similar arguments as to other co-conspirators, for the purpose of determining which statements were admissible as between co-conspirators. Again, now the types of evidence on which the Court relied are part of the trial record, and the jury could now reasonably rely on them as well.

UEP Certified Program and participated in audits would know that they were participating in a supply reduction conspiracy.

Moreover, Plaintiffs have set forth evidence showing that each alleged conspirator was not only a member of the Certified Program, but that each engaged in other activities which would allow a reasonable juror to find that each knowingly joined the conspiracy. *See* PX 748 (Cal-Maine Timeline, showing, among other things, that Cal-Maine exported, engaged in early hen disposal, and was a member of the Certified Program); PX 749 (Country Charm Timeline, showing that Country Charm engaged in exports, the Certified Program, and that Vince Booker of Country Charm was on the export committee); PX 750 (Hickman's Ranch Timeline, showing that Clint Hickman attended meeting where short-term measures were voted on and passed and that Hickman's Ranch was a member of the Certified Program); PX 751 (Hillandale Timeline, showing that Hillandale exported, was a Certified Member, and that it made its intentions known to engage in early flock disposal); PX 752 (ISE America Timeline, showing that ISE America is a Certified Member, that it committed to dispose hens early as part of a short-term supply management program, and that it engaged in exports); PX 753 (Michael Foods Timeline, showing that Michael Foods joined the Certified Program and attended meetings where short-term supply measures were discussed); PX 754 (Midwest Poultry Timeline, showing that Midwest Poultry was a Certified Member, attended board meetings where short-term measures were passed, and that Midwest Poultry engaged in exports); PX 755 (Moark Timeline, showing that Moark was a Certified Member, engaged in exports, and committed to engage in short-term measures); PX 756 (National Food Corp. Timeline, showing that National Foods was a Certified Member, engaged in exports, and made its intentions known about engaging in

short-term supply measures); PX 757 (Oakdell Egg Farm Timeline, showing that Oakdell was a Certified Company, engaged in exports, and attended meeting where short-term measures were voted on and passed); PX 758 (Ohio Fresh Eggs Timeline, showing that Ohio Fresh was a Certified Member and that it agreed to engage in short-term measures); PX 759 (Quality Egg of New England Timeline, showing that Quality Egg was a Certified Member and that Duke Goranites attended a meeting where supply management of national flock was discussed); PX 760 (R.W. Sauder Timeline, showing that Sauder was a Certified Member, attended meetings where short-term supply measures were passed, and assisted in exports); PX 761 (Sparboe Timeline, showing that Sparboe was a Certified Member, engaged in exports, and attended meetings where short-term measures were discussed); PX 762 (Tampa Farm Timeline, showing that Tampa Farms was a Certified Member, engaged in exports, and committed to participate in short-term measures); PX 763 (Weaver Timeline, showing that Weaver was a Certified Member, engaged in exports, and made intentions known to engage in short-term measures); PX 764 (Wilcox Farms Timeline, showing that Wilcox was a Certified Member, engaged in exports, and attended meeting where short-term measures were discussed); PX 765 (Zephyr Egg Timeline, showing that Zephyr was a Certified Member, engaged in exports, and committed to participate in short-term measures).[11]

[11] Although this documentary record would be more than sufficient for a reasonable jury to conclude all the alleged co-conspirators knowingly participated in the alleged conspiracy, Plaintiffs further note that in addition to Rose Acre witnesses, various alleged co-conspirator witnesses also testified at trial. *See generally* Nov. 5-6, 2019 Trial Tr. (Garth Sparboe and John Mueller of Sparboe); Nov. 20, 2019 Trial Tr. (Jack DeCoster and John Glessner of Ohio Fresh and Quality Egg of New England); Nov. 20-21, 2019 Trial Tr. (Orland Bethel, Gary Bethel, James Minkin, and Syed Rizvi of Hillandale); Nov. 22, 2019 Trial Tr. (Tim Weaver of Weaver); Nov. 22-23, 2019 Trial Tr. (Terry Baker of Michael Foods). The jury could reasonably conclude from this representative testimony that not only did these egg producers all knowingly participate

In short, because the jury could reasonably conclude that the UEP orchestrated a conspiracy to restrict egg supply and increase egg prices through the three alleged means, the jury could reasonably conclude that all of the alleged co-conspirators knowingly participated in that conspiracy through one or more of those means on the basis of this trial evidence.

B. Unreasonable restraint of trade

The jury could reasonably conclude under the Rule of Reason framework[12] that the trial evidence is sufficient to meet Plaintiffs' initial burden of showing that the conspiracy had anti-competitive effects in the form of actually reducing the marketwide supply of shell eggs, and increasing the price of eggs as a result. *See generally* Dec. 2, 2019 Trial Tr. (Professor Baye Testimony).[13] And contrary to Defendants' arguments, Professor Baye's analyses correctly relies on national, marketwide data in order to assess the impact of the Conspirators' alleged unlawful acts on Plaintiffs.[14]

As a preliminary note, this is not the first time the Plaintiffs or the Court have had to address Defendants' argument that Professor Baye's testimony is insufficient because he relies on national egg data; and, therefore, Plaintiffs cannot connect the conspiracy to Plaintiff's injury.

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in the alleged conspiracy, but also that any egg producer who attended the same type of meetings and similarly participated in any of the short-term measures, exports at a loss, or the challenged aspects of the UEP Certified program, not least the audits, would also be knowing participants in the conspiracy.

[12] Plaintiffs also suggest that the jury could reasonably conclude from the trial evidence described above that the UEP, USEM, and Rose Acre participated in *per se* supply-reduction/price-fixing violations of the Sherman Act, in which case the jury would be entitled to presume the conspiracy was an unreasonable restraint of trade and move directly to the question of standing under the Clayton Act.

[13] Rose Acre does not appear to argue in support of their motions that this portion of Professor Baye's testimony could not satisfy a reasonable jury. *See* Dkt. No. 2070 at *4-5. Nor could they, because Professor Baye's extremely robust analysis is clearly sufficient on this issue.

[14] Professor Baye analyzed both flock data and egg production data and found equivalent market impacts. Dec. 2 TT at 32:3-18.

This refrain has been heard before. *See* Dkt. No. 1530 (Def. Memo in Supp of Def. Mot. in Limine to Exclude Dr. Baye Damage Calculations) (08/11/2017) (arguing that Baye should be excluded for using nationwide egg data because the IPP's class certification expert, Dr. Stiegart, was disregarded for using similar data). As the court has previously determined, this comparison is without merit because the Court's prior analysis of Dr. Stiegart's work went to a question that will never be relevant to the Plaintiffs in this case: "whether common issues predominate under the IPP class," not whether Plaintiffs have connected the unlawful acts at issue in this case to their injury. *See* Baye MIL Order at 9. DAPs submit that the Court's prior assessment of this argument is as correct now as it was in 2017.[15]

Notwithstanding the fact that the Court has already determined that Defendants' attack on Professor Baye for using marketwide data as a component in his analyses comes too late, Professor Baye's use of data from all egg producers is an appropriate component in analyzing the injury resulting from the conduct of named and unnamed conspirators.

The antitrust question at issue in this case is: what happened to total output? Dec. 2 TT at 189:8-12. Did the alleged conspiracy result in lower output, and therefore, higher prices for the eggs and egg products purchased by the Plaintiffs? *Id.*

The jury could reasonably conclude that the market for eggs is one big bowl. *See* Dec. 6, 2019 Trial Transcript ("Dec. 6 TT") at 65:6-22. As market supply and demand factors change, individual producers are going to change the different ways they use the eggs that come from the chicken. *Id*. Therefore, Professor Baye's model reasonably allows for supply side substitution,

[15] Put another way and consistent with Fed. R. Civ. Pro. 26, Professor Baye's opinions were fully set forth in his written reports. The Defendants failed to timely object to the reliability of Professor Baye's opinions. Those opinions have now been submitted to the jury subject to Defendants' cross examination. The weight or credibility of those opinions is now the jury's province.

which allows individual producers to use the egg as a shell egg, an egg product, dried egg, etc. *Id.*[16]

It would be economically inappropriate to focus on one specific type of egg because that would assume that the specific type of egg is the only determinant of supply of that type of egg. *Id.* You have to ensure that the market considered includes at least the substitutes that an individual might be able to substitute between. Dec. 6 TT at 67:6-15. If the price of shell eggs, for example, goes up, individuals might try to defeat the price increase by buying specialty eggs. Dec. 6 TT at 67:22-24. Kroger, for example, might be able to defeat a price increase on liquid eggs by buying shell eggs and cracking them to create liquid eggs itself. Dec. 6 TT at 68:5-8.

Thus, suppliers and purchasers of eggs, egg products, etc., can both substitute between different types of eggs depending on the relative movement in price. If the total number of all eggs, however, goes down, the movement between eggs, egg products, etc. cannot contain an increase in price precisely because the total supply of eggs has gone down. Dec. 2 TT at 108:8-15. Furthermore, Professor Baye through regression analysis specifically measured the amount by which each of the various products purchased by the Plaintiffs went up due to the drop in output of eggs generally. Dec. 2 TT at 108:22-109:14, 117:15-18.

The conspirators identified for trial were identified to "include" but were not limited to the following: Cal-Maine, Country Charm, Hickman Egg, Hillandale, ISE America, Michael Foods, Midwest Poultry, Moark, National Food, Norco, Quality Egg, Oakdell, Ohio Fresh, Rose Acre, RW Sauder, Sparboe, Tampa Farms, Weaver Bros., Wilcox and Zephyr. Dec. 2 TT at 122:11-24. At no point in time have Plaintiffs taken the position that these are the only co-

[16] Plaintiffs note that this is a conservative approach, and that as Professor Baye testified on rebuttal, his analysis would not be affected if the egg market was instead divided into many submarkets. Dec. 6 TT at 66-69.

conspirators at issue. The identification of these firms for trial is ultimately a damages issue as these are not only firms who participated in the alleged conspiracy, but are also the firms from whom Plaintiffs made most of their purchases of eggs. Plaintiffs are the masters of their complaint, and they are permitted to choose which firms they seek redress against in court. As a matter of law and economics, there are other members of the conspiracy at issue that are unnamed for purposes of trial, but that does not change the fact that they exist.[17]

Here, there is no question that: every member of the UEP certified program agreed in writing to adhere to the rules of that program; that each participant knew who the other participants were; and that each of them had also agreed in writing to adhere to the rules. Nov. 13, 2019 TT 70:18-71:12. The only question therefore is whether the agreement of the participants was knowing. If it was, then the participant was a co-conspirator. This is a question for the jury.

As explained above, this court has already held that the UEP audit form with its automatic fail for violation of the no backfilling rule and the 100% rule, as well as the existence of those rules and the cage space requirements of the Certified Program are sufficient evidence to allow a reasonable jury to conclude that the certified program participants had made a conscious commitment to reduce supply. Dkt. No. 1444 at 22; *see also* at 21(denying Defendants' motion for summary judgment; holding that the commitment to participate in the UEP certified program "may serve as evidence available to a reasonable jury for concluding that such an action was a commitment to reduce or limit supply").

This Court further stated:

[17] *See, e.g.*, Publix Second Amended Complaint (Dkt. No. 791-1) at 70 (identifying "other natural people and entities not named as Defendants and committed acts in furtherance of the illegal conspiracy set forth in this Second Amended Complaint" as conspirators).

> The Defendant's decision to become certified producers, knowing of the existence and effects of these provisions, serves as evidence that each Defendant who pledged to and maintained its certified status was consciously committed to a program that restrained trade. Like the cage space requirements, ban on backfilling and 100% rule that the commitment to be subject to the auditing systems is reasonably related to an alleged conspiracy to limit a reduced supply.

Id at 19. There is, therefore, sufficient evidence for the jury to reasonably conclude that all of the Certified participants—constituting 95% of marketwide egg production capacity—were co-conspirators. Dec. 2, 2019 TT 174:19-25.

Furthermore, as Professor Baye testified, anyone that participates in the coordination is a conspirator from an economic perspective (independent from any legal analysis required). In this way, the economic conspirator analysis comes down to which producers agreed to participate in the output reducing conduct, regardless of their legal liability. Dec. 2 TT at 189:24-190:19, 175:15-17, 199:22-200:9.

Professor Baye also considered whether a group smaller than all of the certified program participants could have caused the market output of eggs to go down. Thus, Professor Baye testified that due to the 100% rule, the program only needed a critical mass of early participants—such as large producers like Rose Acre or Cal-Maine—to cause the market to "tip" to the UEP certified program. Dec. 2 TT 78:2-17, 124:17-125:8. Once the same producers were selling animal care certified eggs, others had to join the program or be excluded from selling to important customers who wanted animal care certified eggs. Dec. 2 TT 78:14-17, 194:3-10, 196:8-13. As a result of the 100% rule, these producers effectively agreed to not produce uncertified eggs. Thus, the group of 20 co-conspirators by themselves were enough to cause the entire market to tip to the certified program, which caused the market output of eggs to go down and increase prices.

Indeed, because so many of the US egg producers signed up for the program quickly–83.6% by 2004 and 95% by 2008–the trial evidence shows that the whole U.S. market for eggs was tipped toward the Certified Program. Dec. 2 TT at 124:7-125, 174:19-25. In other words, "as a result of the 100% rule and monitoring and other actions the UEP implemented along the way, [the market] effectively hit a critical mass such that . . . virtually everyone had little choice but to join the certified program." *Id*.

When conspirators control as much of the U.S. egg laying flock and egg production as the conspirators (named and unnamed) do here, even if one or several firms expanded, it is unlikely for these producers to expand enough to offset the negative impact on the market as a whole. Dec. 2 TT at 189:24-190:19, 199:22-200:9. The acts of one or a few conspirators (named or unnamed) to expand or take advantage of the price effects of the conspiracy are immaterial if the conspiracy nonetheless restricted market output. Dec. 2 TT at 188:21-23. It does not even matter if the conspirator abided by his agreement. *Id*.

Finally, Plaintiffs have introduced documentary evidence that Don Bell and the egg industry on the whole relied on national data in assessing the impact of their supply control campaign. *See* PX0121 (analyzing reduction on national flock size as a means to increase producer income), PX0133 (analyzing the impact of the UEP's Husbandry Guidelines on national flock size and the resulting increase in price), PX0240 (analyzing backfilling impact on total flock size). Professor Baye's work in looking at national flock data is consistent with the work done by Don Bell and other industry participants. Dec. 6 TT at 63:14-64:3. This evidence provides further confirmation from which the jury could reasonably conclude that Professor Baye's analysis of market impact was reliable.

C. Standing under the Clayton Act

Moreover, the jury could reasonably conclude the conspiracy specifically injured each individual Plaintiff in the form of being overcharged for each product identified by Professor Baye. That would be a reasonable conclusion because Professor Baye performed his injury analysis for each Plaintiff and each of their products. *See generally* Dec. 2, 2019 Trial Tr. (Professor Baye Testimony).

Specifically, Dr. Baye used his egg production analysis in conjunction with the 68 different elasticities he calculated for the products purchased by Plaintiffs from Rose Acre or the alleged co-conspirators to conclude that Plaintiffs paid higher prices for eggs and egg products as a result of the reduction of output. Dec. 2 TT at 108:22-109:14, 117:15-18. Dr. Baye's model was designed to answer exactly the question that Defendants now assert that Plaintiffs did not answer: how does a change in total flock size or egg production impact the price of the products purchased by the Plaintiffs? Dec. 6 TT at 63:20-64:3. Dr. Baye calculated price elasticities for the 68 egg and egg products that the Plaintiffs purchased from conspirators as a means to calculating the price increase on a per Plaintiff/Conspirator and product basis. Dec. 2 TT at 94:22-95:2, 95:20-22, 96:5-13, 110:9-16. This results in an analysis of the relationship between transaction prices for 360 different Plaintiff/Conspirator/product combinations. *See* Dec. 2 TT at 115:2-11. Professor Baye does not assume that the elasticity for every shell egg or egg product is the same. Dec. 2 TT at 96:5-13. He separately analyzed each product purchased by the DAPs from conspirators in order to determine the impact of the conspiracy on each Plaintiff for every shell egg and egg product purchased by Plaintiffs. *Id.*; Dec. 2 TT at 109:4-14, 117:10-18. Thus, Defendants' argument that Professor Baye failed to connect the alleged conspiracy to the products purchased by Plaintiffs is simply incorrect.

Professor Baye's model alone provides the jury with sufficient evidence to conclude that the national flock size and egg production was affected by the named conspirators, among others, and that such an affect caused Plaintiffs to pay higher prices for the eggs they bought from the named conspirators.

Defendants' argument that Plaintiffs have failed to show that they were injured should be rejected for several reasons. First, Defendants imply a higher standard to prove injury than the Third Circuit applies: the trial evidence need only be sufficient for a reasonable jury to conclude that "the illegality is . . . a material cause of the injury." *Linerboard*, 497 F. Supp. 2d at 675-76. Professor Baye's testimony, if deemed credible by the jury, is sufficient to satisfy this standard.

Specifically, in the Third Circuit, the "burden of proving the fact of damage under §4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy." *Rea v. Ford Motor Co.*, 497 F.2d 577, 591 (3d Cir. 1974) (quoting *Zenith v. Hazeltine*, 395 U.S. 114, n. 9 (1969)) (emphasis original). In *Rea*, the Third Circuit went on to observe that "inquiry beyond this *minimum point* goes only to the amount and not the fact of damage." *Id.* (emphasis added).[19] In addition, the court stated: "It is enough that the illegality is shown to be a material cause of the injury." *Id.* In explaining what is enough to make that showing, the court stated, quoting from *Zenith*:

> The Court has repeatedly held that in the absence of more precise proof, *the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of*

[19] Furthermore, contrary to Defendants' contention, under Third Circuit law, in order to prove injury in fact or fact of damage, a plaintiff need not show that each purchase resulted in an injury in fact. *See Pitchford v. PEPI*, Inc., 531 F.2d 92, 104-5 (3d Cir. 1975). In that decision, in reversing the grant of a motion for judgment j.n.o.v, the Third Circuit held that the plaintiff need not show each sale lost due to illegal territorial restrictions in order to show fact of damage, and that it was not necessary for the plaintiff "to document each sale that it might have made" but for defendant's anticompetitive conduct. *Id.*

> *the decline in prices*, profits and values, not shown to be attributable to other causes, that *defendants' wrongful acts had caused damage to the plaintiffs.'*

Id. (quoting Zenith, other citations omitted). In this case, the only modification to the rule in *Zenith* and *Rea* is to change evidence of a decline in prices to evidence of the increase in prices. Based on this proper standard for proof of injury in fact, Professor Baye's testimony that each Plaintiff suffered injury as a result of the conspiracy is more than sufficient to meet this standard.

Second, Defendants' argument with respect to the admissibility and import of Professor Baye's testimony should be rejected because under Rule 703 as well as Supreme Court and Third Circuit precedent: (1) his testimony could be based on facts or data not admitted in evidence, as long as those facts or data are of the type that an expert in his field would reasonably rely on; (2) those facts and data may be shown to the jury and were here, without objection from Defendants; (3) the facts and data are independently admissible; and (4) as admitted, Prof. Baye's testimony is more than adequate to satisfy Plaintiffs' burden of showing injury in fact or fact of damage in the face of a Rule 50 motion.

Contrary to Defendants' assertions, Professor Baye's testimony in Plaintiffs' case in chief laid a proper foundation for his testimony that each Plaintiff suffered injury in fact, based on data showing that each Plaintiff purchased eggs and egg products from Rose Acre or its co-conspirators. Specifically, Professor Baye testified that (1) he began with a review of Plaintiffs' purchase data and Defendants' sales data,[20] (2) he took that data and matched it to the categories

[20] For the reasons explained below, Professor Baye's expert opinions are admissible and sufficient on their own. But in addition, Plaintiffs note the fact of their purchases from Rose Acre or its co-conspirators was also established through various other evidence that has been introduced throughout the course of the trial. *See, e.g.*, Nov. 19, 2019 Trial Tr. at 9:8-23 (James Wilson of Publix identifying Publix purchases from co-conspirators, including, among others, Cal-Maine); D-056, D-0459, D-0463 (Publix business records reflecting direct purchases from co-conspirators); Dec. 3, 2019 Trial Tr. at 179:10-15 (Greg Hinton identifying Supervalu and Save-A-Lot Acre as Rose Acre commodity shell egg customers); id. at 179:10-15, 232:16-235:3

of the Urner Barry prices, and (3) using Plaintiffs' and Defendants' data, he prepared Slide 28 which shows that each Plaintiff purchased eggs and egg products from Rose Acre and its co-conspirators.[21]

Thus, with respect to his receipt and review of Plaintiffs' and Defendants' sales data, Prof. Baye testified:

> Q. Professor Baye, to what extent, if any, did you analyze whether each Plaintiff paid more for eggs from one or more co-conspirators, including Rose Acre, because of Defendants' alleged conduct?
>
> A. I examined the relationship between Urner Barry prices and the relationship between those and *the actual transactions prices paid based on the data that was turned over*, and I produced a number of charts like this one that are in the appendix to my report.

(Hinton identifying various Rose Acre customers, including several Plaintiffs); Nov. 15, 2019, Trial Tr. at 59:16-60:3 (James Rohr, the Vice President of Grocery at Giant Eagle, testifying that Giant Eagle purchased commodity shell eggs during the 2004 through 2012 period from Hallandale Farms and Weaver Bros., Inc.); *id*. at 103:19-104:1 (Rohr testifying about a letter awarding Weaver's bid for the Giant Eagle egg program); Nov. 20, 2019 Trial Tr. at 80:13-15, 80:25-81:2 (Gary Bethel, of Hillandale testifying that Giant Eagle purchased eggs from Hillandale); Nov. 14, 2019 Trial Tr. at 167:1-3, 167:11-14 (Mitch Hill of H-E-B testifying that H-E-B purchased from Cal-Maine); Nov. 18. 2019 Trial Tr. at 137:20-140:6 (Lynn Marmer of Kroger describing the Kroger-Rose Acre supply relationship). In addition, Rose Acre has admitted in its answers that Plaintiffs purchased from co-conspirators. *See e.g*, Rose Acre Answer to Publix Second Amended Complaint, 1-31-14, Dkt. No. 38, ¶11 ("Rose Acre admits that Publix Super Markets Inc. has purchased eggs from one or more defendants"); Rose Acre Answer to Supervalu Second Amended Complaint, 1-31-14, Dkt. No. 42, ¶12 ("Rose Acre admits that Supervalu Inc. has purchased eggs from one or more defendants"); Rose Acre Answer to Giant Eagle's Second Amended Complaint, Case No. 2:11-cv-00820-GP, Dkt. No. 70, at ¶ 3 ("Rose Acre admits that Giant Eagle has purchased eggs and/or egg products from one or more of the defendants."); Rose Acre Farms, Inc.'s Answer and Defenses to Winn-Dixie Stores, Inc., et al.'s Second Amended Complaint, Dkt. No. 11, ¶¶27 and 28 (Rose Acre admitting that Winn-Dixie and Roundy's purchased eggs from one or more of the then-Defendants, which included Rose Acre and its co-conspirators); Rose Acre Farms, Inc.'s Answer and Defenses to Kroger Co., et al.'s Second Amended Complaint, Dkt. No. 43, ¶11 (Rose Acre admitting Kroger Co. purchased eggs from one or more of the then-Defendants, which included Rose Acre and its co-conspirators).

[21] When Appendix 5 was prepared, a number of the co-conspirators were still named Defendants in this action, and some co-conspirators have never been named in this action, but are the subject of Plaintiffs' summary exhibits with respect to each co-conspirator and have been admitted into evidence.

> Q. By "actual transaction prices," I think you -- is the language you used, whose actual transaction prices are you talking about?
>
> A. I'm talking about *transactions prices based on Defendant data and transactions prices based on Plaintiff data*.

Dec. 2, 2019 Trial Tr. At 113:6-19 (emphasis added). Professor Baye then testified as to the matching of the data to the Urner Barry prices:

> THE WITNESS: So again, as I -- as I always do, I start with just the raw data, what does the raw data look like, just like I did with flock size and egg production. This raw data here tracks the Urner Barry price of shell white eggs -- shell white eggs and it compares it against -- and the white eggs is the white, large, Midwest index, and it compares that against the transactions data. And in this case, this is the dark purple line, which means this is – transactions prices based on the Defendants' data, the data they turned over in terms of discovery. And -- so that's the first thing I did.
>
> Q. All right. What did you do next?
>
> A. So then I look at this data and I see that as the documentary record suggested, *the actual transactions prices here tracked the Urner Barry index* and, in fact, are pretty much spot on for, you know, the period, you know, 2000, 2002, 2003 to 2012.

Dec. 2, 2019 Trial Tr. at 114:9-115:1 (emphasis added). Finally, Professor Baye testified that he prepared Slide 28 using Plaintiffs' and Defendants' data. Thus, he testified:

> Q. This is titled Summary of Plaintiffs' Purchases From co-conspirator (including Rose Acre). Tell the jury, please, what is reflected in Slide 28, sir.
>
> A. Well, across the top is Plaintiffs A&P, Albertsons, Giant, and so forth. . . . And then below them, what you have is individual co-conspirators or Defendants that actually purchased – I'm sorry, that actually sold each of these individual retailers' products. So, for example, for A&P, A&P bought product from Cal-Maine Foods,
> Hillandale, ISE America, Sparboe Farms, and this is all during the period in which my econometric analysis is finding statistically significant output reductions and price increases. So I can say that *A&P suffered injury from Cal-Maine, Hillandale, ISE America and Sparboe Farms as a result of the decline in output stemming from the alleged conspiracy.*

Dec. 2, 2019 Trial Tr. At 118:10-119:2 (emphasis added).

Using Slide 28 as a demonstrative, Professor Baye went on to offer the same testimony with respect to each Plaintiff. Dec. 2, 2019 Trial Tr. at 119:7-122:2. Professor Baye's testimony, if taken as credible by the jury, thus establishes that (1) he began with a review of Plaintiffs' purchase data and Defendants' sales data, (2) he took that data and matched it to the categories of the Urner Barry prices, and (3) using Plaintiffs' and Defendants' data, he prepared Slide 28 and testified that Plaintiffs were overcharged on purchases of eggs and egg products from Rose Acre or its co-conspirators.[22]

Under Rule 703, and the applicable Supreme Court and Third Circuit law, Professor Baye's testimony is admissible to establish each Plaintiff's injury in fact, with Professor Baye permissibly relying on transaction data showing each Plaintiff's purchases of eggs and egg products from Rose Acre or its co-conspirators. In offering that testimony, Professor Baye was entitled to rely on data showing each Plaintiff's purchases of eggs and egg products from Rose Acre and its co-conspirators even though that data was not separately admitted, as long as the

[22] Rose Acre specifically notes that Giant Eagle both owns some stores, and other stores operate under its banner but are independently owned. As the trial testimony from Mr. Rohr made clear, for commodity shell eggs of the type analyzed by Professor Baye, Giant Eagle, as represented by its egg buyers, places purchase orders to Weaver and Hillandale for delivery to its warehouses (or sometimes for pickup by Giant Eagle's trucks). Nov. 15, 2019 Trial Tr. at 62:1-21. And to the extent that independent stores operating under the Giant Eagle banner may purchase eggs on their own account directly from various egg producers, those would not fit Professor Baye's description of the data he used, and in fact there is no evidence in the record that Professor Baye erroneously included such purchases in the transaction data that he considered. Of course to the extent Giant Eagle purchased eggs from co-conspirators for delivery to its warehouse, and then resold those eggs to its independent stores, or any other stores, in its role as a wholesaler, those purchases would not present an *Illinois Brick* problem for Giant Eagle. In any event, specifying the exact quantity of egg purchases Giant Eagle made from Weaver and Hillandale is a damages issue, and at the present stage of trial it is only necessary for the jury to reasonably conclude that Giant Eagle was injured in some substantial way. The evidence presented at this stage of trial regarding Giant Eagle's purchases from Weaver and Hillandale was more than sufficient for that purpose.

data was the type of data that an expert in his field would reasonably rely on in forming an opinion as to each Plaintiff's injury in fact. Thus, pursuant to Rule 703:

> An expert may base an opinion on facts or data in the case that *the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.* But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Fed. R. Evid. 703.

Accordingly, under Rule 703, "an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993). The Third Circuit has held that, "[u]nder Rule 703 . . . experts may rely on facts from firsthand knowledge or observation, information learned at the hearing, and facts learned out of court." *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 414 (3d Cir. 2002). Furthermore, "[i]f the facts are of the type 'reasonably relied upon' by experts in the particular field in forming opinions or inferences upon a subject, the facts or data need not be independently admissible." *Id.* at 414 (citing to *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 747 (3d Cir. 1994)).

Specifically, the Third Circuit has found that the type of data relied on by Professor Baye is the type of data reasonably relied on by economists. *Petruzzi's*, 998 F.2d at 1239. In that decision, in rejecting a challenge to an expert economist's testimony, the Third Circuit held that "the testimony . . . satisfied Rule 703 because there can be no doubting that price data is of the type reasonably used by economists." *Id.* at 1239 (citation omitted). In short, the central inquiry under Rule 703 is whether the pricing data was of the type reasonably relied on by economists, which it was, and not on whether the pricing data was admissible or had been admitted.

Therefore, Professor Baye's testimony that each Plaintiff suffered injury in fact is admissible because the data he relied on is of the type reasonably relied on by economists.[23]

United States v. Williams, 567 U.S. 50 (2012), the principal decision Defendants rely on, is not inconsistent with these principles. Rather, the Supreme Court in *Williams* affirmed that an expert may disclose the facts and data underlying his expert testimony, even if those facts and data have not been admitted, if the value of the disclosure substantially outweighs any prejudicial effect. *Id*. at 70 fn. 2 ("But disclosure of these facts or data to the jury is permitted if the value of disclosure 'substantially outweighs [any] prejudicial effect.'") (quoting Rule 703); *see also Paramount*, 2018 U.S. Dist. LEXIS 223802, *24 (same).

As contemplated by Rule 703 and reaffirmed in *Williams*, the evidence that Professor Baye relied on, in part, with respect to each Plaintiff's purchases from Rose Acre or its co-conspirators was disclosed to the jury in the form of Slide 28, which Prof. Baye explained was compiled from Plaintiffs' purchase data and Defendants' sales data. The disclosure of these facts or data to the jury was permitted, with no objection from the Defendants that doing so would be prejudicial—the only argument that they could have made under Rule 703. Thus, under Rule 703 and *Williams* alone, Professor Baye's expert testimony that each Plaintiff suffered injury in fact is admissible to establish Plaintiffs' injury in fact, as it was not objectionable on prejudice grounds.

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[23] The Eastern District of Pennsylvania has previously reached the same result, in *Brill v. Mandarola*, 540 F. Supp. 2d 563 (E.D. Pa. 2008). In *Brill*, the court cited *Total Control, Inc. v. Danaher Corp.*, 338 F. Supp. 2d 566, 570 (E.D. Pa. 2004), and *Robert Billet Promotions, Inc. v. IMI Cornelius, Inc.*, 1998 U.S. Dist. LEXIS 151806 at *5 (E.D. Pa. 1998), as examples of admitting expert testimony where the expert "reviewed documents produced in the course of the litigation." *Brill*, 540 F. Supp. 2d at 568. In discussing the holding in *Billet* that found the expert's testimony admissible, the *Brill* court noted: "the plaintiff's damages expert based his report on [among other things] documents produced in the course of the litigation." *Id.* at 568-69. Likewise, in this case, Professor Baye relied on "documents produced in this litigation," namely Plaintiffs' purchase data and Defendants' sales data.

Further supporting the admissibility of Professor Baye's expert testimony is that, as noted above, Professor Baye testified that he received Plaintiff's purchase data and Defendants' sales data, reviewed it, and utilized it to match Plaintiff's purchases with the relevant Urner Barry categories. And there has been no suggestion by Defendants that the Plaintiffs' purchase data is not reliable. Defense counsel did not cross examine Professor Baye on his testimony above or on his use of Plaintiffs' data.[24] Defendants have not challenged (and presumably could not) the reliability of their own sales data. Defendants did not object to Plaintiffs' purchase data, PX 532, in the Final Pretrial Order, nor did they raise any such issue in a motion in limine. Finally, and most importantly, neither of Defendants' experts took issue with Professor Baye's use of Plaintiffs' data, or the reliability of the data itself.[25] Based on all of the above, under Rule 703, *Williams*, *Paramount*, and the Third Circuit precedent cited therein and above, Professor Baye's expert testimony that each Plaintiff suffered injury in fact is admissible to establish each Plaintiff's injury in fact.[26]

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[24] In considering challenges to an expert's testimony in similar circumstances, and in denying such challenges, courts have noted that the party challenging the expert opinion failed to cross examine the expert, and that such cross examination was required based on an interpretation of Rules 703 and 705 together. *See Stecyk*, 295 F.3d at 414; *Botey v. Green*, 2018 U.S. Dist. LEXIS 194242, at *75 (E.D.Pa. 2018).

[25] In fact, the data that Professor Baye relied on when he gave his expert testimony was itself admissible (even if not admitted). Plaintiffs' purchase data and Defendants' sales data is admissible because data is not hearsay, and as mentioned above, Defendants have not challenged the reliability of that data, nor its authenticity. *See, e.g., United States v. Washington*, 498 F.3d 225 (4th Cir. 2007) (holding that raw data is not hearsay because "A 'statement' is defined by Federal Rule of Evidence 801(a) as an 'oral or written assertion, or (2) nonverbal conduct of a *person*, if it is intended by the person as an assertion.")) (emphasis in original). Plaintiffs' purchase data and Defendants' sale data is also admissible as a business record, which covers data compilations. *See* Federal Rule of Evidence 803(6). So, although Rule 703 explicitly provides that the data an expert relies on may be inadmissible, in this case the data was actually admissible.

[26] Defendants' reliance on *In re Urethane Antitrust Litigation* is likewise misplaced because that court expressly withheld a ruling on whether the expert was entitled to rely on the statements taken of Bayer employees by Plaintiffs and their counsel, even though the court noted that the

The trial evidence in the Plaintiffs' case in chief is therefore more than sufficient to show each Plaintiff's injury in fact, given that Professor Baye used Plaintiffs' purchase data and Defendants' sales data as the basis for his opinions.

Professor Baye's rebuttal testimony further supports the conclusion that all of his testimony at trial is more than adequate to show that each Plaintiff suffered injury in fact or fact of damage. First, given this argument in the Defendants' Rule 50 motions, as a precaution this Court properly allowed Prof. Baye to testify on rebuttal in order to further address the issue of Plaintiff's injury in fact. In that testimony, Professor Baye was shown Appendices 5 and 5A to his initial report and supplement, which set forth the purchases in dollars for each Plaintiff by product type and vendor, corresponding to the various categories in the Urner Barry market prices. *See generally* Dec. 6, 2019 Trial Tr.

Specifically, Professor Baye testified that Appendices 5 and 5A specified the transactions and injuries that were summarized in Slide 28. Dec. 6, 2019 Trial Tr.. 71:14-15. He further testified that Appendices 5 and 5A were themselves a summary of the raw transaction data relating to Plaintiffs' purchases of eggs and egg products from Rose Acre and its co-conspirators:

> A. Appendix 5 is a summary of the -- the raw transactions data that were turned over by the Plaintiffs and the Defendants in this matter.

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statements may not be admitted for their truth. In other words, the expert might still be able to rely on the statements in offering her testimony. Thus, the *Urethane* court held:

> Specifically, the issue is whether such evidence should (1) be admissible for its truth; *or (2) be admissible as material on which Plaintiffs' experts relied.*
>
> The Court will reserve on whether it is admissible as evidence upon which Dr. Marx relied when forming her opinion.

2016 U.S. Dist. LEXIS 15137 at *15-16 (D.N.J. 2016) (emphasis added). Therefore, contrary to Defendants' contention, the holding in *Urethane* does not support their position and, instead, is consistent with the long line of authority which holds that expert testimony is admissible if (1) it is based on information that is reliable, and (2) it is of the type that an expert in his or her field would normally rely.

> Q. . . . Is the data the -- the Plaintiffs' direct purchases or the Defendants' direct sales of eggs to the Plaintiffs in the case?
>
> A. This would be what I pulled -- what was pulled out of that dataset to reflect transactions that are direct purchases from Plaintiffs to each - each other party here.
>
> Q. And does it -- does it include the direct purchase sales information for each Plaintiff from -- from one or more of each of the co-conspirators, including Rose Acre?
>
> A. That's correct.
>
> Q. During the alleged conspiracy period?
>
> A. That's correct.
>
> Q. And including during the impact period that you measured in your models?
>
> A. Right. And this includes periods other than the impact periods that -- in my model as well.
>
> Q. . . . Does Appendix 5 show Plaintiffs' actual purchases from the alleged co-conspirators, including Rose Acre?
>
> A. Yes.

Dec. 6, 2019 Trial Tr. at 72:15-73:14. Finally, Professor Baye testified that the Product Type column on Appendices 5 and 5A corresponded to various categories in the Urner Barry market prices:

> Q. Do the -- do the descriptions under -- under Product Type correspond to the Urner Barry categories used in the models about which you've already testified?
>
> A. That's correct.

Dec. 6, 2019 Trial Tr. at 75:6-9.

Assuming the jury finds Professor Baye credible, his testimony established that his prior testimony, using Slide 28 as a demonstrative, that each Plaintiff suffered injury in fact, was derived from Appendices 5 and 5A, which were in turn derived from Plaintiffs' purchase data

and Defendants' sales data. Professor Baye's rebuttal testimony therefore would further allow a reasonably jury to credit his testimony that each Plaintiff suffered injury in fact.

In short, the jury could reasonably conclude that Professor Baye's economic analysis was based on reliable data, and sufficiently tied the conspiracy to overcharge injuries suffered by each Plaintiff, establishing their standing under the Clayton Act.

CONCLUSION

Plaintiffs have satisfied their initial evidentiary burden at trial. As described above, the jury could reasonably conclude from the trial evidence that all of UEP, USEM, and Rose Acre participated in an unlawful conspiracy to reduce the supply of shell eggs and increase shell egg prices, and that each Plaintiff was injured by the conspiracy in the form of being overcharged on shell egg purchases from vendors who also participated in the conspiracy. Defendants' Rule 50 motions should be denied, and the case should go to the jury for a determination of Defendants' liability to the Plaintiffs.

Dated: December 9, 2019

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on December 9, 2019, I caused a true and correct copy of the foregoing document to be filed and served via ECF on counsel for the parties.

By: */s/ David P. Germaine*
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