09-4561-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN BANANA, INC., et al.

Plaintiffs-Appellants,

v.

DEL MONTE FRESH PRODUCE COMPANY, et al.

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York, No. 04-md-1628 (RMB)

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE
AS *AMICUS CURIAE* IN SUPPORT OF
APPELLANTS AND REVERSAL ON DISCRETE ISSUE

ELLEN MERIWETHER
CAFFERTY FAUCHER LLP
1717 Arch St.
Suite 3610
Philadelphia PA 19103
215-864-2800

RICHARD M. BRUNELL
Director of Legal Advocacy
AMERICAN ANTITRUST INST.
2919 Ellicott St., N.W.
Washington, DC 20008
617-435-6464

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a non-profit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF *AMICUS CURIAE*

All parties have consented to the filing of this brief. The American Antitrust Institute ("AAI") is an independent and nonprofit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. AAI frequently appears as *amicus curiae* in important antitrust cases including, for example, *Pacific Bell Tel. Co. v. linkLine Communications, Inc.*, 129 S. Ct. 1109 (2009), which it argued before the Supreme Court, and *In re American Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009), which quoted from AAI's brief. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 100 prominent antitrust lawyers, law professors, economists, and business leaders. For a complete description of AAI's activities and personnel, see http://www.antitrustinstitute.org.[1]

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[1] AAI's Board of Directors alone has authorized this filing. The individual views of members of the Advisory Board may differ from the positions taken by AAI. Two of plaintiffs' counsel, Douglas Richards and Bernard Persky, are members of AAI's Advisory Board, but played no role in the Directors' deliberations. Pursuant to Local Rule 29.1, *amicus* states that no counsel for a party (including Richards and Persky) authored this brief in whole or in part, and no party or a party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person or entity other than AAI or its counsel has contributed money that was intended to fund preparing or submitting the brief.

AAI submits this brief primarily to urge the Court to give guidance to lower courts on the proper analysis of market definition in monopolization cases, and in particular to emphasize the importance of considering anticompetitive effects in the market-definition inquiry. Secondarily, AAI urges the Court to recognize the adverse effects that may result from the explosion in challenges to the admissibility of plaintiffs' economists' testimony in antitrust cases, which makes it imperative to ensure that Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), are not misapplied by the lower courts.

INTRODUCTION AND SUMMARY

Plaintiffs' theory of anticompetitive effects in this case is straightforward and consistent with long-standing antitrust precedent and principles. They allege that Del Monte's "threat letters" and "sham litigation" in connection with a patent delayed the entry of rivals and, as a result, supermarkets and other purchasers paid higher prices for Del Monte's "revolutionary" extra-sweet pineapples until entry did occur and drove down prices. If plaintiffs' theory of harm is established, and Del Monte's alleged exclusionary conduct is not justified or otherwise legally protected, then plaintiffs will have established a violation of Section 2, without any further need to define the relevant market or prove monopoly power.

The district court concluded, as a threshold matter, that Del Monte was entitled to summary judgment because plaintiffs' expert economist's opinion that "fresh whole extra-sweet pineapples" is a relevant product market should be excluded under Fed. R. Evid. 702. The district court's analysis of the relevant product market is erroneous because it fails to take into account plaintiffs' direct evidence of anticompetitive effects, and makes other analytical errors.[2] The task of defining the relevant market in a monopolization case should not be done in a vacuum, untethered to a plaintiff's theory of anticompetitive harm, nor focus on comparing particular substitutes and assessing whether they "compete" with the allegedly monopolized product. Moreover, the district court's exclusion of the economist's testimony is inconsistent with its gatekeeper function under *Daubert* insofar as it is based on the court's mere disagreement with the economist's conclusion rather than a considered conclusion that his methodology was somehow unreliable. A recent study suggesting that *Daubert* is being used excessively to

[2] The district court also concluded that plaintiffs had failed to put forth sufficient evidence upon which a jury could reasonably find that Del Monte had engaged in sham litigation or that the threat letters were illegitimate. Moreover, the court concluded that there was insufficient evidence that Del Monte's conduct slowed its competitors' entry into the market. *Amicus* offers no opinion on these conclusions, which, if correct, would properly dispose of the case. Indeed, as argued below, the district court should have considered the issue of anticompetitive effects, rather than market definition, as the threshold inquiry. However, even if the Court affirms on these other grounds, the Court should correct the lower court's erroneous market-definition analysis to ensure that it does not stand as a precedent for future cases.

challenge plaintiffs' economists' testimony in antitrust cases makes it all the more important that *Daubert* is applied properly by courts to weed out testimony with significant methodological defects, and not as a means to weigh the evidence in contravention of Rule 702 and summary judgment standards.

ARGUMENT

I. MARKET DEFINITION SHOULD BE INFORMED BY A PLAINTIFF'S THEORY OF ANTICOMPETITIVE EFFECTS

Courts, legal commentators, and economists agree that while a violation of Section 2 requires both monopoly power and exclusionary conduct, proof that a defendant has engaged in exclusionary conduct *that raises prices above the level that would have prevailed absent the conduct* is sufficient to establish a violation of Section 2. That is because proof of such conduct and its effect not only establishes the conduct element of Section 2, but it directly establishes defendant's monopoly power, which is "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Such proof also implicitly establishes a relevant market, for it means that substitute products failed to constrain the defendant's ability to maintain supracompetitive prices.

The essential inquiry for any Sherman Act offense is whether the challenged conduct resulted in an anticompetitive effect. Under the Rule of Reason in Section 1 cases, it is well settled that direct evidence of anticompetitive effects obviates the need to circumstantially prove effects by first defining a relevant market and then

inferring market power from a high market share. *See Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'") (quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)); *see also NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 109-10 (1984). Indeed, as this Court has recognized, "[i]f a plaintiff can show that a defendant's conduct exerted an actual adverse effect on competition, this is a strong indicator of market power. In fact, this arguably is more direct evidence of market power than calculations of elusive market share figures." *Todd v. Exxon Corp.*, 275 F.3d 191, 206 (2d Cir. 2001) (Sotomayor, J.).

These principles, first developed under Section 1 of the Sherman Act, have also been extended to Section 2. This Court has recognized that "a relevant market definition is not a necessary component of a monopolization claim." *PepsiCo, Inc. v. The Coca-Cola Co.*, 315 F.3d 101, 107 (2d Cir. 2002). Rather, monopoly power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market." *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 98 (2d

Cir. 1998); *accord Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 500 (2d Cir. 2004). "Indirect proof of market power, that is, proof that the defendant has a large percentage share of the relevant market, is [merely] a 'surrogate' for direct proof of market power." *Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 227 (2d Cir. 2006).

Numerous other circuits also follow this direct-evidence rule in Section 2 cases. *See Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196-97 (1st Cir. 1996) (market power may be proved by direct evidence such as actual supracompetitive prices and restricted output); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 n.3 (3d Cir. 2007) ("Because market share and barriers to entry are merely surrogates for determining the existence of monopoly power, direct proof of monopoly power does not require a definition of the relevant market.") (internal citation omitted); *Re/Max Int'l, Inc. v. Realty-One, Inc.*, 173 F.3d 995, 1026 (6th Cir. 1999) (reversing summary judgment granted to defendant on § 2 claim because plaintiff had offered sufficient direct evidence of anticompetitive effects even though it failed to define the relevant geographic market); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of the injury to competition . . ., and thus, of the actual exercise of market power."); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001)

("Where evidence indicates that a firm has in fact profitably [raised prices substantially above the competitive level], the existence of monopoly power is clear.").[3]

As the Supreme Court noted in *Kodak*, "[i]t is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 477 (1992); *see also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 292 (6th Cir. 1898) ("The most cogent evidence that [defendants] had [market] power is the fact . . . that they exercised it."). Indeed, the ultimate issue in a monopolization claim is not whether the defendant has monopoly power in the abstract. Rather, "[t]he pertinent inquiry in a monopolization claim . . . is whether the defendant has engaged in improper conduct that has or is likely to have the effect of controlling prices or excluding competition, thus creating or maintaining market power." *PepsiCo*, 315 F.3d at 108.

Leading commentators agree that direct evidence of anticompetitive effects is not only an appropriate method of proving monopoly power, it is *superior* to the indirect method of establishing a high market share in a relevant market. *See, e.g.,*

[3] While this Court has stated in a couple of older cases that when market-share proof is lacking, "the plaintiff must produce *unambiguous* evidence that the defendant has the power to control prices or exclude competition," *Broadway Delivery Corp. v. United Parcel Service of America, Inc.,* 651 F.2d 122, 130 (2d Cir. 1981) (emphasis added); *see also U.S. Football League v. National Football League*, 842 F.2d 1335, 1362 (2d Cir. 1988) (quoting *Broadway Delivery*), the more recent cases do not impose any special evidentiary requirement for direct evidence of market power, nor is any such handicap warranted.

Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, *Antitrust Law in Perspective* 919 (2d ed. 2008) ("[E]vidence of the actual ability to restrict output, raise prices, or otherwise determine product characteristics normally shaped by competition, establishes market power . . . and it may do so more reliably than market share evidence."); Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust* 74 (2d ed. 2006) ("Disputes about market definition . . . are of little consequence in the face of actual evidence of anticompetitive effects."); Phillip Areeda, *Market Definition and Horizontal Restraints*, 52 Antitrust L.J. 553, 565 (1983) ("Once we know that significant price enhancement has occurred . . . we know that the defendant has substantial market power. At that point market definition would be superfluous and irrelevant. . . . [M]arket definition and market shares are second best to direct measurement."); *see also* 2B Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* ¶ 500 (3d ed. 2007) ("'alternative' or 'direct' indicators of market power . . . can be independent of market definition and are sometimes superior to it").[4]

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[4] Some commentators find the concept of market definition to be entirely unhelpful (or worse) in assessing market power. *See, e.g.,* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 22 (1984) (describing "the search for the 'right' market" as "a fool's errand" and stating that market definition "is an output of antitrust inquiry rather than an input into decisions, and it should be avoided whenever possible"); Franklin M. Fisher, *Horizontal Mergers: Triage and Treatment*, J. Econ. Persp., Fall 1987, at 23, 27 ("Market definition is an artificial construction created by antitrust litigation. For any other purpose of economic analysis, the binary question of whether particular firms or products are 'in' or 'out' of a given

As Professor Salop has cogently explained,

> Although market power and market definition have a role in antitrust analysis, their proper roles are as parts of and in reference to the primary evaluation of the alleged anti-competitive conduct and its likely market effects. They are not valued for their own sake, but rather for the roles they play in an evaluation of market effects.
>
> Market power and market definition, therefore, should not be analyzed in a vacuum or in a threshold test divorced from the conduct and allegations about its effects. Instead, market power should be measured as the power profitably to raise or maintain price above the competitive benchmark price, which is the price that would prevail in the absence of the alleged anticompetitive restraint.
>
> . . . .
>
> If there is direct evidence of anticompetitive effect, then a separate test of market power, let alone a *threshold* test of market power, is redundant. In essence, the evidence of anticompetitive effect also proves market power in the affected market.

Steven C. Salop, *The First Principles Approach to Antitrust,* Kodak*, and Antitrust at the Millennium*, 68 Antitrust L.J. 187, 188, 200 (2000); *see also* Lawrence J. White, *Market Power and Market Definition in Monopolization Cases*, in II ABA

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market is a meaningless one. Even in antitrust cases, that question is not a useful one if substantive results turn on the answer."); Louis Kaplow & Carl Shapiro, *Antitrust*, in 2 *Handbook of Law & Economics* 1073, 1171 (A. Mitchell Polinsky & Steven Shavell eds., 2007) ("[O]ne often needs to know the right answer – that is, how much market power exists – in order to know which market definition is best.").

Section on Antitrust Law, *Issues in Competition Law and Policy* 913, 923 (2008) ("[F]or cases where the plaintiff alleges that the defendant's actions were exclusionary, the question of market definition can be largely shunted aside and the focus instead should be on the price effects of the alleged exclusion, i.e., if the [competitor] had not been foreclosed by the defendant's actions, would the consequence have been a small but significant nontransitory *decrease* in the price (SSN*D*P) charged by the defendant?") (emphasis in original); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 Antitrust L.J. 3, 14 (2004) ("[E]vidence that conduct has in fact diminished competition – such as lower output and higher prices, and perhaps lower quality or less consumer choice – will tend to establish both the power requirement of the offense and anti-competitive effects.").

The district court ignored these important principles, as explained in the next section. Rather than starting with the direct evidence of anticompetitive effects offered by plaintiffs, or considering such evidence in evaluating the relevant market, the court considered the relevant product market as a threshold issue, without regard to the plaintiffs' theory of harm.

II. THE DISTRICT COURT'S ANALYSIS OF THE RELEVANT PRODUCT MARKET IS ERRONEOUS

The district court excluded the testimony of plaintiffs' economist, Dr. Ronald Cotterill, and rejected his proposed definition of the relevant market as MD-2 (i.e., extra sweet) pineapples largely because the expert did "not consider meaningfully whether the MG-1 and CO-2 pineapples, among other products, are reasonable substitutes for the MD-2." Slip op. at 13. In particular, the court faulted Cotterill for failing to conduct a cross-elasticity test of potential substitutes, *see id*. at 17, and overlooking "relevant facts which show that the MG-1 and CO-2 pineapples are, indeed, reasonable substitutes for the MD-2," *id.* at 14. The court's analysis is erroneous for several reasons.

Evidence of Anticompetitive Effects. As an initial matter, the court erred by failing to consider plaintiffs' proposed market definition in light of the evidence of anticompetitive effects. Under the market-definition test in the federal government's Horizontal Merger Guidelines, a version of which was apparently followed by Dr. Cotterill,[5] a relevant product market is one in which a hypothetical monopolist of the product at issue could impose a small but significant and nontransitory increase in price (SSNIP) without losing so many customers to make the price in-

[5] The Cotterill report is filed under seal; *amicus* has relied on the district court's opinion, redacted briefs, and the transcript of the *Daubert* hearing and accompanying exhibits for its understanding of the report.

crease unprofitable. *See* U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 1.11 (1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf. The point of the SSNIP test under the Merger Guidelines is to aid in the determination of future anticompetitive effects, namely whether the merger of two rivals is likely to allow the merged firm to raise prices post-merger. By contrast, in a retrospective monopolization case such as this one, the question is whether the defendant's exclusionary conduct has already resulted in a price increase. Accordingly, the benchmark price for the SSNIP test is the price that would have prevailed but for the alleged exclusionary conduct,[6] and actual deviations from that benchmark can be observed. If plaintiffs are correct that entry by competing MD-2 pineapples caused Del Monte to reduce its prices, such an effect would be compelling evidence that the MG-1 and CO-2 pineapple that were previously offered for sale did not constrain Del Monte from pricing above the

[6] *See* Salop, *supra*, at 188; White, *supra*, at 923; *see also* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 Antitrust L.J. 129, 159 (2007) ("Retrospective harm cases highlight the importance for market definition of identifying the but-for price; this is, the 5 percent or 10 percent price increase in the conceptual experiment for market definition must be measured relative to the price that would have prevailed but-for that conduct. Making this comparison requires careful attention to the allegations in the antitrust case in which market definition is performed."). Using the but-for price as the benchmark is necessary to avoid the *Cellophane* fallacy, i.e. a mistaken focus on the profitability of a price increase above an already monopolized price. *See* Salop, *supra*, at 197; *Kodak*, 504 U.S. at 471 ("The existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power." (quoting Phillip Areeda & Louis Kaplow, *Antitrust Analysis* ¶ 340(b) (4th ed. 1988))).

benchmark price. It would therefore be appropriate to exclude them from the relevant market. *Cf. Geneva Pharm.*, 386 F.3d at 496-97 (finding that generic version of drug was relevant market alone – excluding more expensive branded version – where entry by new generic competitors caused incumbent generic drug maker to drop its prices substantially).

Cross Elasticity v. Own Elasticity of Demand. Numerous commentators have explained that the critical issue in assessing a firm's market power is not the *cross elasticity* of demand between the firm's product and other products, but the *own elasticity* of demand of the firm's product. The own elasticity directly addresses a firm's ability profitably to raise price, whereas cross elasticity evaluates the substitutes that buyers might choose in response to a price increase. *See, e.g.,* Areeda, Kaplow & Edlin, *supra*, at 495 ("What constrains the defendant's price is not the cross-elasticity of any particular product but the willingness of buyers to purchase less from the firm in response to its price increase – including their choice to do without the product or any of its obvious substitutes. That is, what matters is the elasticity of demand faced by the defendant – the degree to which its sales fall (for whatever reason) as its price rises."). The Merger Guidelines' SSNIP test focuses on the latter, not the former. *See* Gregory J. Werden, *Market Delineation and the Justice Department's Merger Guidelines*, 1983 Duke L.J. 514, 573 ("The guidelines rightly reject the use of cross-elasticity of demand as the test of

whether two products or areas are in the same market.").[7] As Werden explains, "Using cross elasticities to delineate markets . . . not only tends to obscure the ultimate issue, but also necessarily evokes a fundamentally flawed analysis." Werden, *Demand Elasticities, supra,* at 402 & n.152 (also noting that "own elasticity of demand for a product normally can . . . be estimated with greater precision than can cross elasticities"); *see also* Louis Kaplow, *The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative*, 95 Harv. L. Rev. 1817, 1829 n.52 (1982) (criticizing "mistake of overemphasizing cross-elasticity [which] has confused even prominent commentators").

Accordingly, the district court was wrong to fault Cotterill for failing to conduct "an analysis of the cross-price elasticity of demand between the MD-2 pineapple and potential substitutes." Slip op. at 17. If his SSNIP analysis is correct (and the court did not question it), then the fact that a hypothetical monopolist of MD-2 pineapples can impose a SSNIP means that *no* other potential substitutes have sufficient cross-elasticity to constrain the monopolist from raising its price above the competitive levels, and therefore MD-2 pineapples is a relevant market. *See, e.g.,* Phillip Areeda, Louis Kaplow & Aaron Edlin, *Antitrust Analysis* 495 n.29 (6th ed. 2004) ("The firm's demand elasticity is necessarily a sum of all the cross-

[7] The role of cross elasticities under the Merger Guidelines is to identify the "next best substitute" when a hypothetical monopolist of a candidate market is not able to impose a SSNIP. *See* Gregory J. Werden, *Demand Elasticities in Antitrust Analysis,* 66 Antitrust L. J. 363, 402-03 (1998).

elasticities for literally every other product, including products not bought until the future, each weighted by its relative importance in overall consumption."); *cf. Federal Trade Comm'n v. Staples, Inc.*, 970 F. Supp. 1066, 1078 (D.D.C. 1997) (fact that Staples was able to charge higher prices in markets without other superstores "indicates a low cross-elasticity of demand between the consumable office supplies sold by the superstores and those sold by other sellers").

Competition with Other Pineapples. Third, the district court repeatedly referred to evidence that supposedly showed "Dole's MG-1 and Maui's CO-2 pineapples were sold in direct competition with Del Monte's MD-2 pineapple," slip op. at 15; *see also id.* at 16, 19, 21, without recognizing the elementary principle of market definition that a product may compete to some degree with a putative monopolist's product but not be in the relevant market. Whether a "competing" product is in the relevant market depends on whether the product constrains the putative monopolist from raising its price above the competitive level. *See Geneva Pharms.*, 386 F.3d at 496 ("The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output."); *Microsoft*, 253 F.3d at 57 ("Structural market power analyses are meant to determine whether potential substitutes constrain a firm's ability to raise prices above the competitive level . . . ."). Cotterill's SSNIP test, if accurate, would indicate that the MG-1 and CO-2 pineapples did not

constrain Del Monte from pricing above the competitive level, and hence were properly excluded from the relevant market. This would imply either that these pineapples were not good substitutes, or that they were substitutes only at supracompetitive prices. *See* White, *supra*, at 918-19 (asking whether putative monopolist faces competition at its current price is misleading because of *Cellophane* fallacy and fact that competition at the margin may involve small-scale entry).

Cases are legion in which a relevant market has been defined narrowly to include less than all functionally equivalent "competing" products precisely because they did not significantly constrain the pricing of the product at issue. *See, e.g., Geneva Pharms.*, 386 F.3d at 496-97 (relevant market defined as generic warfarin; therapeutically equivalent branded drug excluded); *Federal Trade Comm'n v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) (relevant market defined as premium, natural, and organic supermarkets; ordinary supermarkets excluded); *Staples,* 970 F. Supp. 1066 (relevant market defined as consumable office supplies sold though office superstores; mail order, Wal-Mart and other sellers of office supplies excluded); *see generally* U.S. Dept. of Justice & Fed. Trade Comm'n, *Commentary on the Horizontal Merger Guidelines* 6-7 (March 2006) (noting that "[d]efining markets under the Guidelines' method does not necessarily result in markets that include the full range of functional substitutes from which customers choose" and that the FTC and DOJ "frequently conclude that a relative-

ly narrow range of products or geographic space within a larger group" constitutes a relevant market, citing "superpremium ice cream" among other examples), *available at* http://www.justice.gov/atr/public/guidelines/215247.pdf.[8]

Evidence of Price-Cost Margins. Fourth, the court inexplicably rejected out of hand Dr. Cotterill's conclusion that Del Monte "achieved a huge operating profit to sales ratio, 63.5%, in its Gold business unit." Slip op. at 12 n.9. Evidence of high price-cost margins is well-accepted direct evidence of market power, which would tend to support Cotterill's market definition. *See* Areeda, Hovenkamp & Solow, *supra*, ¶516h (in monopolization cases, "the conventional measurement tools for delineating markets may fail us, and direct examination of price-cost margins may be necessary to draw reasonable inferences that substantial power does or does not exist."); Areeda, Kaplow & Edlin, *supra,* at 487 ("Clear evidence of a

[8] Of course, courts often reject a narrow relevant market, or "submarket," as the cases cited by the district court indicate. *See* slip op. at 21. Regardless of whether those cases were correctly decided, to the extent the district court was suggesting that a relevant market or "submarket" cannot be defined by "'price variances or product quality variances,'" *id.* at 20-21 (quoting *In re Super Premium Ice Cream Dist. Antitrust Litig.*, 691 F. Supp. 1262. 1268 (N.D. Cal. 1988)), the court was manifestly incorrect, as other cases (cited above) demonstrate. *See also Brown Shoe v. United States*, 370 U.S. 294, 325 (1962) (practical indicia of submarket include "product's peculiar characteristics" and "distinct prices"). The court was also off the mark in suggesting that plaintiffs were required to demonstrate "exceptional market conditions to justify their single brand market." Slip op. at 21. The MD-2 (or extra sweet) pineapple market proposed by plaintiffs cannot reasonably be characterized as a "single brand" market where other brands of MD-2 pineapples were (ultimately) in this market, and it is defined by the characteristics of the product, not its brand.

substantial [price-cost] divergence does not merely suggest market power; it is the very definition of power.”).

Starting with Narrow Relevant Market. Fifth, the court erred in faulting Cotterill for applying the Horizontal Merger Guidelines “in an overly mechanical fashion” by selecting too “narrow [a] ‘tentative’ product market . . . , i.e., the MD-2 pineapple alone,” “[e]ven though (at least some) consumers purchased MG-1 and CO-2 pineapples during the Class Period . . . .” Slip op. at 16. In fact, however, by starting with a narrow tentative market, Cotterill followed precisely the market delineation process in the Merger Guidelines. *See Horizontal Merger Guidelines*, *supra*, § 1.0 (“A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test.”). Indeed, in deciding whether the MD-2 pineapple is a relevant market it would make no sense to start from a broader market.

***Brown Shoe* Factors.** Finally, the district court apparently misapprehended the significance of the “practical indicia” of a submarket set forth in *Brown Shoe*, 370 U.S. 294. Contrary to the suggestion of the district court, those criteria are not “more generous” than the standard tools of market definition. Slip op. at 18. Rather, they have been interpreted to be consistent with the Merger Guidelines and the SSNIP methodology. *See, e.g., Staples,* 970 F. Supp. at 1075-76 (discussing *Brown Shoe* “sensitivity to price changes” factor in terms of SSNIP test); Jonathan

B. Baker, *Stepping Out in an Old* Brown Shoe: *In Qualified Praise of Submarkets*, 68 Antitrust L.J. 203, 206 (2000) ("practical indicia can be interpreted as 'evidentiary proxies for direct proof of substitutability' in demand and supply" (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J.))).

The court erred in considering the *Brown Shoe* factors independently from Cotterill's testimony and the direct evidence of market power and anticompetitive effects that supports it. *See* slip op. at 17-20. For example, while a "product's peculiar characteristics and uses" – one of *Brown Shoe*'s "practical indicia" – is important insofar as it bears on buyer substitution patterns that may or may not allow a putative monopolist profitably to charge supracompetitive prices, a relevant market cannot be properly defined by looking at the physical characteristics of products and concluding, as did the court here, that "the MD-2 pineapple is [not] so unique (e.g., as compared to the MG-1 and CO-2 pineapples) as to support (constitute) a separate submarket." Slip op. at 19.

The court's treatment of the *Brown Shoe* factors illustrates another problem with its critique of Cotterill's testimony, namely the court engaged in improper fact finding, as discussed in the next section.

III. THE DISTRICT COURT MISAPPLIED *DAUBERT*

A. *Daubert* Was Not Intended to Usurp the Jury's Role in Evaluating the Factual Strength of an Expert's Opinion

In light of the foregoing methodological and legal errors, the district court abused its discretion in excluding Cotterill's testimony on market definition under Fed. R. Evid. 702. In addition, the exclusion was also faulty because it was based in part on the court's disagreement with the version of the facts upon which Cotterill relied, not a well-grounded challenge to his methodology. The district court appeared to weigh the evidence suggesting that the MG-1 and CO-2 were reasonable substitutes for the MD-2 against *some* of the evidence upon which Cotterill relied to show the contrary, finding the former more persuasive. Thus, the court criticized Cotterill's testimony for "its insufficient factual basis," slip op. at 13, "overlook[ing] relevant facts," *id.* at 14, relying on "scant evidence," *id.*, and "fail[ing] to provide sufficient facts or data to support" his conclusion, *id.* at 15 n.12. Even apart from the court's methodological errors discussed above, and the important facts *it* ignored, the court's approach to evaluating the facts exceeded its "gatekeeper" function under *Daubert*. *See Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002) ("the district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions").

In rejecting the "austere" and "uncompromising 'general acceptance' test" for the admissibility of expert testimony under prior case law, *Daubert* stressed that the trial court's gatekeeper role was not intended to usurp the jury's function, and that the adversary system itself provided the "appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 589, 596; *see also Amorgianos,* 303 F.3d at 267 ("adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony"). Indeed, the distinction between "admissibility" and "sufficiency" is an important one, as it determines the standard of review by both the district court and this Court. "[T]he question of admissibility of expert testimony is not . . . an issue of fact, and is reviewable under the abuse of discretion standard." *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997). In contrast, sufficiency determinations (including whether there are sufficient facts to avoid summary judgment) require the district court to view the evidence in the light most favorable to the non-moving party and are reviewed *de novo*. *See In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1132 (2d Cir. 1995) ("*Daubert* left the traditional sufficiency standard intact"); *see generally* Andrew I. Gavil, *After* Daubert: *Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 Antitrust L. J. 663 (1997).

To be sure, Fed. R. Evid. 702(1) requires that expert testimony "is based upon sufficient facts or data," but as the Advisory Committee on the Federal Rules of Evidence explained, "The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the grounds that the court believes one version of the facts and not the other." Fed. R. Evid. 702, Notes of Advisory Committee on 2000 amendments; *see also In re: Scrap Metal Antitrust Litig.,* 527 F.3d 517, 529-30 (6th Cir. 2008) (district court's task in assessing reliability is "not to determine whether [the expert's opinion] is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to, say, unsupported speculation;" "we will generally permit testimony based on allegedly erroneous facts when there is some support for those facts in the record"); *Micro Chemical, Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed. Cir. 2003) ("it is not the role of the trial court to evaluate the correctness of facts underlying one expert's testimony"); *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 249-50 (5th Cir. 2002) (holding that jury was entitled to hear expert testimony and decide whether to accept or reject it after considering whether predicate facts on which expert relied were accurate). *Daubert* should not be used, as it was here, as a means to circumvent Rule 56's summary judgment standard as to factual issues.[9]

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[9] After excluding Cotterill's testimony under *Daubert*, the district court went on to conclude that even it were to consider the testimony, "Plaintiffs' have failed to raise a triable issue of fact regarding the boundaries of the product market for the

B. The Ubiquitous and Asymmetric Application of *Daubert* in Antitrust Cases Requires Courts to be Judicious in Evaluating *Daubert* Challenges

The district court's misapplication of *Daubert* is illustrative of a broader, disturbing trend in the federal courts, namely the sharp growth in the use of *Daubert* to challenge and exclude plaintiffs' expert testimony in antitrust cases. In 2000, when the Advisory Committee revised Rule 702 in response to *Daubert*, the Committee believed that "the rejection of expert testimony is the exception rather than the rule," and stated that the amendment "is not intended to provide an excuse for an automatic challenge to the testimony of every expert." Fed. R. Evid. 702, Notes of Advisory Committee on 2000 amendments. Yet the evidence appears to be to the contrary, at least in antitrust cases.[10]

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reasons described below." Slip op. at 17. But this did not cure the court's *Daubert* error because while it is certainly true that an expert's testimony may be admissible but insufficient to forestall summary judgment, the court's summary judgment analysis entirely ignored Cotterill's testimony, not to mention other evidence favorable to plaintiffs.

[10] It is widely recognized that trial courts have expanded their gatekeeper function in the years following the *Daubert*, and have tightened the standards for admissibility of expert testimony in all types of cases. *See* Lloyd Dixon & Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the* Daubert *Decision* 33 (2001), *available at* http://www.rand.org/publications/MR/MR1439/MR1439.pdf (RAND study finding increase in rate of challenges and exclusions after *Daubert* in all substantive areas); *see also* D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 Albany L. Rev. 99, 104 (2000) ("Clearly *Daubert* triggered a deluge, especially in regard to civil cases.").

"Prior to *Daubert* admissibility challenges to the qualifications and methodologies of expert economic testimony in antitrust cases were rare." Andrew I. Gavil, *Competition Policy, Economics, and Economists: Are We Expecting Too Much?*, 2005 Fordham Corp. L. Inst. 575, 586 (B. Hawk ed., 2006). However, at least since *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999), which confirmed that *Daubert* applies to non-scientific experts, the number of challenges to antitrust economists has exploded, to the point where such challenges are considered "common, even expected." Christopher B. Hockett et al., *Revisiting the Admissibility of Expert Testimony in Antitrust Cases*, Antitrust, Summer 2001, at 7, 7. Indeed, a recent unpublished empirical study by James Langenfeld and Chris Alexander shows that challenges to the admissibility of economists' testimony are especially prevalent in antitrust cases. *See* James Langenfeld & Chris Alexander, Daubert *and Other Gatekeeping Challenges of Antitrust Economists* (AAI Working Paper 08-06 March 1, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337081.

Analyzing data collected by a service that tracks *Daubert* challenges, Langenfeld and Alexander found that there were more challenges to the admissibility of economists' testimony in *antitrust cases* than in any other field of law.[11] Of

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[11] *See* Langenfeld & Alexander, *supra*, at 11, fig. 3 & table 5. The authors concluded that "antitrust economists are subject to a disproportionately high rate of challenges," based on the facts that antitrust cases accounted for the highest per-

even greater significance is the fact that an overwhelming number of such challenges in antitrust cases were lodged against plaintiffs' experts: nearly 90%, *see id.* at 10-11 & table 5, confirming the widely shared view that "*Daubert* motions are almost exclusively defense tools used to attack the plaintiff's case." Gavil, *Competition Policy*, *supra*, at 586; *see* Hockett et al., *supra*, at 11 n.12. *Daubert* challenges appear now to be merely another phase in the prosecution of the antitrust case, another weapon in the defendants' arsenal to derail such cases prior to trial. And *Daubert* challenges often are likely to succeed, at least when brought against the plaintiffs' economists. According to Langenfeld and Alexander's study, nearly half of the *Daubert* challenges brought against plaintiffs' economists on issues of liability or damages in antitrust cases were at least partially successful; by contrast, none of the relatively few challenges lodged against defendants' economists in antitrust cases succeeded.[12]

As illustrated by the district court's decision here, defendants are motivated to bring *Daubert* challenges because a successful challenge will often entirely derail plaintiffs' case. *See e.g.* Hockett, *supra*, at 7 ("Although *Daubert* challenges

centage of the challenges in the study (15%) and the lowest percentage of the civil docket (.03%). *See id.* at 11 & table 6.

[12] *See id.* at 13 & table 8. The rate of complete exclusion was close to 30%. These seemingly high exclusion rates are not out of line with the exclusion rate of economists in other areas of law, *see id.* table 7, which indicates the higher rate of challenges cannot be explained by a higher likelihood of success.

have been 'hit or miss' in terms of their results, where they hit in antitrust cases, they are often devastating."). Indeed, a successful *Daubert* challenge will routinely be accompanied by summary judgment in favor of defendant, as the expert's testimony may be the primary basis for an essential element of plaintiff's claim. Furthermore, even when defendants have little chance of success, they are incentivized to bring *Daubert* motions "to increase the costs of litigation under the guise of 'educating the judge.'" Gavil, *Competition Policy, supra,* at 588.

The ubiquitous and asymmetric application of *Daubert* plainly creates additional disincentives for the prosecution of a plaintiff's case, arguably impairing Congress's objective of promoting the private enforcement of the antitrust laws. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.") (internal quotation marks omitted). *Daubert* motions and hearings undoubtedly raise the costs and risks of litigation for plaintiffs, which may deter some meritorious cases from being brought. Moreover, as Langenfeld and Alexander point out, even well-qualified economists may be reluctant to testify on behalf of plaintiffs in good antitrust cases given the risk that they may be "Dauberted" by a court and their credibility undermined for future cases with the stigma of having proffered "unreliable"

testimony.[13] Given these effects, the Court should be particularly vigilant in ensuring that *Daubert* is applied properly to weed out testimony with significant methodological defects, and not as a means to weigh the evidence in contravention of both Rule 702 and summary judgment standards. As Professors Areeda and Hovenkamp conclude, "*Daubert*-style exclusion of economic testimony should be used judiciously in antitrust cases and limited to situations where the economist's methodology is obviously deficient as measured by the standards of that discipline." 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 309e (3d ed. 2007).

[13] *See* Langenfeld & Alexander, *supra*, at 15. "Highly qualified and respected expert witnesses have been regular targets of *Daubert* challenges in antitrust cases." Hockett et al., *supra*, at 8 (citing, among others, a Nobel Prize Winner in Economics).

CONCLUSION

The Court should reverse the district court's grant of summary judgment on market definition and its exclusion of plaintiff's economist's testimony on this issue. It should offer guidance to the lower courts to ensure that the evaluation of the relevant market does not occur in a vacuum, without regard to a plaintiff's theory of anticompetitive harm, and should not be used blindly in the presence of more direct evidence of anticompetitive effects. The Court should also caution the lower courts about misapplying Rule 702 by weighing evidence, a practice that invades the province of the jury and circumvents the requirements of Rule 56.

Respectfully submitted,

s/Ellen Meriwether
ELLEN MERIWETHER
CAFFERTY FAUCHER LLP
1717 Arch St.
Suite 3610
Philadelphia PA 19103
215-864-2800

RICHARD M. BRUNELL
Director of Legal Advocacy
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, DC 20008
617-435-6464

Counsel for Amicus Curiae

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 6,952 words, excluding the parts of the brief exempted by Rule.

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S/ELLEN MERIWETHER
ELLEN MERIWETHER
CAFFERTY FAUCHER LLP
1717 Arch St.
Suite 3610
Philadelphia PA 19103
215-864-2800

RICHARD M. BRUNELL
Director of Legal Advocacy
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, DC 20008
617-435-6464

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I, Ellen Meriwether, hereby certify that the foregoing Brief for the American Antitrust Institute as *Amicus Curiae* in Support of Appellants and Reversal on Discrete Issue was served this 16th day of March, 2010, by First Class Mail and by electronic mail, on the counsel listed below.

s/Ellen Meriwether
Ellen Meriwether

David A. Barrett, Esquire
Boies Schiller & Flexner LLP
575 Lexington Avenue
New York, NY 10022
dbarrett@bsfllp.com

Michael M. Buchman, Esquire
Pomerantz Haudek Grossman & Gross LLP
100 Park Avenue
New York, NY 10017
mbuchman@pomlaw.com

J. Douglas Richards
Cohen Milstein Sellers & Toll PLLC
150 East 52nd Street, Thirtieth Floor
New York, NY 10022
drichards@cohenmilstein.com