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# [***Universal Surveillance Corp. v. Checkpoint Sys.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H8B-4YD1-F04F-10P1-00000-00&context=)

United States District Court for the Northern District of Ohio, Eastern Division

September 30, 2015, Decided

Case No. 5:11-CV-1755

**Reporter**

2015 U.S. Dist. LEXIS 147106 \*; 2015 WL 6082122

UNIVERSAL SURVEILLANCE CORP. v. CHECKPOINT SYSTEMS, INC.,

**Prior History:** [*Universal Surveillance Corp. v. Checkpoint Sys., 2012 U.S. Dist. LEXIS 15017 (N.D. Ohio, Feb. 6, 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54X1-T191-F04F-11B3-00000-00&context=)

**Core Terms**

sales, towers, damages, retailers, customers, products, margin, bundling, tags, admissibility, reliable, prices, calculations, deactivators, relevant market, certification, opines, label, competitors, contends, unreliable, discount, argues, expert testimony, anticompetitive, ***antitrust***, contracts, barriers, anticompetitive conduct, food and drug

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**Judges:** David R. Cohen, Special Master.

**Opinion by:** David R. Cohen

**Opinion**

**REPORT REGARDING DEFENDANT'S MOTION TO PRECLUDE TESTIMONY OF DR. RAMSEY SHEHADEH**

***REDACTED***

Plaintiff Universal Surveillance Corporation d/b/a Universal Surveillance Systems ("USS") brings this action against defendant Checkpoint Systems, Inc., asserting Checkpoint engaged in unlawful, anticompetitive conduct in the sale of Electronic Article Surveillance systems.[[1]](#footnote-0)1 The parties have submitted expert reports, and each side has moved to exclude expert testimony.

This Report addresses Checkpoint's motion to preclude USS's economics expert, Ramsey Shehadeh, from testifying as to certain opinions (docket no. 317). The Special Master concludes nearly all of Shehadeh's opinions are admissible, but certain opinions related to damages are not.[[2]](#footnote-1)2 Accordingly,**[\*4]** for the reasons and to the extent stated in Sections I-III of this Report, the Special Master **recommends the Court grant in part and deny in part Checkpoint's motion to exclude Shehadeh's opinions**.

Further, for the reasons stated in Section IV of this Report, the Special Master **recommends the Court deny Checkpoint's motion to strike the Canfield declaration** (docket no. 490).

Finally, the deadlines related to filing of objections, if any, are set out in Section V of this Report.

**I. Background**.

USS and Checkpoint are competitors in the business of selling Electronic Article Surveillance Systems ("EAS Systems"). EAS Systems, which are used to prevent theft in retail stores, typically include the following equipment: (1) security labels and tags that are attached to merchandise; (2) deactivators that neutralize the label or tag after the merchandise is paid for; and (3) security towers that signal if a still-active label or tag leaves the store. Sellers of EAS Systems also typically provide**[\*5]** support services, such as fixing security towers that malfunction. EAS systems work using one of two different technologies: Radio-Frequency ("RF") or Acousto-Magnetic ("AM").

According to USS, there are two separate relevant markets in the United States in which to assess the anticompetitive effects of Checkpoint's alleged conduct: "(1) EAS systems sold to food and drug retail stores ('Food and Drug Market' or 'F&D Market') and (2) EAS systems sold to drug and pharmacy retail stores ('Drug and Pharmacy Market' or 'D&P Market')." Second amended complaint at ¶24. (As discussed below, Shehadeh opines that the Drug and Pharmacy Market is actually a submarket within the larger Food and Drug Market.) USS contends Checkpoint engaged in illegal, anticompetitive conduct in both of these relevant markets in two different ways. First, USS claims Checkpoint entered into long-term, exclusive contracts with retailers in the relevant markets, and these contracts worked to prohibit the retailers from purchasing EAS products from Checkpoint's competitors. Second, USS claims Checkpoint eliminated efficient competition in the relevant markets by "bundling" its EAS products — that is, selling security**[\*6]** towers, tags, deactivators, and other EAS equipment as a group, with one or more of these products provided at a sharp discount (or even for free), in exchange for a customer's commitment to buy other EAS equipment.

USS asked Shehadeh to evaluate: (a) whether Checkpoint is a monopolist, (b) whether Checkpoint's conduct worked to maintain prices for EAS products at a monopoly level, and, (c) if so, the amount of economic damages Checkpoint owes to USS. Shehadeh submitted an expert report detailing four principal conclusions, quoted below:

1. The relevant ***antitrust*** markets for evaluating Checkpoint's conduct consist of (i) a market for RF-EAS equipment, (ii) a market for RF-EAS labels, and (iii) a market for RF-EAS tags (jointly referred to as RF-EAS systems in this report) to food and drug retailers in the United States. These retailers carry a high volume of health and beauty products and over-the-counter drugs and choose EAS based on factors that are identifiable by EAS retailers.

2. Checkpoint was a monopolist, maintaining 99 percent of sales in the relevant markets from at least 2005 through 2011, and has engaged in anticompetitive conduct including anticompetitive bundling and exclusive**[\*7]** contracting to exclude competition from the market. These bundles satisfy the economic standard for identifying anticompetitive conduct under [*Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 910 (9th Cir. 2008)]*.

3. But for this anticompetitive conduct, prices for RF-EAS systems to food and drug retailers between 2004 and 2012 would have been about 8 percent lower than they actually were. This conduct cost consumers in excess of $20 million between 2004 and 2012.

4. Absent anticompetitive conduct by Checkpoint, USS could have penetrated the relevant markets prior to 2012 because of its low cost to supply RF[-EAS] systems. Based on this, I calculate damages to USS to be at least $27 million.

Shehadeh Report at ¶2. Checkpoint moves to exclude each one of these opinions.

**II. Legal Standard**.

Pursuant to the Supreme Court's decision in [*Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDR0-003B-R3R6-00000-00&context=), trial courts must serve a "gatekeeping" role with respect to expert testimony to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." [*Id. at 589*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDR0-003B-R3R6-00000-00&context=). This gatekeeping function applies to scientific expert testimony as well as other expert testimony involving technical or specialized knowledge. [*Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W30-2X60-004C-000J-00000-00&context=). The requirement that expert testimony be reliable is codified in [*Federal Rule of Evidence 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=), which provides as follows:

**[\*8]**A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

[*Fed. R. Evid. 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=).

A trial court "has 'considerable leeway in deciding . . . how to go about determining whether particular expert testimony is reliable,'" [*United States v. Sanders, 59 Fed. Appx. 765, 767 (6th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:484D-0G70-0038-X4JF-00000-00&context=) (quoting [*Kumho Tire, 526 U.S. at 152*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W30-2X60-004C-000J-00000-00&context=)); and the test for determining reliability is "a flexible one," [*Daubert, 509 U.S. at 594*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDR0-003B-R3R6-00000-00&context=). The Supreme Court has articulated several factors that should guide the trial court's decision on the admissibility of proposed expert testimony, including: (1) whether the theory or technique can be and has been tested; (2) whether the technique has been subject to peer review and publication; (3) the technique's known or potential rate of error; (4) the existence of standards controlling the technique's operation; and (5) the level of the theory's or technique's**[\*9]** acceptance within the relevant discipline. [*Daubert, 509 U.S. at 593-94*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDR0-003B-R3R6-00000-00&context=). The factors identified in *Daubert*, however, are not definitive or exhaustive, and the trial judge enjoys broad latitude to use other factors to evaluate reliability. [*Kumho Tire, 526 U.S. at 153*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W30-2X60-004C-000J-00000-00&context=). Moreover, the factors identified in *Daubert* are not dispositive in every case and "should be applied only 'where they are reasonable measures of the reliability of expert testimony.'" [*In re Scrap Metal* ***Antitrust*** *Litig., 527 F.3d 517, 529 (6th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=) (quoting [*Gross v. Commissioner of Internal Revenue, 272 F.3d 333, 339 (6th Cir. 2001))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44G9-S6P0-0038-X1WV-00000-00&context=).

A trial court's scrutiny of expert testimony balances "a liberal admissibility standard for relevant evidence on the one hand [against] the need to exclude misleading 'junk science' on the other." [*Best v. Lowe's Home Ctrs., Inc., 563 F.3d 171, 176-77 (6th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W34-6020-TXFX-8371-00000-00&context=). Accordingly, a court should exclude an expert's testimony where it amounts to "mere guess or speculation," but challenges to the accuracy of an expert's conclusions or factual basis generally "bear on the weight of the evidence rather than on its admissibility." [*United States v. L.E. Cooke Co., 991 F.2d 336, 342 (6th Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GW60-003B-P01J-00000-00&context=); *see* [*Tamraz v. Lincoln Electric Co., 620 F.3d 665, 671 (6th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:50YV-PYX1-652R-4004-00000-00&context=) ("no matter how good experts' credentials may be, they are not permitted to speculate") (internal quotation marks omitted). When an expert provides a reliable foundation for reaching his or her conclusions, the weight afforded to that testimony is a question for the jury, not the trial court. [*In re Scrap Metal, 527 F.3d at 529-530*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=); *see* [*Burgett v. Troy-Bilt, LLC, 579 F. App'x 372, 376-77 (6th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D24-4NS1-F04K-P08G-00000-00&context=) ("A court should not use**[\*10]** its gatekeeping function to impinge on the role of the jury or opposing counsel."). In other words, the trial court's gatekeeping role "is not intended to serve as a replacement for the adversary system." [*Fed. R. Evid. 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=), advisory committee notes, 2000 amendments. Rather, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof . . . are the traditional and appropriate means of attacking shaky but admissible evidence." [*Daubert, 509 U.S., at 596*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDR0-003B-R3R6-00000-00&context=). Ultimately, "rejection of expert testimony is the exception, rather than the rule," and courts will "generally permit" erroneous or weak expert testimony as long as it has "some support" in the record. [*In re Scrap Metal, 527 F.3d at 530*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=) (citations omitted).

**III. Analysis**.

Checkpoint's motion is a comprehensive attack that essentially seeks to exclude *all* testimony from Shehadeh in this case. Listed by category, Checkpoint seeks to exclude Shehadeh's opinions regarding: (A) the relevant product market; (B) Checkpoint's alleged anticompetitive conduct; (C) Checkpoint's purported market/monopoly power and whether there was harm to competition; (D) the barriers to entry in the relevant markets; (E) Checkpoint's market share; and (F) damages. The Special Master examines each**[\*11]** of these categories of testimony below.

**A. Dr. Shehadeh's Opinions About the Relevant Product Market**.

*Recommendation: deny the motion to bar these opinions*.

Shehadeh's definition of the relevant product market is consistent with the allegations in USS's complaint. Specifically, Shehadeh opines that "[t]he relevant market is limited to grocery stores and drug stores, or Food and Drug ("F&D") retailers including the subset of these that are Drug and Pharmacy ("D&P") chains." Shehadeh Report ¶12. This market definition is premised primarily on the fact that F&D retailers sell a particular mix of products that is different from other retailers — that is, F&D retailers sell a relatively large volume of small, high-value items at high risk of theft, such as infant formula, over-the-counter-drugs, and high-end health, cosmetic, and beauty aids. Shehadeh opines that certain differences between AM-EAS systems and RF-EAS systems make RF so comparatively well-suited to the needs of F&D retailers that other theft-reduction systems, including AM-EAS systems, are not economically viable alternatives. *Id.* ¶15-20, 23-24, 60-63. Shehadeh also states that Checkpoint has been able to sustain prices in the relevant**[\*12]** product market "more than 10 percent above those that would have prevailed without the exclusionary conduct" alleged by USS, which supports the conclusion that the F&D market is distinct. *Id.* ¶12.

Checkpoint urges a much broader definition of the relevant product market than does Shehadeh — Checkpoint's expert opines that the relevant product market is "at least as broad as *all* EAS systems," including AM-EAS, and likely includes other, non-EAS anti-theft products as well, such as security cameras and closed-circuit television. Harris Report at ¶16. Accordingly, Checkpoint advances four reasons why Shehadeh's opinions about the relevant product market are unreliable and should be excluded: (1) AM-EAS and RF-EAS systems are reasonably interchangeable; (2) Shehadeh misapplied the relevant market test; (3) Shehadeh did not apply a reliable methodology to classify retailers in the Food and Drug market; and (4) Shehadeh's definition was driven by the result he desired, as opposed to an economic justification. Each of Checkpoint's criticisms is examined below.

**1. Checkpoint's Argument that AM and RF Electronic Article Surveillance Systems Are Interchangeable**.

The essence of Shehadeh's product market opinion is that "AM systems are not an economic alternative**[\*13]** for drugstores or grocery stores." Shehadeh Report at 9. Checkpoint contends this is simply false — AM-EAS and RF-EAS systems are in fact largely interchangeable, and Shehadeh arrived at a contrary conclusion because he considered the "wrong information." Motion at 3. Checkpoint argues Shehadeh focused improperly on minor differences between AM-EAS and RF-EAS systems, rather than the extent to which they are functionally identical and interchangeable, and relied improperly on the opinion of USS's industry expert, Michael Knievel, who asserts RF-EAS is "superior" to AM-EAS in filling the needs of F&D retailers (an opinion Checkpoint has also moved to exclude).[[3]](#footnote-2)3 Checkpoint adds Shehadeh's opinion is unreliable because he does not offer any analysis to support his conclusion that AM-EAS and RF-EAS systems cannot "perform the same function" for food and drug retailers — that is, reduce merchandise theft, also known as product "shrinkage." Further, Checkpoint insists Shehadeh's product market opinion is unreliable because it "ignores market reality" and overlooks "inconvenient evidence" showing that (i) some F&D retailers use AM-EAS, and (ii) AM-EAS remains a competitive threat in the F&D**[\*14]** Market.[[4]](#footnote-3)4

The "essential" test for ascertaining the product component of a relevant market in an ***antitrust*** case is the "reasonable interchangeability" standard. [*Kentucky Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc., 588 F.3d 908, 917 (6th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X93-RK40-YB0V-J00G-00000-00&context=). "[R]easonable interchangeability may be gauged by (1) the product uses, i.e., whether the substitute products or services can perform the same function, and/or (2) consumer response (cross-elasticity); that is, consumer sensitivity to price levels at which they elect**[\*15]** substitutes for the defendant's product or service." [*Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917, 933 (6th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JBJ-9VR0-0038-X4XC-00000-00&context=) (citations and emphasis omitted).

Importantly, even if two products are functionally fungible, consumers may still view them as *not* reasonably interchangeable - that is, consumers do not treat them as substitutes in the marketplace. Thus, for example, even though the drug Coumadin and its "chemically identical" generic equivalent, warfarin sodium, perform exactly the same function, economic analysis reveals they are in different product markets. [*Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 497 (2nd Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DK6-R430-0038-X3T5-00000-00&context=). *See also* [*U.S. v. Aluminum Co. of America, 377 U.S. 271, 276, 84 S. Ct. 1283, 12 L. Ed. 2d 314 (1964)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GVG0-003B-S4B3-00000-00&context=) (finding insulated aluminum conductors and insulated copper conductors for "overhead distribution" were in separate product markets, even though "each does the [same] job equally well"); [*U.S. v. Gillette Co., 828 F.Supp. 78, 81-83 (D.D.C. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-RCD0-001T-614K-00000-00&context=) (finding low-cost fountain pens and more-expensive fountain pens are in different product markets, even though they are functionally identical); *see also* [*E.I. du Pont de Nemours, 351 U.S. at 404*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-J8H0-003B-S4P3-00000-00&context=) (the product market "is composed of products that have reasonable interchangeability for the purposes for which they are produced - *price, use and qualities considered"*) (emphasis added).

Further, even if *some* potential customers believe two similar products are interchangeable, the two products may still be in different product markets. *See,****[\*16]*** *e.g.,* [*Geneva Pharmaceuticals, 386 F.3d at 497*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DK6-R430-0038-X3T5-00000-00&context=) (even though the generic version of Coumadin is " therapeutically equivalent" and some patients do switch, "[c]ustomers that have remained with Coumadin clearly do not perceive generics to be a reasonable substitute"). The ultimate question is whether the two products are economic substitutes.

Here, Shehadeh opines that AM-EAS technology is not a reasonable economic substitute for F&D retailers — not because AM-EAS systems cannot perform the same function of reducing shrinkage, but because RF technology is so comparatively well-suited to F&D retailers in particular, in terms of both features and price, that AM technology does not effectively act as a competitive constraint. *See* Shehadeh Report ¶¶ 15-16, 20, 22 (discussing features and cost differences between AM and RF systems for food and drug customers and evidence that customers find the distinctions significant). There is substantial evidence upon which Shehadeh relies to support this conclusion. For example: (1) Rite-Aid's head of loss-prevention stated he would never consider switching from RF-EAS to AM-EAS, given drugstore needs and the different capacities of the two systems; (2) Sensormatic's corporate representative testified**[\*17]** his company had virtually no realistic hope of selling its AM-EAS products to CVS, Rite-Aid, or Walgreens; and (3) USS expert Knievel described an array of product differences between AM and RF technologies that F&D retailers find meaningful (such as energy efficiency and the availability of customizable, flat RF-tags that can more easily be affixed to small, expensive products like cosmetics).

It is true that Checkpoint points to other, substantial evidence suggesting at least some consumers believe AM and RF technologies *are* economic substitutes. For example: (1) USS's own corporate representative testified that the RF-tags USS sells to Rite-Aid are "dual technology" (both RF and AM), in case Rite-Aid decides to switch; and (2) Kroger and Walmart, which are arguably in the F&D Market (as opposed to the mass merchant market), use AM-EAS. That this evidence exists, however, does not make Shehadeh's product market opinions inadmissible; it simply means Checkpoint has ammunition to cross-examine Shehadeh at trial for failing to accurately account for the "market reality" of all relevant evidence in the case.

In sum, Shehadeh's product market opinion — that "AM systems are not an economic**[\*18]** alternative for drugstores or grocery stores" and do not act as a competitive constraint on sales of RF systems — has sufficient factual support to satisfy the threshold standard of admissibility under [*Federal Rule of Evidence 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=). "Where an expert's testimony amounts to 'mere guess or speculation,' the court should exclude his testimony, but where the opinion has a reasonable factual basis, it should not be excluded. Rather, it is up to opposing counsel to inquire into the expert's factual basis." [*U.S. v. L.E. Cooke Co., Inc., 991 F.2d 336, 342*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GW60-003B-P01J-00000-00&context=) (quoting *United States v. 0.*[*161 Acres of Land, 837 F.2d 1036, 1040 (11th Cir. 1988))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2PG0-001B-K4JC-00000-00&context=). Here, there is a reasonable factual basis for Shehadeh's product market opinion. Accordingly, Checkpoint's motion to exclude this opinion should be denied.

**2. Checkpoint's Argument that Shehadeh Has Not Shown Checkpoint Could Charge Higher Prices to F&D Customers**.

As further support for his opinion that the relevant market is limited to RF-EAS products, Shehadeh opines that Checkpoint charges its F&D customers more than its non-F&D customers for RF-EAS products. Shehadeh opines Checkpoint's higher prices in the F&D market show not only that it has monopoly power, but that the relevant product market is limited to RF-EAS systems.

In response, Checkpoint contends Shehadeh's pricing analysis**[\*19]** is faulty. Checkpoint asserts Shehadeh's analysis suffers from two deficiencies: (1) the examination of Checkpoint's prices for F&D and non-F&D retailers did not compare like products; and (2) Shehadeh's margin analysis relies on data entry errors, is not statistically significant, and cannot be extrapolated. These criticisms are both directed at Shehadeh's methodology.

Shehadeh's analysis regarding price margins begins with data obtained from Checkpoint; the data are summarized in figures 2, 3, 8, and 9 in his Report, as well as revised figure 9. *See* Shehadeh Report ¶¶18-20. Figures 2 and 3 purport to compare (a) Checkpoint's overall margin for sales of RF-labels to F&D customers with (b) its overall margin for RF-label sales to non-F&D customers. Figure 3 shows Checkpoint's margins for RF labels among F&D retailers were 11.16% higher over the relevant time period than its margins from other customers. *Id.* ¶23. Similarly, figures 8 and 9 compare (a) Checkpoint's margins on sales of RF-EAS systems to the F&D market with (b) Checkpoint's margins on its sales of RF-EAS systems to other customers. Figure 9 shows Checkpoint's margins for RF-EAS systems to F&D retailers were 4.48% higher**[\*20]** over the relevant time period than its margins from other customers.

Checkpoint's first argument is that Shehadeh's analysis "d[id] not compare the prices of like products charged in and outside of F&D." Motion at 7 (docket no. 317). Instead, the figures "compare the *overallm*argins on products sold to F&D with the *overallm*argins on products sold to non-F&D, even though the two groups purchased different product mixes." *Id.* (emphasis added). Checkpoint explains its criticism as follows: if (a) tags are high-margin items and towers are low-margin items, and (b) Checkpoint's sales to F&D retailers include a high ratio of tags to towers, while (c) Checkpoint's sales to non-F&D retailers include a low ratio of tags to towers, then (d) Checkpoint's *overall* margin in the F&D market will be higher, even though its individual margins on tags and towers are the same for both markets. Checkpoint concludes Shehadeh's opinions related to figures 2, 3, 8, & 9 are all inadmissible because "the reliability of any analysis depends upon an unbiased selection of sample data." *Id.* (citing [*U.S. Information Systems, Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3, AFL CIO, 313 F. Supp 2d 213, 233 (S.D.N.Y. 2004))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BSV-B3K0-0038-Y02G-00000-00&context=).

Checkpoint's argument is unpersuasive. As an initial matter, *U.S. Information Systems* does not stand for the proposition**[\*21]** that a comparison of pricing margins between different product mixes is fatal to the reliability of an expert economist's opinion. Rather, the cited passage simply suggests an expert's sample selection should be scrutinized for bias. [*Id. at 233-234*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BSV-B3K0-0038-Y02G-00000-00&context=). Checkpoint has not identified any bias in Shehadeh's selection of the data he used that might yield unreliable results; indeed, Checkpoint's explanation is theoretical, as it does not contend its overall sales to the F&D market *actually do* include a higher proportion of high-margin items. Further, other courts have permitted this type of product margin evidence even though the comparisons involved different product mixes. *See, e.g.,* [*Micro Chem., Inc. v. Lextron, Inc., 161 F. Supp. 2d 1187, 1198 (D. Colo. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:441R-FW30-0038-Y1PF-00000-00&context=), *reversed on other grounds*, [*103 F.3d 1538, (Fed. Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-KJC0-003N-42WR-00000-00&context=); [*F.T.C. v. Staples, Inc., 970 F. Supp. 1066, 1085-86 (D.D.C. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S45-NCT0-00B1-F4HK-00000-00&context=).

Moreover, Shehadeh's deposition testimony makes clear he considered and rejected Checkpoint's approach because of the bundling discounts provided by Checkpoint. Specifically, Shehadeh explained why he believed comparison of Checkpoint's *aggregate* product margins inside and outside the F&D market was the only fair comparison to make, yielding a reasonable benchmark. When the selection of certain data in an expert's analysis is challenged, but the expert provides a rationale supported by the**[\*22]** record, the issue of whether the expert's conclusions are accurate or defensible goes to the weight of the evidence, not its admissibility. [*In re Scrap Metal, 527 F.3d at 530-31*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=).

Checkpoint next argues that, even if differences in product mix were corrected, Shehadeh's opinions should still be excluded. Regarding figures 2 & 3, Checkpoint asserts: (a) Shehadeh improperly extrapolates the margin-comparison for *RF labels* to support his market analysis for *all RF-EAS products*; and (b) some of the label prices Shehadeh used were elevated because of a Checkpoint promotional program. These arguments both go to the weight of Shehadeh's opinion, not its admissibility. Checkpoint is correct that discrimination in RF *label* pricing does not definitively establish a separate F&D market across other RF-EAS components, as well. But evidence of RF label price discrimination is still sufficiently probative of the issue to be admissible. *See* [*Spirit Airlines, 431 F.3d at 955-59 (6th Cir 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JBJ-9VR0-0038-X4XC-00000-00&context=) (Moore, J. concurring) (finding evidence of price discrimination in one market component to be probative of the ability to price-discriminate across a market for an entire package of products or services); US DOJ & FTC, Horizontal Merger Guidelines ¶4.1.1 (2010) (the hypothetical monopolist test is**[\*23]** satisfied where a firm is able to raise prices "for at least one product in the market").

Similarly, Checkpoint challenges Shehadeh's failure to reduce the RF-label margins he calculated to take into account "comp tag" (promotional) pricing, which Checkpoint often employed for F&D retailers. But Checkpoint did not use promotional pricing only in the F&D market; there is no reason to believe label margin reductions would not apply more-or-less equally to both the F&D and non-F&D markets (and, again, Checkpoint does not contend its margin reductions *were* unequal across markets — just that they might have been). More important, Shehadeh's decision to simply use the price data he received from Checkpoint, and not to "correct" that price data on one or both sides of his market-margin comparison, does not reflect any methodological error or make his opinion inadmissible.[[5]](#footnote-4)5 *See* [*In re Scrap Metal, 527 F.3d at 531*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=) (finding expert's reasons for selecting certain data a matter for cross-examination, where expert offered a foundation for how he analyzed the data and there was no suggestion he "merely pulled the numbers comprising his calculations out of thin air"); [*In re Southeastern Milk* ***Antitrust*** *Litig., 739 F.3d 262, 281 (6th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B6H-9NS1-F04K-P13H-00000-00&context=) (citations omitted) ("Including some facts while omitting others**[\*24]** goes to the accuracy of the conclusions, not to the reliability of the testimony."). The margin-analysis principles Shehadeh used are reliable and the data he used were Checkpoint's own; accordingly, his price analysis opinions are admissible.

Turning to figures 8 & 9, Checkpoint asserts: (a) the results are skewed because of a data entry error; and (b) regardless of whether Shehadeh uses figure 9 or corrected figure 9 (which addresses the alleged data entry error), the margin differences are not statistically significant.

The first assertion deserves careful analysis. Checkpoint insists Shehadeh's original figure 9 fails to account for incorrect cost entries existing in Checkpoint's own transactional database. Specifically, Checkpoint's data showed its cost for CAT5 cable that it sold to Lowe's — a non-F&D retailer — was $[TEXT REDACTED BY THE COURT] instead of $[TEXT REDACTED BY THE COURT]. As a result: (1) there was a huge negative-margin calculation for numerous transactions in the non-F&D market; (2) this made Checkpoint's overall non-F&D margin appear much lower than it really was; and, (3) accordingly, this made the difference between Checkpoint's F&D margin and non-F&D margin appear much higher than it really was. As Checkpoint notes, when Shehadeh accounted for the allegedly erroneous cost entries (in his revised figure 9), the difference in overall**[\*26]** margins obtained by Checkpoint fell from 4.48% to 1.38%.

USS points out the data entry error at issue was not Shehadeh's, it was Checkpoint's, so it bears little on the reliability of Shehadeh's methodology. USS also observes that challenges to the accuracy of data underlying a reliable method go to the weight of the evidence and do not impact its admissibility. *See* [*Quiet Tech. DC-8, Inc., v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1344-45 (11th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48BM-W8H0-0038-X0KS-00000-00&context=). Indeed, at least for now, Shehadeh is unwilling to concede the $[TEXT REDACTED BY THE COURT] data entries in question are, in fact, errors, or at least that these data entries should be excluded. *See Daubert* hearing tr. at 51 ("to just say, ah, I found one [erroneous] data point, [but] I'm not going to look at the other data points [to see if there are other errors or if other data works to correct the error], I'm [just] going to throw this [erroneous] one out, is not a valid procedure from my perspective").

Checkpoint is correct that an expert's opinion must be based on sufficient facts or data. See [*Fed. R. Evid. 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=). "[E]ven where an expert's methodology is reliable, if the analysis is not based upon relevant and reliable data, the expert's opinion will be inadmissible." [*Johnson Elec. N. Am. Inc. v. Mabuchi Motor Am. Corp., 103 F. Supp. 2d 268, 283 (S.D.N.Y. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:40ND-KN40-0038-Y196-00000-00&context=). Here, there is a dispute regarding the reliability of Checkpoint's own**[\*27]** data, and the parties will adduce evidence at trial whether the $[TEXT REDACTED BY THE COURT] cost entries are correct. In light of the Sixth Circuit's instruction that the accuracy of data underlying a reliable methodology normally goes to the weight of the opinion and not its admissibility, *see* [*In re Scrap Metal, 527 F.3d at 530*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=), Shehadeh's opinion should not simply be excluded. If the jury concludes Checkpoint is correct and the $[TEXT REDACTED BY THE COURT] cost entries are errors, then the jury will follow Checkpoint's logic and reject Shehadeh's conclusion that the margin difference is 4.48%. Especially given that Checkpoint provided the transactional data at issue in the first place, the proper course is to let the jury decide whether Shehadeh's opinion based on that data is correct, not to exclude Shehadeh's opinion wholesale.[[6]](#footnote-5)6

Checkpoint also assails the statistical significance**[\*28]** of the difference in price margins calculated by Shehadeh, but does not provide a *mathematical* basis for its criticism. Checkpoint notes the margin differences in Shehadeh's original and revised figure 9 (being 4.48% and 1.38%, respectively) are both "less than Shehadeh's claim of 10%" and "less than the 5% difference that is used as a baseline for the SSNIP test from the [Department of Justice Horizontal] Merger Guidelines." Motion at 9 (docket no. 317). The Small but Significant Nontransitory Increase in Price test, or "SSNIP" test, measures whether a monopolist could profit by raising a product's price by a small amount (typically five percent) or whether the increase would instead result in a substantial number of customers purchasing an alternative product. [*In re Southeastern Milk Litig., 739 F.3d 262, 277-78 (6th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B6H-9NS1-F04K-P13H-00000-00&context=). The test has been recognized as a valid diagnostic technique in defining the relevant market in ***antitrust*** cases. *Id.*

USS responds that, although Shehadeh opines the market he defines would satisfy the hypothetical monopolist test, "Shehadeh never purports to offer a SSNIP analysis" and he is not required to do so. Response at 12 (docket no. 354); *see* [*Olin Corp. v. F.T.C., 986 F.2d 1295, 1299 (9th Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HKS0-003B-P1D0-00000-00&context=) (noting the SSNIP test is "not binding on the courts"); [*In re Se. Milk* ***Antitrust*** *Litig., 739 F.3d 262, 278 (6th Cir.)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B6H-9NS1-F04K-P13H-00000-00&context=), *cert. denied sub****[\*29]*** *nom.* *Dean Foods Co. v. Food Lion, LLC, 135 S. Ct. 676, 190 L. Ed. 2d 389 (2014)* (although the SSNIP test is "informative for courts in analyzing some ***antitrust*** violation claims," it applies especially to claims involving mergers, which is not the instant case). Rather, Shehadeh utilized a different, still-reliable statistical method to determine the relevant product market — that is, "a straightforward comparison of profit margins to show that food and drug customers comprise an economically distinct market." Response at 7 (docket no. 354). The question, then, is whether the margin difference Shehadeh calculated is *internally* statistically significant, not whether this margin difference is more than the 5% SSNIP test mete.

USS is correct that the test Shehadeh used is an approved method to define a relevant market in an ***antitrust*** case. *See, e.g.,* [*Moecker v. Honeywell Int'l, Inc., 2001 U.S. Dist. LEXIS 12075 at \*11-17 (M.D. Fla. Mar. 8, 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43SV-NND0-0038-Y3M6-00000-00&context=) (admitting an expert opinion comparing the defendant's gross profit margins for two of its customer groups, as a means of defining the relevant market). Further, Shehadeh states explicitly in his report that his 4.48% calculation in original figure 9 carries an internal "1 percent level of significance," as do his calculations in revised figure 9 for the 2004-10 period. *See Daubert* hearing tr. at 45 (explaining**[\*30]** he measured internal statistical significance using a "a difference in means test"). The only support Checkpoint has for its assertion that Shehadeh's figures are "not statistically significant" is that his bottom line margin differences are less than 5%, which is used in the SSNIP test. But this is a non sequitur; Shehadeh did not use the SSNIP test.[[7]](#footnote-6)7,[[8]](#footnote-7)8 And in any event, Checkpoint's attacks on statistical significance generally do not address admissibility. *See* [*In re High-Tech Employee* ***Antitrust*** *Litig., 2014 U.S. Dist. LEXIS 47181, 2014 WL 1351040 at \*15 (N. D. Cal. April 4, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BX3-1F31-F04C-T18F-00000-00&context=) (finding that whether a variable is statistically significant goes to the weight and not the admissibility of an expert's testimony); [*Cook v. Rockwell Int'l Corp., 580 F. Supp. 2d 1071, 1102 (D. Colo. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MJB-W4M0-TVSX-P35R-00000-00&context=) (finding that an alleged lack of statistically significant results goes to the sufficiency of proof and not the threshold question of admissibility).

In reply, Checkpoint does not dispute that Shehadeh may assess the relevant product market using a method other than the SSNIP test. But Checkpoint contends the "unestablished" and "idiosyncratic" profit-margin comparison Shehadeh used is not a reliable economic test to define the product market, because it has not been "accepted and validated." Reply at 6-7 (docket no. 387); [*Kentucky Speedway, 588 F.3d at 918*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X93-RK40-YB0V-J00G-00000-00&context=) (rejecting expert testimony based on the expert's "own version" of the SSNIP test, because it "has not been tested; has not been subject to peer review and publication; there are no standards controlling it; and there is no showing that it enjoys general acceptance within the scientific community"). In addition, Checkpoint argues that an average margin comparison,**[\*33]** like the one Shehadeh computed, suffers from other reliability problems; for example, it does not control for other major factors that affect margins, such as whether customers received the same product at different prices because their contracts were negotiated at different times under different economic conditions. Checkpoint also contends "Shehadeh may not reliably conclude that the statistically insignificant 1.38% margin difference in his Revised Figure 9, even if it is expressed as a roughly 3% relative price difference, is due to anything other than chance." Reply at 10 (docket no. 387). Likewise, Checkpoint asserts: "on a year-to-year basis, individual years [reflected in Shehadeh's statistics] with negative margins or individual years that are not statistically significant present the same problem: if Checkpoint could target [customers for price increases] in advance, how could it lack the ability to target in those years?" *Id.*

While Checkpoint's reply does reveal numerous reasons why Shehadeh's profit margin analysis may be vulnerable to attack, Checkpoint does not cite a case holding that a straightforward statistical profit margin comparison like the one Shehadeh performed**[\*34]** is inherently "unreliable" for purposes of determining a relevant product market in an ***antitrust*** case (either as a matter of law or economic principle). To the contrary, [*Moecke*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43SV-NND0-0038-Y3M6-00000-00&context=)*r* holds that such a methodology may be used to determine a relevant market.

In *In re Scrap Metal*, the district court allowed the ***antitrust*** plaintiff's expert to testify even though the defendant articulated "well-supported" and "substantial" attacks on the expert's underlying data, as well as his assumptions. [*In re Scrap Metal, 527 F.3d at 529-530*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=). Despite these infirmities, the district court concluded the expert's opinion was admissible because he had provided "reasoned explanations for the assumptions that he made" and "viable arguments to support his data set choices." [*Id. at 532*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=). The Sixth Circuit agreed with the district court's conclusion, noting "[t]he task for the district court in deciding whether an expert's opinion is reliable is not to determine whether it is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to . . . unsupported speculation." [*In re Scrap Metal, 527 F.3d at 529-530*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=).

A similar conclusion is warranted here. Shehadeh did not simply pull the numbers comprising his calculations out of "thin air;" his opinion is based on real data provided**[\*35]** by Checkpoint. Checkpoint correctly notes that "significant errors" in an expert's application may go to admissibility, as opposed to merely the weight of the expert's testimony; and to be sure, Checkpoint sets forth some fair and pointed criticisms of Shehadeh's data choices, the assumptions underlying his opinions, and the conclusions he draws from his calculations. Still, Shehadeh has presented viable explanations for the assumptions and data choices he made in conducting his profit margin comparison analysis. Accordingly, Shehadeh's product market opinion meets the flexible standard of admissibility. Whether his opinion will ultimately convince a finder-of-fact is not presented by Checkpoint's *Daubert* motion.

Finally, in a single footnote, Checkpoint argues Shehadeh should at least be precluded from testifying about a "drug and pharmacy" submarket within the larger food and drug market, because he never performed "any test" to demonstrate the existence of this submarket. Motion at 6 n.3 (docket no. 317). As USS points out, however, there is no requirement that an expert perform any specific study or economic cross-elasticity test in order to demonstrate a submarket. It is true that**[\*36]** an expert must provide *some* "basis from which to conclude that a submarket" exists, but the absence of a formal study or test "affects the weight of [the expert's] opinion as to the submarket . . . more than it affects its reliability under [*Rule 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=)." [*Worldwide Basketball & Sports Tours, Inc. v. NCAA, 273 F. Supp. 2d 933, 944 (S.D. Ohio 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4969-MNJ0-0038-Y19D-00000-00&context=), *reversed on other grounds*, [*388 F.3d 955 (6th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DT5-XBK0-0038-X07X-00000-00&context=); *see* [*Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H870-003B-S01T-00000-00&context=) (within a product market, "well-defined submarkets may exist which, in themselves, constitute product markets for ***antitrust*** purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors"); [*Kentucky Speedway, 588 F.3d at 918*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X93-RK40-YB0V-J00G-00000-00&context=) ("Once the contours of the 'broad market' are defined, practical indicia are then employed to determine whether 'well-defined submarkets' exists."). Because Shehadeh clearly recites in his report the practical indicia upon which he relied to determine there exists a D&P submarket, Checkpoint's argument that this opinion should be excluded is not persuasive.

**3. Checkpoint's Argument that Shehadeh did not Reliably Classify Retailers**.

**4. Checkpoint's [\*37]  Argument That Shehadeh's Market Analysis Definition Was Driven by the Result He Desired**.

Checkpoint makes two more brief arguments to exclude Shehadeh's market opinions. First, Checkpoint argues that all of Shehadeh's market opinions must be excluded for the independent reason that he never explains the methodology he used to separate Checkpoint's customers into the categories of "F&D" and "non-F&D," making his margin comparisons "arbitrary and speculative." Second, Checkpoint argues Shehadeh's motivation for including grocery stores in the relevant market was not driven by any real economic justification, but by USS's need to show higher profit margins in the relevant market. Neither of these arguments is persuasive to show that Shehadeh's market opinions are inadmissible.

Shehadeh adequately explains in his report that he considered Food and Drug retailers together in his analysis because they have similar loss prevention needs, and — more important — the two types of retailers are treated as a group by the industry itself. *See* Shehadeh Report at ¶12, n.28. Further, Shehadeh notes his market definition is parallel to USS's industry expert, W. Michael Knievel. USS contends Knievel's**[\*38]** methodology also mirrors industry practice, in which retailers are routinely categorized into "verticals," including a vertical for drugstores and a vertical for grocery stores. An "expert is free to give his opinion relying upon the types of data an expert would normally use in forming an opinion in his area of expertise." [*Mannino v. Int'l Mfg. Co., 650 F.2d 846, 851 (6th Cir. 1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1HM0-0039-W22G-00000-00&context=).

Like Checkpoint's other attacks on Shehadeh's market opinions, these last two criticisms are appropriately reserved for cross-examination at trial. Checkpoint is simply wrong that Shehadeh does not explain why he included certain retailers in the F&D category and excluded others. *See, e.g.*, Shehadeh Report ¶13 at 8 (explaining he did not include WalMart, Target, and KMart in the F&D category because they are more appropriately included in the "mass merchant" vertical, since they "have a different mix of high-shrink items than F&D retailers and different store configurations"); *id.* at 10 n.45 (explaining that Kroger's retail format is "more similar to a mass merchandiser like Wal-Mart," which explains why it is an exception to the general rule that grocery stores prefer RF-EAS).

Accordingly, the Court should also deny Checkpoint's motion to preclude Shehadeh from testifying as**[\*39]** to his product-submarket opinions.

**B. Shehadeh's "Anticompetitive-Conduct" Opinions**.

*Recommendation: deny the motion to bar these opinions*.

Shehadeh opines that Checkpoint engaged in anticompetitive conduct in the relevant markets through the use of (a) bundled discounts and (b) exclusive contracts. Checkpoint moves to exclude his opinions as to both types of conduct.

**1. Opinions on Bundling**.

Shehadeh evaluated whether Checkpoint's bundling of products sold to Walgreens, CVS, Rite Aid, and Albertson's were anticompetitive under the economic test set out in *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 910 (9th Cir. 2008)*. Shehadeh Report ¶¶ 54-57, fig. 7. The *PeaceHealth* test applies when a bundle contains both competitive and non-competitive products; a bundle is anticompetitive when, "after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant sold the competitive product or products below its average variable cost of producing them." *PeaceHealth, 515 F.3d at 910*; *see* [*Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 273-74 (6th Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FKM-78K1-F04K-P0F2-00000-00&context=) (adopting the *PeaceHealth* test). Applying this test, Shehadeh found the discounts from list prices for products for which Checkpoint does not face significant competition (including towers, deactivators, and services) are so significant**[\*40]** they would result in below-cost prices if allocated to the products for which Checkpoint does face competition (labels and tags).

Checkpoint contends Shehadeh's bundling opinion using the *PeaceHealth* test is inadmissible for two reasons: the test does not apply here as a matter of law; and Shehadeh did not apply it reliably.

First, Checkpoint argues bundled discounts are only anticompetitive when no other significant rival, or group of rivals together, can readily offer the bundle at issue. *See* [*Invacare Corp. v. Respironics, Inc., 2006 U.S. Dist. LEXIS 77312, 2006 WL 3022968 at \*12 (N.D. Ohio Oct. 23, 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4M6C-27G0-TVW7-73CN-00000-00&context=) (recognizing that bundling can be anticompetitive only where the defendant reduces prices for a combined bundle of goods that neither the plaintiff nor any other competitor in the industry can produce). Checkpoint argues that, because Shehadeh opines in the damages portion of his report that USS had the ability to offer all of the elements of the bundles (*i.e.*, was the low-cost supplier of each element of the bundles), the *PeaceHealth* test does not apply as a matter of law. Checkpoint also asserts the evidence shows other competitors in the industry *could* collaborate to offer the same product bundles as Checkpoint.

In response, USS contends the damages portion of Shehadeh's opinion (where he opines**[\*41]** as to USS's abilities in a "but-for" world) "says nothing about the actual . . . ability of USS" to sell EAS equipment and service on a national scale. Response at 16 (docket no. 354). Rather, Shehadeh "makes it clear" that "USS and other smaller suppliers could not offer towers, services, or deactivators at sufficient scale to meet the needs of large, national food and drug retailers," and that such an opinion is supported by the record. *Id* at 16-17. USS also disputes it or other RF-EAS competitors were able to offer the same bundles as Checkpoint. In other words, Shehadeh does not opine, in the damages opinion of his report, that USS *was* the low-cost supplier for each element of the RF-EAS bundle that Checkpoint sold; rather, he opines USS *would have been* the low-cost supplier if Checkpoint had not engaged in anticompetitive activity.

Shehadeh's opinion that neither USS nor Checkpoint's other rivals had the ability to offer products at sufficient scale to meet the needs of large, national food and drug retailers has "some support" in the record. *See* Shehadeh Report ¶¶ 52-57; *see also* exhs. 13, 102, 165-66. Indeed, as discussed below, it has become apparent that even USS could not offer at least**[\*42]** two elements of the bundle (towers and deactivators). Shehadeh's assertion that USS *could have been* the low-cost provider of all of the products contained in Checkpoint's bundle, *if* Checkpoint had not engaged in all of its anti-competitive conduct, does not undermine his other opinion that USS could not actually offer the same bundle in the "real world." Accordingly, Shehadeh's *PeaceHealth* opinion is not inadmissible on the ground that it is based wholly on "unsupported speculation." [*In re Scrap Metal, 527 F.3d at 530*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=). The strength of Shehadeh's conclusions regarding whether USS or other competitors could offer the same bundles as could Checkpoint is a jury question.

Checkpoint also contends Shehadeh applied *PeaceHealth* unreliably because: (1) he included Checkpoint's agreements with Walgreens in his bundling analysis, even though he has not shown Walgreens was required to purchase labels to trigger discounts (and Checkpoint states its agreements with Walgreens are not bundles); and (2) he did not use a "reliable method" to determine unbundled prices — specifically, he estimated unbundled list prices customers would have paid in the absence of Checkpoint's bundling using "the maximum list price in each year" and the**[\*43]** highest volume discount level shown in Checkpoint's price list. Shehadeh Report ¶¶55-57. Checkpoint argues the price to be measured in a bundling analysis is the difference between the price a customer "would actually have paid a la carte and the discounted price contingent on a bundled purchase," and there is no basis in fact to believe that any customer — especially one as big as Rite-Aid, CVS, or Walgreens — would have paid the maximum list or catalog prices Shehadeh uses. Reply at 17-18 (docket no. 387); post-*Daubert* hearing brief at 6-7 (docket no. 491.

The Special Master, however, does not find Shehadeh applied the *PeaceHealth* test "unreliably." First, USS has shown there is "some support" in the record to show Checkpoint's contracts with Walgreens are bundles. Accordingly, even if a jury concludes Shehadeh's inclusion of Walgreens in his bundling analysis is wrong, his opinion including Checkpoint's contracts with Walgreens is at least admissible. A challenge to whether an expert should have included or excluded certain data from a study goes to the weight of the expert's opinion and not its admissibility. [*In re Scrap Metal, 527 F.3d at 530*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=) (citing [*Quiet Tech. DC-8, Inc. v. Hurel—Dubois UK Ltd., 326 F.3d 1333, 1333-45 (11th Cir. 2003))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48BM-W8H0-0038-X0KS-00000-00&context=). Second, Shehadeh used actual**[\*44]** Checkpoint data (i.e., list and catalog prices) to estimate unbundled prices, and the Special Master cannot conclude his methods for estimating unbundled prices are inherently unreasonable or "unreliable" as a matter of law.[[9]](#footnote-8)9 Ultimately, Checkpoint identifies only disagreements with the prices Shehadeh used, not the method he used to analyze those prices. The sole case cited by Checkpoint, [*American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc., 135 F. Supp.2d 1031 (N.D. Cal. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42NX-WR90-0038-Y1VF-00000-00&context=), did not involve a *PeaceHealth* analysis and does not hold that methods like Shehadeh's for determining unbundled prices in this context are unsupported or unreliable. Again, if Checkpoint can show Shehadeh's estimates are flawed, it will have the opportunity to do so on cross-examination. *See* [*In re Scrap Metal, 527 F.3d at 530*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=) (citing [*McLean v. 988011 Ontario, Ltd., 224 F.3d 797, 801 (6th Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4124-05B0-0038-X3XX-00000-00&context=) ("However, mere weaknesses in the factual basis of an expert witness' opinion bear on the weight of the evidence rather than on its admissibility"); *see also* [*Robinson v. Suffolk County Police Dept., 544 F. App'x 29, 32 (2nd Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59TV-VDN1-F04K-J0TW-00000-00&context=) ("Expert testimony should be excluded where it is speculative or conjectural, but arguments that the expert's assumptions are unfounded go to the weight, not the admissibility, of the testimony.") (citations omitted).

In sum, the Special Master finds Shehadeh's opinions regarding the anticompetitive nature of Checkpoint's bundling practices are admissible.

**2. Opinions Regarding Exclusive Dealing**.

Shehadeh analyzed Checkpoint's contracts with a number of EAS retailers and concluded Checkpoint's contracts with Albertsons, CVS, Rite-Aid, Ingles Supermarkets, and Brooks Pharmacy contained express exclusivity provisions. He further concluded Checkpoint's contract with Walgreens was "effectively exclusive" due to bundling discount terms, and he found Checkpoint's contracts with other food and drug retailers (Vons, Schmuck's, H-E-B, Winn Dixie, and Brookshire Grocery Company) contained service terms that effectively deterred retailers from dealing with other suppliers. Shehadeh Report ¶¶43-49. Shehadeh determines in his**[\*47]** report that the purpose and effect of Checkpoint's contracts was to foreclose competition from rivals across a significant majority of the Food and Drug market.

Checkpoint argues Shehadeh's opinion that Checkpoint engaged in exclusive dealing is unreliable and should be excluded because: (1) he ignores "inconvenient evidence" that CVS, Walgreens, Albertsons, and Ingles could all still have made purchases from other vendors, notwithstanding the exclusivity provisions in their contracts, because the contracts were terminable; (2) he never analyzes whether Checkpoint's exclusive contracts are "anticompetitive;" and (3) his opinion that service terms in Checkpoint's contracts "deterred retailers from purchasing labels and tags from other EAS suppliers" is mere speculation, because he has not cited any evidence that contractual service provisions actually deterred any retailer. Motion at 16-17 (docket no. 317).

In response, USS cites to evidence in the record (including the agreements themselves, competitor testimony, and internal Checkpoint documents) supporting Shehadeh's conclusion that Checkpoint had exclusive contracts with retailers and those contracts effectively foreclosed retailers**[\*48]** from purchasing EAS products from other vendors. *See* response at 20-23 (docket no. 354). Further, Shehadeh has not simply "ignored" the fact that, since their contracts were terminable, Checkpoint's largest customers could have made purchases from other vendors notwithstanding the exclusivity provisions; rather, Shehadeh explains the termination penalties were so onerous that the only realistic option was exclusive dealing. The Special Master easily agrees with USS that, like Shehadeh's opinion regarding the parameters of the relevant market, whether Shehadeh's opinion adequately accounts for "inconvenient evidence" in the record is a matter for cross-examination at trial rather than a basis to exclude.

The Special Master also does not find Shehadeh failed to analyze whether Checkpoint's exclusive contracts were anticompetitive. An expert must evaluate whether an alleged restraint has "anticompetitive effect" in the relevant market and cannot assume such anticompetitive effect based only on the existence of the restraint itself or because the plaintiff itself sustained harm. [*Craftsmen Limousine, Inc. v. Ford Motor Co., 2005 U.S. Dist. LEXIS 34987, 2005 WL 3263288 at \*7 (W.D. Mo. Dec. 1, 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HW3-6700-TVVR-839R-00000-00&context=). But Shehadeh does analyze the anticompetitive effect of Checkpoint's exclusive contracts on the broader relevant**[\*49]** markets. He opines in his report that Checkpoint was able to use exclusive contracts and contract terms to preclude the purchase of RF-EAS systems or components from third-party suppliers during the terms of the exclusive contracts, and this allowed Checkpoint to sustain monopoly power and prices in the market and harm competition generally. Moreover, he analyzes *how* Checkpoint's contracts allegedly achieved this harm to competition, such as: (1) by conditioning a retailer's receipt of free RF-EAS equipment on the purchase of so many tags that the retailer's entire tag needs were fulfilled — thereby precluding tag purchases from USS or any other supplier; and (2) including early termination penalties that prevented competitors from establishing any relationship with the retailer. *See* Shehadeh Report, ¶¶ 31-36, 41-53, 60-63. Shehadeh's opinion on Checkpoint's exclusive contracts may not be persuasive to a jury and may favor certain facts over others, but it is not inadmissible on the ground that "Shehadeh never analyzes whether Checkpoint's purportedly exclusive contracts are anticompetitive." Motion at 17 (docket no. 317).

The Special Master also does not find Shehadeh's opinion regarding**[\*50]** Checkpoint's contractual service provisions is "based on pure speculation." Shehadeh expressly states in his report that, in order "[t]o investigate whether or not [the service contract] terms in fact led to exclusivity, [he] undertook to identify situations when customers purchased from another supplier," and he identified only one retailer (Brookshire Grocery Company) that made minimal purchases from a competitor while it had a service agreement with Checkpoint. Shehadeh Report ¶45 at 26-27, n.109. Equally important, Shehadeh cites evidence tending to show Checkpoint, itself, purposefully used its service contracts to implicitly threaten retailers not to use competitive labels. *Id.* n.113. From this, he concluded Checkpoint's service contracts were anticompetitive. Thus, Shehadeh had "some" factual basis to support his opinion; he did not merely "speculate." Accordingly, the Special Master finds Shehadeh's opinion to be admissible even if his justification for it is "weak," as Checkpoint contends.

Checkpoint makes two final arguments addressing Shehadeh's opinions on Checkpoint's exclusive contracts and foreclosure of competition. The Court should reject both arguments. First, Checkpoint**[\*51]** contends Shehadeh should be precluded from testifying that Checkpoint competitors were foreclosed from making sales of hard tags because "no Checkpoint contract actually forbade IPPD [hard tag] purchases from competitors." Motion at 18 (docket no. 317). USS disputes this position and points to evidence in the record indicating Checkpoint had exclusive contracts that included the sorts of hard tags sold by Checkpoint's Alpha division. In the alternative, USS argues the agreements effectively precluded customers from purchasing hard tags because Checkpoint's oversupply of labels under its contracts had the effect of limiting the ability and incentive of the retailer to purchase hard tags. The Special Master cannot conclude there is no reliable basis for Shehadeh to testify that Checkpoint's exclusive contracts preluded customers from purchasing hard tags.

Last, Checkpoint asserts that, at a minimum, Shehadeh should only be allowed to testify as to the fourteen retailers he specifically identifies in his report as having anticompetitive agreements with Checkpoint, and he should be precluded from testifying that Checkpoint's conduct was anticompetitive with respect to any of Checkpoint's**[\*52]** other 172 customers. *Id.* at 19. Checkpoint contends Shehadeh has "no basis to opine that Checkpoint's conduct had any additional anticompetitive effects beyond the analysis he discloses in his report," and his testimony as to any of Checkpoint's 172 other customers would be purely "*ipse dixit." See* motion at 19 (docket no. 317); reply at 12 (docket no. 387). However, USS makes the common-sense observation that the foreclosure of the major F&D retailers that Shehadeh discusses in his report "has repercussions beyond lost opportunities to sell to the directly foreclosed customers." Response at 25 (docket 354). And the Special Master has already found that Shehadeh may testify about Checkpoint's other customers to support a "validation" theory. *See* Report at 11-12 (docket no. 337) (quoting Shehadeh deposition testimony that "Rite-Aid would be recognized as a sophisticated customer, and . . . their decision to purchase from USS would give comfort to other customers that they had gone through a . . . testing process with Rite-Aid that would provide validation for other customers;" and having no "access to the largest customers worked to prevent USS from achieving the scale of operations, experience,**[\*53]** and reputation necessary to sell to any of the other . . . potential F&D retailers"). The Special Master recommends the Court should apply the same ruling here — that is, there is evidence upon which Shehadeh may reliably base an opinion that: (1) Checkpoint engaged in anticompetitive conduct with "11 large F&D customers: Rite-Aid, CVS, Brooks Pharmacy, Albertsons, Ingles Supermarkets, Vons, Brookshire Grocery, Schnuck's, Winn Dixie, H-E-B, and Walgreens;" and (2) "th[os]e 11 large F&D retailers represented so large a segment of the entire F&D market that, absent the opportunity to make sales to those 11, USS was effectively foreclosed from making sales to any of the other 147 F&D retailers, either." Report at 11 (docket no. 337).

In sum, for all of the reasons discussed above and in the Special Master's prior Report and Recommendation, the Court should deny Checkpoint's motion to preclude Shehadeh from testifying as to his "anti-competitive conduct opinions" regarding exclusive contracts and bundling.

**C. Shehadeh's Opinions About Market/Monopoly Power and Harm to Competition**.

*Recommendation: deny the motion to bar these opinions*.

Shehadeh opines that Checkpoint has been able to exercise market**[\*54]** power for EAS products sold to F&D retailers, and this power is demonstrated by Checkpoint's having earned significantly higher margins from RF-EAS products sold to F&D retailers than from other customers over the relevant time period. Shehadeh Report ¶¶ 23-24, figs. 2 & 3; 60-63 & figs. 8 & 9. In addition, he opines Checkpoint's anticompetitive conduct cost customers over $20 million between 2004 and 2012. *Id.* at ¶2.

According to Checkpoint, Shehadeh's opinion that it earned monopoly profits is unreliable and should be excluded for two of the same reasons it advanced to exclude Shehadeh's relevant product market opinions — namely: (1) his monopoly power opinion is based on the same "flawed margin comparisons he used to define the relevant market;" and (2) for the sole purpose of showing higher margins, he "gerrymandered" his analysis of the relevant market to include numerous higher-margin grocery customers without economic justification. Motion at 20 (docket no. 317). The Court should reject these arguments for the same reasons that it should reject them in connection with Checkpoint's challenge to Shehadeh's product market opinions (discussed above in sections III.A.2-4) . Specifically,**[\*55]** where an expert's analysis is reliable and supported by facts in the record, whether the expert properly considered or properly rejected various facts bears on the weight, not the admissibility, of the testimony. *See, e.g.,* [*Scrap Metal, 527 F.3d at 530*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=); [*McLean, 224 F.3d at 801*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4124-05B0-0038-X3XX-00000-00&context=); [*Robinson, 544 F. App'x at 32*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59TV-VDN1-F04K-J0TW-00000-00&context=).

Checkpoint also argues Shehadeh's opinion about monopoly power should be excluded because it "is dramatically and fundamentally inconsistent with his bundling analysis" under *PeaceHealth*. Motion at 20, 21 (docket no. 317). Checkpoint explains:

The thrust of [Shehadeh's] *PeaceHealth* analysis is that Checkpoint has offered anticompetitive discounts that an efficient competitor could not match. But that contention contradicts the idea that Checkpoint has also earned supracompetitive returns — i.e., those discounts that would cut into, rather than inflate, Checkpoint's margins. Shehadeh never resolves that tension: were Checkpoint's prices too low, or too high? For that reason, Shehadeh's opinion that Checkpoint has earned monopoly returns makes no economic sense and must be excluded as unreliable.

*Id.* at 21.

USS responds, however, that no contradiction exists between Shehadeh's observation of monopoly pricing and his *PeaceHealth* opinion. USS explains that "[m]arket power is a necessary**[\*56]** precondition for the collection of supracompetitive profits;" and ***antitrust*** scholars have recognized that "a monopolist will rationally incur costs — such as a discount from a maximal monopoly price to induce the purchase of a bundle including products for which it would otherwise face competition — in order to achieve or protect the market power necessary to earn a monopoly profit in the first place." Response at 26 (docket no. 354). Therefore, according to USS, there is no contradiction in Shehadeh's opinions: while "Checkpoint's overall pricing is too high — and [is] evidence of Checkpoint's exercise of its market power" — at the same time, "its pricing of equipment *relative to consumables* is so low that no equally efficient rival could profitably induce a customer to forgo Checkpoint's bundled pricing." *Id.* at 27 (emphasis added).

The Special Master does not find Shehadeh's opinions unreliably "inconsistent" for purposes of determining whether they are admissible under *Daubert* in light of USS's explanation. Indeed, the supposedly "irreconcilable tension" Checkpoint identifies exists in every case where a monopolist uses bundling discounts to drive out competition, because the monopolist's**[\*57]** goal is always to eventually achieve supra-competitive profits. Even though Checkpoint has set forth what may be substantial and well-reasoned attacks on Shehadeh's market power and monopoly opinions, these attacks are best reserved for the jury, where Shehadeh's opinions and methods can be evaluated under cross-examination, compared with Checkpoint's own evidence, and subjected to the criticism of Checkpoint's experts. In sum, the weight and persuasiveness of Shehadeh's market power and monopoly opinions, including whether they make economic sense, are proper matters for the jury to decide.

**D. Opinions Regarding Barriers to Entry**.

*Recommendation: deny the motion to bar these opinions*.

Shehadeh opines that entry into the EAS market is difficult and requires extensive investment. The barriers to entry he identifies include the time, resources, and costs associated with designing and manufacturing EAS products, as well as governmental ***regulation***. In addition, he opines that new entrants face difficulties in achieving economies of scale in the market due to the small quantity of orders fulfilled. Shehadeh also found Checkpoint's maintenance of monopoly market power through use of exclusive**[\*58]** contracts constitutes an additional entry barrier, as evidenced by many failed attempts of other firms to enter the market "in the face of exclusivity." Shehadeh Report ¶36.

Checkpoint argues Shehadeh's entry-barrier opinions should be excluded because he has no reliable method to show that entry to the market is difficult. Specifically, Checkpoint argues: (1) Shehadeh's barrier opinions contain no economic reasoning and do not quantify the purported entry barriers; (2) he improperly relies on two USS documents to support market-wide entry barriers related to up-front investment costs and economies of scale; and (3) his own positions in the case contradict the existence of entry barriers. With respect to the last argument, Checkpoint contends Shehadeh "concedes" the *non-F&D* EAS market is competitive (and, by implication, that entry barriers have been overcome), but Shehadeh also testified that the non-F&D EAS market has the *same* entry barriers as the F&D market; thus, "competitors who sell EAS products outside of F&D can maintain efficient scale and enter the [F&D] market." Motion at 22 (docket no 317). In addition, Checkpoint asserts Shehadeh's damages calculations (addressed below)**[\*59]** are based "on the assumption that USS's suppliers can produce at scale notwithstanding the purported investment or production-related entry barriers," which directly contradicts his deposition testimony that "new entrants may face difficulties in meeting production schedules due to the small quantity of orders fulfilled." *Id.*

The Court should reject Checkpoint's *Daubert* challenge to Shehadeh's entry-barrier opinions. These opinions would be helpful to the jury in understanding difficulties faced by firms attempting to enter the EAS market, and Checkpoint's arguments to exclude are without merit. None of Checkpoint's objections suggest that Shehadeh's opinions and analysis are not typical of the analysis that characterizes the practice of economists evaluating commercial barriers to entry, nor that Shehadeh misapplied a standard methodology. Again, Checkpoint's arguments are more suitable to evaluations of credibility than admissibility.

For example, Checkpoint has not demonstrated an expert must "quantify" commercial barriers faced by new entrants in a market for such opinions to be admissible in an ***antitrust*** case. The entry barrier opinions are largely qualitative, not quantitative,**[\*60]** and well within Shehadeh's area of expertise. Further, USS has pointed not only to USS's internal documents (regarding upfront investment needs and economies of scale) to demonstrate commercial barriers, but also to consistent testimony of competitors in the industry; this is sufficient and appropriate evidence of the barriers that Shehadeh identifies in his report. *See, e.g.* docket no. 354, exh. 165 at 15:19-22; exh. 169 at 133:5-16; and exh. 172 at 71:22-73:8. Shehadeh's citation to USS's internal documents to support a broader opinion regarding market entry barriers (which are fairly typical for businesses selling technical equipment) is not an "improper extrapolation" indicative of unreliability, as Checkpoint contends. Moreover, Shehadeh has not "conceded" that fully competitive conditions exist outside of the F&D market, or that the damages portion of his report shows USS or its suppliers were actually capable of producing at the scale required to compete for major F&D customers during the relevant time period. Rather, Shehadeh has: (i) testified only that conditions outside of the F&D market are more competitive than within it, *see Daubert* hearing tr. at 54; and (ii) explained**[\*61]** that his damages assessment assumes USS could overcome the other market entry barriers in a but-for world, once the threshold barrier of Checkpoint's anticompetitive conduct was removed. In any event, whether Shehadeh's entry-barrier opinions are irreconcilably in conflict with other positions he has taken in the case, as Checkpoint contends, is a matter for the jury to decide. [*Young v. All Erection & Crane Rental, Corp., 399 F. Supp. 2d 1028, 1030 (D.N.D. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HKK-NP40-TVVV-N320-00000-00&context=) (holding that conflicts between experts' reports and their subsequent testimony did not make their testimony unreliable under *Daubert)*; [*United States v. Black Hills Power, Inc., 2006 U.S. Dist. LEXIS 101215, 2006 WL 6908315 at \*21 (D.S.D. June 12, 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58C3-5VN1-F04F-9013-00000-00&context=) (finding that a purported inconsistency among expert opinions goes to credibility and weight, not admissibility).

In sum, Shehadeh's barrier-entry opinions have support in the record and are not unreliable. Accordingly, the Court should find them admissible.

**E. Opinions Regarding Market-Share**

*Recommendation: deny the motion to bar these opinions*.

Shehadeh computes Checkpoint's market share by examining sales data obtained from five competitors — Checkpoint, Sensormatic, USS, All-Tag, and BSI — and concludes that "Checkpoint maintained a near 99 percent share of RF EAS sales to EAS F&D retailers" during the relevant time period. Shehadeh Report, fig. 4. Shehadeh further concludes**[\*62]** that Checkpoint held: (1) a "nearly 80 percent" share of combined RF-EAS and AM-EAS sales to F&D retailers, *id.* fig. 5; and (2) a "95% share" of RF-EAS and AM-EAS sales in the drug and pharmacy submarket, *id.* fig. 6. *See* Report ¶¶31-32, figs. 4-6. Shehadeh also cites to estimates of market share purportedly reflected in Checkpoint's own internal documents, which USS contends are consistent with Shehadeh's calculations of market share. Id. ¶32, n.86.

Checkpoint argues Shehadeh's market-share opinions must be excluded as unreliable and not based on sufficient facts or data because his figures do not include all competitors in the relevant market, but instead include only a "subset of sales from a limited group" (i.e., Checkpoint, Sensormatic, USS, All-Tag, and BSI). Motion at 23 (docket no. 317). Further, Checkpoint notes Shehadeh did not include in his analysis: (a) all of the competitors USS itself identified in its interrogatory responses (Unisen, WG Security Products, Inc., Vector Security, Inc., SenTech EAS Corporation, and Catalyst Tags, Inc.); nor (b) all vendors that produced data for RF-EAS sales in the case (Catalyst, Ketec, Inc., and SenTech). *Id.* at 24.

Checkpoint cites *TYR Sport, Inc.,****[\*63]*** *v. Warnaco Swimwear* and contends that omitting the "full set of RF EAS competitors from Figures 4-6 makes Shehadeh's market share calculations unreliable." *Id.* at 23; *see* [*TYR Sport, Inc., v. Warnaco Swimwear, Inc., 709 F. Supp. 2d 821 (N.D. Cal. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YGJ-93J1-2R6J-24CD-00000-00&context=) (excluding an expert's opinion on market impact because it compared sales trends only for the plaintiff- and defendant-manufacturers' products, and presented no evidence of sales or market shares of any other competitors). In *TYR Sport*, the court held: "By not considering any data on the pricing, sales volume, or market share of manufacturers other than Speedo and TYR, [the expert] simply cannot make a reliable analysis as to the market impact." [*TYR Sport, 709 F. Supp. 2d at 834*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YGJ-93J1-2R6J-24CD-00000-00&context=). Checkpoint asserts Shehadeh's market-share opinions must be excluded for the same reason — that is, he never identifies or defines the suppliers that sell in the relevant markets, does not address their size, and "he offers no support for the idea that the vendors he lists were the only five." Motion at 23 (docket no. 317). In addition, Checkpoint contends Shehadeh may not rely on internal Checkpoint market-share documents to bolster his opinions because Shehadeh "does not know what methods underlie those documents." *Id.* at 24.

In response, USS contends Shehadeh's "estimate of market share**[\*64]** based on available sales data is reliable" because it "captures the sales made by the most significant competitors in the market." Response at 31 (docket no. 354). USS asserts the only two suppliers omitted from Shehadeh's share calculations "that provided testimony in the case" have made only "minimal sales." *Id.* And USS contends *TYR Sport* is distinguishable because, unlike the expert in *TYR Sport*, Shehadeh provided data for "three additional competitors" in the market other than the parties themselves. *Id.*

Checkpoint is correct that the court in *TYR Sport* excluded an expert's opinion because the expert failed to account for other market participants when calculating market share. But the *TYR Sport* court identified other problematic issues with the expert's analysis as well, including data regarding market-share trends, the expert's definition of relevant sales in the market, and so on. *See* [*709 F. Supp. 2d 821, 834-36*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YGJ-93J1-2R6J-24CD-00000-00&context=). Further, Shehadeh explains he selected the suppliers included in his market-share analysis because they were the "most significant competitors in the market." Response at 31 (docket no. 354). While it is indeed a weakness that Shehadeh's report does not analyze or estimate what *all* other suppliers**[\*65]** sold in the markets he analyzes, the relevant question under *Daubert* is whether too great an analytical gap exists between Shehadeh's opinion and the less-thancomplete data upon which he relies — that is, whether Shehadeh's opinion regarding market-share must be excluded as wholly unreliable or unfounded *ipse dixit*, or instead admissible but subject to attack. [*Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (U.S. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RR5-5J20-004C-300R-00000-00&context=).

The Special Master concludes that *Tyr Sport* is distinguishable and Shehadeh's market share opinions are admissible. Shehadeh has analyzed the five market participants he deems to be most significant, rather than only the two parties in this case, and Checkpoint does not refute the contention that the other market participants are minor players. Indeed, Shehadeh testified that each of the competitors he did not include in his RF-EAS market share analysis enjoyed less than 1% of the market. *Daubert* hearing tr. at 30, 33. Further, it is notable that Shehadeh's opinions are consistent with Checkpoint's own internal documents. While Shehadeh may not know the precise methods underlying Checkpoint's internal market share calculations, their corroboration of his analysis is meaningful. The conclusions drawn in Checkpoint's own documents**[\*66]** suggest the foundation for Shehadeh's opinions is reasonably solid.[[10]](#footnote-9)10

In sum, the Court should deny Checkpoint's motion to bar Shehadeh from testifying as to his "market-share" opinions.

**F. Opinions on Damages**.

*Recommendation: grant the motion to bar opinions regarding lost profit damages stemming from sales of towers, deactivators, and related service; and otherwise deny the motion to bar opinions on damages*.

An ***antitrust* [\*68]** plaintiff's recovery is not limited to the damages he can prove with certainty. Rather, in ***antitrust*** cases, "the trier of the facts may make a just and reasonable estimate [of damages] based on relevant data and may act upon probable and inferential . . . proof." [*Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 784 (6th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45V1-KVD0-0038-X2NG-00000-00&context=) (citations omitted). Thus, damages may be awarded in an ***antitrust*** case based on the "plaintiff's estimate of sales it could have made absent the ***antitrust*** violation." [*Id. at 794*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45V1-KVD0-0038-X2NG-00000-00&context=).

Shehadeh opines USS suffered at least $27 million in lost profit damages. His opinion is premised upon: (1) calculations of the sales of RF-EAS products and services that USS would have made "but for" Checkpoint's alleged anticompetitive conduct, and (2) the profit margin USS would have made on those sales. Shehadeh Report ¶¶ 71-75. Shehadeh estimates USS would have obtained 30% of Checkpoint's sales absent Checkpoint's anticompetitive conduct. Shehadeh bases this estimate upon, among other things: (1) USS's ability to source high-quality RF-EAS products at lower costs; (2) the sales USS finally made to Rite Aid, once Checkpoint's allegedly exclusive contract began to unwind; and (3) USS's growth rate outside of F&D. *Id.* ¶72.

Checkpoint argues Shehadeh's damages**[\*69]** calculations are overstated and should be excluded for a number of reasons. First, according to Checkpoint, "Shehadeh must be precluded from testifying that USS would have any lost-profits damages from selling towers, deactivators, or related service," because USS lacked FCC approval to sell these products during the entire damages period and USS cannot base damages on "illegal sales." Motion at 27-28 (docket no. 317). Second, Checkpoint asserts "USS has no basis to claim damages on [hard tags] because no Checkpoint agreement precluded customers from purchasing competitors' [hard tags] and USS would not have made any additional [hard tag] sales in the but-for world." *Id.* at 28-29. Third, Checkpoint contends Shehadeh's damages calculations assume USS would have captured sales from 186 of Checkpoint's RF-EAS customers, but Shehadeh did not analyze 172 of those customers; therefore, he "has no basis to claim that Checkpoint's conduct prevented USS from making any such sales to those [172] retailers." *Id.* at 29. Fourth, Checkpoint argues Shehadeh used unreliable benchmarks in concluding USS would have captured 30% of Checkpoint's sales in a "but-for" world. And fifth, Checkpoint contends Shehadeh's damages**[\*70]** opinion is fatally unreliable because he fails to "disaggregate" the damages and ignores evidence of other major variables, independent of Checkpoint's actions, that could explain why USS failed to make RF-EAS sales to the F&D market.

As the Sixth Circuit recognized, "***antitrust*** cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections." [*South—East Coal Co. v. Consol. Coal Co., 434 F.2d 767, 794 (6th Cir. 1970)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRR0-0039-X06M-00000-00&context=). ***Antitrust*** plaintiffs are excused "from an unduly rigorous standard of proving ***antitrust*** injury." [*J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6DX0-003B-S0YX-00000-00&context=); *see* [*id. at 566-67*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6DX0-003B-S0YX-00000-00&context=) (observing "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted"). "In addition, 'in an action for damages for violation of the ***antitrust*** laws plaintiff is [not] limited to recover only for specific items of damage which he can prove with reasonable certainty. On the contrary, the trier of the facts may make a just and reasonable estimate . . . based on relevant data and may act upon probable and inferential . . . proof." [*Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 784 (6th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45V1-KVD0-0038-X2NG-00000-00&context=) (quoting [*Elyria—Lorain Broad. Co. v. Lorain Journal Co., 358 F.2d 790, 793 (6th Cir. 1966)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YJ50-0039-Y536-00000-00&context=) (modifications in original)); *see also* [*Rodney v. Northwest Airlines, Inc., 146 Fed. Appx. 783, 791 (6th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GY2-VKB0-TVRV-B1TW-00000-00&context=) ("A plaintiff need not calculate a specific damage figure so long as he proposes**[\*71]** an acceptable method for calculating damages."). Against this background, the Special Master examines each of Checkpoint's five arguments to exclude Shehadeh's damages opinions.

**1. FCC Approval**.

Checkpoint asserts that, because the FCC did not certify USS's RF-EAS towers and deactivators for sale in the United States until 2014, USS was simply not allowed to sell towers or deactivators during the relevant time period of 2004-2012. Accordingly, Checkpoint insists Shehadeh should not be allowed to opine that: (1) Checkpoint's conduct was the cause of USS's failure to achieve sales of towers, deactivators, and related services; or (2) the amount of damages USS suffered from not being able to sell towers, deactivators, or related services.

To assess Checkpoint's argument, it is necessary to review Shehadeh's evolving knowledge regarding FCC approval of USS products. This review makes apparent that Shehadeh's original understanding of the facts was incorrect.

From the beginning of this case, USS alleged it tried to sell RF-EAS towers during the relevant time period of 2004 to 2012: "Despite attempting to enter the EAS tower market in 2010 with a low-priced tower of equal or better quality,**[\*72]** USS has been unable to gain any traction in this market and may soon be forced to abandon its efforts." Complaint ¶5 (docket no. 1); *see also* second amended complaint ¶78 (docket no. 139) ("in 2010, USS attempted to enter the EAS tower market for customers in the Relevant Markets, but has been unable to gain any traction in this market due to Checkpoint's anticompetitive, exclusionary conduct"). USS alleged it was able to sell *some* towers, but its efforts were mostly unsuccessful: "USS has secured very few customers in the EAS tower market and may soon be forced to abandon its efforts if Checkpoint continues to foreclose a substantial majority of the market through long-term exclusive agreements and bundled discounts designed to eliminate USS and other potential competitors from the market." Complaint ¶81 (docket no. 1) (emphasis added).

During discovery, USS's executives confirmed that USS had sold and was continuing efforts to sell RF towers. *See e.g.*, docket no. 326-4 at 79-80 (9/25/12 depo. of USS Vice President Robert Schindler, recalling sales of "RF Pedestals" to Golfsmith); docket no. 327-7 at 90-92 (1/8/13 morning depo. of USS Senior Vice President Rod Holm, recalling sales**[\*73]** of "Mirage" RF towers to C&K Markets). These executives further testified that USS's RF towers were FCC-certified as of 2011. *See* docket no. 326-4, Schindler depo. at 83 ("our systems have been approved by FCC. I don't know which ones, but they have to approve them all."); docket no. 328-3 at 95-96 (1/8/13 afternoon depo. of Holm, stating USS towers obtained FCC approval in 2011).[[11]](#footnote-10)11 Similarly, in its 2012 answers to interrogatories, USS affirmed that it then offered for sale an RF tower known as the "8.2MHz Transceiver 2 Pedestal with Power Supply (USS Part No. UNI-MONO/8.2)." Docket no. 491-3 at 17.

In his June 24, 2013 expert report, Shehadeh relied explicitly on USS's factual assertions that it had spent the time and money necessary to obtain FCC certification for its RF towers, and had for several years made those towers available for sale to consumers in the Relevant Markets, with occasional success. Shehadeh wrote:

. *FCC certification is not easy to get*: "All RF devices are ***regulated*** by the FCC for frequency and power output," and "[t]he FCC imposes strict limitations on the power output of EAS towers that are difficult for new entrants to reach." Further, "[t]esting to pass FCC ***regulations*** is often time consuming and expensive." Report ¶¶28, 29 at 18.

. *USS obtained FCC certification*: The "product development cycle" for EAS hardware, such as towers and deactivators, requires not only "creating CAD drawings and prototypes, conducting customer surveys, and filing patents," but also "passing FCC inspection. \* \* \* USS has made this upfront investment." *Id.* at 24 n.92.

. *USS had towers available****[\*75]*** *for sale*: "USS could have sold towers along with labels and tags at least as early as 2007. \* \* \* A discussion with Callidus, the [Czechoslovakian] manufacturer for USS towers, indicated that it was a large company and could easily have scaled up production of towers to accommodate USS sales over the relevant period." *Id.* at 50-51 n.200.

Based on his understanding that USS had all of the equipment necessary to sell full RF-EAS Systems — including not only RF-labels and RF-tags but also FCC-certified RF-towers and deactivators — Shehadeh opined that USS suffered $27 million in lost profit damages. Specifically, Shehadeh: (1) "calibrate[d] the share of Checkpoint's sales that would have gone to USS in each year" from 2007-2017, absent Checkpoint's allegedly anticompetitive conduct; and then (2) "determine[d] the lost profits to USS, [by] calculat[ing] a margin for each product category—RF service (including installation, repair, and maintenance contracts), RF consumables (tags, labels, and related accessories), RF deactivators, and RF towers." Report ¶72-74 at 50-51; *see also id.* at 52 (noting that Figure 19, which is a Table showing damages, "includes sales of [1] RF EAS consumables (including labels and related accessories and tags and related accessories),**[\*76]** [2] hardware (including towers and related accessories and deactivators and related accessories), and [3] service (including maintenance contracts, installation, and repair)"). Shehadeh further broke down his damages analysis by product, as follows:

[*Go to table1*](#Table1)



*See* docket no. 334-14 at 2.[[12]](#footnote-11)12

As it turns out, however, the factual assertions upon which Shehadeh relied in his report were incorrect. Checkpoint's research subsequently revealed that the FCC did not certify any USS tower in 2011; rather, the FCC's first certification of a USS tower did not occur until January of 2014, and the FCC's first certification of a USS deactivator did not occur until February**[\*77]** of 2014. USS eventually confirmed Checkpoint's research: USS Senior Vice President Denise Canfield very recently explained that, "in approximately January 2014, it came to [USS's] attention that certain steps to complete FCC certification had not been completed for the UNI-MONO8.2A board. USS took immediate steps to secure certification, and it completed certification for the [RF tower] board and our RF deactivator product in less than two months . . . ." Declaration at ¶5 (docket no. 484) (Aug. 18, 2015).[[13]](#footnote-12)13

It is not clear why USS believed its towers were FCC-certified beginning in 2011, even though they were not.[[14]](#footnote-13)14 But it is clear USS had no FCC-certified towers available for sale before 2014. And it is also clear that USS was not allowed to sell towers or deactivators unless they were FCC-certified (although it apparently did so). *See***[\*78]** [*47 C.F.R. §15.201(b)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5S69-F760-008H-03W5-00000-00&context=) & [*§2.803(b)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5S69-F750-008H-03DN-00000-00&context=) (FCC ***regulations*** requiring certification before a party can import, market, sell, lease, distribute, or advertise RF-EAS towers and deactivators); [*47 U.S.C. §502*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GPK1-NRF4-454S-00000-00&context=) (criminalizing willful or knowing violations of these FCC ***regulations***).; USS's response at 6 (docket no. 495) ("USS *has* offered and sold EAS towers, and Checkpoint received the transaction-level data associated with those sales.") (emphasis in original).

The essence of Checkpoint's position for excluding**[\*79]** at least a portion of Shehadeh's damages opinion is that critical facts underlying his logic are simply and inarguably wrong. Shehadeh opines that USS would have garnered about $12.3 million in profits from the sale of towers and deactivators during the relevant period, and another $5.9 million in profits from related service calls. But, contrary to Shehadeh's understanding, USS did not have any towers or deactivators it was allowed to sell or service, so USS could not possibly have suffered this $18.2 million in lost profits. Accordingly, Checkpoint argues Shehadeh should not be allowed to opine that Checkpoint caused, or USS suffered, this $18.2 million in damages.

The Special Master concludes Checkpoint's position has merit. [*Federal Rule of Evidence 702(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=) states that an expert may "testify in the form of an opinion or otherwise if \* \* \* the testimony is based on *sufficient facts or data*" (emphasis added). The Sixth Circuit Court of Appeals explains that "[e]xpert testimony, however, is inadmissible when the facts upon which the expert bases his testimony contradict the evidence." [*Greenwell v. Boatwright, 184 F.3d 492, 497 (6th Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3X29-DT60-0038-X2RJ-00000-00&context=). *See also* [*Lee v. Smith & Wesson Corp., 760 F.3d 523, 527 (6th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CSN-6CF1-F04K-P0VX-00000-00&context=) ("expert testimony should be excluded if it relies on facts that no jury could accept, or relies on the rejection of facts that**[\*80]** any jury would be required to accept"); [*Guillory v. Domtar Indus. Inc., 95 F.3d 1320, 1331 (5th Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0N20-006F-M527-00000-00&context=) ("Expert evidence based on a fictitious set of facts is just as unreliable as evidence based upon no research at all."); [*Turpin v. Merrell Dow Pharm., Inc., 959 F.2d 1349, 1360 (6th Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-55C0-008H-V40P-00000-00&context=) (affirming exclusion of opinions which "go far beyond the known facts that form the premise for the conclusion stated").

Similarly, [*Federal Rule of Evidence 703*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120V-00000-00&context=) states that "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." But "nothing in [*Rule 703*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120V-00000-00&context=) requires a court to admit an opinion based on facts that are indisputably wrong." [*Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1114 (5th Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9FH0-008H-V3N0-00000-00&context=), *overruled on other grounds,* [*Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 587 n.5, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDR0-003B-R3R6-00000-00&context=). Indeed, "[e]ven if [*Rule 703*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120V-00000-00&context=) will not *require* the exclusion of such an unfounded opinion, general principles of relevance will. In other words, an opinion based totally on incorrect facts will not speak to the case at hand and hence will be irrelevant." *Id.* (emphasis added).

Here, Shehadeh's opinion that Checkpoint caused USS to suffer lost profit damages from sales of towers, deactivators, and related service is premised on a fictitious set of facts that contradict the undisputed evidence. USS simply had no towers or deactivators it was allowed to sell, from which it could derive the supposedly lost profits. The "facts or data in the case that [Shehadeh**[\*81]** was] made aware of" were wrong, [*Fed. R. Evid. 703*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120V-00000-00&context=), so his opinion related to $18.2 million in damages has no reliable foundation. *See* IIA Areeda & Hovenkamp, ***Antitrust*** *Law* ¶338b at 102 (3rd ed. 2007) ("On occasion, a force other than the ***antitrust*** violation fully accounts for the plaintiff's injury. For example, a plaintiff cannot be injured in fact by private conduct excluding it from the market when a statute prevents the plaintiff from entering that market in any event.") (footnotes omitted). Accordingly this opinion must be excluded.[[15]](#footnote-14)15

The Special Master reaches this conclusion in spite of USS's argument that Shehadeh should be permitted to explain and elaborate upon his original opinion, and even correct errors it contains. It is true that *Rule 26(a)(2)(B)* "does not limit an expert's testimony simply to reading his report. \* \* \* The rule contemplates that the expert will supplement, elaborate upon, explain and subject himself to cross-examination upon his report." [*Thompson v. Doane Pet Care Co., 470 F.3d 1201, 1203 (6th Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MK6-STK0-0038-X18H-00000-00&context=). Further, the Special**[\*82]** Master agrees that "*Daubert* does not require that an expert's testimony be excluded simply because he admitted and corrected his own mistakes or retracted his false statements." [*Crowley v. Chait, 322 F. Supp. 2d 530, 540 (D.N.J. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CNY-W4N0-0038-Y2T5-00000-00&context=). Indeed, "one of the very purposes of a *Daubert* hearing . . . is to give experts a chance to explain and even correct errors that they made in their reports." *Id.* "There is no stigma attached to such error correction, nor should there be. If anything, it strengthens the quality of the expert report." *Id.*

But there are differences in degrees of error. The problem here is that Shehadeh does not now simply seek to correct his opinion to address a small factual flaw; he hopes to offer entirely new opinions using major, revised factual premises. In his report, Shehadeh originally said (essentially) that: (1) getting FCC certification is not cheap, quick, or easy; (2) USS nonetheless obtained it; (3) USS therefore had RF towers available for sale; and (4) USS was damaged because Checkpoint prevented it from selling those towers. *See* page 44 of this Report, above (quoting Shehadeh). Having learned he was wrong, Shehadeh *now* seeks to opine that: (1) USS *would have tried* for certification earlier, but Checkpoint's anticompetitive**[\*83]** conduct created "economic disincentives";[[16]](#footnote-15)16 and (2) USS *would have* quickly and easily obtained FCC certification earlier, if it had tried.[[17]](#footnote-16)17

These new opinions are not contained anywhere in Shehadeh's original report; indeed, they are at least partially *contrary* to his original report. Generally, "courts should not permit experts to 'testify as to a wholly new, previously unexpressed opinion.'" [*In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig., 45 F. Supp. 3d 724, 760 (N.D. Ohio 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D8S-CWG1-F04F-12WG-00000-00&context=) (quoting [*Niles v. Owensboro Med. Health Sys., Inc., 2011 U.S. Dist. LEXIS 82570, 2011 WL 3205369 at \*5 (W.D. Ky. July 27, 2011))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82TP-JFH1-652H-S0J6-00000-00&context=). Among other reasons, this is because the opposing party must be given the opportunity to pursue discovery to test the foundation and methodology of an expert's opinions. Checkpoint has not had any opportunity to explore FCC certification issues, such as pursuing discovery to determine: (a) the incentives and disincentives USS had to obtain certification earlier, (b) why USS did not obtain certification until 2014, (c) the time and cost it actually took to obtain certification, (d) how damages might be affected if USS sold or attempted to sell large quantities of uncertified towers,[[18]](#footnote-17)18 and so on. Checkpoint had no reason to pursue discovery to test Shehadeh's "incentives" opinion because Shehadeh did not timely offer it.

Further, *Rule 26(e)(1)* "requires a party to supplement its experts' reports**[\*86]** and deposition testimony when the party learns of new information. If the party fails to do so, the court may exclude any new opinion offered by the expert." [*Southern States Rack And Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 595-96 (4th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47TG-Y7S0-0038-X12G-00000-00&context=); *see* [*Pluck v. BP Oil Pipeline Co., 640 F.3d 671, 681 (6th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52V9-FWX1-F04K-P04K-00000-00&context=) (affirming exclusion of an untimely-disclosed expert opinion that "contradicted [the expert's] prior causation opinion and attempted 'to introduce an entirely new methodology well after the point at which it would be proper.'"). Here, USS learned in January 2014 that its towers were not FCC-certified, but nearly two years later it still has not supplemented or amended its pleadings, discovery responses, or (most important) Shehadeh's report to reflect this evidence.[[19]](#footnote-18)19 In these circumstances, the Special Master concludes it would be unfair to allow Shehadeh to offer entirely new logic and rationales to support his existing lost profit calculations.[[20]](#footnote-19)20

In sum the Court should grant Checkpoint's motion to exclude Shehadeh's opinions that: (1) Checkpoint's conduct was the cause of USS's failure to achieve sales of towers, deactivators, and related services; and (2) USS suffered any amount of damages from not being able to sell towers, deactivators, or related services.

**2. Hard Tags**.

Next, Checkpoint argues Shehadeh has no basis to claim "damages on [hard tags] because no Checkpoint agreement precluded customers from purchasing competitors' [hard tags] and USS would not have made any additional [hard tag] sales in the but-for world." Motion at 28-29 (docket no. 317). USS responds by citing evidence in the record which allegedly shows that Checkpoint's contracts included hard tags, response at 34 (docket no. 354), and arguing that Checkpoint's oversupply of labels limited the ability of retailers to purchase hard tags from other suppliers. This topic was discussed earlier, *see* pages 29-30 of this Report. While the parties disagree as to what the evidence shows, USS has demonstrated the opinion has sufficient factual support to satisfy the threshold standard of admissibility. For this reason, Shehadeh's opinion should not be excluded.

**3. [\*89]  Other Retailers**.

Checkpoint contends Shehadeh's damages calculations assume USS would have captured sales from 186 of Checkpoint's RF-EAS customers, but Shehadeh did not analyze 172 of those customers. Checkpoint argues Shehadeh "has no basis to claim that Checkpoint's conduct prevented USS from making any such sales to those [172] retailers." Motion at 29 (docket no. 317). In response, USS states Shehadeh's calculations are based on his opinion that USS would have captured 30% of Checkpoint's sales without reference to any specific customers. Response at 34 (docket no. 354).

Checkpoint's challenge conflates the requirements of *Daubert* with those of the ultimate proof of damages in an ***antitrust*** matter. *See* [*In re Joint E. & S. Dists. Asbestos Litig., 52 F.3d at 1132*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FV40-001T-D3T3-00000-00&context=) (distinguishing inquiry into the threshold question of whether expert evidence is admissible from inquiry into whether this and other evidence is sufficient to present a jury question). That Shehadeh's conclusions are based on Checkpoint's sales in the aggregate and not on a customer-by-customer basis does not reduce the analysis to the level of speculation, guesswork, or junk science. The opinions of Shehadeh are not inadmissible because he failed to break down each of Checkpoint's**[\*90]** customers in his analysis. [*Best v. Lowe's Home Ctrs., Inc., 563 F.3d 171, 176-77 (6th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W34-6020-TXFX-8371-00000-00&context=) ("*Daubert* attempts to strike a balance between a liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading 'junk science' on the other.").

For the reasons discussed earlier, *see* pages 30-31 of this Report, Shehadeh may offer opinions regarding his "validation theory," including opinions related to damages.

**4. Benchmarks**.

Fourth, Checkpoint argues Shehadeh used unreliable benchmarks to find USS would have captured 30% of sales in a "but-for" world. Checkpoint reargues Shehadeh's use of USS's sales to Rite Aid as a benchmark is improper because (a) most of USS's sales to Rite Aid were for hard tags, but (b) hard tags were not covered by the Checkpoint-Rite Aid contract that USS claims foreclosed its opportunity to make sales to Rite-Aid. This argument is unpersuasive for the same reasons explained above.

Checkpoint also argues USS's growth rate outside of the F&D market is an improper benchmark because that growth rate is based almost entirely on AM-EAS sales; therefore, "[i]ncluding AM EAS sales [in a damages calculation] creates an implausible but-for world artificially designed to inflate USS's claimed RF EAS damages." Motion**[\*91]** at 32 (docket no. 317). In response, USS contends its experience in growing its sales of AM-EAS products is a reasonable benchmark for its capacity to grow its sales of RF-EAS products. "[D]amages may be awarded on a plaintiff's estimate of sales it could have made absent the ***antitrust*** violation." [*J. Truett Payne, 451 U.S. at 565*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6DX0-003B-S0YX-00000-00&context=). An ***antitrust*** expert's testimony as to damages is admissible so long as it supports a "just and reasonable estimate" of damages. [*Conwood, 290 F.3d at 784*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45V1-KVD0-0038-X2NG-00000-00&context=). Because Shehadeh has provided "reasoned explanations for the assumptions that he made" and "viable arguments to support his data set choices," [*In re Scrap Metal, 527 F.3d at 527*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SHG-F470-TXFX-834J-00000-00&context=), Shehadeh's extrapolation of the Rite Aid sales and inclusion of AM-EAS sales are appropriate targets for cross-examination, but not bases to exclude his opinion.

**5. Disaggregation**.

Finally, Checkpoint contends Shehadeh's damages opinion is fatally unreliable because he fails to "disaggregate" the damages and ignores evidence of other major variables, independent of Checkpoint's actions, that could explain why USS was unable to make RF-EAS sales to F&D retailers. According to Checkpoint, the obvious variables ignored by Shehadeh are: (a) USS did not have RF-EAS equipment to sell during the relevant time period, because it lacked**[\*92]** FCC certification; (b) USS's equipment was of lower quality; and (c) customers simply preferred Checkpoint products.

Checkpoint's argument that USS must have a licensed product for Shehadeh to conduct a reliable but-for damages assessment has already been addressed above. For the reasons stated, the Special Master agrees with Checkpoint that Shehadeh should not be allowed to offer opinions regarding lost profit damages flowing from towers, deactivators, and related service.

Regarding the other two variables Checkpoint identifies, USS contends its sales to Rite Aid serve as an appropriate benchmark precisely because, after the exclusivity provision unwound, those sales account for these other factors. This contention is reasonable. In any case, an expert's "failure to segregate plaintiff's losses and account for outside factors is not fatal to his presentation at trial." [*Univac Dental, 2010 U.S. Dist. LEXIS 41130, 2010 WL 1816745, at \*3*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YBG-T6B0-YB0P-004T-00000-00&context=). An expert's benchmarks and assumptions also "need not be perfect" as long as they will give a "reasonable estimate" of damages. *See* [*Fleischman v. Albany Med. Ctr., 728 F.Supp.2d 130, 148 (N.D.N.Y. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:800T-K021-652J-D01K-00000-00&context=). The standard for admitting expert testimony as to damages in ***antitrust*** cases is "liberal," and courts "should be very hesitant before determining that damages cannot be awarded." *Id.***[\*93]** (citation omitted).

Having considered the parties' arguments, it appears plain that the extent to which Shehadeh's analysis failed to account for customer preferences cited by Checkpoint (such as product testing data, USS's own efforts to make sales into the marketplace, and so on) is an appropriate subject for cross examination. Checkpoint has not identified an "obvious" alternative explanation so compelling that it renders Shehadeh's testimony inadmissible.

**6. Summary**.

For the reasons stated, the Special Master concludes Shehadeh may not offer opinions regarding lost profit damages flowing from sales of towers, deactivators, and related services. As USS concedes, these opinions, as originally set out in Shehadeh's report, are all premised on an incorrect understanding of critical facts. Further, Shehadeh's more-recent opinions on this topic, offered after he came to understand the correct facts, are not simply elaboration and explanation of his original opinions; rather, they are entirely new opinions that are at least partially contrary to those contained in his report, and also come far too late.

Upon review of the parties' other arguments, however, the Special Master finds the rest**[\*94]** of Shehadeh's damages opinions are sufficiently reliable to survive a *Daubert* challenge, especially given the considerable leeway afforded an expert's estimate of damages in ***antitrust*** cases. Checkpoint will have the opportunity to cross-examine Shehadeh and present its own evidence at trial, and thus bring fully to light the weaknesses it has identified in Shehadeh's damages opinions — including his assessment of the scope of the "but-for" world, USS's abilities to win sales in it, and the amount USS would have profited in the absence of Checkpoint's alleged anticompetitive conduct. Shehadeh's damages opinions may not be persuasive to the jury, but they are admissible under [*Federal Rule of Evidence 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=).

**IV. Checkpoint's Motion to Strike**.

As noted above, after the Special Master conducted a *Daubert* hearing, USS submitted the declaration of Senior Vice President Denise Canfield. *See* docket no. 484. Among other reasons, USS filed Canfield's declaration in order to: (1) prove that USS had gotten FCC certification for its towers in January of 2014; and (2) assert that it took "less than two months" and cost "no more than $16,800" to obtain this certification. Declaration at ¶4.

Checkpoint moves to strike this affidavit**[\*95]** for numerous reasons, including: (1) Canfield's declaration is contrary to USS's earlier answers to discovery, and is untimely and prejudicial; (2) Canfield's declaration is contrary to her own prior sworn testimony, contains hearsay, and is not based on personal knowledge; and (3) Canfield is offering inadmissible lay opinions.

Checkpoint's motion to strike makes several good points. For example, while Canfield stated in 2012 she did not know anything about USS's product research and development, or FCC approval, she addresses these topics in her declaration without any explanation of how she obtained this new knowledge. This type of testimony is not admissible. *See* [*Cooley v. Lincoln Elec. Co., 693 F. Supp. 2d 767, 792 (N.D. Ohio 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y08-C6M0-YB0N-W02S-00000-00&context=) (excluding an executive's hearsay testimony about "corporate knowledge" that had "no independent evidentiary basis"). Further, it is clear Canfield's statements are contrary to what Shehadeh was told earlier, and Shehadeh did not rely on her statements when he authored his report. In other words, Canfield's declaration is offered mostly to provide Shehadeh with post-hoc justification for his new opinions.

Ultimately, however, the Special Master recommends the Court deny Checkpoint's motion because "the proper use of a motion**[\*96]** to strike is actually quite narrow." [*In re Commercial Money Ctr., Inc., Equip. Lease Litig., 2007 U.S. Dist. LEXIS 37260, 2007 WL 1514282 at \*3 (N.D. Ohio May 22, 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NT3-SB80-TVW7-71TY-00000-00&context=) (denying a motion to strike expert testimony). While some courts have employed [*Rule 12(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) to strike an affidavit, *see, e.g.,* [*McLaughlin v. Copeland, 435 F.Supp. 513, 519-20 (D. Md. 1977)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-TYD0-0054-7242-00000-00&context=), there is "no basis in the Federal Rules to strike items such as an affidavit or a brief, or portions thereof." [*Huber v. Auglaize County Bd. of Elections, 2009 U.S. Dist. LEXIS 10057, 2009 WL 367526 at \*3 (N.D. Ohio Feb. 11, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VKN-KHH0-TXFR-K2NB-00000-00&context=); [*Lombard v. MCI Telecommunications Corp., 13 F.Supp.2d 621, 625 (N.D. Ohio 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TD3-S2W0-0038-Y46B-00000-00&context=). [*Rule 12(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) only authorizes a court to strike certain matters "from a pleading," not from a motion or brief.[[21]](#footnote-20)21

Rather, if a brief or affidavit refers to matters a court should not consider (such as inadmissible evidence), the usual recourse is for the court simply to "disregard" those matters, not to strike them. [*Aerel, S.R.L. v. PCC Airfoils, L.L.C., 448 F.3d 899, 908 (6th Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4K19-RTX0-0038-X1R0-00000-00&context=); [*Lombard, 13 F.Supp.2d at 625*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TD3-S2W0-0038-Y46B-00000-00&context=) (quoting [*State Mut. Life Assur. Co. of America v. Deer Creek Park, 612 F.2d 259, 264 (6th Cir. 1979))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-T980-0039-M0BT-00000-00&context=).

In this Report, the Special Master has excluded from consideration those portions of the Canfield declaration that are not based on personal knowledge, irrelevant, or otherwise inadmissible.

**V. Time for Filing Objections**.

The Court originally set a deadline of 14 calendar days for filing objections to this Report. The Court further stated, however, that "[t]he Special Master may . . . provide in his order,**[\*97]** finding, report, or recommendation that the period for filing objections to that particular document is some period longer than 14 calendar days, if a longer period appears warranted." Order at 5 n.4 (docket no. 52). Given the length and complexity of this Report, the Special Master sets the following deadlines for filing of objections:

(1) objections to be filed on or before the date 28 days from the date of this Report;

(2) responses to be filed on or before the date 49 days from the date of this Report (21 days after objections); and

(3) replies to be filed on or before the date 70 days from the date of this Report (21 days after responses).

**RESPECTFULLY SUBMITTED**,

/s/ David R. Cohen

**David R. Cohen**

**Special Master**

**DATED**: September 30, 2015

**Table1 (**[*Return to related document text*](#Table1_insert)**)**

| **Amount of Lost Profit Damages** | |
| --- | --- |
| **Caused by Checkpoint's Allegedly Anticompetitive Conduct** | |
| **By Product Category, 2005 - 2017** | |
| Labels & Accessories | $4,921,141 |
| Tags & Accessories | $4,097,882 |
| Deactivators & Accessories | $5,000,327 |
| Towers & Accessories | $7,343,946 |
| Service & Repair | $5,904,420 |
| **Total** | $27,267,716 |

**Table1 (**[*Return to related document text*](#Table1_insert)**)**

**End of Document**

1. 1USS claims Checkpoint entered into agreements restraining trade in violation of ***Section 1*** of the Sherman Act and [*Ohio Revised Code §§1331 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8M13-KDT2-D6RV-H386-00000-00&context=); unlawfully monopolized and attempted to monopolize relevant markets in violation of ***Section 2*** of the Sherman Act; and unreasonably restrained trade in violation of [*Section 3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GT11-NRF4-4341-00000-00&context=) of the Clayton Act. *See* second amended complaint, counts I-IV, VI (docket no. 139). [↑](#footnote-ref-0)
2. 2Specifically, the Special Master concludes the Court should grant Checkpoint's motion to bar Shehadeh's opinions regarding lost profit damages stemming from sales of towers, deactivators, and related service; and otherwise deny Checkpoint's motion. [↑](#footnote-ref-1)
3. 3Knievel opines that "RF is superior to AM for the drug and grocery markets because (1) RF tags are available in a wide variety of flat designs, which are suitable for small, lightweight packaging of many [health, beauty, and cosmetic] products sold in drugstores and grocery stores, and may be custom printed or transparent; (2) RF tags have a greater deactivation range making RF tags more easily and efficiently deactivated; and (3) RF technology is generally less costly and more energy efficient." Knievel Report at 15, ¶33. [↑](#footnote-ref-2)
4. 4Checkpoint cites [*Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1056 (8th Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YWD-0000-0038-X1FX-00000-00&context=), which found inadmissible an ***antitrust*** expert's opinions because the economic model the expert used to construct a hypothetical market "ignored inconvenient evidence" and "was not grounded in the economic reality of the [relevant] market." [↑](#footnote-ref-3)
5. 5To calculate Checkpoint's label margins in the F&D market and non-F&D market, Shehadeh simply used the price data provided to him by Checkpoint. Checkpoint asserts Shehadeh should have corrected this price data to account for the fact that Checkpoint sometimes raised label prices in connection with "comp tag" promotions, where F&D customers agreed to pay higher label prices in exchange for receiving other EAS products for free. These higher label prices would, of course, appear to increase label margins, even though the increase was offset by lower margins on other EAS products. As noted, however, Checkpoint's non-F&D customers received similar promotions, so the label margin "corrections" would have to occur for both markets; further, it is extremely likely Checkpoint would challenge any comp tag "correction" Shehadeh made to label prices, in any event. Ultimately, Shehadeh used Checkpoint's own data in a methodologically reasonable fashion;**[\*25]** Checkpoint is free to challenge those methods on cross-examination. [↑](#footnote-ref-4)
6. 6If Shehadeh opines at trial that his original conclusion shown in figure 9 is correct (as opposed to his modified conclusion in revised figure 9) and a jury concludes he is wrong because he insisted on relying on incorrect data, then USS's case will certainly be undermined much worse than would pretrial exclusion of Shehadeh's opinion. [↑](#footnote-ref-5)
7. 7To be clear, Shehadeh's original Figure 9 shows Checkpoint's average margin difference for "all years" — meaning 2003-2012 — was 4.48%, and this calculation ***is*** statistically significant at the 1% level. In Shehadeh's revised Figure 9, which accounts for the purported Lowe's data entry error, Checkpoint's average margin difference for "all years" was 1.38%, and this calculation is ***not*** statistically significant. Shehadeh adds, however, that revised**[\*31]** Figure 9 also shows Checkpoint's average margin difference for 2004-2010 was 1.31%, and this calculation ***is*** statistically significant. The overriding point is that statistical significance is properly measured internally based on the average margin test Shehadeh actually ran, and not with reference to the SSNIP test. It is also true, however, that a 1.31% average margin difference is fairly minor and is therefore relatively weak evidence of market power. Still, the average margin difference for certain single years in revised Figure 9 was much higher (e.g., 17.25% in 2008 and 12.28% in 2010). [↑](#footnote-ref-6)
8. 8Furthermore, USS explains that Checkpoint's focus is incorrect when it asserts Shehadeh's margin difference calculations are insignificant because they are less than 5%:

   The 4.48% difference observed [in Figure 9] is a difference in actual percentage points, not a relative change. Given Checkpoint's margins, a 4.48 point difference in the gross margin actually corresponds to a 9.9% relative difference in price (assuming identical costs for both sets of customers), which aligns with Shehadeh's observation that Checkpoint has been able to sustain roughly 10% higher prices in the food and drug market.**[\*32]** Similarly, the 1.38 point difference reported in Shehadeh's revised Figure 9 corresponds to a roughly 3% relative difference in price.

   Docket no. 354 at 12. It is the price differential more than the gross margin that provides evidence of monopoly. *See* IIB Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust*** *Law* ¶516f3 at 144 (3rd ed. 2007) (a monopolist "may spend up to its full monopoly profit in activities designed to achieve or maintain market power"). [↑](#footnote-ref-7)
9. 9Checkpoint insists the prices CVS (for example) would pay absent the bundling discount CVS received would not be Checkpoint's catalog**[\*45]** or list prices; rather, because CVS was such a huge customer, it would still have received a discount from list price. Checkpoint notes that other large customers, such as Target (and even some smaller customers) did not pay list price, even though they did not receive a bundling discount. Checkpoint concludes, therefore, that Shehadeh's calculation of "the discount given by [Checkpoint] on the entire bundle of products" was unrealistically high. ***PeaceHealth, 515 F.3d at 910***. As such, Checkpoint insists Shehadeh's allocation of this too-high discount "to [Checkpoint's] competitive product or products," and his conclusion that Checkpoint "sold the competitive product or products below its average variable cost of producing them," is demonstrably incorrect. ***PeaceHealth, 515 F.3d at 910***.

   Checkpoint's argument asks the Court to find that Shehadeh's use of Checkpoint's own published, catalog and list prices as the benchmark for calculating discounts was an unreliable method. The Special Master cannot conclude that comparison of a product's actual selling price with its own list price is not a reliable measure of its discount. In other words, Checkpoint's complaint about Shehadeh's discount calculation is a matter for cross-examination, not a**[\*46]** basis for exclusion. The "real amount" of product discount given by Checkpoint to various retailers for various products must be determined by a finder-of-fact.

   The question of how the amount of "discount" is measured under *PeaceHealth* will also be addressed in the Special Master's forthcoming Report addressing the admissibility of the expert opinions of Checkpoint experts Harris and Keeley. [↑](#footnote-ref-8)
10. 10In *TYR Sport*, the court determined the expert's opinion was not based on sufficient facts or data only after the defendant supplied missing information. Here, despite the opportunity to do so in three briefs, Checkpoint has not identified a single *significantm*arket participant unaccounted for in Shehadeh's analysis, nor provided support for a meaningfully larger sales volume for RF-EAS in the F&D market. In short, Checkpoint asks the Court to find the data underlying Shehadeh's market share calculations insufficient because, despite Shehadeh's testimony that he considered all the significant players, and despite Checkpoint's own documents concurring with Shehadeh's conclusions, there "may be" an unidentified market participant that would render Shehadeh's conclusions so flawed as to be inadmissible.

    It cannot be the case that an expert's market share opinion must include an analysis of every single market participant, no matter how *de minimis*. If the evidence showed the RF-EAS market for F&D retailers across the relevant time period is $1 billion and not the approximately $210 million Shehadeh included in his analysis**[\*67]** (*see* Shehadeh Report fig. 4), then Shehadeh's conclusion that Checkpoint's $208 million in sales constitutes nearly a 99% share would not be credible. But that is not the case here. Where an experienced economist examines multiple market participants and dismisses others as insignificant, that expert should be permitted to offer his opinion. *See* [*U.S. Information Systems, 313 F. Supp.2d at 232*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BSV-B3K0-0038-Y02G-00000-00&context=) ("despite the potential effect the small sample size could have on the persuasiveness of [an expert]'s conclusions, his testimony is not inadmissible solely based on sample size alone"); [*A & M Records, Inc. v. Napster Inc., 2000 U.S. Dist. LEXIS 20668, 2000 WL 1170106 at \*3-4 (N.D. Cal. Aug.10, 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:434B-0Y90-0038-Y13N-00000-00&context=) (error in identifying the entire universe of a target population did not affect admissibility of the expert's testimony). Of course, if Checkpoint provides evidence at trial that the market's size or composition is materially different from Shehadeh's figures, then cross-examination will undermine his credibility. [↑](#footnote-ref-9)
11. 11During Holm's deposition, he was shown an internal USS document that stated: "The FCC has approved the systems designed and patented by Universal Surveillance Systems to service the loss prevention requirements of the food and drug industry." Depo. at 95 (docket no. 328-3). Holm confirmed his understanding that USS's RF-System components were FCC-approved. *Id.* The internal document Holm looked at was an "executive summary" sent from USS Senior Vice President Denise Canfield to USS President Adel Sayegh on March 16, 2011; Sayegh forwarded it to a potential investor. *Id.* at 87.

    As discussed below, Canfield**[\*74]** has since attested USS's towers were *not* FCC-approved until 2014. It is unclear why the executive summary Sayegh forwarded to a potential investor in March of 2011 stated incorrectly that USS's towers *were* FCC-approved. [↑](#footnote-ref-10)
12. 12This table summarizes a "backup chart" created by Shehadeh. For reasons that are unclear, the figures in Shehadeh's backup chart are slightly different from the figures contained in Figure 19 of Shehadeh's report. These slight differences, however, are immaterial. [↑](#footnote-ref-11)
13. 13Checkpoint observes that the FCC certified USS's "Mirage" tower, while Shehadeh's damage calculations were based on but-for sales of the "UNI-MONO8.2" tower. USS asserts the "the 'Mirage' incorporated the UNI-MON8.2 technology for purposes of FCC certification." Response at 2 (docket no. 495). At this juncture, the Special Master assumes USS is correct. [↑](#footnote-ref-12)
14. 14At the *Daubert* hearing, Checkpoint referred to an October 22, 2007 email from Callidus to USS, where Callidus writes, "We finally passed FCC here in Czech republic." *Daubert* hearing exh. HX070. Perhaps this led USS to believe its towers were FCC-certified. Still, this belief does not fit with subsequent documents — for example: (1) a much-later email from Callidus to USS dated October 10, **2010**, describing Callidus's efforts in resolving a "slight hitch in RF FCC testing," *Daubert* hearing exh. HX064; and (2) a January 7, **2012** document showing that an independent lab tested USS's RF tower and found it met FCC ***regulations***, *see* Canfield declaration exh. A (docket no. 484). This latter document is the first that suggests USS received some degree of "FCC approval," which is still apparently not the same as actual certification. *See also Daubert* hearing tr. at 104-16 (discussing several emails showing that, beginning in 2006, USS repeatedly urged Callidus to procure FCC certification for the RF-towers). [↑](#footnote-ref-13)
15. 15The Special Master observes it was not Shehadeh's fault that his opinions were premised upon incorrect facts. It was USS's own executives — including Sayegh, Canfield, Holm, and others — who provided Shehadeh with incorrect information. [↑](#footnote-ref-14)
16. 16*See, e.g., Daubert* tr. at 78 ("[Checkpoint's] exclusionary conduct doesn't just [mean] you don't make these sales, right, it changes your incentives. It changes USS's incentives to engage in a full range of marketing activities, of product development activities, . . . . \* \* \* If [USS] had the commercial opportunities that they anticipated based on everything I reviewed, they would have pursued the FCC certification earlier."); USS's post-*Daubert* hearing brief at 7 (docket no. 483) ("In the absence of Checkpoint's conduct, . . . USS would have been incentivized to secure FCC certification sooner because the largest purchasers of RF EAS equipment would not have been foreclosed."). [↑](#footnote-ref-15)
17. 17*See e.g., Daubert* tr. at 79 ("based on the information I reviewed, [USS] would have had the opportunity to pursue [FCC certification], and given the relatively short amount of time that it took them to get that, would have achieved it in time to make the sales that are included in the — the damages that I've calculated."); USS's post-*Daubert* hearing brief at 7 (docket no. 483)**[\*84]** ("in the but-for world, USS would have achieved full-scale EAS equipment capability within two years of penetrating the Relevant Markets with EAS consumables"). [↑](#footnote-ref-16)
18. 18In its summary judgment briefing, USS argues**[\*85]** the "only impact [its failure to get FCC certification] could have . . . is regarding the quantum of damage." Response at 45 (docket no. 352). USS then writes: "the question one must ask is: *in the but-for world*, what impact if any would alleged FCC intervention [against USS] have had on the quantum of damage?" *Id.* at. 46 (emphasis in original). Citing [*First Beverages, Inc. v. Royal Crown Cola Co., 612 F.2d 1164 (9th Cir. 1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KHS0-0039-W076-00000-00&context=), USS concludes the impact would be zero, because Checkpoint has no evidence that the FCC would have (for example) intervened by forbidding USS from selling its towers, thereby reducing any lost profit damages. The point, however, is that Checkpoint had no reason or opportunity to pursue discovery related to an FCC intervention theory, because USS stated its towers were FCC-approved — USS did not say (and Shehadeh did not assume) that it would have knowingly sold towers even without certification. USS cannot fault Checkpoint for failing to adduce evidence of the "impact . . . FCC intervention [would] have . . . on the quantum of damage" in Shehadeh's (or some other) version of the but-for world, when it was USS's own assertions of fact that kept Checkpoint from pursuing that evidence. [↑](#footnote-ref-17)
19. 19USS argues: (1) its complaint "makes no mention of FCC certification at all," so it has no obligation to amend its pleadings; (2) its answers to interrogatories "are complete and do not require supplementation;" and (3) Shehadeh timely supplemented his report by offering revised FCC certification opinions during his second deposition and his testimony at the *Daubert* hearing. Response**[\*87]** at 5-6 (docket no. 6). Even assuming the first two arguments are valid, the third is not. [↑](#footnote-ref-18)
20. 20It is interesting to speculate how things might be different if USS had given Shehadeh correct information from the start. "[I]n the ***antitrust*** context, plaintiffs enjoy a considerable amount of leeway in 'constructing a hypothetical world free of the defendant['s] exclusionary activities'" for purposes of estimating their damages. [*Univac Dental Co. v. Dentsply Intern., Inc., No. 1: 07 CV 493, 2010 U.S. Dist. LEXIS 41130, 2010 WL 1816745 at \*3 (M.D. Pa. Apr. 27, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YBG-T6B0-YB0P-004T-00000-00&context=) (quoting [*LePage's Inc. v. 3M, 324 F.3d 141, 166 (3rd Cir. 2003))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4875-KVW0-0038-X13K-00000-00&context=). This is because "[d]amages in an ***antitrust*** case 'are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts.'" [*Litton Sys., Inc. v. Am. Tel. & Telegraph Co. 700 F.2d 785, 823 (2nd Cir. 1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0RR0-003B-G3K6-00000-00&context=) (quoting [*Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F880-003B-S1K4-00000-00&context=). It is entirely conceivable that Shehadeh could have offered an admissible "but-for" damages opinion that included lost profits flowing from tower and deactivator sales, premised on the hypothetical that USS would have obtained FCC certification earlier but for Checkpoint's anticompetitive conduct. Because he was given incorrect information, however, Shehadeh never offered this hypothetical or explained the evidentiary bases for it; and therefore, Checkpoint never had a chance to investigate or challenge any such opinions.**[\*88]** [↑](#footnote-ref-19)
21. 21*See* [*Fed. R. Civ. P. 12(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) ("The court may strike *from a pleading* an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.") (emphasis added); *see* [*Fed. R. Civ. P. 7(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YF-00000-00&context=) (defining "pleadings" and contrasting them with motions). [↑](#footnote-ref-20)