

Case Nos. 07-1586, 07-1588, 07-1590

---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

---

Herman Schumacher; Michael P. Callicrate; Roger D. Koch,

Plaintiffs - Appellees,

v.

Cargill Meat Solutions Corp., doing business as Excel Corp.; Swift Beef  
Company, formerly known as  
ConAgra Beef Company; and Tyson Fresh Meats, Inc.,

Defendants - Appellants.

---

COMBINED BRIEF OF APPELLANTS

---

Appeals from the United States District Court  
for the District of South Dakota,  
Honorable Charles B. Kornmann, Presiding

---

## SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

This is an appeal from a judgment entered after trial in a Packers and Stockyards Act class action. The case concerns an erroneous boxed beef price statistic that was reported by the U.S. Department of Agriculture during six weeks in 2001. Plaintiffs (cattle sellers) claim that the defendant packers, each acting individually, knew of the USDA's *boxed beef* error, did not tell plaintiffs, and thus are liable for manipulating *fed cattle* prices.

The district court instructed the jury (over defendants' objection) that defendants could be guilty of illegal price manipulation even if they "acted unintentionally." So instructed, the jury found liability, even though plaintiffs presented no evidence of any deliberate action to affect prices.

In calculating damages, plaintiffs' economist combined class member damages with opt-out damages. The jury rejected his calculations, awarded damages in a lower amount, but included in its award an unknown amount of damages suffered by opt-outs. Although the court had told the jury that opt-out damages would be removed before judgment was entered, it failed to do so, entering judgment on the full amount.

Defendants request 30 minutes per side (10 minutes for each defendant) for oral argument.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1A of the Local Rules of the United States Court of Appeals for the Eighth Circuit, Appellants provide the following corporate disclosures:

Appellant Cargill Meat Solutions Corporation d/b/a Excel Corporation is a wholly-owned subsidiary of Cargill, Incorporated, a privately-owned company.

Appellant Swift Beef Company is a wholly-owned subsidiary of Swift & Company, which is in turn a wholly-owned subsidiary of S&C Holdco 3, Inc., a privately-held Delaware corporation. No publicly-held corporation owns 10% or more of the stock of Swift Beef Company or its parents.

Appellant Tyson Fresh Meats, Inc. is a wholly-owned subsidiary of Tyson Foods, Inc. A publicly-held corporation, Nuveen Investments, Inc., owns more than 10% of the stock of Tyson Foods, Inc. via its wholly-owned (and not publicly-held) subsidiary, NWQ Investment Management Co.

Respectfully submitted,

---

Mark W. Ryan  
Michael E. Lackey, Jr.  
Brad P. Rosenberg  
MAYER, BROWN, ROWE & MAW LLP  
1909 K Street, N.W.  
Washington, DC 20006-1101  
(202) 263-3000

Kennith L. Gosch  
BANTZ, GOSCH & CREMER, L.L.C.  
305 Sixth Avenue, S.E.  
P.O. Box 970  
Aberdeen, SD 57402-09070  
(605) 225-2232

*Counsel for Appellant  
Cargill Meat Solutions Corporation  
d/b/a Excel Corporation*

---

Patrick E. Brookhouser, Jr.  
MCGRATH NORTH MULLIN &  
KRATZ, PC LLO  
1601 Dodge Street, Suite 3700  
Omaha, Nebraska 68102  
(402) 341-3070

Thomas J. Welk  
BOYCE, GREENFIELD, PASHBY &  
WELK, LLP  
101 N. Phillips Avenue, Suite 600  
Sioux Falls, SD 57117-5015  
(605) 336-2424

*Counsel for Appellant  
Swift Beef Company*

---

William H. Baumgartner, Jr.  
Constantine L. Trela, Jr.  
Louis E. Fogel  
SIDLEY AUSTIN LLP  
1 S. Dearborn Street  
Chicago, Illinois 60603  
(312) 853-7000

Daniel R. Fritz  
FRITZ LAW OFFICES  
428 North Hwy. 281 - Suite 3  
Aberdeen, SD 57401  
(605) 225-6953

*Counsel for Appellant  
Tyson Fresh Meats, Inc.*

May 7, 2007

# TABLE OF CONTENTS

|  | <b>Page</b> |
|--|-------------|
| STATEMENT OF THE ISSUES .....  | 1           |
| STATEMENT OF THE CASE.....   | 3           |
| STATEMENT OF FACTS.....  | 5           |
| A.    The Market for Fed Cattle .....  | 5           |
| 1.    Cattle Purchases and Sales .....   | 5           |
| 2.    Hedging.....   | 8           |
| 3.    Beef Processing.....   | 9           |
| B.    The Livestock Mandatory Reporting Act.....   | 9           |
| C.    The USDA’s Error.....  | 12          |
| D.    This Litigation.....   | 14          |
| 1.    Class Certification.....   | 14          |
| 2.    Plaintiffs’ Expert Reports.....  | 16          |
| 3.    Plaintiffs’ Case At Trial .....  | 17          |
| a.    Fact of Injury and Damages.....  | 17          |
| b.    Claimed Knowledge of the<br>Error.....   | 20          |
| 4.    The Jury Instructions and Verdict .....  | 26          |
| 5.    Post-Trial Motions.....  | 29          |
| SUMMARY OF THE ARGUMENT.....   | 31          |
| STANDARDS OF REVIEW .....  | 34          |
| ARGUMENT.....  | 35          |
| I.    DEFENDANTS DID NOT MANIPULATE OR CONTROL<br>CATTLE PRICES.....   | 35          |
| A.    The Jury Was Instructed to Evaluate Plaintiffs’ Price<br>Manipulation Claim Using the Wrong Legal Standard ..... | 36          |

**TABLE OF CONTENTS**  
(continued)

|  | <b>Page</b> |
|--|-------------|
| 1.    The “Manipulation or Control” of Prices Requires Intentional Conduct.....  | 36          |
| 2.    Both the “Purpose” and “Effect” Prongs of Section 202(e) Require Intentional Conduct .....   | 38          |
| B.    Plaintiffs Failed to Present Any Evidence of Conduct Intended to Create an Artificial Price.....   | 40          |
| 1.    Knowledge Alone, Absent a Duty to Disclose, Is Insufficient to Create Liability Under the PSA.....   | 41          |
| 2.    Plaintiffs Failed to Prove That Defendants – Much Less Defendants’ Cattle Procurement Personnel – Knew of the Error.....                                   | 45          |
| C.    Plaintiffs’ Failure To Demonstrate Injury To Competition Is Fatal To Their PSA Claim.....  | 48          |
| II.    THERE WAS NO EVIDENCE TO SUPPORT THE JURY’S FINDING OF IMPACT .....   | 50          |
| A.    In Rejecting Schroeder’s Formula, The Jury Rejected The Only Evidence Offered To Show That The USDA’s Error Injured Each Class Member .....                | 52          |
| B.    Because No Individual Defendant Had Market Power Sufficient to Lower Cattle Prices Unilaterally, Plaintiffs’ Impact Claim Is Economically Implausible..... | 53          |
| C.    Plaintiffs Cannot Show Impact For Every Class Member Because Some Hedged.....  | 56          |
| III.   PLAINTIFFS FAILED TO PROVE CLASS DAMAGES, ENTITLING DEFENDANTS TO JUDGMENT AS A MATTER OF LAW .....   | 57          |
| A.    Plaintiffs Failed To Prove A Formula That Can Be Used To Calculate Damages To Class Members .....  | 57          |

**TABLE OF CONTENTS**  
(continued)

|  | <b>Page</b> |
|--|-------------|
| B. The Class Cannot Recover Damages Suffered By Opt-Outs .....   | 60          |
| C. The Jury’s Verdict Provides No Basis for Determining the Damages to the Class.....  | 62          |
| IV. BECAUSE THIS CASE INVOLVES NUMEROUS INDIVIDUALIZED ISSUES, THE CLAIMS ARE INAPPROPRIATE FOR CLASS TREATMENT .....  | 64          |
| A. Plaintiffs Failed to Prove Impact or Damages on a Classwide Basis.....  | 64          |
| B. Class Certification Was Inappropriate Because, Even If the Jury Had Accepted Schroeder’s Formula, Defendants Would Still Have Been Entitled To Jury Trials On Each Class Member’s Individual Claim..... | 65          |
| C. Individual Class Member Knowledge Of The USDA’s Error Precludes Treating This As A Class Action.....  | 67          |
| CONCLUSION .....   | 68          |

## TABLE OF AUTHORITIES

### Cases

|  |                   |
|--|-------------------|
| <i>Ahlberg v. Chrysler Corp.</i> , 481 F.3d 630, 2007 U.S. App. LEXIS 7136<br>(8th Cir. 2007).....   | 34, 47, 48        |
| <i>Amerinet, Inc. v. Xerox Corp.</i> , 972 F.2d 1483 (8th Cir. 1992) .....                           | 51, 52            |
| <i>Bathke v. Casey's General Stores, Inc.</i> , 64 F.3d 340 (8th Cir. 1995) .....                    | 54                |
| <i>Bell Atlantic Corp. v. AT&amp;T Corp.</i> , 339 F.3d 294 (5th Cir. 2003) .....                    | 51                |
| <i>Belles v. Schweiker</i> , 720 F.2d 509 (8th Cir. 1983) .....                                      | 34                |
| <i>Blades v. Monsanto Co.</i> , 400 F.3d 562 (8th Cir. 2005) .....                                   | 2, 34, 35, 51, 68 |
| <i>Boyle v. United Technologies Corp.</i> , 487 U.S. 500 (1988) .....                                | 45                |
| <i>Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.</i> , 429 U.S. 477 (1977).....                         | 64                |
| <i>Cargill, Inc. v. Hardin</i> , 452 F.2d 1154 (8th Cir. 1971) .....                                 | 37, 38            |
| <i>Chiarella v. United States</i> , 445 U.S. 222 (1980).....   | 42                |
| <i>Cudworth v. Midcontinent Communications</i> , 380 F.3d 375 (8th Cir. 2004) .....                  | 38                |
| <i>DeJong Packaging Co. v United States Dep't of Agric.</i> , 618 F.2d 1329 (9th<br>Cir. 1980) ..... | 48                |
| <i>DePaepe v. General Motors Corp.</i> , 141 F.3d 715 (7th Cir. 1998) .....                          | 48                |
| <i>Ernst &amp; Ernst v. Hochfelder</i> , 425 U.S. 185 (1976).....                                    | 37                |
| <i>First Union National Bank v. Benham</i> , 423 F.3d 855 (8th Cir. 2005).....                       | 34                |

|  |           |
|--|-----------|
| <i>Flegel v. Christian Hospital, Northeast-Northwest</i> , 4 F.3d 682 (8th Cir. 1993).....           | 53        |
| <i>Frey v. Commodity Futures Trading Commission</i> , 931 F.2d 1171 (7th Cir. 1991).....             | 37        |
| <i>General Foods Corp. v. Brannan</i> , 170 F.2d 220 (7th Cir. 1948) .....                           | 37        |
| <i>Gerace v. Utica Veal Co.</i> , 580 F. Supp. 1465 (N.D.N.Y. 1984).....                             | 1, 49     |
| <i>Grand Laboratories, Inc. v. Midcon Laboratories of Iowa</i> , 32 F.3d 1277 (8th Cir. 1994).....   | 44        |
| <i>Hanson v. Ford Motor Co.</i> , 278 F.2d 586 (8th Cir. 1960).....                                  | 45        |
| <i>IBP, Inc. v. Glickman</i> , 187 F.3d 974 (8th Cir. 1999).....                                     | 43        |
| <i>Jackson v. Swift Eckrich, Inc.</i> , 53 F.3d 1452 (8th Cir. 1995).....                            | 43, 48    |
| <i>Kline v. Coldwell Banker &amp; Co.</i> , 508 F.2d 226 (9th Cir. 1974).....                        | 66        |
| <i>Ex parte Lange</i> , 85 U.S. (18 Wall.) 163 (1873).....   | 62        |
| <i>Mahon v. Stowers</i> , 416 U.S. 100 (1974) .....  | 1, 42, 43 |
| <i>Matsushita Elec. Ind. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986).....                    | 55        |
| <i>Morgenstern v. Wilson</i> , 29 F.3d 1291 (8th Cir. 1994) .....                                    | 2, 54, 55 |
| <i>Nebraska Plastics, Inc. v. Holland Colors Americas, Inc.</i> , 408 F.3d 410 (8th Cir. 2005) ..... | 2         |
| <i>Phillips Petroleum Co. v. Shutts</i> , 422 U.S. 797 (1985) .....                                  | 2, 60     |
| <i>Pickett v. IBP, Inc.</i> , 182 F.R.D. 647 (M.D. Ala. 1998).....                                   | 50        |

|   |                              |
|---|------------------------------|
| <i>Pickett v. Tyson Fresh Meats, Inc.</i> , 315 F. Supp. 2d 1172 (M.D. Ala. 2004), <i>aff'd</i> , 420 F.3d 1272 (11th Cir. 2005), <i>cert. denied</i> , 126 S. Ct. 1619 (2006)..... | 1, 2, 18, 48, 49, 57, 59, 60 |
| <i>Reno v. Bossier Parish School Board</i> , 528 U.S. 320 (2000).....   | 1, 39                        |
| <i>Schiller &amp; Schmidt, Inc. v. Nordisco Corp.</i> , 969 F.2d 410 (7th Cir. 1992).....   | 63                           |
| <i>Schwaiger v. Mitchell Radiology Associates, P.C.</i> , 652 N.W.2d 372 (S.D. 2002).....   | 41                           |
| <i>State of Alabama v. Blue Bird Body Co.</i> , 573 F.2d 309 (5th Cir. 1978).....   | 50, 64                       |
| <i>Union Carbide Corp. v. Nisley</i> , 300 F.2d 561 (10th Cir. 1961).....   | 66                           |
| <i>United States v. Empire Gas Corp.</i> , 537 F.2d 296 (8th Cir. 1976).....  | 54                           |
| <i>United States v. Ron Pair Enterprise, Inc.</i> , 489 U.S. 235 (1989).....  | 38                           |
| <i>U.S. Anchor Manufacturing, Inc. v. Rule Industries, Inc.</i> , 7 F.3d 986 (11th Cir. 1993).....  | 54                           |
| <i>Utesch v. Dittmer</i> , 947 F.2d 321 (8th Cir. 1991).....  | 1, 37                        |
| <i>Volkart Brothers, Inc. v. Freeman</i> , 311 F.2d 52 (5th Cir. 1962).....   | 37                           |
| <i>Western Union Telegraph Co. v. Pennsylvania</i> , 368 U.S. 71 (1961).....  | 61                           |
| <i>Williams v. ConAgra Poultry Co.</i> , 378 F.3d 790 (8th Cir. 2004).....  | 62                           |

## Statutes

|                           |              |
|---------------------------|--------------|
| 7 U.S.C. § 181.....       | 1            |
| 7 U.S.C. § 192(a).....    | 4            |
| 7 U.S.C. § 192(e).....    | 1, 3, 36, 49 |
| 7 U.S.C. § 209.....       | 50           |
| 7 U.S.C. § 1635f(a) ..... | 9            |
| 7 U.S.C. § 1635f(b) ..... | 11           |
| 15 U.S.C. § 15.....       | 50           |
| 28 U.S.C. § 1291 .....    | 1            |
| 28 U.S.C. § 1331 .....    | 1            |
| 28 U.S.C. § 1367 .....    | 1            |
| 42 U.S.C. § 1973c.....    | 39           |

## Rules and Regulations

|                                  |       |
|----------------------------------|-------|
| Fed. R. Civ. P. 23(b)(3) .....   | 34    |
| Fed. R. Civ. P. 23(c)(1)(C)..... | 65    |
| Fed. R. Civ. P. 23(c)(3) .....   | 61    |
| Fed. R. Civ. P. 50(a)(1) .....   | 34    |
| Fed. R. Civ. P. 54(b).....       | 1, 30 |
| Fed. R. Evid. 702.....           | 47    |

## JURISDICTIONAL STATEMENT

Plaintiffs filed suit on July 1, 2002, asserting claims under the Packers and Stockyards Act, 7 U.S.C. § 181 *et seq.* ("PSA"), and state law. District court jurisdiction was based on 28 U.S.C. §§ 1331 & 1367. The district court entered final judgment under Fed. R. Civ. P. 54(b) on February 15, 2007. Defendants timely filed their notices of appeal on March 12, 2007. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Can price manipulation under Section 202(e) of the PSA, 7 U.S.C. § 192(e), be established without proof that the defendant acted with the intent to create an artificial price?

*Utesch v. Dittmer*, 947 F.2d 321 (8th Cir. 1991)

*Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000)

*Mahon v. Stowers*, 416 U.S. 100 (1974)

2. Must a plaintiff show an injury to competition to prevail on a claim under Section 202(e) of the PSA?

*Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005), *cert. denied*, 126 S.Ct. 1619 (2006)

*Gerace v. Utica Veal Co.*, 580 F. Supp. 1465 (N.D.N.Y. 1984)

3. Did plaintiffs establish fact of injury as to each member of the class, where the jury rejected plaintiffs' only evidence of alleged injury to the class as a whole, no defendant had sufficient market power to

lower the market price, and an unknown number of class members entered into hedges that would have protected them from injury in any event?

*Pickett v. Tyson Fresh Meats, Inc.*, 315 F. Supp. 2d 1172 (M.D. Ala. 2004), *aff'd*, 420 F.3d 1272 (11th Cir. 2005), *cert. denied*, 126 S.Ct. 1619 (2006)

*Morgenstern v. Wilson*, 29 F.3d 1291 (8th Cir. 1994)

4. Did plaintiffs prove actual damages to the class by presenting a formula, rejected by the jury, which measured damages for a group of cattle sellers that included opt-outs?

*Pickett v. Tyson Fresh Meats, Inc.*, 315 F. Supp. 2d 1172 (M.D. Ala. 2004), *aff'd*, 420 F.3d 1272 (11th Cir. 2005), *cert. denied*, 126 S.Ct. 1619 (2006)

*Nebraska Plastics, Inc. v. Holland Colors Americas, Inc.*, 408 F.3d 410 (8th Cir. 2005)

*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)

5. Did the district court properly certify plaintiffs' claims for class treatment where plaintiffs were unable to prove impact and damages on a classwide basis, and jury trials on individual class members' claims would have been required even if the jury had accepted plaintiffs' proffered impact and damages evidence?

*Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005)

## STATEMENT OF THE CASE

This appeal involves a PSA claim by a nationwide class of cattle producers against the nation's largest meatpackers.<sup>1</sup> Plaintiffs entered into individually-negotiated contracts to sell cattle to defendants. During a six-week period in April and May 2001, the U.S. Department of Agriculture reported boxed beef "cutout values" - a composite figure calculated by the USDA using prices for finished beef products, not cattle - which later proved to be incorrect. Plaintiffs claim that, as a result of the USDA's error, they received too little for cattle they sold during the error period.

It is undisputed that defendants were not responsible for the error and that all price information they submitted to the USDA was completely accurate. It also is undisputed that defendants, fierce competitors, did not act in concert or conspire in any way. Nevertheless, plaintiffs asserted that defendants somehow used the USDA's mistake to "manipulate or control" cattle prices in violation of Section 202(e) of the PSA, 7 U.S.C. § 192(e).

---

<sup>1</sup> Plaintiffs sued Tyson Fresh Meats, Inc., Cargill Meat Solutions Corporation d/b/a Excel Corporation, Swift Beef Company, and National Beef Packing Company, L.L.C. National prevailed at trial and is not a party to these appeals. Unless otherwise noted, "defendants" refers to Tyson, Excel, and Swift.

Under plaintiffs' theory of liability, a defendant can engage in illegal price manipulation even without (1) any intent to manipulate or control prices, (2) any action to manipulate or control prices, or (3) any knowledge on the part of defendants' cattle procurement personnel that the USDA cutout values were wrong. The jury instructions permitted a finding of price manipulation in the absence of intentional conduct to manipulate or control prices, and the jury accordingly made that finding. The jury rejected plaintiffs' other claim that defendants had engaged in an unfair or deceptive practice under Section 202(a), 7 U.S.C. § 192(a).

The jury also rejected plaintiffs' damages calculation. Plaintiffs requested awards of \$16,476,519 against Tyson, \$12,708,617 against Excel, and \$9,234,409 against Swift. The jury awarded \$4,000,000 against Tyson, \$3,000,000 against Excel, and \$2,250,000 against Swift. Because the only damages evidence presented at trial aggregated class member and non-class member cattle sales, the jury's verdict, like plaintiffs' calculation, did not purport to measure damages to the class. Although the district court had told the jury that any damages it awarded would be reduced to account for sales by non-class members, it later refused to do so. The court entered final judgment in the full amounts found by the jury – thus

awarding damages to the class based upon cattle sales by non-class members. This appeal followed.

## **STATEMENT OF FACTS**

### **A. The Market for Fed Cattle**

#### **1. Cattle Purchases and Sales**

To meet consumer demand for beef, meat packers purchase and slaughter hundreds of thousands of cattle weekly. (A622.) These cattle are “fed cattle,” raised specifically for human consumption. Cattle owners typically send their cattle to feedyards for finishing and ultimate sale. (A707:8-708:11.) These feedyards fatten the cattle for a fee and normally act as the owners' agents in negotiating sales and selling cattle to packers. (A816:1-19.)

Fed cattle are sold in a variety of ways. One common method is the “cash market” sale. In a cash market sale, a feedyard and packer haggle until they agree upon a price for a particular pen of cattle. (A826:3-827:25.) The agreed-upon price is typically a dollar amount per unit weight for all cattle in the pen. (A817:14-16; A828:3-6.) Cash market sale contracts are

usually oral, handshake agreements; written contracts are rare. (A724:12-17; A763:18-764:4.)<sup>2</sup>

Total U.S. beef processing capacity exceeds the available supply of cattle, so packers compete vigorously to acquire enough cattle to keep their high-fixed-cost plants operating at an efficient level. (A787:1-788:13; A838:6-839:19.) To that end, cattle buyers employed by various packers canvass cattle-producing areas, visiting feedyards and farms to evaluate

---

<sup>2</sup> As an alternative to a cash market sale, packers also buy cattle using an agreed-upon “formula” which (depending on the agreement) can establish a framework for repeated cattle purchases from a single seller. The formula produces a base price for a given week, and is also used to make adjustments, for each animal, to account for variations in quality. (A848:8-11.) The base price is typically keyed to cash market prices that are negotiated by other sellers. (A848:23-850:13.) Different methodologies are used to make the quality adjustments. (E.g., A850:20-851:11.)

The record indicates that Tyson made no use of USDA cutout values, or spreads based upon them, in its formula purchases. (A850:16-19; A851:21-852:10.) Excel and Swift used spreads, derived from USDA cutout values, to make certain quality adjustments on formula purchases. However, plaintiffs presented no evidence of any resultant impact on specific class members. For Excel, the net effect of the USDA error was that Excel paid *more* for formula cattle during the class period than it would have if USDA had correctly calculated the cutout values. (A625-652; A871:13-872:7.) For Swift, the net effect of the USDA error on quality premiums and discounts was “[v]irtually a wash.” (A881:10-882:2.)

pens of cattle and bidding against one another to acquire cattle. (A837:24-839:19.)

In agreeing on a price for a pen of cattle, packers and cattle producers consider a wide variety of information. A cattle buyer examines the cattle to try to predict the quality and quantity of the meat they will produce when processed. (A818:2-825:24.) A given packer's bidding decisions also will be influenced by factors such as available plant capacity, beef sale commitments, and internal company beef sales data. (A840:24-844:17.)

When pricing their cattle, producers typically take account of cattle prices paid to others, following published reports of such prices and seeking out price information in private communications. (A725:18-726:17.) Many producers carefully monitor price changes for live cattle futures contracts traded on the Chicago Mercantile Exchange. (A704:20-706:17.) Some say that they rely heavily on the cutout values published by the USDA (A699:7-700:21), while others pay little or no attention to those values. (A832:23-833:2; A876:6-877:2.) And, the USDA's monthly *Cattle on Feed* report, which details the number of cattle in feedyards, provides important information on supply. (A722:25-723:9; A765:4-6.)

After a process of negotiation, cash market buyers and sellers agree on a dollar price for a pen of cattle. The cattle are delivered to the packer within the next week, and the cattle are trucked to a processing plant. (A829:7-19.)

## **2. Hedging**

Because price fluctuations can make marketing cattle a risky business, some owners hedge by selling cattle futures. (A710:7-10; A728:6-21.) A futures market sale locks-in a price for the producer's cattle months before the cattle are delivered, and subsequent price changes thus do not affect how much the cattle owner receives for his cattle, net of the futures position. (A709:8-710:3.)

Owners typically place a "hedge a couple of months before the cattle are finished." (A710:7-10; A795:25-796:4.) Thus, for cattle sold during the period at issue here (April 2 to May 11, 2001), most hedges would have been placed before the USDA error began. (A796:5-9.) Because the price of hedged cattle was fixed before the error had even happened, the error could not have affected those who sold hedged cattle. (A795:25-796:18.)

And there were many. Named plaintiff Koch hedged "maybe as much as 50%" of his fed cattle. (A729:9-12.) Jerry Adams, a large cattle

producer who opted out of the class, hedged between 50% and 80% of his cattle in 2001. (A316:18-317:3.) Plaintiffs' expert testified that as many as 30% of the fed cattle sold in 2001 could have been hedged. (A795:14-24.)

### **3. Beef Processing**

After being sold to a packer and delivered to its plant, the cattle are slaughtered, and USDA employees at the plant grade most of the carcasses. The grades, from highest to lowest, are Prime, Choice, and Select. In addition, there is ungraded "no-roll" product. (A820:16-821:18.) Once graded, the carcasses are processed into various "cuts" of meat – such as ribeye steaks, chuck roasts, and flank steaks – that are wrapped in vacuum-sealed packages, boxed, and shipped to customers. (A698:20-699:6.)

#### **B. The Livestock Mandatory Reporting Act**

In April 2001, the USDA implemented the Livestock Mandatory Reporting Act of 1999, 7 U.S.C. §§ 1635-1636h ("LMRA"). (A278 – 8:17-9:14.) Under the LMRA, any packer slaughtering over 125,000 head per year was required to report the price, quantity, quality grade, cut, and trim specification of the boxed beef it sold. (See 7 U.S.C. § 1635f(a); A285 – 30:5-12.) During the April-May 2001 period, fifteen packers made LMRA reports to USDA. (A285 – 30:5-12.)

As part of its beef price reporting efforts, the USDA created a formula that estimates the average wholesale price for the meat from a carcass. The formula calculates a weighted average price for 56 individual cuts. (A855:13-20.) The average price is referred to as the USDA “cutout value,” and is generated for both Choice and Select graded meat, and for both Heavy and Light cattle. (A277 – 7:2-10; A338-621.)<sup>3</sup> Cutout values are expressed as so many dollars per hundred pounds of beef. (A338-621.)

The 56 cuts used to estimate the cutout values are representative. Other cuts exist. (A296 – 59:9-15.) Tyson, for example, sold around 1,000 different Choice beef cuts in 2001. (A854:7-10.) Moreover, in calculating its cutout values, the USDA only considered sales for delivery within 21 days, and roughly 65% of the beef price data reported to USDA were ignored in its cutout calculations. (A297-98 – 65:6-66:1 & 66:4-67:9.)

Under the LMRA, in addition to the four cutout values (Heavy Choice, Light Choice, Heavy Select, and Light Select), the USDA also calculated and reported average wholesale prices for seven “primals” (rib, chuck, round, loin, brisket, short plate, and flank) which collectively

---

<sup>3</sup> A “Light” carcass weighs between 600 and 750 pounds; a “Heavy” carcass weighs between 750 and 900 pounds. (A338-621.)

account for essentially all of the meat on an animal. The USDA calculated the average price for a given primal from reported prices for representative cuts from that primal. (A290-293 – 45:12-23 & 50:20-51:11; A472-481; A653-654.)

Limited price data for the 56 individual cuts were also reported. In reporting these data (high price, low price, and weighted average price), the USDA used a confidentiality rule called the “3/60 rule.” Under this rule, the USDA would not report any prices for a particular cut unless at least three of the fifteen reporting packers had reported sales of that cut, and no single packer accounted for 60% or more of the reported sales. (A289 – 40:16-41:22.) Because of that rule, the USDA often would not report any price data for many of the 56 cuts. (A338-621.) One therefore could not use the prices reported for the cuts to check the accuracy of the reported primal values. (A295 – 57:15-58:17.) Individual packer data were maintained by the USDA on a confidential basis – no packer knew what any other packer reported. (A301 – 80:14-25.)

Under the LMRA, the USDA issued beef price reports containing cutout, primal, and individual cut values twice daily – once in the morning and again in the afternoon. (See 7 U.S.C. § 1635f(b); A338-621.) Packers

had to submit data for the afternoon report by 2:00 p.m., and the USDA typically issued the report between 3:00 and 4:00. (A289, A302 – 42:4-17 & 82:22-84:9.)

Before the LMRA went into effect in April 2001, packers voluntarily provided the USDA with meat pricing information, which the USDA used to calculate cutout and primal values. (A278 – 8:17-9:14.) However, for the cutout and primal values calculated under mandatory reporting, the USDA changed the way that it treated freight. (A299-300 – 70:19-73:5.) The effect of this change was never determined by the USDA. (A300-301 – 74:21-75:13.) Consequently, if a reader of the USDA reports had observed a small price difference when the USDA shifted from voluntary to mandatory reporting, the reader would have had no way to know whether the difference was due to the new freight methodology or something else. (A301 – 76:3-11.)

### **C. The USDA's Error**

The USDA first began publishing boxed beef cutout values under the LMRA on April 3, 2001. It is undisputed that the packers submitted accurate reports to the USDA. (A241.) However, a computer program used to calculate the USDA cutout values contained a flaw. When

calculating the primal and cutout values for Choice and Select beef, the program included not only the reported prices for individual Choice and Select cuts, but also the reported prices for lower-value “no-roll” cuts. (A280 - 14:13-15:22; A283 - 24:3-10; A291- 47:17-48:4.) Due to this error, the USDA misreported its boxed beef cutout and primal values from April 3 through May 11, 2001. (A280 - 14:13-15:22.)

During that period, the price of “no-roll” beef was “very similar” to the prices for Choice and Select beef. (A286 - 32:11-33:11.) Thus, for the Heavy Choice cutout, the reported values, on average, were 97.8% of the correct values. (A769:5-13; Add. 15.) For the Heavy Select cutout, the reported values, on average, were 99.5% of the correct values. (A769:23-770:2; Add. 15.)

The USDA discovered that an error existed on Friday, May 11, after a market analyst at Sparks Commodities pointed out that the “Choice cuts and Select cuts were trending in one way and yet the cutout values were trending in another way.” (A282 - 21:6-21:19.) After confirming the discrepancy, the USDA temporarily stopped issuing beef price data. Instead, on Monday, May 14 and Tuesday, May 15, the USDA reported that it had “data format and aggregation problems.” (A568-580.) On

Wednesday, May 16, the USDA issued accurate boxed beef cutout values for the afternoon reports for May 14-16 (A584-587), and accurate reports continued thereafter. On May 23, the USDA published corrected cutout values for the afternoon reports for the period from April 3 through May 11. (A608-621.) The USDA has never published corrected cutout values for its morning reports for that period. (A811:21-812:5.)

Other cattle industry data were not affected by the cutout value error. For example, the USDA correctly reported prices for the 56 individual cuts throughout the error period. (A294 - 54:12-55:10.) Similarly, USDA reports regarding fed cattle prices and supply were unaffected.

#### **D. This Litigation**

##### **1. Class Certification.**

When urging class certification, plaintiffs asserted that they could prove the class's damages through "the development and estimation of econometric models." (A92.) In addition, they claimed that "the impact of the USDA boxed beef price reporting error" would be "shown through the use of econometric models," and they promised "to prove class-wide impact." (A95-96.)

Based on these representations, the court certified a class of “all persons or business associations that owned any interest in cattle that were intended for slaughter and who sold or permitted sale of such cattle (excluding culled dairy and beef cows and bulls) to defendants on the open spot cash cattle market, or on a basis affected by that market, between April 2, 2001, to and including May 11, 2001.” (A110.)

Following notice, 244 cattle owners opted out of the class. (A162-172.) Although plaintiffs knew the identity of the 244 opt-outs, and could have tried to obtain (and preserve) their cattle sale records, they did not. As a result, plaintiffs never determined which of the cattle bought by defendants during the class period had been owned by the 244 opt-outs. (A791:5-792:12.) Because packer records generally identify purchases by feedyard and not by cattle owner, packer records do not provide this information. (A712:2-10; A727:3-10; A791:5-22; A872:16-873:4.) At this point, complete cattle owner records from 2001 may no longer exist. (A792:3-12.)

One thing is certain, however: the volume of opt-out sales is significant. One opt-out and his family alone owned up to 93,000 head of cattle at any given time. (A314:2-315:10.) Plaintiff Callicrate knew many of

the opt-outs and described them as “very, very large cattle feeders.”

(A718:15-22.)

## **2. Plaintiffs’ Expert Reports.**

Plaintiffs’ expert, Professor Ted C. Schroeder of Kansas State University, created regression models to try to determine whether the USDA error affected what defendants paid for cattle. Schroeder concluded that the error reduced prices, and he used his models to estimate damages for each defendant. (A750:9-752:4.)

Defendants’ expert, Professor Jerry A. Hausman of MIT, reviewed Schroeder’s models and found a number of mistakes. When the mistakes were corrected, the damages “went from \$22.1 million to 0.” (A802:12-803:14.) Schroeder subsequently agreed that his regression models were unreliable. (A766:19-767:18; A803:15-804:14.) He therefore abandoned his initial methodology and prepared a “rebuttal” report containing new regression models – increasing his damages estimates from \$22.1 million to \$42.7 million. (A767:19-768:9; A805:12-15.)

The new models supposedly calculated what each defendant would have paid, absent the USDA error, for Choice and Select cattle during each business day of the USDA error period. Schroeder’s estimates were highly

sensitive to the precise date when the cattle sale was agreed upon. For example, for cash market cattle purchased by Tyson on April 12, 2001, Schroeder estimated that the damages were \$11.26 per head. (A674.) But for the very next day, April 13, 2001, Schroeder estimated damages for Tyson cash market purchases to be more than twice as much – \$22.57 per head. (*Id.*) Only ten days earlier, on April 3, 2001, Schroeder estimated that damages for Tyson cash market purchases were \$2.63 per head. (*Id.*)

### **3. Plaintiffs' Case At Trial.**

#### **a. Fact of Injury and Damages**

On the eve of trial, plaintiffs revealed that they could not prove actual, classwide damages because Schroeder had failed to deduct damages attributable to cattle owned by opt-outs. (A686:3-692:13.) Instead, he estimated damages for all sales to defendants during the class period, including sales by opt-outs. (A753:17-756:1.) Plaintiffs argued that they should be excused from proving actual damages to the class because the process of deducting opt-out transactions would be “highly time-consuming and individualized.” (A214.)

Instead, plaintiffs proposed to prove “a formula by which individual class members’ damages could be calculated” in some future proceeding.

(A694:19-24. *See also* A215.) To support this eleventh-hour reversal, plaintiffs explicitly adopted an approach used by the plaintiffs in *Pickett v. Tyson Fresh Meats, Inc.*, another PSA class action. The *Pickett* plaintiffs, in lieu of proving damages to the class, sought to “establish a formula from which damages could be calculated at a later claims procedure.” (A216. *See also* A694:19-24.) In this case, over defendants’ objections, the court permitted plaintiffs to proceed under their “prove a formula” theory and to present Schroeder’s “damages” figures to the jury, even though the supposed “damages” included an unknown quantity of sales by opt-outs. (A686:3-692:13.)

Schroeder’s formula was not just the basis for plaintiffs’ damage claim. It was also their only evidence to show an essential element of their liability case – that the challenged conduct injured each and every member of the class.

Schroeder had abandoned his original regression models because they were unreliable, but his new models also had serious problems. The USDA published cutout values twice per day – once in the morning, and once in the afternoon. (A789:3-15.) Many cattle sales took place before the time (3:00 to 4:00) when the USDA issued its afternoon report. (A818:8-12;

A289, 302 – 42:4-17 & 82:22-84:9.) Nevertheless, in deriving his formula, Schroeder relied entirely on the afternoon numbers. (A790:12-23.)

Professor Hausman explained the flaw in this methodology:

[N]obody knew what the afternoon report was. If you sell your cattle at 6:00 in the morning, and I've been at a feedlot at 6:00 in the morning it's not uncommon, nobody knows what that afternoon report's going to be unless they're in that movie *Back to the Future*. Now if you remember the movie *Back to the Future*, you know, you can predict what's going to happen six hours down the road, but we know that's only in the movie.

(A810:5-11.)

Because Schroeder's new models were still unreliable, their results made no economic sense. For example, his models said that on a day when the USDA erroneously reported a \$1.00 drop in the cutout average (the correctly-calculated cutout being unchanged), cattle prices at a Tyson plant would fall \$1.01. But if the USDA cutout really did fall \$1.00, and was reported as having fallen \$1.00, then Tyson's cattle prices would fall only 25 cents. (A806:4-809:15.) Plaintiffs provided no explanation for this nonsensical result.

In estimating damages using his regression models, Schroeder failed to distinguish between hedged and unhedged cattle. He therefore awarded damages to sellers who had effectively locked in a price through

hedging months before the USDA reporting error began. (A797:18-25.)

The court, however, did not allow defendants to cross-examine Schroeder on hedging in front of the jury. (A794:17-798:8 (rejecting offer of proof).)

While the court expressed the view that producers who hedged were not entitled to damages – a view from which it subsequently retreated – the court stated that “we’re not going to try that here with all those details.”

(A691:15-18.) Thus, the jury did not hear Schroeder testify, as he did during a rejected offer of proof, that hedges insulated producers from price risks, that producers who sold during the error period would have entered into hedges well before the USDA’s reporting mistake, and that up to 30% of fed cattle were hedged in 2001. (A795:10-796:9.)

One final point on damages is key. Schroeder’s damage calculations were specific dollar amounts, not ranges. (A666-675.) He provided no basis for the jury to adjust his damage estimates for a given day and a given defendant. The jury was presented, in effect, with a “take-it-or-leave-it” number.

**b. Claimed Knowledge of the Error**

There is no evidence that the employees who purchased cattle for the three defendants even knew about the USDA error before it was

announced. Plaintiffs tried to use Schroeder to address this failure of proof. Schroeder testified (over defendants' objections) that packers monitor market conditions very closely and that, as a result, they would have recognized that "something was awry" with the USDA cutout values. (A741:11-748:18; A177-202; A212-213; A695:1-4.) He purported to base his opinion on conversations he had had "at various ways, in various times" with defendants' employees. (A745:15-18.) He articulated no science-based methodology that he had employed in forming his opinion.

Apart from Schroeder's speculation, there was no *evidence* that anyone involved in cattle procurement at Tyson, Excel, or Swift knew of the USDA error.

For Tyson, plaintiffs presented no testimony from any employee in any part of the company who knew of the error before it was announced. Indeed, Schroeder admitted that there was no such testimony. (A786:5-9.) Tyson's head cattle buyer, assistant head cattle buyer, and head beef accountant all testified that they were not aware of the USDA's error. (A275:5-9; A846:8-11; A857:7-10.) Moreover, no Tyson document reflected knowledge of the error before it was announced. (A786:14-18.)

Tyson did not compute an internal company cutout at the time, so no internal comparisons to the USDA cutout were possible. (A856:8-11.) To be sure, during the error period, Tyson did refer to the USDA's reported prices for the 56 individual cuts and compared those prices to its own (A853:16-854:2), but the USDA's individual cut prices – when reported – were always correct. (A294 – 54:12-55:10; A853:8-11.) Schroeder ignored these facts in formulating his opinion about what Tyson knew; he admitted that he did not know exactly how Tyson tracked its own beef sales. (A785:3-5.)

Schroeder testified that Tyson's profits increased during the error period, which supposedly should have signaled that something was wrong. (A740:19-741:5.) But packer profits normally increase in the Spring. First, the supply of cattle increases, as calves born the previous Spring become available for processing. (A761:10-762:3.) Second, the demand for beef increases as consumers start to grill meat more frequently. (A783:24-784:6.) During the error period, Tyson's employees believed the profit increase was due to normal seasonal factors. (A845:25-846:2; A858:2-4.) In any event, a change in profits would not have indicated anything about the accuracy of the USDA cutout values. (A859:4-7.)

For Excel, Schroeder similarly admitted that he could not identify anyone who knew of the error or any documents reflecting knowledge. (A757:2-760:13.) Excel's vice president for cattle procurement, Ken Bull, testified that he first learned of the USDA's error when it was announced, and that no one at Excel had previously indicated to him that the USDA reports contained errors. (A863:6-13; A864:12-15.)

Excel did calculate an internal company cutout, but the methodology it used was radically different from the USDA's methodology. For example, Excel calculated a single composite cutout for all of its beef sales, whereas the USDA calculated four different cutouts reflecting sales of only 56 cuts sold for delivery within 21 days. (A866:18-868:15.) Excel's cutout included sales from its Canadian plant, whereas the USDA cutout value involved only U.S. packing plants. (A865:16-24.) Finally, Excel's cutout included substantial beef sales abroad, whereas the USDA cutout value was limited to U.S. sales. (A868:16-869:6.)

Comparing the Excel cutout with the USDA cutout was therefore an "apples-to-oranges" comparison, and Bull did not do such a comparison during the error period. (A870:3-5.) According to Bull, the USDA's boxed beef cutout values were "not relevant to really how we come up with our

buy order to buy cattle.”<sup>4</sup> (A870:3-8.) Finally, Excel’s profits were not unusual during the error period. (A623-624.)

Like Excel, Swift calculated a cutout based on all of its beef sales. (A332:23-335:13.) During the error period, a Swift employee in beef sales, Tom Shires, had questions about the relationship among Swift’s cutout, the USDA cutout values, and a “Yellow Sheet” cutout published by a private company (A325:9-330:3.) Shires did not have access to the beef sales data reported by other packers, which made up approximately 82% of the USDA cutout calculation (A305 - 97:9-13; A301 -80:14-25), so he called the USDA on three occasions to ask questions. (A326:12-330:3.) He also talked to the publisher of the “Yellow Sheet.” (A331:20-332:4.) Neither indicated that the USDA cutout values were wrong. (A328:23-329:8; A331:20-332:4.)

Shires did not mention his questions to anyone in Swift’s “accounting” or “fed cattle procurement” areas (A336:24-337:9), and Swift’s fed cattle procurement personnel had no knowledge, or even suspicion, of

---

<sup>4</sup> Excel’s boxed beef sales department, which is a different department from Bull’s cattle procurement department, did do a monthly comparison of Excel’s internal boxed beef cutout to the USDA boxed beef cutout values. (A870:9-16.) There was no evidence, however, that anyone at Excel suspected that the USDA’s numbers were wrong.

an error until after the USDA announced it. (A880:11-13; A883:12-19.)

Moreover, there was nothing about Swift's fed cattle purchases or profits during the error period to suggest that the USDA cutout values were incorrect. (A883:22-24.)

John Goetz, the head of the two-man USDA team responsible for beef price reporting in 2001 (A277-278 - 7:11-8:12), testified that it would have been "difficult" to "tell that there was a mistake in the reported cutout values" if a person "had access to the beef sales reports that one packer made" to the USDA, but "no access to the beef sales reports made by other packers." (A309:11-24.) Goetz explained that the cutout values were "an aggregation of all the packers," and one packer "wouldn't know what the other 14 packers were doing." (*Id.*) Goetz also testified that from "looking at the individual cut numbers, it would be impossible for a person outside" the USDA "to verify that the reported primal value was right or wrong." (A311:8-13.) Inexplicably, the district court excluded all this testimony, at plaintiffs' request. (A204; A208:¶18.)

In contrast to the packers, two of the named plaintiffs claimed (after the fact) that they had suspected that something was wrong with the USDA cutout values from "day one" of the mandatory reporting program.

(A714:1-21; A730:4-731:7.) But other than generally asserting (again, after the fact) that the USDA cutouts during the period were “bizarre” (A714:11-13) and looked “funny” (A730:4-6), they offered no specific explanation of what they thought at the time looked wrong. Nor did they bring their supposed concerns to the attention of the USDA, or the packers with whom they were doing business. (A715:7-716:1; A730:4-732:5.)

#### **4. The Jury Instructions and Verdict.**

For purposes of this appeal, several jury instructions are important. Defendants argued that to find them liable for violating the price manipulation provision in Section 202(e) of the PSA, the jury would have to find that they acted with the intent to create artificial prices. (A888:6-19; A889:10-14; A174.) Plaintiffs, without citing any authority, disagreed. The district court accepted plaintiffs’ position and expressly instructed the jury that “Plaintiffs need not prove that the defendants acted intentionally or with the intent to violate the law.” (Add. 5.)

In addition, over defendants’ objections (A893:24-894:23; A176), the court instructed the jury to treat those who opted out of the class “as included within the definition of class members.” (Add. 2-3.) The court further instructed the jury, again over defendants’ objections (A894:24-

895:18), that if it found liability, it should award damages to create “a fund for the class members.” (Add. 6.) The court assured the jury that “the court, at a later date, would then reduce the amount of the fund so as to prevent cattle producers who are members of the class but who have previously ‘opted out’ from making any recovery.” (*Id.*)

Thus instructed, the jury rejected plaintiffs’ claim that defendants had violated Section 202(a) of the PSA, which prohibits “unfair, unjustly discriminatory, or deceptive” practices. (Add. 7-8; Add. 5.) The jury did find, however, that defendants had violated Section 202(e), which prohibits a packer from “[e]ngag[ing] in any course of business or [doing] any act for the purpose or with the effect of manipulating or controlling prices paid to class members.” (*Id.*)

Turning to damages, the jury did not accept the “take-it-or-leave-it” amounts calculated by Schroeder. Instead of those amounts (\$16,476,519 for Tyson, \$12,708,617 for Excel, and \$9,234,409 for Swift), the jury awarded \$4,000,000 against Tyson, \$3,000,000 against Excel, and \$2,250,000 against Swift. (Add. 8.) The verdict form provides no clue as to how the jury came up with these amounts. In particular, there was no indication whether the jury awarded damages for all or only part of the class period.

The jury verdict contained a further oddity. At trial, plaintiffs took the position that defendants' alleged knowledge of the USDA's error was irrelevant to liability under the PSA. The defendants disagreed. While the district court sided with plaintiffs and held that knowledge was irrelevant, the court included three special interrogatories on the verdict form in the event that its interpretation of the PSA was incorrect. (A884:3-885:17.)

Question 7 asked whether defendants knew of the USDA reporting error on or before May 11, 2001. (A901:7-9.) Question 8 asked whether defendants should have known of the error on or before May 11, 2001. (A901:12-14.) The jury answered "no" to both questions for all defendants. (A901:10-16.) Question 9 asked: "If you determined that any defendant knew or should have known of the USDA reporting errors on or before May 11, 2001, are you able to specify the date or time frame?" (A901:17-19.) Despite the court's instruction to "refrain from answering any question that has become no longer relevant because of your answer to a previous question" (A245), the jury answered Question 9, inexplicably finding that – notwithstanding the finding that defendants neither knew nor should have known about the USDA's mistake – Tyson, Excel, and

Swift knew or should have known of the error on April 24, 2001. (A901:20-902:1.)

After the verdict was read, the district court immediately acknowledged the problem. (A903:2-5.) Defendants argued that, given the evident inconsistency and confusion, the jury should be allowed to reconsider all the questions on the verdict form, including whether defendants had violated Section 202(e). (A904:10-905:8.) The district court disagreed, instructed the jury that its answers to Questions 7, 8, and 9 were “inconsistent,” told the jury that it must “decide what [it wants] to do on those questions,” but did not allow the jury to reconsider other questions. (A904:25-907:6.) In less than three minutes (A910:18-911:16), the jury changed its “no” answers to Questions 7 and 8 to “yes.” (Add. 9; A908:23-909:2.)

## **5. Post-Trial Motions.**

After trial, defendants renewed their motions for judgment as a matter of law, which the district court denied. (A257-265; a copy of the district court's JMOL ruling is also reproduced at the end of this brief.) The court rejected defendants' arguments that, because the jury returned damages figures that were irreconcilable with Schroeder's formula,

plaintiffs had failed to prove their formula (and, hence, both fact of injury and damages). (A260-262.) The court also rejected defendants' argument that because plaintiffs failed to prove damages to the class, further jury trials were required to address individual class member claims. The court reasoned that "[s]uch a procedure would doom any class action."

(A264:¶19.)

The court also rejected defendants' argument that hedgers could not have been damaged. (A262.) The court did so despite the fact that it had precluded defendants from cross-examining Schroeder about hedging (A794:17-798:8) or from making arguments about hedging to the jury. (A897:18-898:3.) Nonetheless, the court concluded that "[f]or all we know, the jury may have bought, wholly or in part, the arguments of defendants [that hedgers were not harmed] and reduced the damages accordingly."

(A262:¶9.)

In a subsequent order, the district court directed the entry of final judgment, pursuant to Fed. R. Civ. P. 54(b), in the amounts returned by the jury, even though it had told the jury its award would be reduced by amounts attributable to opt-outs. (A266-268.) It left for a "later determination questions of qualifying class members, claims for

compensation to all class members, issues as to attorney fees and costs, and any other issues not resolved by the entry of a final judgment.” (A267.) On February 15, 2007, the clerk entered a final judgment against Tyson for \$4,000,000, against Excel for \$3,000,000, and against Swift for \$2,250,000. (A269.)

### **SUMMARY OF THE ARGUMENT**

When the jury was presented with plaintiffs’ “manipulate or control prices” claim, it was instructed by the district court that defendants need not have acted intentionally. That was error. The manipulation or control of prices, by definition, requires conduct intended to create an artificial price that does not reflect the forces of supply and demand.

The record contains no evidence on which a finding of intentional conduct could have rested, even if one had been made. Indeed, the record contains no evidence that defendants’ cattle buyers (the people accused of doing the manipulating) even knew of the USDA error, much less that they intentionally acted on that knowledge.

Furthermore, plaintiffs failed to demonstrate that any defendant’s alleged conduct injured competition. Such a showing is a prerequisite to recovery under the PSA.

Even if plaintiffs had shown that defendants' conduct violated the PSA, judgment as a matter of law is still necessary. To prove defendants' liability to the class, plaintiffs had to prove impact, or fact of injury, for each and every class member. To do so, plaintiffs relied on a single piece of evidence: the formula produced by Professor Schroeder's regression models. But the jury rejected Schroeder's formula by finding damage amounts wholly inconsistent with it. Having done so, no reasonable juror could have relied upon Schroeder's formula to establish impact, because proof of impact is judged using a more demanding legal standard than damages.

In any event, plaintiffs' claim that each defendants' individual conduct affected cattle prices makes no economic sense. Plaintiffs concede that there was no conspiracy or collusion among the packers, and the evidence at trial demonstrated that packers competed vigorously with one another to buy cattle and keep their plants operating at full (or nearly full) capacity. None of the defendants had an individual market share sufficient to permit it to lower cattle prices through unilateral conduct. If an individual packer consistently bid less than others, that packer would not acquire enough cattle to run its plants efficiently, while its competitors

could run at higher capacity utilization levels (and thus make larger profits).

In addition, some class members hedged their cattle before the USDA reporting error even began, so they could not have been injured by the error. Because plaintiffs were unable to distinguish between class members who hedged and those who did not, they failed to prove fact of injury for anyone.

Plaintiffs' damages case also fails. Plaintiffs chose to "prove a formula" that could be used in a subsequent claims procedure to calculate individual class member damages. They chose that gambit because Schroeder did not bother to exclude opt-outs from his damages calculations. But the jury rejected Schroeder's formula, and plaintiffs never attempted to prove actual, classwide damages through any other means. At this point, there is no way to determine how much of the jury's damages award is attributable to cattle sales by the 244 opt-outs. Nonetheless, the district court entered judgment for the entire damages amount returned by the jury, thus permitting the class to recover damages for persons who opted-out (and subjecting defendants to a possibility of double-recovery).

Finally, this case never should have been certified as a class action. Plaintiffs were unable to prove either impact or damages on a classwide basis, thus necessitating individualized inquiry into these issues for each class member. Questions “common to the members of the class” therefore did not “predominate over any questions affecting only individual members.” Fed.R.Civ.P. 23(b)(3).

### STANDARDS OF REVIEW

Denial of judgment as a matter of law is reviewed *de novo*. See *First Union Nat’l Bank v. Benham*, 423 F.3d 855, 863 (8th Cir. 2005). JMOL must be granted where “there is no legally sufficient evidentiary basis for a reasonable jury to find” for plaintiffs on an essential element of their case. Fed. R. Civ. P. 50(a)(1).

“The admissibility of testimony that is offered as expert opinion” is reviewed “for abuse of discretion.” *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 2007 U.S.App.LEXIS 7136 at \*11 (8th Cir. 2007).

“Determining the appropriateness of a class action is within the discretion of the trial court and will be overturned only upon a showing of an abuse of that discretion.” *Belles v. Schweiker*, 720 F.2d 509, 515 (8th Cir. 1983); see also *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005).

However, “the district court’s rulings on issues of law are reviewed de novo, and the court abuses its discretion if it commits an error of law.” *Blades*, 400 F.3d at 566. “The district court also abuses its discretion if its conclusions rest on clearly erroneous factual determinations.” *Id.*

## ARGUMENT

### I. DEFENDANTS DID NOT MANIPULATE OR CONTROL CATTLE PRICES.

Plaintiffs advanced two theories of PSA liability: that defendants had (a) committed an unfair or deceptive practice, and (b) engaged in price manipulation.<sup>5</sup> The jury rejected the first theory but found for plaintiffs on the second. The liability finding thus rests solely on a determination that each defendant individually engaged in the illegal manipulation of fed cattle prices.

---

<sup>5</sup> The district court decertified plaintiffs’ common law claim for unjust enrichment. (A220-225.)

**A. The Jury Was Instructed to Evaluate Plaintiffs' Price Manipulation Claim Using the Wrong Legal Standard.**

**1. The "Manipulation or Control" of Prices Requires Intentional Conduct.**

Section 202(e) of the PSA provides that a packer may not engage "in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices." 7 U.S.C. § 192(e). (Add. 1.) In its jury instructions, the district court provided virtually no guidance about what "manipulating or controlling prices" means, choosing simply to read the statutory language to the jury *verbatim*. The limited guidance that the court *did* provide was wrong. Specifically, after reading the statutory language, the court told the jury that "[p]laintiffs need not prove that defendants acted intentionally or with the intent to violate the law." (A239.)

This was error. One cannot unintentionally manipulate or control prices. As this Court has noted (in the context of the prohibition against price manipulation in the Commodities Exchange Act):

There are no fixed standards or tests to apply in determining whether there has been "manipulation" of a commodities market. The Commodities Act does not define the term, and the "test of manipulation must largely be a practical one.... The aim must be therefore to discover whether conduct has been *intentionally engaged in* which has resulted in a price which does not reflect basic forces of supply and demand...."

*Utesch v. Dittmer*, 947 F.2d 321, 327 (8th Cir. 1991) (emphasis added), quoting *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1162 (8th Cir. 1971). See also *Frey v. Commodity Futures Trading Comm’n*, 931 F.2d 1171, 1175 (7th Cir. 1991) (under the Commodities Exchange Act, “[m]anipulation, broadly stated, is an intentional exaction of a price determined by forces other than supply and demand”); *Volkart Bros., Inc. v. Freeman*, 311 F.2d 52, 58 (5th Cir. 1962) (to violate the Commodities Exchange Act, “there must be a purpose to create prices not responsive to the forces of supply and demand; the conduct must be calculated to produce a price distortion”).

Similarly, “when used in connection with securities markets,” the word “manipulative” is “virtually a term of art.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). It “connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.” *Id.*

In *Cargill*, this Court cited with approval “[o]ne of the few judicial definitions” of “manipulation,” which is “found in *General Foods Corporation v. Brannan*, 170 F.2d 220, 231 (7th Cir. 1948)”:

We are favored with numerous definitions of the word “manipulation.” Perhaps as good as any is one of the definitions which appears in the government’s brief, wherein it

is defined as “the creation of an artificial price by planned action, whether by one man or a group of men.”

*Cargill*, 452 F.2d at 1163.

“Manipulating or controlling prices” in Section 202(e) of the PSA likewise requires intentional conduct to create an artificial price. Absent “legislative definitions or a clearly contrary legislative intent,” this Court gives “statutory terms their ‘plain, ordinary, and commonly understood meaning.’” *Cudworth v. Midcontinent Communications*, 380 F.3d 375, 381 (8th Cir. 2004). The ordinary meaning of “manipulate” is “to manage, control, or influence in a subtle, devious, or underhanded manner.” Oxford English Dictionary Online (2006), available at <http://www.oed.com>. “Control” means “to exercise authoritative or dominating influence over.” *Id.* The statutory language therefore requires deliberate action to affect prices, and where “the statute’s language is plain, the sole function of the courts is to enforce it according to its terms.” *U.S. v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989) (citation and quotation marks omitted).

**2. Both the “Purpose” and “Effect” Prongs of Section 202(e) Require Intentional Conduct.**

Plaintiffs cannot escape the plain meaning of the statute by arguing that the “effect” prong of Section 202(e) obviates any need to demonstrate

intent. Section 202(e) provides that there must be either a purpose *to manipulate or control* or the effect of *manipulating or controlling*. Thus, both the “purpose” and “effect” must be to manipulate or control. One’s actions have the “effect” of manipulating or controlling prices if one intends to interfere with market forces and succeeds in doing so. One’s actions have the “purpose” of manipulating or controlling prices if one intends to interfere with market forces, but fails to affect prices, despite intending to do so. *Id.* Either way, intent is required.

The Supreme Court has addressed the proper construction of statutory language addressed to “purpose” and “effect.” In *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), the Court analyzed Section 5 of the Voting Rights Act of 1965. That section authorizes preclearance of a proposed voting change that “does not have the purpose and will not have effect of denying or abridging the right to vote on account of race or color.” 42 U.S.C. § 1973c. The Supreme Court explained that when a statute refers to having “the purpose or effect of *x*,” it is necessary to give “*x*” the same meaning in both contexts: “we refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence.” 528 U.S. at 329. The Court noted that

whenever Congress enacts a statute that bars conduct having “the purpose or effect of *x*,” the purpose prong has application entirely separate from that of the effect prong only with regard to unlikely conduct that has “the purpose of *x*” but fails to have “the effect of *x*” – in the present context, the conduct of a so-called “incompetent retrogressor.”

528 U.S. at 332. In reaching this conclusion, the Court specifically referred to the “manipulating or controlling prices” provision of the PSA. *Id.* at 331. The “purpose” prong in the PSA therefore reaches conduct intended to interfere with market forces which nevertheless fails to have that effect.

Because the court and the jury did not apply the correct legal standard to plaintiffs’ price manipulation claim, the judgment must be reversed.

**B. Plaintiffs Failed to Present Any Evidence of Conduct Intended to Create an Artificial Price.**

When evaluated under the correct legal standard, plaintiffs’ manipulation claim fails as a matter of law. Simply put, there was no evidence of any intentional conduct by any defendant to produce a price that did not reflect the forces of supply and demand.

**1. Knowledge Alone, Absent a Duty to Disclose, Is Insufficient to Create Liability Under the PSA.**

Even accepting the jury's verdict that defendants knew of the USDA's error as of April 24, no reasonable juror could have found that each defendant intentionally used that knowledge to manipulate fed cattle prices. Plaintiffs presented no evidence of any *action* that defendants took to interfere with the normal forces of supply and demand.

Mere knowledge of the USDA error – without any action based upon the knowledge – is not price manipulation. None of the defendants had a duty to disclose any awareness of the USDA's error to cattle producers, their contractual counter-parties. In an ordinary buy-sell transaction, the buyer is not required to disclose to the seller all material facts known to him. As stated in the *Restatement (Second) of Torts*,

[o]ne party to a business transaction is not liable to the other for harm caused by his failure to disclose to the other facts of which he knows the other is ignorant and which he further knows the other, if he knew of them, would regard as material in determining his course of action in the transaction in question.

Restatement (Second) of Torts § 551 cmt. (1)a (1977); *see also Schwaiger v. Mitchell Radiology Associates, P.C.*, 652 N.W.2d 372, 380 (S.D. 2002) (no duty to disclose where parties “merely had a contractual relationship”).

Nothing in the PSA trumps these fundamental contract principles. To the contrary, the Supreme Court has rejected the argument that the PSA imposes on packers “[a]n implicit fiduciary obligation which would override state commercial law.” *Mahon v. Stowers*, 416 U.S. 100, 107 (1974). And without a fiduciary or other trust relationship, there can be no liability for “failure to disclose”:

[O]ne who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information “that the other [party] is entitled to know *because of a fiduciary or other similar relation of trust and confidence between them.*”

*Chiarella v. United States*, 445 U.S. 222, 228 (1980) (quoting Restatement (Second) of Torts § 551(2)(a) (1976)) (emphasis added); *see also* Restatement (Second) of Torts § 551(1) (liability for nondisclosure in a business transaction may occur “if, but only if, [the non-disclosing party] is under a duty to the other to exercise reasonable care to disclose the matter in question”).

There was no duty to disclose here, because there was no fiduciary or trust relationship between any of the packers and cattle sellers. Any attempt to create a trust relationship between packers and producers

“plac[es] more weight on the Packers & Stockyards Act, and corresponding regulations and practices, than they will properly bear.” *Mahon*, 416 U.S. at 106.

This Court has agreed, stating – twice – that the PSA does not supplant “the traditional principles of freedom of contract.” *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999). The packers had no duty to disclose any awareness of the error to sellers of cattle, and the failure to do so cannot, as a matter of law, constitute illegal price manipulation under Section 202(e).

Moreover, the after-the-fact assertions of two of the class representatives that they suspected from “day one” that the USDA cutout values looked “funny” and “bizarre” (A714:1-21; A730:4-732:5) would doom the class’s claims even if there had been some duty to disclose. Plaintiffs Koch and Callicrate did not share their supposed awareness of the problem with defendants or the USDA at the time, saving the revelation of their supposed prescience until after they had filed this lawsuit.<sup>6</sup> (A715:7-716:1; A730:4-732:5.) Their intent in presenting this story

---

<sup>6</sup> They did assert, however, that there was an “industry buzz” about the USDA numbers. (A730:4-732:5.) Named plaintiff Schumacher, by contrast,

is unknown, although they may have hoped to convince the jury that if they, mere cattle producers, could see that the USDA's numbers were "bizarre," then surely the country's largest beef packers must have known that something was amiss. Whatever their intent, the effect of their testimony is clear: even if defendants had a duty to disclose an awareness of the USDA's error – an awareness and duty defendants did not in fact have – they could not have breached that duty by failing to tell plaintiffs something plaintiffs claim they already knew.

The district court therefore should have granted JMOL on plaintiffs' price manipulation claim. No reasonable juror could have found that any defendant engaged in intentional conduct to create artificial fed cattle prices. To be sure, the jury instructions misstated the legal standard. However, "[i]n determining whether the district court erred in denying a motion for judgment as a matter of law, 'it is the applicable law which is controlling,'" and not what the "court announced the law to be in [its] instructions.'" *Grand Laboratories, Inc. v. Midcon Labs of Iowa*, 32 F.3d 1277,

---

evidently missed the supposedly widespread "buzz," candidly acknowledging that he, like defendants' cattle buyers, was unaware of the USDA's error until it was announced. (A814:4-7.)

1280 (8th Cir. 1994), *quoting Hanson v. Ford Motor Co.*, 278 F.2d 586, 593 (8th Cir. 1960). Because “the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict,” judgment can “properly be entered for the respondent at once, without a new trial.” *Boyle v. United Technologies Corp.*, 487 U.S. 500, 513 (1988).

**2. Plaintiffs Failed to Prove That Defendants – Much Less Defendants’ Cattle Procurement Personnel – Knew of the Error.**

Plaintiffs’ manipulation claim fails because plaintiffs failed to prove any intentional *action* by any defendant aimed at manipulation. There is a further, related failure of proof: to have used the USDA error to manipulate prices, defendants’ cattle procurement personnel would have first needed to *know* of the error. But plaintiffs failed to prove such knowledge, either before or after April 24.

For the period before April 24, 2001, the jury found that defendants neither knew nor should have known of the USDA error. Therefore, no damages could be awarded for cattle purchased before then. This alone requires vacating the jury’s damage award, because it is not clear that the jury’s damage award was limited to the period after April 24.

With respect to the jury's finding of knowledge as of April 24, there was no admissible evidence that defendants' cattle procurement personnel knew of the error. And if the people buying the cattle did not know of the error, then defendants could not have manipulated cattle prices.

Every Tyson witness who was asked about the error testified that he had been completely unaware of it before the USDA's public announcement. No Tyson records suggest any pre-announcement knowledge by any Tyson employees. Tyson did not compute an internal cutout at the time, and its profits were consistent with normal seasonal patterns and would have shed no light on the accuracy of the USDA cutout values even if they were not. (*Supra* at 21-22.)

The record with respect to Excel is much the same. There is no evidence that any individual at Excel knew of the error before USDA disclosed it. Excel's vice president for cattle procurement, Ken Bull, testified that he was unaware of the error. Although Excel, unlike Tyson, computed its own internal cutout average at the time, its calculation was radically different than the USDA's, and Excel made no use of the USDA cutout in its purchase decisions. And, Excel's profits were not unusual. (*Supra* at 23-24.)

Swift's cattle procurement personnel likewise had no knowledge, or even suspicion, of a USDA error before the USDA announced it, and there was nothing about Swift's fed cattle purchases or profits during the error period to suggest that there was anything wrong with the USDA reports. (*Supra* at 24-25.)

Tom Shires, an employee in beef sales, had questions about the relationship among Swift's composite cutout, the USDA cutout values, and a "Yellow Sheet" cutout published by a private company. He talked to the USDA three times, and also talked to the "Yellow Sheet" publisher, but neither indicated that the USDA cutout values were wrong. He did not have access to the beef sales data reported by other packers, so he had no way of knowing how the change to mandatory reporting had affected the USDA cutout values or that there was a USDA error. (*Supra* at 24-25.)

True, Schroeder offered vague "expert" testimony that unspecified employees had to have known of the error, but this testimony should never have been admitted. Schroeder's opinion was not based on "sufficient facts or data." Fed.R.Evid. 702. Nor was it "the product of reliable principles and methods." *Id.* To the contrary, Schroeder "employed no methodology whatsoever - reliable or otherwise." *Ahlberg*, 2007 U.S. App. LEXIS 7136 at

\*13. See *DePaepe v. General Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998) (excluding testimony where expert “lacked any scientific basis for an opinion about the motives of GM’s designers”).

**C. Plaintiffs’ Failure To Demonstrate Injury To Competition Is Fatal To Their PSA Claim.**

As this Court has observed, the “PSA has its origins in antecedent antitrust legislation and primarily prevents conduct which injures competition.” *Jackson*, 53 F.3d at 1460. The PSA “incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation.” *DeJong Packing Co. v. United States Dep’t of Agric.*, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980). Having brought their claim under Section 202(e) of the PSA, plaintiffs were required to show that defendants’ allegedly unlawful conduct injured competition. They failed to do so.

In *Pickett v. Tyson Fresh Meats, Inc.* – the case plaintiffs relied upon for their “proof of a formula” theory – the Eleventh Circuit held that Section 202(e) requires a showing of injury to competition:

Section 202(e) is aimed at preventing a particular type of unfairness in the meat-packing industry, namely, price manipulation and control and the creation of monopolies. With section 202(e), as with section 202(a), the chief evil Congress feared was the monopoly of the packers, and the primary purpose was to assure fair competition and fair trade

practices.... For the same reasons a section 202(a) unfairness claim requires a plaintiff to show an adverse effect on competition, so does a section 202(e) price manipulation or control claim.

*Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005)

(internal quotations and citations omitted); *see also Gerace v. Utica Veal Co.*, 580 F. Supp. 1465, 1469 (N.D.N.Y. 1984) (“Clearly, § 202(e) of the Act, 7 U.S.C. § 192(e), prohibits only anticompetitive practices”).

Here, there was no basis for the jury’s finding of injury to competition. The Court instructed the jury, without objection, that “[t]here’s no claim of conspiracy here.” (A719:25.) Even Schroeder admitted that packers “vigorously compete” with each other for the “purchase of fed cattle.” (A788:10-18.) The USDA error did not affect that competition. (A847:13-16.)

Plaintiffs presented no evidence of any “act” or “course of business” by any defendant that involved an intentional effort to lower fed cattle prices. 7 U.S.C. § 192(e). There being no such conduct to evaluate, plaintiffs presented no evidence that any defendant had engaged in an “act” or “course of business” that was anticompetitive or had an anticompetitive effect. *Id.* On this record, no reasonable juror could have

found that any defendant engaged in manipulative conduct that had an anticompetitive effect.

## II. THERE WAS NO EVIDENCE TO SUPPORT THE JURY'S FINDING OF IMPACT.

Section 209 of the PSA provides that if “any person subject to this chapter violates any of [its] provisions . . . he shall be liable to the person or persons *injured thereby* for the full amount of damages sustained in consequence of such violation.” 7 U.S.C. § 209 (emphasis added). Section 209 “is similar to the provision in the Clayton Act,” 15 U.S.C. § 15, “which states that ‘any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor.’” *Pickett v. IBP, Inc.*, 182 F.R.D. 647, 658 (M.D. Ala. 1998). Thus, under both the PSA and the Clayton Act, “both violation *and impact* are required before there can be a finding of liability.” *Id.* (emphasis added).

To show impact/fact of injury under the Clayton Act, a plaintiff must show that “the antitrust violation caused injury to the antitrust plaintiff.” *State of Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 317 (5th Cir. 1978). To make this showing,

an antitrust plaintiff need not prove that the violation was the sole cause of any alleged injury, but he does need to show that

the violation was a material cause. This showing, of course, may not be based on speculation. Rather, *the required causal link must be proved as a matter of fact and with a fair degree of certainty.*

*Id.* (emphasis added, citations omitted). In other words, the “relaxed standard of proof with regard to the *amount* of antitrust damages does not apply” to “proving *fact*” of “antitrust injury.” *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1493-94 (8th Cir. 1992) (emphasis added).

The standards are no different because this case is a class action:

Establishing causation, or “fact of damage,” requires the plaintiff to demonstrate a causal connection between the specific . . . violation at issue and an injury to the business or property of the . . . plaintiff. *This requirement is in no way lessened by reason of being raised in the context of a class action.* Rather, . . . the issue of fact of damage “is a question unique to each particular plaintiff and one that must be proved with certainty.”

*Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302-03 (5th Cir. 2003) (emphasis added). In other words, “every member of the proposed class[ ]” must “prove with common evidence that they suffered impact.” *Blades*, 400 F.3d at 571.

**A. In Rejecting Schroeder's Formula, The Jury Rejected The Only Evidence Offered To Show That The USDA's Error Injured Each Class Member.**

Schroeder's formula was the only evidence plaintiffs offered to show that each and every class member was injured by the challenged conduct. (A749:13-24.) The models on which Schroeder's formula was based were fundamentally flawed and made no economic sense. (*Supra* at 18-19.)

The jury's damage awards make clear that it rejected Schroeder's formula. Having done so, no reasonable juror could have relied upon that same formula to prove impact/fact of injury. That is because the required standard of proof is higher for showing impact than for showing the amount of damages. *See Amerinet*, 972 F.2d at 1493-94. Without the formula, there was no basis for the jury to find classwide impact. Because this was an essential element of plaintiffs' case, this failure of proof – by itself – required entry of JMOL for defendants.<sup>7</sup>

---

<sup>7</sup> Schroeder testified that one could evaluate whether the error affected cattle prices by looking at how prices changed once the USDA had announced its error. (A739:4-10.) Viewed from this perspective, however, the error had no effect.

On Wednesday, May 16, the USDA issued accurate boxed beef cutout values for the afternoon reports for May 14-16 (A584-587), and accurate reports continued thereafter. (A771:15-23.) That day, the price of 65 to 85 percent Choice cattle fell by 18 cents per hundred pounds. The next day,

**B. Because No Individual Defendant Had Market Power Sufficient to Lower Cattle Prices Unilaterally, Plaintiffs' Impact Claim Is Economically Implausible.**

As noted above, the court instructed the jury that “[t]here’s no claim of conspiracy here.” (A719:25.) Thus, to show that a given defendant’s conduct injured the class, plaintiffs needed to prove that each packer, *acting alone*, had sufficient market power to force producers to accept a non-competitive price. Plaintiffs offered no such evidence.

To prove that each defendant had the ability to lower prices through its own unilateral conduct, plaintiffs needed to establish that each defendant had “a dominant market share in a well-defined relevant market.” *Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 682, 689 (8th Cir. 1993). The “definition of the relevant market has two components – a

---

May 17, the price for such cattle was unchanged. On Friday, May 18, the price rose 44 cents. (A772:4-774:14; A775:25-776:20.) Over the three-day period, the net change (up 26 cents) amounted to only a 0.4 percent difference. (A777:12-20; A778:23-25.)

Late in the afternoon on Friday, May 18, the USDA issued its monthly *Cattle on Feed* report. (A779:25-780:4.) Schroeder described this report as “the best and most important long-run supply information of how many cattle are out there.” (A780:10-15.) Between the issuance of the *Cattle on Feed* report on Friday, May 18 and Wednesday, May 23, cattle prices rose more than 3 percent. (A779:18-24.) Schroeder admitted that he had not “tried to determine how much of that” increase was due to the *Cattle on Feed* report versus “other factors.” (A781:16-782:16.)

product market” (fed cattle) “and a geographic market.” *Bathke v. Casey’s General Stores, Inc.*, 64 F.3d 340, 345 (8th Cir. 1995). The relevant “geographic market encompasses the geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition.” *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994). And the “burden of establishing that a specified area constitutes a relevant geographic market in a particular case rests with the plaintiff.” *Id.*

Plaintiffs presented no evidence to establish the relevant geographic markets for buying fed cattle. “Defining the market is a necessary step in any analysis of market power,” *U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 994 (11th Cir. 1993), and plaintiffs’ failure to prove this essential element of their case requires reversal.

The record did contain evidence as to defendants’ national shares of fed cattle purchases. In 2001, Tyson’s share of fed cattle purchases was 30-35%, Excel’s share was 20%, and Swift’s share was 18%. (A305 – 96:2-5 & 96:25-97:13.) As a matter of law, a market share of 35% or less is insufficient to “exert control over prices.” *United States v. Empire Gas Corp.*, 537 F.2d 296, 307 (8th Cir. 1976) (market share of about 50% insufficient).

*See Morgenstern*, 29 F.3d at 1296 n.3 (“As a matter of law, absent other relevant factors, a thirty percent market share will not prove the existence of monopoly power.”).

Lacking market power, a single firm could not force cattle prices below the competitive level. If Packer A consistently bid less than other packers, it would simply choke off the cattle supply to its own plants. At the same time, Packer A would enable its competitors to run at higher capacity utilization levels – and thus make larger profits. (A837:24-838:5.)

When antitrust plaintiffs advance a claim “that simply makes no economic sense,” the plaintiffs “must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”

*Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

There was no such evidence here. To the contrary, neither Schroeder nor plaintiffs ever provided any explanation of what Tyson, Excel, or Swift actually *did* with the supposed knowledge of the USDA reporting error to lower fed cattle prices.

**C. Plaintiffs Cannot Show Impact For Every Class Member Because Some Hedged.**

Plaintiffs also failed to prove that producers who hedged were harmed by the USDA's error. "[W]hen you hedge, you're trying to lock in a price." (A710:1-3.) Producers typically place a "hedge a couple of months before the cattle are finished." (A710:7-10.) For a cattle owner who placed a hedge months before his cattle were sold, Schroeder testified that "there is no reason to think that the price of the futures contract would have been affected by the USDA error" because the "error had not yet taken place." (A795:25-796:18.) Therefore, class members who hedged, and did so before April 3, 2001, suffered no injury. (A709:8-710:3; A795:10-13.)

This is not an issue that affects only a few class members. Schroeder admitted that as many as 30% of the fed cattle sold in 2001 could have been hedged. (A795:14-24.) Nevertheless, Schroeder computed damages for all cattle sold to defendants during the error period, regardless of whether those cattle were hedged. That is because, "for any specific class member," Schroeder could not "say for sure if that class member hedged all of his cattle or not." (A797:18-20.) In other words, he simply ignored hedges

because plaintiffs did not obtain the evidence needed for a correct analysis. (A797:5-25.)

The jury had no way to know whether a given class member hedged before April 3 or not. Those who did were not injured. Plaintiffs therefore failed to prove injury for *any* class member. That failure of proof is fatal to plaintiffs' case, and requires the entry of judgment for defendants. *See Pickett*, 315 F. Supp. 2d at 1177.

### **III. PLAINTIFFS FAILED TO PROVE CLASS DAMAGES, ENTITLING DEFENDANTS TO JUDGMENT AS A MATTER OF LAW.**

#### **A. Plaintiffs Failed To Prove A Formula That Can Be Used To Calculate Damages To Class Members.**

Plaintiffs could have attempted to prove actual damages to the class. But citing the "highly time consuming and individualized" nature of that endeavor (A214), plaintiffs tried a shortcut: the approach adopted by the plaintiffs in *Pickett*. Pursuant to *Pickett*, plaintiffs tried to show impact and damages by "prov[ing] a formula by which individual class members damages could be calculated." (A694:19-24.)

Plaintiffs recognized that, to establish that their formula had been accepted, the jury would need to return damage awards consistent with

that formula. Plaintiffs therefore urged the jury to adopt Schroeder's exact damage estimates:

Dr. Schroeder built a house. He went through and he looked at every transaction of sales of lots of cattle during this period to each of the four Defendants. . . . Dr. Schroeder looked you guys in the eye, said I did the work, and this I am certain of, these are the damages. *And if you believe him and you should, then you should write down these amounts* [Schroeder's damage estimates] in No. 4.

(A899:23-900:8 (emphasis added).) "[T]hese amounts" were \$16,376,519 for Tyson, \$12,708,617 for Excel, and \$9,234,409 for Swift. (A900:10-14; *see also* A738:6-10; A666.) The jury, however, did not accept Schroeder's estimates. Instead, the jury awarded damages of \$4,000,000 against Tyson, \$3,000,000 against Excel, and \$2,250,000 against Swift. (Add. 8.)

One can only speculate about how the jury arrived at these numbers. They did not simply award the damages that Schroeder had calculated for the period after April 24, when the jury found that defendants knew or should have known of the USDA error. For that period, Schroeder's damage estimates were \$11,585,487 for Tyson, \$9,017,883 for Excel, and \$6,996,982 for Swift. (A667-668, A671-675.) Schroeder never supplied the jury with any methodology for discounting or adjusting his damage estimates for a given period. Whether the jury guessed at a damages

number for the entire class period, or whether it guessed at a damages number for some subset of the period is simply not known. All that is clear is that the jury rejected Schroeder's formula.

The *Pickett* court was presented with precisely this scenario. There, as here, "the Court framed a question on the verdict form such that the jury was asked to determine damages to the entire cash market during the class period," not to members of the class, because "plaintiffs' evidence did not permit a finding of any other sort." *Pickett*, 315 F. Supp. 2d at 1178. The jury in *Pickett* awarded far less in damages than the plaintiffs sought, and thus the jury's damage awards obviously were not based on plaintiffs' damages formula. As a result, the plaintiffs had "failed to establish a viable formula for computing damages for individual members of the class." *Id.* The *Pickett* court was "left without any formula or method from which a magistrate judge or special master could calculate damages on an individual basis in a future claims procedure." *Id.* Accordingly, the court held that the plaintiffs had "failed to carry their burden on the issue of damages to members of the class," *id.* at 1179, and entered JMOL for defendants.

Here, when plaintiffs conceded that they could not prove actual damages to the class, the district court permitted plaintiffs to proceed under their *Pickett* “prove a formula” theory. But the jury rejected plaintiffs’ formula. That meant that plaintiffs failed to carry their burden on the issue of damages to members of the class, just as in *Pickett*.

**B. The Class Cannot Recover Damages Suffered By Opt-Outs.**

The 244 producers who opted out of the class chose not to participate in this litigation. Nonetheless, the jury was instructed – over defendants’ objections (A886:9-21; A887:12-17; A890:4-896:8; A176) – that “so-called ‘opt outs’ are to be treated by you as included within the definition of class members.” (Add. 2-3.) Thus, the verdict includes damages attributable to sales by the 244 opt-outs. The district court still entered judgment for the class in the full amount of the verdict.

This mistake, by itself, was fatal. The class cannot recover damages suffered by persons who opted out of the class. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-11 (1985) (if a potential class member “takes advantage” of the “opportunity to ‘opt out’ of the class,” he “is removed from the litigation entirely”). Precisely because opt-outs cannot share in a

class recovery (and a class cannot recover damages on behalf of opt-outs),

Rule 23 requires that the

judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

Fed.R.Civ.P. 23(c)(3). The district court's judgment ignored these elementary requirements, referring simply to the "plaintiff class previously certified by the court" before the process of notice and opting-out even began. (A269.)

Although the court awarded damages to the class based upon damages suffered by opt-outs, nothing prevents the opt-outs from filing suit to recover the same damages a second time. Subjecting defendants to this risk of a double recovery violates due process. An owner of property "is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again . . . in a suit brought by a claimant who is not bound by the first judgment." *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961). The problem presented by repeated claims for money damages for the same injuries is no different.

*See Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1873) (describing “the maxim” in civil cases “that no man shall be twice vexed for one and the same cause”); *see also Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) (making the same point in the punitive damages context). Here, the judgment exposes defendants to liability to the opt-outs twice: once in this class litigation, and again to any opt-outs who elect to bring an individual action. Due process does not permit this result.

**C. The Jury’s Verdict Provides No Basis for Determining the Damages to the Class.**

Defendants plainly cannot be required to pay the damages awarded by the jury, because the award includes damages attributable to opt-outs. At this point, adjusting the jury’s award to reflect only damages to class members is impossible. For one thing, there is no way to know the period over which the jury awarded damages. Was it the entire class period (April 2 to May 11, 2001)? Was it the period when the jury found that the defendants knew or should have known of the error (April 24 to May 11, 2001)? No one knows.

Because the period over which the jury awarded damages is unknown, there is no way to determine the amount of damages awarded

for any given cattle sale. For a pen of cash market cattle sold to Tyson on April 13, 2001, was the damage award zero, \$10 per head, or the number that Schroeder proposed (\$22.57 per head)? (A674.) No one knows. Now that the jury has been discharged, there is no way to find out.

Damages in a class action are normally distributed to class members through a ministerial claims process, based upon the damage award to the class as a whole. But here there was no damage award to the class – the award included opt-outs. And whether the jury awarded damages to class members who sold during all of the class period, or merely during part of the class period, is unknown. Consequently, a ministerial claims process will not work. There is no way to get from the jury's award to a class damages award. Nor is there any way to determine the period in which a class member would have had to sell cattle in order to be entitled to a share of the class recovery.

This was a problem of plaintiffs' own making. They knew who the opt-outs were, and they could have tried to obtain (and preserve) their sale records. Had plaintiffs done so, they would have been able to present an actual class damages figure to the jury. That was their burden: "people who want damages have to prove them." *Schiller & Schmidt, Inc. v. Nordisco*

*Corp.*, 969 F.2d 410, 415 (7th Cir. 1992). Plaintiffs failed to prove the class's damages, and they are not entitled to a second chance. *See State of Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) ("inherent in the Seventh Amendment guarantee of a trial by jury is the general right of a litigant to have only one jury pass on a common issue of fact"); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 490 (1977) (where plaintiffs did not prove damages in an antitrust case after ten years of litigation, defendant was "entitled, in accord with its motion made pursuant to Rule 50(b), to judgment on the damages claim notwithstanding the verdict").

**IV. BECAUSE THIS CASE INVOLVES NUMEROUS INDIVIDUALIZED ISSUES, THE CLAIMS ARE INAPPROPRIATE FOR CLASS TREATMENT.**

This class should never have been certified in the first instance, but (at a minimum) the district court should have decertified the class once the infirmities in plaintiffs' classwide proof became evident.

**A. Plaintiffs Failed to Prove Impact or Damages on a Classwide Basis.**

When the district court certified the plaintiff class, it did so based upon plaintiffs' promise that they would prove the class's damages through "the development and estimation of econometric models." (A92.)

At trial, however, plaintiffs admitted that they could not do so, being

unable to distinguish class member cattle from opt-out cattle. In any event, the jury ultimately rejected even the “class plus opt-out” damages proof that plaintiffs presented.

The impact/fact of injury proof and damages proof were the same: Schroeder’s formula. When the jury rejected Schroeder’s formula, it also rejected plaintiffs’ classwide impact proof.

Under Rule 23, a class certification order “may be altered or amended before final judgment.” Fed.R.Civ.P. 23(c)(1)(C). Once the trial had concluded, it was apparent (as defendants had said all along) that plaintiffs could not prove injury or damages on a classwide basis. The class should have been decertified.

**B. Class Certification Was Inappropriate Because, Even If the Jury Had Accepted Schroeder’s Formula, Defendants Would Still Have Been Entitled To Jury Trials On Each Class Member’s Individual Claim.**

Even if the jury had accepted Schroeder’s formula, further proceedings still would have been required to determine each individual class member’s damages. The individualized nature of those proceedings would have required decertification.

To use Schroeder's formula to show that a given class member was entitled to damages, plaintiffs would have to prove (a) that the class member owned specific lots of cattle that were sold to Tyson, Excel, or Swift during the class period; (b) the date each sale was made (Schroeder's formula was highly sensitive to the date of sale, as discussed above); and (c) how many, if any, of the cattle were not hedged before April 3, 2001.

These issues are hotly disputed. For example, plaintiff Callicrate testified that he had "no idea" when a lot of cattle, shipped on April 16, 2001, had actually been sold (the Schroeder formula uses the sale date, not the shipping date). (A717:1-17.) Similarly, although Callicrate maintained at one point that he could not determine whether any of the cattle that he sold during the class period had been hedged, he later testified that "I don't believe any of them were hedged." (A710:11-711:9.)

Defendants have a Seventh Amendment right to a jury trial to resolve these disputed issues. See *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 235-36 n.8 (9th Cir. 1974) (Rule 23 does not "foreclose the right of each defendant to assert his defenses before a jury if one is requested"); *Union Carbide Corp. v. Nisley*, 300 F.2d 561, 589 (10th Cir. 1961) (magistrate or special master can handle claims distribution in a class action only where

“[a]ll operative facts have been determined in the original action” and the magistrate or special master is simply employing a mechanical means or formula to compute damages). An individualized inquiry into particular cattle purchase transactions would be lengthy; Excel alone engaged in “4,700 individual transactions” to buy cattle lots during the class period. (A735:24-737:3.) As the district court noted, the need to conduct individualized jury trials addressing each such transaction would “doom” class action treatment. (A264:¶19.)

**C. Individual Class Member Knowledge Of The USDA’s Error Precludes Treating This As A Class Action.**

There is another fundamental problem with treating this case as a class action. Plaintiffs Koch and Callicrate testified at trial that some producers suspected the USDA reporting error from “day one,” long before the jury found that it was known by the packers (A714:1-21; A730:4-732:5), while others, such as plaintiff Schumacher, denied that they knew about the error before it was publicly announced. (A814:4-7.) Producers who suspected the error cannot recover. Even if defendants had a duty to disclose an awareness of the USDA error – an awareness and a duty

defendants did not in fact have – they could not have breached that duty by failing to tell plaintiffs something plaintiffs already knew.

Plaintiffs' manipulation claim therefore demanded inquiry into the individual state of mind of class members. The need for such inquiry swamps any issues common to the class. As this Court recently explained in affirming a denial of class certification:

The requirement of Rule 23(b)(3) that common questions predominate over individual questions “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” ... The nature of the evidence that will suffice to resolve a question determines whether the question is common or individual.... *If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.*

*Blades*, 400 F.3d at 566 (emphasis added). Here, individual questions of producer knowledge swamp any issues that are common to the class.

Class certification was therefore inappropriate.

## CONCLUSION

For the foregoing reasons, judgment as a matter of law should be entered for Tyson, Excel, and Swift. In the alternative, this Court should order the district court to decertify the class.

Respectfully submitted,

---

Mark W. Ryan  
Michael E. Lackey, Jr.  
Brad P. Rosenberg  
MAYER, BROWN, ROWE & MAW LLP  
1909 K Street, N.W.  
Washington, DC 20006-1101  
(202) 263-3000

Kennith L. Gosch  
BANTZ, GOSCH & CREMER, L.L.C.  
305 Sixth Avenue, S.E.  
P.O. Box 970  
Aberdeen, SD 57402-09070  
(605) 225-2232

*Counsel for Appellant  
Cargill Meat Solutions Corporation  
d/b/a Excel Corporation*

---

Patrick E. Brookhouser, Jr.  
MCGRATH NORTH MULLIN &  
KRATZ, PC LLO  
1601 Dodge Street, Suite 3700  
Omaha, Nebraska 68102  
(402) 341-3070

Thomas J. Welk  
BOYCE, GREENFIELD, PASHBY &  
WELK, LLP  
101 N. Phillips Avenue, Suite 600  
Sioux Falls, SD 57117-5015  
(605) 336-2424

*Counsel for Appellant  
Swift Beef Company*

---

William H. Baumgartner, Jr.  
Constantine L. Trela, Jr.  
Louis E. Fogel  
SIDLEY AUSTIN LLP  
1 S. Dearborn Street  
Chicago, Illinois 60603  
(312) 853-7000

Daniel R. Fritz  
FRITZ LAW OFFICES  
428 North Hwy. 281 - Suite 3  
Aberdeen, SD 57401  
(605) 225-6953

*Counsel for Appellant  
Tyson Fresh Meats, Inc.*

May 7, 2007

## CERTIFICATE OF COMPLIANCE

This brief contains 13,802 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Book Antiqua 14 point font.

DATED: May 7, 2007

---

William H. Baumgartner, Jr.  
Counsel for Tyson Fresh Meats, Inc.

