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. McKinley
TYSON CHICKEN, INC., et al.	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE THE TESTIMONY OF MR. JASON ANDERSON

The central conclusion of Defendants' proffered expert, Mr. Jason Anderson, has no bearing on this case, and his remaining analysis relies on Google searches, a "flip through" of Plaintiffs' contracts, and a single call with a "good friend" of his. *E.g.*, Anderson Depo. 184:9-185:13, 199:22-200:3, 351:1-17 (deposition excerpts attached as Exhibit A). Federal Rule of Evidence 702 mandates experts "help the trier of fact" in resolving the matter, and provide analysis beyond what could be offered by a lay witness. Anderson's testimony fails both tests.

Specifically, Anderson concludes Plaintiffs' poultry growing contracts generate income higher than the Henderson County average. But, that is irrelevant to Plaintiffs' claims—that Defendants violated the Packers and Stockyards Act, particularly because Defendant Tyson Chicken ("Tyson") possesses anticompetitive power to reduce Plaintiffs' wages, fraudulently induced Plaintiffs to enter their contracts, and violated the contracts' terms and the implied

covenant of good faith and fair dealing.[1] Anderson's other conclusion, that it is generally "economically viable" to contract with Tyson, reflects no expertise at all. As he put it, his conclusion reflects his summary of internet sources he can no longer identify, his confirming the existence of certain terms in Plaintiffs' contracts, and his half-hour phone call with a friend. The documents and individuals can provide this information on their own, if they can be found. Anderson's "expert analysis" does not add to this case and the Court should exclude his testimony.

I. BACKROUND

Anderson testified he was assigned two tasks: (1) to examine Plaintiffs' tax returns to determine whether they were "making money," particularly as compared to others in the geographic area, and (2) to opine on "economic viability" of Tyson contracts generally, particularly whether Plaintiffs could have a "measure of comfort" their cash flow will continue. Anderson Depo. 167:8-168:15, 200:5-9. On the first issue, based upon his analysis of Plaintiffs' tax returns, Anderson states Plaintiffs' contracts yielded "generally strong positive cash flow" and "strong economic income." Anderson Report, p. 3. (Full report attached as Exhibit B.) Although, when asked, he was "not sure how to define [strong], quiet honestly" and eventually conceded that "perhaps, 'strong' you know shouldn't--shouldn't be in there." Anderson Depo. 313:16-25, 315:24-316:1. He also compares his summary of Plaintiffs' figures with the median income figure for Henderson County—pulled from a government website—and declares

[1] Plaintiffs alleged violations of 7 U.S.C. § 192(a), (b), and (g), of the Packers and Stockyards Act, which prohibit Defendants engaging in or using unfair practices or devices, unjustly discriminatory, or deceptive practices, undue or unreasonable preferences, prejudice, advantages, or disadvantages, and conspiring, acting in combine, agreeing, arranging or aiding and abetting to do the same.

Plaintiffs' income to be "substantially higher." Anderson Report, p. 4; Anderson Depo. 284:17-285:5.

On the second issue, Anderson states his "research of financing opportunities for ventures similar to Plaintiffs'" and his understanding of how Plaintiffs' contracts operate suggest Plaintiffs can expect their cash flow will continue. Anderson Report, p. 3-4. Yet the actual "research" this conclusion involved is undeserving of the name. Based solely on the results of a Google search, for instance, Anderson asserts that Tyson "very infrequently terminate[s] a contract with a grower during the contract term." *Id.* at 4; Anderson Depo. 351:1-14. Moreover, Anderson was unable to recount what he Googled, and could not "remember a specific site" he visited, "point to a specific document" he viewed, or identify any other "analysis or review" to support the claim. Anderson Depo. 351:18-23, 352:11-18. Anderson also observes that banks have a "strong appetite for lending" to poultry growers, suggesting they expect growers to be able to pay off their loans, Anderson Report, p. 3, but he explained this statement merely summarizes a thirty-minute conversation with a "good friend," who is also a banker. Anderson Depo. 184:18-185:13, 322:14-19, 327:5-19, 327:24-328:16. In addition, Anderson states Plaintiffs are "generally assure[d] an ongoing and predictable revenue stream," Anderson Report, p. 4; but he detailed this statement is wholly based on his observation that Plaintiffs' contracts contained fixed terms and disclosed their pricing mechanisms, Anderson Depo. 332:10-334:16, although he also acknowledged he could not testify Plaintiffs' contracts would go to term, *id.* at 201:4-7. The only other "research" he could point to that had any bearing relating to these latter two points was: (i) Anderson compared Plaintiffs' contracts terms to one's he believed he read about in a USDA report—but he could not name or produce the report, *id.* at 353:16-354:20; (ii) Anderson read Plaintiffs' testimony, wherein a grower explained he had paid off his loans—

although Anderson could not identify the Plaintiff, *id.* at 329:3-25, and (iii) Anderson noted Plaintiffs' contracts show Tyson had once adjusted Plaintiffs' base pay and provides Plaintiffs a fuel subsidy—although he did not claim that influenced his analysis, Anderson Report, p. 4-5.[2]

Thus, unsurprisingly, Anderson disclaimed his ability to speak to the Packers and Stockyards Act, tort, and contract claims Plaintiffs allege. He testified he did not evaluate, and has no opinion regarding how Tyson sets Plaintiffs' pay. *E.g.*, Anderson Depo. 255:17-256:7. In fact, he does not know "how [the] tournament [payment system] work[s] in any way," and did no analysis "to determine whether or not [the] contractual relationship between [Tyson] and [the] farmer is" the result of anticompetitive practices. *Id.* at 217:5-12, 278:10-20. He also explained he was offering no testimony about whether Plaintiffs are being paid "appropriately" in light of what they were promised. *Id.* at 258:6-19. Nor did he "at all evaluate" whether Plaintiffs' contracts were "fair," or "equitable," or "onerous," or whether Plaintiffs were "being paid what the contract said they should get paid." *Id.* 222:11-25, 402:19-24. According to Anderson, whether Tyson complied with the "responsibilities [it] has" to a grower was "not really" relevant to his work. *Id.* at 201:18-25.

Consistent with this, Anderson further admitted he is offering no opinion on whether Plaintiffs were damaged. *Id.* at 262:22-263:7. When asked whether he was saying that Plaintiffs' have not suffered financial harm of some sort he responded, "I don't think I'm saying that at all." *Id.* 263:2-3. As Anderson put it, his report solely concerns Plaintiffs' "cash flow." *Id.* at 263:3-5.

II. STANDARD OF REVIEW

Experts must "help the trier of fact [in] understand[ing] the evidence or [] determin[ing] a fact in issue," and their opinions must be grounded in reliable principles and methodology, which

[2] Anderson's report also states he reviewed Plaintiffs' settlement sheets, but at his deposition Anderson clarified these "weren't relevant" to his analysis. Anderson Depo. 224:8-10.

are reliably applied to the facts of the case, using their "specialized knowledge." Fed. R. Evid. 702. In other words, the testimony must be "relevant to the task at hand," and the product of expert "reasoning or methodology," non-experts could not perform. *Daubert v. Merrell Down Pharms., Inc.*, 509 U.S. 579, 593-94, 597 (1993). Thus, when analyzing the admissibility of expert testimony, courts consider the elements that a plaintiff must prove, and exclude testimony that does not "'fit'" the questions presented by the case. *Childress v. Kentucky Oaks Mall Co.*, 2007 WL 2772299, at *1 (W.D. Ky. Sep. 20, 2007); *see also Daubert*, 509 U.S. at 592 (expert testimony must have a "valid [] connection to the pertinent inquiry").

Experts are also deemed inadmissible when they merely present "lay matters which a jury is capable of understanding and deciding without the expert's help." *United States v. Castillo*, 924 F.2d 1227, 1232 (2d Cir. 1994). Especially given the aura of reliability that surrounds expert evidence, *see Daubert*, 509 U.S. at 595, testimony is properly excluded where the expert provides "virtually no methodology or guiding principles" for his conclusions, *United States v. Freeman*, 730 F.3d 590, 600 (6th Cir. 2013), or otherwise fails to use a process that "can be mastered only by specialists in the field," *United States v. White*, 492 F.3d 380, 401 (6th Cir. 2007); *see also United States v. Vela-Salinas*, 677 Fed. App'x 224, 229 (6th Cir. 2017) (unpublished) (where testimony "results from a process of reasoning familiar in everyday life," that is lay testimony, which must meet the requirements of Rule 701).

III. ARGUMENT

a. Anderson's Discussion of Plaintiffs' Income Does Not Speak to the Issues in the Case and Thus Cannot Help the Jury.

Anderson's main conclusion—that Plaintiffs' grower contracts generated net income above the Henderson County average—is wholly irrelevant to the questions presented in this case and thus should be excluded. Anderson Report, p. 3. That the contracts generated income,

even "strong" income as Anderson's report states, is not the "pertinent inquiry" for any of Plaintiffs' claims. As a result, the evidence does not and cannot assist the trier of fact and fails Rule 702. *Daubert*, 509 U.S. at 597.

Whether the contracts allowed Plaintiffs to meet or exceed the median income in Henderson County is irrelevant to whether Tyson violated the Packers and Stockyard Act ("PSA"). The primary inquiry for that claim is whether Tyson's conduct, particularly its manipulation of its "tournament"-payment system, is likely to harm competition. *See Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1232 (10th Cir. 2007) (explaining a core issue under the PSA is whether defendant's practices have caused or are likely to cause an anticompetitive effect, which, for poultry growers, can be shown through the defendant acting as a monopsony, allowing it to unilaterally depress wages).

Plaintiffs' income has no bearing on whether Tyson was manipulating its payment system to their detriment. Plaintiffs could have made a living (even a so-called "strong" living) and still be likely to receive less than they would have had Tyson behaved lawfully, allowing them to prove their PSA claim. Indeed, Anderson admits his report cannot address the PSA issues as he confirms he has never done antitrust work, he is "not at all" knowledgeable about the PSA "in a conversational way," and he is unable to recount "how [Tyson's] tournaments [payments] work in any way"; thus he proffers no opinion on Tyson's tournament-payment system, or whether Tyson fairly operated it. Anderson Depo. 166:5-167:5, 217:5-12, 255:17-256:7.

Furthermore, that Plaintiffs received a better paycheck than their average neighbor, has no bearing on whether Plaintiffs would have received higher pay in a competitive and lawful poultry market. As this Court held in denying the Motion to Dismiss, the contracts at issue here are for specific poultry growing services, they are not general labor contracts. *Morris v. Tyson*

Chicken, Inc., No. 4:15-cv-00077-JHM, 2015 WL 7188479, at *6 (W.D. Ky. Nov. 13, 2015). Yet Anderson uses the median income for Henderson County as his point of comparison, *see* Anderson Depo. 284:17-285:9, without any analysis comparing Plaintiffs' income to related industries in Henderson County—let alone looking at the other counties where Plaintiffs perform their work. *Id.* at 283:21-284:16, 294:22-295:20. Median income of the entire labor force in one of the multiple counties where Plaintiffs operate is a meaningless benchmark to determine whether Tyson's manipulation enables it to lower Plaintiffs' wages. *See, e.g.*, *Home Placement Serv., Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1205-06 (1st Cir. 1987) (explaining profit comparisons are only useful in the antitrust context when referencing "closely comparable" businesses in the "same industry" as plaintiffs).

Again, Anderson conceded as much. In his deposition, he explained that the comparison was only relevant to gauging whether the Robards-area population would find Tyson contracts "attractive." Anderson Depo. 168:12-169:3. But how attractive Tyson contracts are, given the other options available in Henderson County, does not make it more or less likely that Tyson payments to chicken growers were lowered because Tyson possessed anticompetitive or otherwise unlawful power in the market for chicken growing services. Anderson agreed. He stated he has not "done any analysis to determine whether or not a contractual relationship between an integrator and a farmer is one of a monopsony," *id.* at 278:10-14, nor does his income analysis speak to whether growers "lost revenue as a result of the practices of Tyson," *id.* at 263:19-24.

Anderson's income "analysis" and comparison also cannot speak to Plaintiffs' fraud, contract, or fair dealing claims. Plaintiffs allege Tyson fraudulently induced them to enter into contracts, and then acted unreasonably, breaching its obligations, along with the implied

covenant of good faith and fair dealing. First Amended Compl., Dkt. No. 18 ¶¶ 172-97. Yet, Anderson was not tasked with evaluating, and offered no opinion on whether Tyson lived up to its pre-contractual representations to Plaintiffs. *See* Anderson Report, p. 1-4. Thus, his conclusions are not pertinent to the fraud inquiry. *See Id.* Likewise, he cannot speak to the contract claims because he did not examine whether Tyson violated its obligations. Indeed he did not examine Tyson's course of conduct at all. The notion that Plaintiffs received "strong" or "substantial" income from their Tyson contract is irrelevant to whether Plaintiffs received the amount due or whether Tyson behaved properly. *See, e.g.*, *Bazarian Int'l Fin. Assocs., LLC v. Desarrollos Aerohotelco, C.A.*, 315 F. Supp. 3d 101, 118-19 (D.D.C. 2018) (explaining that an expert opinion on the reasonableness of the fee amount to which plaintiff claimed entitlement, is irrelevant to whether the plaintiff satisfied its obligations, so as to be entitled to the fee). Plaintiffs are not arguing whether, in the abstract, their grower income was adequate, but rather that Tyson's violations caused them to lose income they were promised and entitled. First Amended Compl. ¶¶ 172-77.

Once again, Anderson confirmed the irrelevance of his conclusions. When asked to characterize the scope of his work, he clarified that his task was to determine whether "the contracts were a good thing for a grower" as determined by the median income in Henderson County and Plaintiffs' potential to build personal wealth. Anderson Depo. 221:25-222:10. He did "not at all evaluat[e]" whether the contracts were "fair," or "equitable," or "onerous," or "illegal." *Id.* at 222:11-24. Nor did he examine whether Plaintiffs were "being paid what the contract said they should get paid." *Id.* at 402:19-24. For these reasons he is "not speaking to damages," because he cannot. *Id.* 263:7. Such an analysis does not "fit" the issues presented in the case and therefore cannot assist the trier of fact. *See Daubert*, 509 U.S. at 592-93.

Further still, in presenting Plaintiffs' income and comparing it to that of others in Henderson County, Anderson admits he did not employ his *own* recommended methodology, thus his report fails a separate component of Rule 702. Fed. R. Ev. 702(c)-(d) (expert testimony must be based on "reliable principles" "reliably applied"). In presenting Plaintiffs' "income," Anderson took into account the value of their property, which he calculated using depreciation as a proxy for residual value. Anderson Depo. 382:12-383:2. He admitted that this methodology would *not* be something commonly used to make an appraisal; he could not say that it is generally accepted method; and he agreed it is not a peer-reviewed approach. *Id.* at 383:8-384:4, 386:19-387:4, 388:10-14. At the same time, he acknowledged, he did not consider the full "residual value" of Plaintiffs' assets or those of the people in Henderson County, to whom he was comparing Plaintiffs, which he agreed would be necessary to fulfill his own (uncommon) methodology. *Id.* at 179:12-181:19. In other words, even if Anderson's analysis was relevant (it is not) it should still be excluded.

Indeed, excluding Anderson's testimony is necessary as its *only* function is to unfairly prejudice the jury. The Supreme Court has instructed, in "assessing a proffer of expert [] testimony under Rule 702 [courts] should also be mindful of other applicable rules," including Rule 403's prohibition. *See Daubert*, 509 U.S. at 595. Both the *Daubert* Court, and the Sixth Circuit have warned that improper expert testimony is likely to have an unduly prejudicial effect. *See Daubert*, 509 U.S. at 595 (directing courts to exercise greater control over potentially misleading expert testimony); *United States v. Anderson*, 584 F.2d 849, 851-52 (6th Cir. 1978). Here, poorly constructed, testimony that the Tyson contracts were "a good thing" because Plaintiffs earned more than their neighbors, *see* Anderson Depo. 221:23-24, would only present the jury with a lawyer's argument that Plaintiffs' income makes them undeserving of recovery.

See Silbergleit v. First Interstate Bank of Fargo, N.A., 37 F.3d 394, 397 (8th Cir. 1994) (excluding irrelevant evidence regarding a plaintiff's personal wealth because it was "designed to impassion and prejudice the jury" against plaintiff). The Court should not allow Defendants to present such a narrative through the guise of expert opinion, particularly when that opinion has no bearing on the issues and its author concedes it fails his own standards.

b. Anderson's Opinion Reflects Lay Analysis Not Expert Testimony.

Anderson's second opinion, that Tyson's contracts are stable and desirable, does not rely on expert analysis at all, but rather reflects lay testimony improperly presented with the patina of expertise.[3] In particular, several observations underlying the opinion—that Tyson contracts are set for a meaningful term, disclose a formula for determining grower pay, and one Plaintiff paid off his loans, Anderson Depo. 329:3-25, 332:10-334:16—are no different than those that can be made by a lay witness using "'reasoning familiar in everyday life.'" *Vela-Salinas*, 677 Fed. App'x at 229 (quoting *White*, 492 F.3d at 401). They merely repeat the words in the contract and testimony. As the Eleventh Circuit put it, where a proffered expert simply seeks to "characterize[e] [] documentary evidence," the testimony is not warranted, "the trier of fact is entirely capable of determining whether or not to draw [] conclusions without any technical assistance." *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 565 (11th Cir. 1998); *Ancho v. Pentek Corp.*, 157 F.3d 512, 519 (7th Cir. 1998) (expert cannot testify on what is "obvious to a layperson.").

Moreover, Anderson largely bases this conclusion on a Google search and "Google search[es] . . . which would ordinarily be a basis for little more than lay speculation, do not

[3] Defendants proffer Anderson as an expert, rather than a lay witness, because his testimony is based on hearsay rather than personal observation and thus he cannot be called as a fact witness under Rule 701.

provide an appropriate basis for expert opinion." *Haynes ex rel. Haynes v. National R.R. Passenger Corp.*, 319 Fed. App'x. 541, 543 (9th Cir. 2009) (unpublished). Indeed, another judge in this district has explained "informal internet searches" are not a basis for expert opinion. *Miller v. Coty, Inc*., No. 3:14-cv-00443-CRS, 2018 WL 1440608, at *5 (W.D. Ky. Mar. 22, 2018); *see also Spangler Candy Co. v. Tootsie Roll Industries, LLC*, 372 F. Supp. 3d 588, 595 (N.D. Oh. 2019) (excluding as unreliable expert opinion based on unverified and "questionable sources" discovered through internet searches).

Excluding Anderson's testimony is especially appropriate as his search was so informal he could not even identify his internet sources. For instance, when asked how he determined that Tyson "very infrequently terminate[s] a contract," Anderson Report, p. 4, Anderson explained that he "just Googled it," but could not cite a particular website or online source. Anderson Depo 349:2-21, 351:13-352:2. Likewise, as part of his "Overview of Broiler Contracts," he states, "the industry sees grower contract durations ranging from flock to flock up to 15 years," and compares Plaintiffs' contracts favorably, Anderson Report, p. 4; but, while he testified that he *believed* this statement came from a USDA document his internet searches uncovered, he could not remember its title, or any other identifying information. *Id.* 353:15-354:20.

Anderson's sole additional statement supporting the desirability of Plaintiffs' contracts, that lenders look favorably upon them, *see* Anderson Report, p. 3, reflects no greater analysis. Anderson testified the basis for his statements on the lending environment for poultry growers was a thirty-minute phone call with his "good friend," a banker in the area, who expressed a "strong appetite for lending to prospective growers." *Id.*; Anderson Depo. 184:20-185:9, 327:5-328:16. Nonetheless, Anderson admitted that during this exchange, he failed to ascertain how many poultry lending arrangements this banker had entered into, nor did he engage in any

analysis to determine whether the lending institutions Plaintiffs' relied on held similar views. *See* Anderson Depo. 324:14-326:14 328:8-11. Far from demonstrating a "process of reasoning which can be mastered only by specialists in the field," *White*, 492 F.3d at 401, Anderson showed no process of reasoning whatsoever. Because the jury would be "just as competent to consider and weigh the [banker's] evidence as is an expert witness and just as well qualified to draw the necessary conclusions therefrom," it is "improper" to admit Anderson's testimony. *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 973 (D.C. Cir. 2016).

IV. CONCLUSION

Rule 702 and *Daubert* are clear: expert testimony which not only fails to assist the jury understand the pertinent issues, but also is grounded in lay techniques that reflect no expertise is inadmissible. The irrelevance of Mr. Anderson's income analysis to the claims at bar, paired with the basic, non-expert approaches used to reach his conclusions do not satisfy Rule 702. The Court should exclude his testimony.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On this the 27th day of March, 2020, I hereby certify that a copy of the foregoing has been sent via the District Court electronic filing system and by email to:

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