IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CHARLES MORRIS, et al.	)	
	)	
Plaintiffs,	)	Case No. 4:15-cv-00077
	)	
v.	)	
	)	Judge: Honorable Joseph H.
TYSON CHICKEN, INC., et al.	)	McKinley
	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO DEFENDANT TYSON CHICKEN, INC.'S MOTION TO RECONSIDER OR CERTIFY *DAUBERT* RULING

I. INTRODUCTION.

Tyson's motion to reconsider or certify the Court's decision to admit Dr. Stiegert's testimony does not present a viable request for relief. Having been granted additional pages to present this matter to the Court the first time, Tyson now seeks to re-litigate it. The Court and the Sixth Circuit have been clear, rehashing disputes over the admissibility of evidence is not a basis for reconsideration or certification. The motion should be denied on that basis alone.

If the Court were to consider Tyson's arguments in support of its motion, they depend on the same errors as its original briefing. Tyson ignores the law on how to calculate antitrust damages; overstates the *Daubert* standard, particularly for economics experts; and rewrites Dr. Stiegert's report to fit its unsupported rules. Indeed, while ironically complaining the Court "did not address Tyson's case law" justifying exclusion, Dkt. No. 253, at 1, Tyson does not provide a single case excluding an expert in similar circumstances, and barely cites any case law at all.

Specifically, Tyson claims all of Dr. Stiegert's damages calculations must be thrown out because he did not identify a processing plant that pays chicken growers using the formulas Dr.

Stiegert relied on to determine Plaintiffs' damages. Dkt. No. 253, at 3-4. Tyson fundamentally misunderstands the purpose and methods of antitrust damages.[1] Antitrust damages are based on constructing a hypothetical "but-for" world to "estimate[e] damages flowing from the challenged conduct," and nothing else. *Aetna, Inc. v. Blue Cross Blue Shield of Michigan*, No. 11-15346, 2015 WL 1497826, at *5–6 (E.D. Mich. Mar. 31, 2015). They do not (and cannot) merely point to another entity—which is subject to a variety of economic forces irrelevant to the case—and conclude that because that entity acts in certain ways the differences between it and the defendant amounts to damages.

With this background, contrary to Tyson's claims of "inconsistencies" in the Court's opinion, *e.g.* Dkt. No. 253, at 2, the decision flows directly from applying the controlling principles for antitrust damages. The Court admitted those damages it determined Plaintiffs could show resulted from Tyson's unlawful activities, and excluded one form of damages the Court determined Plaintiffs could not.

Further still, Tyson's suggestion that it or the Court could direct how Dr. Stiegert should have put together his calculations would be inconsistent with Federal Rule of Evidence 702. Rule 702 requires parties and courts to defer to economics experts for the best way to construct their models. *E.g.*, *In re Air Cargo Shipping Services Antitrust Litigation*¸ No. 06-MD-1175 (JG)(VVP), 2014 WL 7882100, at *8 (E.D.N.Y 2014) (report and recommendation); *Trollinger v. Tyson*

[1] As Plaintiffs explained in their opposition to Tyson's summary judgment motion, Dkt. No. 222, at 5, the relevant provisions of the Packers and Stockyards Act do not purport to regulate anticompetitive practices, but "unfair, unjust, discriminatory, or deceptive practice or device, as well as "unreasonable preference[s] or advantages." 7 U.S.C. § 192(a), (b).

The Court rejected Plaintiffs' argument that it could give the text its plain meaning, Dkt. No. 246, at 7. It concluded that the Sixth Circuit, following a variety of other courts, has read some antitrust elements into the PSA, holding all actions under § 192(a) and (b) require plaintiffs show a challenged "'practice[] [] will likely affect competition adversely.'" *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277 (6th Cir. 2010).

Foods, Inc., No. 4:02-CV-23, 2008 WL 305032, at *10 (E.D. Tenn. Jan. 31, 2008); *Falise v. Am. Tobacco Co.*, 258 F.Supp.2d 63, 67 (E.D.N.Y 2000).[2] Thus, Tyson's rule mandating that Dr. Stiegert needed to use a real world comparator would be particularly improper here, as Dr. Stiegert explained that he determined "[t]he micro-economy generated by contract chicken growing lacks so many features of a competitive structure" it might not be reliable to calculate damages by comparing Tyson's Robards complex with another chicken plant. *E.g.*, Second Stiegert Report, Dkt. No. 180-2 ¶ 63.

Tyson's other argument, that Dr. Stiegert's opinion that Tyson possesses anticompetitive monopsony power relied on "simply [] read[ing] the Plaintiffs' deposition transcripts," and therefore is inadmissible, Dkt. No. 253, at 12, is a direct repeat of a claim presented and disproven in the original briefing. *Compare* Dkt. No. 175, at 9 (Tyson's *Daubert* brief), *with* Dkt. No. 192, at 16-19 (Plaintiffs' opposition). Any reading of Dr. Stiegert's reports establishes he engaged in much more analysis. In fact, when properly unpacked, even Tyson agrees Dr. Stiegert's analysis is sufficient. Moreover, Tyson is again improperly asking this Court to allow its lawyerly arguments to displace the recommended analysis of a trained economist. Dr. Stiegert, not Tyson should determine how to evaluate the Robards complex.

In sum, the *Daubert* decision was correct and thus there simply can be no clear error requiring reconsideration or dispute warranting interlocutory review. Tyson's critiques at most amount to matters for cross-examination, not for taking Dr. Stiegert's analysis from the jury. *See United States v. Lang*, 717 Fed. App'x. 523, 534 (6th Cir. 2010) (unpublished) ("[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" is

[2] For these same reasons, as discussed more below, Tyson's suggestions that Dr. Stiegert's calculations required additional or different data are arguments for cross-examination, not exclusion.

the "traditional and appropriate means" to deal with disputes about the credibility of an expert witnesses); *Maiz v. Virani*, 253 F.3d 641, 666 (11th Cir. 2001) ("A district court's gatekeeper role under *Daubert* is not intended to supplant the adversary system or the role of the jury."); Fed. R. Evid. 702 Advisory Committee's Notes (2000 amend.) ("[T]he rejection of expert testimony is the exception rather than the rule.").

More importantly, Tyson's motion should be denied because it is an abuse of process. It adds nothing to the record. Its sole function is to delay resolution of this matter and drain resources by re-litigating resolved issues, which can never justify reconsideration or interlocutory review.

I. TYSON'S MOTION DOES NOT STATE A COGNIZABLE CLAIM FOR RECONSIDERATION OR CERTIFICATION.

Tyson's motion does not state a viable basis for this Court to reconsider its *Daubert* ruling or certify it for interlocutory appeal. Regarding the former request, the Court has stated, "Motions for reconsideration are not intended to re-litigate issues previously considered by the Court or to present evidence that could have been raised earlier." *Colter v. Bowling Green-Warren Cty. Reg'l Airport Bd.*, No. 1:17-CV-00118-JHM, 2018 WL 775366, at *1 (W.D. Ky. Feb. 7, 2018) (McKinley, J.) (quoting *Ne. Ohio Coal. for Homeless v. Brunner*, 652 F.Supp.2d 871, 877 (S.D. Ohio 2009)); *see also Owens v. Liberty Life Assurance Co. of Bos., No.* 415CV00071JHMHBB, 2016 WL 4499098, at *3 (W.D. Ky. Aug. 26, 2016) (Brennenstuhl, Magistrate Judge) (same). Therefore, a motion for reconsideration may not rely on facts or argument that "could have been" raised in the original briefing. *Colter*, 2018 WL 775366, at *1.

Yet, Tyson not only relies on arguments and evidence that were available to it in its original briefing, but arguments and evidence that were actually presented in its original briefing. In Tyson's words, it is asking this Court to examine what it showed in its original papers, including arguments this Court recognized but rejected. Dkt. No. 253, at 4; *see also id.* at 11 (explaining

Tyson raised three legal challenges in its original brief and is repeating them here). Moreover, Tyson explains it is not only regurgitating the contentions this Court already ruled on, but citing" the same passages and deposition testimony. *Id.* at 9-10. Tyson's position appears to be that the Court did not discuss its arguments in enough detail the first time, so reconsideration is warranted. *Id.* at 4, 9. Tyson is not allowed to file seriatim motions because it deems the Court's explanation inadequate or arrogantly thinks if the Court worked a little harder it could come around. Its rehashing alone is a basis to deny reconsideration.

Regarding Tyson's alternatively requested relief, it makes no effort to identify a disputed "controlling question of law," as required for certification for interlocutory review. *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002). Indeed, Tyson relies almost exclusively on the text of Federal Rule of Evidence 702, failing to identify any relevant split or gap in authority on how that rule is applied. *See, e.g.*, *id.* at 11, 19.

Even had it done so, the Sixth Circuit has held, "A legal question of the type envisioned in [29 U.S.C.] § 1292(b) generally does not include matters within the discretion of the trial court," like an evidentiary ruling. *In re City of Memphis*, 293 F.3d at 351. Specifically with regards to *Daubert* rulings, which merely allow a jury to consider evidence, a court within this circuit has also explained they are not controlling legal decisions as required for certification "purposes of § 1292(b)." *Rover Pipeline LLC v. 5.9754 Acres of Land, More or Less, in Defiance Cty., Ohio*, No. 3:17CV225, 2019 WL 1455791, at *5 (N.D. Ohio Apr. 2, 2019). Moreover, courts are especially reluctant to certify a case like this one that is nearing trial as the delay through interlocutory appeal indicates the appeal is unlikely to materially advance the litigation, as is required for certification. *Schall v. Suzuki Motor of Am., Inc.*, No. 4:14-CV-00074-JHM, 2017 WL 2960540, at *1 (W.D.

Ky. July 11, 2017) (McKinley, J.) (quoting *Newsome v. Young Supply Co.*, 873 F. Supp. 2d 872, 876 (E.D. Mich. 2012)).

The two out-of-circuit district court decisions Tyson cites do not support certification. The court of appeals explains *MLC Intellectual Prop., LLC v. Micron Tech., Inc.*, was only accepted for interlocutory review because the district court certified *Daubert* and damages orders that collectively presented the unique circumstance where the "plaintiff [had] no damages case to present at trial," effectively ending the case. *MLC Intellectual Prop., LLC v. Micron Tech., Inc.*, 794 F. App'x 951, 952–53 (Fed. Cir. 2020) (unpublished). The Federal Circuit did not suggest any willingness to review the discretionary admission of expert testimony alone. While Tyson claims *Travelers Prop. & Cas. Corp. v. Gen. Elec. Co.*, 150 F. Supp. 2d 360, 368-69 (D. Conn. 2001), "certified its *Daubert* ruling for interlocutory appeal," Dkt. No. 253, at 20, in fact that decision merely invites such a motion and it appears the motion was never filed. Thus, the district court never certified the issue, nor did the court of appeals weigh in on whether that would have been proper.

Despite Tyson's hyperbole that "the Court's *Daubert* order puts the poultry industry at risk," Dkt. No. 253, at 21, the Court simply exercised its discretion to allow testimony to be heard and considered by a jury. That is not the sort of "exceptional" decision that warrants the atypical procedure and delay of interlocutory review. *Bullock v. Otto Imports, LLC*, No. 4:19-CV-00149-JHM, 2020 WL 5043140, at *1 (W.D. Ky. Aug. 26, 2020) (McKinley, J.).

For these reasons, the Court can dismiss Tyson's motion as failing to make out the basic requirements for its requested relief.

II. THIS COURT'S DECISION TO ADMIT DR. STIEGERT'S DAMAGES CALCULATIONS EVINCES NO CLEAR ERROR, IT WAS CORRECT.

While Tyson spends pages cross-examining Dr. Stiegert's damages calculations, in reality it repeatedly makes one argument (without legal support): It was clear error to admit Plaintiffs' damages calculations because Dr. Stiegert did not point to a company that pays its employees using the rules Dr. Stiegert relied on to calculate damages. Dkt. No. 253, at 4-5 (Dr. Stiegert's "Suppressed-Wage" damages should be excluded because he "never showed poultry processing plants, competitive or otherwise" calculated wages in this manner); *id.* at 8 ("For all Dr. Stiegert knows, every plant in American could be calculating the weight of condemned broiler chickens by the average weight of non-condemned broiler chickens. Dr. Stiegert does not know because he never looked" and therefore those damages are inadmissible.); *id.* at 9-10 (Dr. Stiegert's "Days-Out" damages are inadmissible because "he never considered evidence of competitive market practices" among other chicken integrators). According to Tyson, this Court excluded Dr. Stiegert's dog food damages—damages related to Tyson taking meat grown by Plaintiffs and profiting off it through dog food production without compensating Plaintiffs—because Dr. Stiegert did not prove that "grower pay at other plants" includes such compensation. Dkt. No. 253, at 22. Therefore, Tyson insists, all of Dr. Stiegert's other damages calculations must be excluded for the same reason. *Id.* Yet, when the goals and methods for antitrust damages are properly understood, there is no tension between the Court's rulings. In actuality, no comparison to currently operating entities is needed and thus the presence or absence of such a comparison was not the basis for this Court's holdings. Tyson has had to misstate the process for determining damages to create an inconsistency. There is no error and admitting Dr. Stiegert's analysis is consistent with established law.

As the Court correctly recognized in its *Daubert* ruling, antitrust damages need not be based on real world comparators. "'Damages calculations in antitrust cases seek to compare

plaintiffs' actual experience," where they were harmed by the defendant, "with what the plaintiffs' experience would have been 'but for' the antitrust violation.'" Dkt. No. 247, at 9 (quoting *In re Pool Prod. Distrib. Mkt. Antitrust Litig.*, 166 F. Supp. 3d 654, 678 (E.D. La. 2016)). That "but for" world is meant to strip out the anticompetitive conduct identified by the plaintiffs, modeling how the alleged misconduct harms competition. *In re Nw. Airlines Corp. Antitrust Litig.*, 197 F. Supp. 2d 908, 927-28 (E.D. Mich. 2002). The objective is not to determine how all (or any) other firms should be organized.

In other words, damages are calculated based on the difference between the real world and a hypothetical world that "isolates the loss of value caused by the harmful act." Federal Judicial Center, *Reference Guide on Estimation of Economic Damages* 432 (3d 2011). Such a determination often cannot point to how current businesses operate because damages "differ[] from what actually happened *only* with respect to the harmful act." *Id.* (emphasis added). The damages calculation must "exclude[s] any change … arising from other sources" that may inform real-world competitive businesses' practices. *Id.*

Indeed, a court in this circuit admitted testimony that depended on the expert's "*sui generis* measure" of damages, "fail[ing] to analyze the price actually paid" to similarly situated farmers, because the model successfully created the "but-for" world. *In re Se. Milk Antitrust Litig.*, No. 2:07-CV 208, 2010 WL 8228839, at *5 (E.D. Tenn. Dec. 8, 2010). Likewise, courts have excluded damages calculations that simply pointed to differences between the plaintiffs and a real world comparator because they failed to show that the differences were exclusively the result of the conduct at issue. *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 06-0620, 2015 WL 5766929, at *5 (E.D. Pa. Aug. 27, 2015). The different contexts can result in an analytical gap between the real world and the proper but-for world. *Id.*; *see also In re LIBOR-Based Fin.*

Instruments Antitrust Litig., 299 F. Supp. 3d 430, 494 (S.D.N.Y. 2018) (critiquing damages analysis because it failed to account for the "difference between the real world and the but-for world").

For these reasons, the so-called "yardstick method" for calculating damages—in which "the plaintiff identif[ies] a sufficiently comparable market against which it can measure its quantum of damages"—is an accepted method of damages calculation *only* where an expert can show the comparator successfully leads the expert to identify the damages based on the "facts of the case." *Hyland v. HomeServices of Am., Inc.*, No. 3:05-CV-612-R, 2012 WL 12995647, at *8 (W.D. Ky. July 3, 2012). Put another way, the yardstick method can be employed only when the comparator is shown to be a stand in for the theoretical but-for world. For these reasons, as Plaintiffs' explained and this Court agreed, the yardstick method is not "the *only* reliable method[]" to calculate damages. Dkt. No. 247, at 8 (district court opinion) (emphasis in original). The proper damages methodology is the one "'tailored to the facts of the case'" to show the harm that flowed, not merely uplift some other business model. Dkt. No. 192, at 10 (Plaintiffs' *Daubert* opposition) (quoting *Eleven Line, Inc. v. N. Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 207 (5th Cir. 2000)).

Defendants' earlier briefing demonstrates the "gotcha" their demand that Dr. Stiegert use a real world comparator would set up. There, they insisted no economic studies could model the market at the Robards complex because it is unique. Dkt. No. 175, at 14-15. Thus, if a comparator were required, no damages could be proven because a comparator could not properly reveal the harms to Plaintiffs. This is to say nothing of the fact that Dr. Stiegert questions whether an appropriate comparator exists. Second Stiegert Report, Dkt. No. 180-2 ¶ 63.

Antitrust law has developed to avoid the absurd result that violations could exist without damages. The Supreme Court's decisions in "*Hanover Shoe*, *Illinois Brick*, and *McCready* make

plain that the antitrust laws create a system that, to the extent possible, permits recovery," even if damages are only "in rough proportion to the actual harm" because they are based on the hypothetical but-for world. *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 483 (7th Cir. 2002).

Tyson's suggestion that it or the courts can dictate how to model damages, and particularly require a real world comparator, is also inconsistent with the *Daubert* standard. Under Rule 702, "Deference to experts is particularly appropriate when expert testimony concerns soft sciences like economics. Because these disciplines require the use of professional judgment." *In re Air Cargo Shipping Services Antitrust Litigation*¸ No. 06-MD-1175 (JG)(VVP), 2014 WL 7882100, at *8 (E.D.N.Y 2014) (cleaned up). Particularly regarding economic modeling, the courts continue, experts "depend[] upon judgment and art," that neither judges nor lawyers are situated to second guess. *Falise v. Am. Tobacco Co.*, 258 F.Supp.2d 63, 67 (E.D.N.Y 2000). "Models are not the real world; rather, such models are a reasoned and educated attempt to describe reality" and thus admitting the results of the expert's earned judgment in how to construct them is warranted. *Id.* That there might have been alternative ways of quantifying damages is a "matter for cross examination," not exclusion. *In re Se. Milk Antitrust Litig.*, 2010 WL 8228839, at *5; *see also Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 794 (6th Cir. 2002).

Given this background, Tyson's insistence that the Court's ruling on Dr. Stiegert's damages calculations are inconsistent, Dkt. No. 253, at 4, 6, is false. The Court explained that Dr. Stiegert produced evidence "Tyson exercised monopsonist power in ways that adversely impacts or is likely to adversely impact competition." Dkt. No. 246, at 6.[3] The harmful acts this Court identified were: "Tyson acted on its monopsony power" and "kept base pay artificially low, used

[3] These citations are to the Court's summary judgment opinion, which it made clear was to be read in conjunction with its *Daubert* decision, but which Tyson fails to address. Dkt. No. 246, at 9 n.1.

control over the tournaments to manipulate grower pay,[4] used its condemnation policy to reduce grower pay,[5] and [manipulated] the days-out representations that Tyson allegedly made."[6] *Id.*

The Court then admitted damages calculations that corresponded to and compensated for each of those harmful acts. It allowed Dr. Stiegert's damages that adjusted Plaintiffs' base pay upwards, Dkt. No. 247, at 9; compensated for Tyson's ability to control and diminish Plaintiffs' ultimate compensation through the tournament payment system by providing Plaintiffs part of Tyson's gross-margin, *id.* at 11; "pa[id] growers for condemned birds" that Tyson used its anticompetitive power to deduct from Plaintiffs' pay at the growers' average weight, rather than the sick birds' actual weight, *id.*; and compensated Plaintiffs for the fact that Tyson represented the growers would have a smaller "number of days out," which would have increased their number of flocks and pay days, *id.* at 13. The only damages the Court excluded were those that compensated for Tyson profiting from using condemned meat "in its dog food product." *Id.* at 12. This makes sense because the Court did not find Plaintiffs established Tyson's failure to provide that compensation was an expression of Tyson's anticompetitive power. In other words, entirely consistent with the case law, the Court approved damages that it determined "isolate[d] the loss of value caused by the harmful acts" and excluded loses it determined were not connected with the misconduct. Federal Judicial Center, *supra*, at 432.

In sum, Tyson's premise that Plaintiffs must show another company in a competitive market has "raise[d] their broiler pay" in the exact manner reflected in Dr. Stiegert's damages

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[4] Tyson's tournament payment system determines growers' final pay by measuring the relative performance of a subset of growers—selected by Tyson—and use that to calculate rewards and demerits off of the base pay. *See.* Dkt. No. 246, at 2 (summary judgment decision).

[5] "Condemnation is the process of removing birds from processing that are deemed unfit for human consumption as determined by the USDA." Dkt. No. 247, at 11 (*Daubert* decision).

[6] "'Day's out' refers to the time between flocks" and growers are only paid for each flock they bring to the requested weight. Dkt. No. 247, at 6 n.2.

calculation, Dkt. No. 253, at 5, is wrong. Dr. Stiegert was assigned to determine how much Plaintiffs lost due to the specific anticompetitive practices Plaintiffs identified. That required Dr. Stiegert to determine how Plaintiffs would have been compensated in a world without those practices, but holding everything else constant. To do this, he reasonably constructed models and the Court properly admitted those models. Tyson's issues with Dr. Stiegert's analysis should be presented at trial via cross-examination, not through reconsideration, with this Court exercising its own judgment over that of the expert, resulting in exclusion.

i. Tyson's other objections to the damages calculations are without merit.

As part of making the argument above, Tyson inserts two other arguments, which were also available and addressed in the earlier briefing. For the avoidance of any doubt, Plaintiffs re-emphasize why Tyson's positions are incorrect here.

First, Tyson complains Dr. Stiegert is "not a poultry scientists" and therefore not "qualified to offer any opinion" on how much money Plaintiffs lost because Tyson deducted the weight of condemned birds from Plaintiffs' pay using the flock's average weight, rather than the bird's actual weight. Dkt. No. 253, at 6. However, as Plaintiffs explained in their original brief, Dkt. No. 129, at 28, an economist's extensive experience in identifying relevant data and then "apply[ing] methods of examination" to determine economic effects allows Dr. Stiegert to opine on this issue, even if the expert does not have experience with the particular industry at issue. *In re FCA US LLC Monostable Elec. Gearshift Litig.*, 382 F. Supp. 3d 687, 697 (E.D. Mich. 2019). As this Court recognized, Dr. Stiegert relied on a peer-reviewed study to calculate the amount of meat wrongfully charged against Plaintiffs. Dkt. No. 247, at 12. His economic expertise certainly allows him to determine that study is reliable and construct a damages model using that study. *See, e.g.*, *Maiz*, 253 F.3d at 665; *In the Matter of M&M Wireline & Offshore Servs., LLC, No.* 15-5338, 2017

WL 430063, at *6 (E.D. La. Jan. 31, 2017); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02 C 5893, 2016 WL 374132, at *2 (N.D. Ill. Feb. 1, 2016). Tyson's sole case in support of exclusion involved an economics expert offering a lay opinion on the type of music performed, not using peer-reviewed data to calculate economic information like Dr. Stiegert does. *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 994-95 & n.18, 19 (C.D. Cal. 2012). Further still, as this Court has already noted, Tyson's suggestion that Dr. Stiegert is unfamiliar with the agriculture and food industries is farfetched. He specializes in agricultural economics and his "primary research areas are agricultural and food markets." Dkt. No. 247, at 4. Tyson's notion that Plaintiffs could only prove up damages by locating an expert in economics and econometrics who also specializes in bird health confirms they take an improperly narrow view of Rule 702.

Second, Tyson argues Dr. Stiegert did not determine Tyson extended Plaintiffs' days-out as an "exercise of its monopsony status" and therefore these damages should be excluded. Dkt. No. 253, at 9. To the contrary, as Plaintiffs explained in their original opposition brief, "Dr. Stiegert established that Tyson shifts onto the growers 'nearly all the economic and financial risks related to feed and chick quality,' quantity, and timing (the last of which corresponds to 'days out')." Dkt. No. 192, at 15 (quoting First Stiegert Report, Dkt. 242-1 ¶ 61).[7] Tyson's basis for its statement—beyond repeating its disproven argument that a real world comparator was required—is unclear, but Dr. Stiegert determined Tyson used its power to decrease Plaintiffs' number of flocks by extending Plaintiffs' days out.

If Tyson means to suggest Dr. Stiegert's calculation should be excluded because he assumed how many days-out the jury would determine Tyson promised and failed to deliver, that too is incorrect. Dkt. No. 253, at 9. As Plaintiffs also explained, it is entirely appropriate for an

[7] Dr. Stiegert's full report was first filed in the record unredacted and under seal at Dkt. 180.

expert to use a placeholder figure where, as here, a known factual dispute exists between the parties and the expert needs to provide a methodological "'framework'" to award damages once that fact dispute is resolved. Dkt. No. 192, at 15 (quoting *Manpower, Inc. v. Insurance Co. of Pennsylvania,* 732 F.3d 796, 807-09 (7th Cir. 2013)).

* * *

The Court should not entertain the above arguments asking it to retread its *Daubert* ruling. However, should it do so, it is plain there are no clear errors warranting reconsideration. Tyson relies on made-up rules to impugn this Court's analysis. When the law is properly laid out, the Court's conclusions follow. They do not warrant reconsideration, and certainly there is no basis for certification where Tyson cannot support its position.

III. TYSON'S ATTACK ON DR. STIEGERT'S CONCLUSION THE ROBARDS COMPLEX IS A MONOPSONY REPEATS PRIOR CLAIMS, AND FAILS.

Tyson's other argument for reconsideration or certification is that Dr. Stiegert's conclusion the Robards complex possesses anticompetitive monopsony power fails the requirements of Rule 702 because it is solely "based on his review of Plaintiffs' deposition testimony." Dkt. No. 253, at 12; *id.* at 13 ("The 'facts and data' on which Dr. Stiegert relied for his opinion were 12 deposition transcripts from Plaintiffs" and that is insufficient.); *id.* at 16 (Dr. Stiegert "has no real 'method' to speak of" because he only employed "a haphazard review of Plaintiffs' deposition testimony."). This is a false characterization of Dr. Stiegert's work, as Plaintiffs fully briefed in their original opposition. Dkt. No. 192, at 16-19. Even Tyson concedes Dr. Stiegert actually did more, and Dr. Stiegert's analysis is yet more fulsome than Tyson eventually acknowledges. Thus, there is no clear error warranting reconsideration and certainly this (ill-fated) fact dispute is unworthy of certification. *See e.g. In re City of Memphis,* 293 F.3d at 351 (discretionary evidentiary rulings are not grounds for an interlocutory appeal because they do not present the "legal question of the type

envisioned by § 1292(b)"); *Bullock*, 2020 WL 5043140, at *1 ("§ 1292(b) is not appropriate for securing early resolution of disputes concerning whether the trial court properly applied the law to the facts.").

Indeed, after raising the argument that Dr. Stiegert relied only on Plaintiffs' testimony, Tyson concedes the Court already analyzed this claim and found against Tyson. The Court explained Dr. Stiegert did not rely "'only on Plaintiffs' deposition testimony'" but "'also research.'" Dkt. No. 252, at 15 (quoting Dkt. No. 246, at 6). Tyson complains that the Court did not detail the nature of the research it concluded Dr. Stiegert performed, *id.*, but that churlish argument is not a basis for reconsideration. *Colter*, 2018 WL 775366, at *2.

Were that not enough (and it is), Tyson is also forced to concede that even under its reading of Dr. Stiegert's report, he did not just rely on Plaintiffs' testimony to conclude the Robards complex is a monopsony, but also "identif[ied] whether any processing plants are within" the geographic market, concluding there are no relevant competitors. Dkt. No. 253, at 12. Tyson claims this irrelevant because Dr. Stiegert's analysis relied on nothing more than an internet search. *Id.* But, Tyson successfully argued otherwise regarding its own expert, with this Court explaining internet searches are weighty enough to justify admission. Dkt. No. 226, at 9-10.

Tyson is also wrong regarding the extent of the additional analysis Dr. Stiegert performed regarding the geographic market. Dr. Stiegert conducted the so-called "SSNIP test" recommended by the Department of Justice to determine the relevant geographic market for Plaintiffs' growing services. Stiegert Second Report, Dkt. 180-2, ¶¶ 17-18. This is precisely what Tyson suggests he should have done and would have been sufficient. Dkt. No. 253, at 18. Dr. Stiegert also drew from literature, including USDA reports, to confirm the scope of market. First Report, Dkt. 242-1, ¶¶ 28, 70; *see also* Stiegert Second Report, Dkt. 180-2, ¶ 17. As a result, he recognized there are

actually two distinct markets in this case, one where Tyson is the only purchaser of Plaintiffs' growing services (giving it monopsony power), and the other where both Tyson and Perdue purchase those services. Stiegert First Report, Dkt. 242-1, ¶¶ 72-73. In analyzing the second market, Dr. Stiegert drew on evidence regarding Perdue's production practices and hiring, including third-party testimony, to conclude Perdue was not a true competitor of Tyson's. *Id.*, ¶¶ 73-75.

Thus, contrary to Tyson's insistence, Dr. Stiegert did not "ignore" facts in Plaintiffs' depositions that suggested competition between Tyson and Perdue for grower services. Dkt. No. 253, at 17. Rather given the full panoply of evidence he reviewed, he concluded the nature of that competition did not undermine his conclusion that the Robards complex is an effective monopsony, acting as the only buyer for Plaintiffs' services because the other firm does not functionally compete with Tyson. Stiegert First Report, Dkt. 242-1, ¶¶ 65, 73-76; *see also* Stiegert Second Report, Dkt. 180-2, ¶¶ 31, 33.

Tyson also critiques Dr. Stiegert for not identifying what sort of competition normally exists between two firms, Dkt. No. 253, at 14-15, but Dr. Stiegert explained this was not necessary because he was relying on facts specific to the Perdue-Tyson relationship to conclude Perdue did not compete with Tyson. First Stiegert Report, Dkt. 242-1, ¶¶ 73-75; Stiegert Second Report, Dkt. 180-2, ¶ 30. In sum, even Tyson cannot maintain its pretense that Dr. Stiegert relied solely on Plaintiffs' testimony. When that additional analysis is unpacked, it is much more robust than Tyson suggests.

Were that not enough (and it is), Tyson wholly overlooks another basis for Dr. Stiegert's opinion that Tyson's Robards complex is a monopsony: that he "observed" that the Robards complex acts in ways that indicated it possesses and uses such anticompetitive power. *E.g.* First

Stiegert Report, Dkt. 242-1, ¶¶ 111-12. Specifically, drawing on records of Tyson's tournament payment system and the inputs and houses Tyson mandated growers use to participate in that system, Dr. Stiegert showed the Robards complex shifted risk onto growers without compensating them for assuming that risk. He explained this is indicative of Tyson possessing (and wielding) anticompetitive monopsony power. *See e.g. Id.* ¶¶ 18, 41-45, 48-58, 61-62, 84, 87, 94-108.

Were that still not enough, Tyson's entire approach of trying to identify other steps Dr. Stiegert could have taken and holes in the evidence on which he relied does not undermines the admissibility of his testimony. The Sixth Circuit emphasizes such critiques should be resolved through trial, not briefing. *See e.g. Lang*, 717 Fed. App'x. at 534. This is particularly true because courts should defer to economics experts. *In re Air Cargo Shipping Services Antitrust Litigation*¸ 2014 WL 7882100, at *8 (E.D.N.Y 2014).

Tyson harps on Dr. Stiegert's purported failure to meet *some* of the *non-exhaustive* considerations applicable to the admission of *scientific* testimony—such as replicability, *e.g.*, Dkt. No. 253, at 13—but the courts recognize those are not considerations applicable to economic opinions, which regularly create models specific to the case based on their educated judgments. Fed. R. Evid 702, Advisory Committee Notes (2000) (listing testimony on "'economic principles'" as a "'non-scientific subject[] [that] should be evaluated" for admissibility "by reference to the knowledge and experience of that particular field.'"); *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 566 n.25 (11th Cir. 1998) (replicability not the proper focus of *Daubert* inquiry for economic and statistical opinions); *Barbe v. Gov't Employees Ins. Co.*, 2014 WL 12601572, at *2 (E.D. Tex. June 30, 2014) (admitting economic expert testifying "based mainly on the observations, professional experience, and education of the expert witness"); *In re Air Cargo Shipping Services Antitrust Litigation*¸ 2014 WL 7882100, at *8. Where, as here, a "foremost

expert in the field of economics," and particularly this subset of economics "determine[s] th[e] data, although not perfect in its specificity, was sufficient to make certain reasonable conclusions … the Court has no place" to intervene. *Trollinger*, 2008 WL 305032, at *10 (E.D. Tenn. Jan. 31, 2008).

Dr. Stiegert relied on numerous methods and substantial evidence to determine Tyson possesses monopsony power. Tyson's cherry-picked, already disproven characterization of the record cannot establish any clear error or issue warranting interlocutory review.

IV. CONCLUSION

For the foregoing reasons, Tyson's motion should be denied.

RESPECTFULLY SUBMITTED this 14th day of December, 2020.

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CERTIFICATE OF SERVICE

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