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 REPLY BRIEF OF APPELLANTS

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

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INTRODUCTION

Plaintiffs have transformed a small computer glitch by a government agency into a five-year-long class action lawsuit. After years of preparation, plaintiffs announced – on the eve of trial – that they would be unable to prove actual class-wide damages, because doing so would be "highly time-consuming and individualized." (A214.) Instead, plaintiffs promised to prove a formula from which individual class member damages could later be calculated, thus purportedly relieving them of their burden of establishing class damages at trial.

During trial, plaintiffs carefully avoided – and still avoid – describing exactly how defendants violated the PSA, other than supposedly failing to disclose the government error that defendants had no way of uncovering. Plaintiffs' theory would make illegal any cattle sale transaction in which a packer knows something about market conditions that a producer does not. That flies in the face of Supreme Court precedent holding that the PSA does not impose a duty to disclose on packers. And even if plaintiffs' theory were valid, defendants still could not have manipulated or controlled cattle prices, because none had sufficient market power to do so.

The jury rejected the heart of plaintiffs' factual case: Schroeder's "formula." That formula was an elaborately constructed edifice, involving a regression analysis of dozens of variables. Schroeder calculated damages on a daily basis by inputting into his formula the error in each of the USDA's afternoon boxed beef cutout reports. The results were then applied to all cattle sales that day, including sales that took place before the publication of the erroneous afternoon reports upon which plaintiffs claim to have relied. The formula also was applied to sales by producers who hedged their cattle, even though those producers could not have been harmed by the USDA error. (The jury never heard Schroeder's admission on this point, the district court having rejected defendants' offer of proof.) And Schroeder's analysis included damages attributable to sales by opt-outs who are not participants in this case.

The damage awards returned by the jury are irreconcilable with Schroeder's calculations. Plaintiffs, tellingly, propose no way of harmonizing the two. By rejecting Schroeder's formula, the jury rejected not only plaintiffs' damages theory, but their liability theory as well, because the formula was the *only* evidence offered to show that the USDA

error injured every member of the class, an essential element of plaintiffs' liability case.

Evidently believing that defendants should be content with any judgment for less than the full amount plaintiffs sought, the district court admonished defendants for "looking a gift horse in the mouth." (A261.) It then entered a judgment for $9.25 million, without deducting opt-out sales. Regardless of what plaintiffs now claim the district court is "likely" to do (Opp. 26), defendants are liable for the full damage awards.

Plaintiffs characterize this remarkable course of events as a "fairly routine jury-trial" and try to dismiss many of defendants' arguments as "premature." But no subsequent proceedings can fix the problems with this case: (1) defendants did not manipulate or control, and as a matter of law cannot have manipulated or controlled, cattle prices in the manner described by plaintiffs; (2) there is no valid basis on which to exclude opt-outs from the jury's damage award (which also is invalid because the jury resorted to sheer speculation in deriving the damage amount); (3) plaintiffs cannot prove class-wide impact; and (4) this case never should have been certified for class treatment.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE CLAIM THAT THEY MANIPULATED OR CONTROLLED CATTLE PRICES.

A. The Jury Was Wrongly Instructed That 7 U.S.C. § 192(e) Does Not Require A Finding Of Intent.

Plaintiffs try to convert the PSA into a strict liability statute by arguing that one can engage in unintentional price manipulation. They are forced to assert that untenable proposition because there is no evidence that any individual purchased cattle on behalf of any defendant while knowing of the USDA reporting error. Plaintiffs' answer to this show-stopper is to argue that packer intent is beside the point if the USDA error had a manipulative "effect" on cattle prices. But statutory prohibitions against "manipulation" or "control" of prices require an intent to manipulate or control.

Plaintiffs ignore cases holding that manipulation is "the creation of an artificial price *by planned action*." *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971) (emphasis added), *quoting Gen. Foods Corp. v. Brannan*, 170 F.2d 220, 231 (7th Cir. 1948). It requires conduct "*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*, 452 F.2d at 1162; *see also Frey v. Commodity Futures Trading Comm'n*, 931 F.2d 1171, 1175 (7th Cir. 1991) (similar). Plaintiffs do not point to a single case from any context in which the term "manipulate" has been viewed to encompass unintentional conduct.

Plaintiffs attempt to dismiss Supreme Court precedent holding that the "purpose" and "effect" prongs of a statute must be read consistently. The Court "refuse[d] to adopt a construction that would attribute different meanings to the same phrase in the same sentence." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000). Plaintiffs dismiss this as "dicta" involving the Voting Rights Act of 1965 (Opp. 31-32), but they ignore the Court's specific reference to the "manipulating or controlling prices" provision of the PSA. *Bossier Parish*, 528 U.S. at 331. The logic from *Bossier Parish* compels the conclusion that having the "effect" of manipulating prices requires intent.

Plaintiffs even go so far as to say that "[t]here is no way any court would ever impose liability for such an abstract wrong" as a packer deliberately trying, but failing, to manipulate prices. (Opp. 31.) Plaintiffs

are incorrect: once an unlawful intent has been established, liability can be imposed in a PSA action brought by the USDA whether or not the wrongdoer was successful. "'The purpose of the [PSA] is to halt unfair trade practice in their incipiency, *before harm has been suffered*.'" *Farrow v. USDA*, 760 F.2d 211, 215 (8th Cir. 1985) (emphasis added), *quoting De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1336-37 (9th Cir. 1980); *see also IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (similar). Thus, the "abstract" wrong of which plaintiffs complain – the conduct of what the *Bossier Parish* Court called the "incompetent retrogressor" – is precisely the type of conduct addressed by the "purpose" prong of 7 U.S.C. § 192(e). *See Bossier Parish*, 528 U.S. at 332. In short, no court has held that § 192(e) can be violated absent an unlawful intent.

When the evidence presented at trial is evaluated under the correct legal standard, defendants are entitled to judgment as a matter of law. Plaintiffs offered no evidence that any defendant intended to manipulate or control cattle prices, and they point to none in their opposition brief.[1]

[1] At most, plaintiffs attempted to prove that defendants knew or should have known of the USDA's error. But as discussed in defendants' Opening Brief (at 45-48), the evidence was insufficient to support even that finding. Plaintiffs try to avoid that problem by arguing that the Court

Accordingly, under the correct legal standard, "the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict," so judgment can "properly be entered for the [defendants] at once, without a new trial." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 513 (1988).

B. The Conduct Of Which Plaintiffs Complain Is Not, As A Matter of Law, A Violation Of 7 U.S.C. § 192(e).

Plaintiffs never explain what conduct resulted in the "manipulation or control" of cattle prices, other than cryptic allegations that defendants "knowingly [took] advantage of their superior information about boxed beef prices to offer the class members less than fair value for fed cattle they purchased for slaughter." (Opp. 32.)[2] However, the governing precedent

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should consider only part of the evidence. (Opp. 28.) The Supreme Court, however, rejected that argument in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149-51 (2000).

[2] Plaintiffs assert that defendants commonly will say "the box is down" during cattle purchase negotiations in order to obtain a lower purchase price. (Opp. 8.) But there was no evidence of any specific misstatement. To the contrary, the direction of change – whether the boxed beef cutout values were up or down from the previous day's report – was correctly reported on 22 out of 29 days for Choice Heavy cutouts and on 28 out of 29 days for Select Heavy cutouts. (A913:14-25.) Thus, if a packer buyer said that "the box is down" based upon the erroneous values

from this Court and the Supreme Court makes clear that, even assuming that defendants had possessed superior information, the PSA would not have required them to share it. *See Mahon v. Stowers*, 416 U.S. 100, 107 (1974) (rejecting argument that PSA imposes "[a]n implicit fiduciary obligation which would override state commercial law"); *Chiarella v. United States*, 445 U.S. 222, 228 (1980) (duty to disclose superior information only arises in "fiduciary or other similar relation of trust and confidence" between transacting parties) (internal quotation marks omitted); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995) (PSA does not supplant "the traditional principles of freedom of contract"); *IBP*, 187 F.3d at 977 (same).

Plaintiffs' "superior information" theory also ignores the crucial fact that the only issue before this Court is plaintiffs' "manipulation or control" claim. Plaintiffs had a separate claim that defendants engaged in "unfair, unjustly discriminatory, or deceptive" conduct in violation of 7 U.S.C. § 192(a). They lost on that claim, and their own expert admitted that he

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reported by the USDA, on the vast majority of days the buyer would have been right. Plaintiffs did not offer any evidence that was limited to the remaining days.

was "not aware of any employee of any defendant making any misrepresentation of any sort during the error period." (AA173:21-25.) Having found that defendants' failure to disclose their allegedly "superior information" was neither "unfair" nor "deceptive," there was no basis for the jury to have found that the same conduct illegally manipulated or controlled prices.

C. Plaintiffs' Claim Fails As A Matter Of Law Because Each Defendant Lacked Unilateral Market Power Sufficient To Lower Cattle Prices.

There is another reason why defendants could not have manipulated or controlled cattle prices in violation of 7 U.S.C. § 192(e): As a matter of law, none of the defendants individually had market power sufficient to do so.

Plaintiffs ignore their requirement to establish each defendant's "dominant market share in a well-defined relevant market." *Flegel v. Christian Hosp., Ne.-Nw.*, 4 F.3d 682, 689 (8th Cir. 1993) (internal quotation marks omitted); *see also Bathke v. Casey's Gen. Stores, Inc.*, 64 F.3d 340, 345 (8th Cir. 1995) (defining a relevant market); *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994) (burden of establishing market rests with plaintiffs). Nor do plaintiffs address this Court's precedent holding that

market shares of up to 50% are insufficient to exert control over prices. *See United States v. Empire Gas Corp.*, 537 F.2d 296, 307 (8th Cir. 1976) (market share of about 50% insufficient); *see also 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."). As these cases make clear, market power is necessary to exert control over prices.

Plaintiffs repeatedly refer in their brief, as they did at trial, to the 70% combined market share of the defendants.[3] But that number is irrelevant, because there is no suggestion here of conspiracy or collusion. (A719:25 (instructing the jury that "[t]here's no claim of conspiracy here").) In fact, Schroeder admitted that packers "vigorously compete" with each other for the "purchase of fed cattle," and that there was no evidence that packers failed to compete during the error period. (A788:10-18; *see also* A847:13-16 (testimony by Tyson's head cattle buyer that the USDA error did not affect competition); Opp. 10 (noting that there is competition in the cattle industry).)

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[3] Plaintiffs, in their opening statement, told the jury that "the four Defendants [including National] collectively absolutely dominated the market for fed cattle" because they had a combined 80 percent market share. (A912:2-9.)

The relevant percentages are the defendants' individual market shares. Plaintiffs concede that Tyson had a market share of only about 30-35% of the U.S. fed cattle market, and that Excel and Swift each accounted for approximately 20% of that market. (Opp. 5-6.) Under this Court's precedents, these market shares are insufficient for a firm unilaterally to control cattle prices.

D. Plaintiffs' Failure To Demonstrate Injury To Competition Is Fatal To Their PSA Claim.

1. 7 U.S.C. § 192(e) Requires Plaintiffs To Show An Actual Or Potential Injury To Competition.

Plaintiffs assert that "[t]his action is not an antitrust case and the claims asserted by the Plaintiff class here do not sound in antitrust or injury to competition." (Opp. 32.) Plaintiffs then attack a straw man by arguing that "the purpose of the PSA was to protect the farmers and ranchers from the Packers, not to protect the Packers from each other." (*Id.* at 33.)

Defendants have never argued that the purpose of the PSA's "injury to competition" requirement was to protect packers. The PSA protects producers by ensuring that packers will compete against one another to purchase cattle. As this Court has recognized, the "PSA has its origins in antecedent antitrust legislation and primarily prevents conduct which

injures competition." *Jackson*, 53 F.3d at 1460; *see also Farrow*, 760 F.2d at 214 (recognizing, in the context of a claim that packer conduct affected the market price, that "[a] practice is 'unfair'" for purposes of 7 U.S.C. § 192(a) "if it injures or is likely to injure competition"). Other circuits have reached the same conclusion. *See De Jong Packing Co.*, 618 F.2d at 1335 n.7 (PSA "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation"); *Armour & Co. v. United States*, 402 F.2d 712, 720 (7th Cir. 1968) (PSA "was aimed at halting 'a general course of action for the purpose of destroying competition.'"), *quoting* House Rep. No. 1297, 66th Cong. 3d Sess. (1921), p. 11.[4]

More specifically, this Court has required the Secretary of Agriculture to show that challenged market-based conduct is anticompetitive. For example, in *IBP*, 187 F.3d at 977, this Court reversed a USDA decision because a packer's "right of first refusal [did] not potentially suppress or reduce competition sufficient to be proscribed by the Act." Similarly, in *Farrow*, 760 F.2d at 215, this Court held that the

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[4] As plaintiffs themselves note, "the 'chief evil' at which [the PSA] was aimed was 'the *monopoly* of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells.'" (Opp. 33 (emphasis added), *quoting Mahon*, 416 U.S. at 106 (*quoting Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922)).)

USDA may establish that a bidding scheme violates the PSA if there is a "likelihood that an arrangement will result in competitive injury." The Seventh Circuit has imposed the same requirements upon the USDA. *See Armour*, 402 F.2d at 720, 725 (evidence was insufficient to show injury to competition).[5] Plaintiffs, as private litigants, do not have broader authority than the USDA to enforce the PSA. *See, e.g.*, *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 467 n.5 (1999) (implied private right of action not broader than government's enforcement authority).

The cases that plaintiffs do cite (Opp. 33) have nothing to do with a claim (like that here) that defendants acted improperly to affect a market price. Plaintiffs characterize *Bruhn's Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332 (8th Cir. 1971), as a "controlling decision" (Opp. 27), but it was not a manipulation claim arising under 7 U.S.C. § 192(e). Instead,

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[5] Against this backdrop, plaintiffs argue that *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005), *cert. denied*, 540 U.S. 1040 (2006), is "wrongly decided" because, among other things, it ignored the USDA's position in certain other cases that no finding of anticompetitive effect is necessary. (Opp. 35-36.) However, the USDA is not a party in this case, and it has not taken a position on the issues presented here (other than to decline to take enforcement action against defendants under Section 192, which the USDA is responsible for enforcing). For plaintiffs to characterize what the USDA's position would be on the facts of this case – much less what the USDA's position would have been in *Pickett* – is sheer speculation.

Bruhn's involved a claim alleging a violation of § 192(a) (*i.e.*, "unfair" or "deceptive" practices) involving "bait-and-switch sales practices, misrepresentation of USDA grades of meat, misrepresenting yields, misrepresenting the parts of the carcass from which cuts were derived, and failure to deliver the quality of meat ordered." (Opp. 34.) In *Van Wyk v. Bergland*, 570 F.2d 701, 705 (8th Cir. 1978), another case upon which plaintiffs rely, the USDA sued market dealers for bouncing checks in violation of 7 U.S.C. § 213(a), which prohibits "unfair" and "deceptive" conduct, and a specific USDA regulation prohibiting delays in payment. Neither *Bruhn's* nor *Van Wyk* involved a market-based claim against a packer. So it is hardly surprising that neither discusses the competitive injury requirement applicable to market-based claims, such as the claims in this case.

2. No Reasonable Juror Could Have Found An Actual Or Potential Injury To Competition.

Plaintiffs claim that individual defendants unilaterally lowered the prices paid for cattle. But in a competitive market – such as the one that

plaintiffs admit exists here (A788:10-18; Opp. 10) – that claim makes no economic sense and cannot support a finding of injury to competition. [6]

For reasons that are not at all clear, plaintiffs allude to the defendants' supposed "knowledge advantage" over smaller packers, such as National. (Opp. 37.) But that cannot be significant. If a larger packer tried to "underbid" for scarce cattle, other packers would scoop up a disproportionate share of purchases, causing the underbidding packer's plants to operate at less than optimal levels. As Schroeder put it, packers "try to keep their plants as close to capacity as they can . . . . they will try to get ahold of those cattle in whatever way they can" because higher capacity utilization normally means higher profit (all other things being equal). (A788:6-9.) During the error period, there were not enough finished cattle to permit every packer to run its plants at full capacity. (A839:5-11.) As a result, if a packer bid less than the market price, other packers would buy the cattle and the underbidding packer could not run its plants at a high capacity utilization level. The packer's profits would therefore fall.

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[6] Plaintiffs assert that, as a result of the USDA error, competition was reduced among cattle producers. (Opp. 20.) But the issue in this case is whether there was competition among packers, not producers.

(A914:9-16.) In other words, unilateral underbidding by a packer would be a recipe for financial disaster.

Plaintiffs' claim of unilateral underbidding "simply makes no economic sense," and thus they must "come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). There is no such evidence in the record. Because plaintiffs failed to prove actual or potential injury to competition, judgment as a matter of law must be entered for the defendants.

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

A. The Amount Of Class-Wide Damages Cannot Be $9.25 Million, Because The Jury's Award Included Damages Attributable To Opt-Outs.

Plaintiffs' entire trial strategy hinged on persuading the jury to adopt Schroeder's formula. According to plaintiffs, having the jury approve that formula would enable each class member to present evidence of its cattle sales in a subsequent claims proceeding, in which the formula could be applied to those sales and each plaintiff would receive the amount of the alleged "underpayment." It would not be necessary to worry about opt-

outs, because they would not submit claims, or could be weeded-out if they did. But that process cannot work without a jury-validated formula. As things stand now, (i) there is no mechanism for calculating the "underpayment" on a given cattle sale by a given class member, and (ii) there is no jury-approved methodology for determining what portion of the judgment is attributable to opt-out sales and what portion is attributable to class member sales.

These deficiencies place this case on all fours with *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*, 540 U.S. 1040 (2006). There, as here, the court – at plaintiffs' request – instructed the jury to determine damages that included purchases for which defendants could not be held liable. *Id.* at 1178. There, as here, an economist tried to employ a regression formula to prove both impact and quantity of damages. *Id.* at 1177-78. There, as here, the jury awarded far less damages than plaintiffs sought, thus rejecting the plaintiffs' formula. *Id.* at 1178. And there, as here, the 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.*

Now that the jury has rejected Schroeder's formula, plaintiffs assert that *Pickett* has few similarities to this case. (Opp. 52.) But it was plaintiffs who specifically embraced *Pickett* on the eve of trial as a way of circumventing the fact that they could not prove class-wide damages:

> On Picket[t], which I'm most familiar with, Judge Strom said there's an alternative [to proving class-wide damages]. We can either prove total damage for the class or a formula by which individual class members['] damages could be calculated. We are prepared to have [Professor Schroeder] prepare to do the latter to be consistent with Picket[t].

(A694:19-24**.**) Plaintiffs rewrite history when they now assert that defendants are attempting to "force comparisons" between this case and *Pickett.* (Opp. 52.) Plaintiffs cannot escape the fact that they gambled – and lost – their bet that the jury would adopt the precise formula they offered.

Equally flawed is plaintiffs' assertion that the jury determined "that the amount of the class-wide damage is $9,250,000.00." (Opp. 45.) Although the district court entered judgment in the full amount of the verdict, that verdict was not a class damages verdict. The district court instructed the jury that "so-called 'opt outs' are to be treated by you as included within the definition of class members" (Add. 2-3) and assured the jury that "the court, at a later date, would then reduce the amount of

the fund" to account for opt-outs (Add. 6).[7] But the district court later entered judgment anyway, in the full amount awarded by the jury (including damages on sales by opt-outs).

Plaintiffs do not suggest that, because the damages awarded against each defendant are approximately 24% of what Schroeder calculated, his formula can be applied to class members' claims with the resulting "underpayment" reduced by 76%. This is a necessary concession on plaintiffs' part. There is no way to know if the jury awarded damages for the entire class period or only a part, and – if a part – which part. For

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[7] As defendants noted in their opening brief, packer records generally identify purchases by feedyard and not by cattle owner; thus, those records do not identify which, or how many, cattle were sold by the 244 opt-outs. (A712:2-10; A727:3-10; A791:5-22; A872:16-873:4.) At this point, the feedyards' cattle sale records from 2001 may no longer exist. (A792:3-12.) Plaintiffs dispute none of this.

Plaintiffs take Excel to task for failing to inform some producers that they were underpaid on the choice-select spread for their "formula" cattle. (Opp. 13.) The record makes clear, however, that the net effect of the USDA error was that Excel *overpaid* for formula cattle. (A625-652; A871:13-872:7.) And because packer records identify purchases by feedyard, Excel did not know who owned the formula cattle. (A872:25-873:4.) Excel nonetheless informed feedyards that Excel had recalculated the choice-select spread using the USDA's corrected data. (A871:22-872:7.) The feedyards did not volunteer refunds or demand additional payments on behalf of their clients, leaving well enough alone. (A872:8-15.)

example, the jury may have determined that for part of the class period, defendants did not engage in any illegal conduct. Alternatively, the jury may have concluded that on those days where the USDA error was especially small there were no damages. As a third possibility, the jury may have awarded damages for the entire class period, but reduced the damages calculated by Schroeder's formula by 76% across-the-board. As plaintiffs implicitly acknowledge by remaining silent on such an important point, it is impossible to tell how the jury came up with its damage award.

Of course, without a damages formula that is derivable from the jury's verdict, there is no way to estimate class damages – *i.e.*, damages for class members with opt-outs removed. After all, to remove damages attributable to opt-out sales to an individual defendant on April 14, one must know whether damages were awarded for sales on April 14, and if so, how to calculate those damages.

Plaintiffs now argue that defendants should have insisted on a special verdict form that laid out the basis for the damages award. (Opp. 50-51.) But that argument misses the point: the verdict form was sufficient to show whether or not the jury accepted Schroeder's formula. If plaintiffs wanted to preserve the option for a class damages award based upon

something other than the jury's full acceptance of the Schroeder formula, they are the ones who should have offered a verdict form that would have given the jury that choice. Plaintiffs' failure to do so is fatal, because Schroeder's formula is not like a cafeteria line in which one can pick and choose what one likes: the jury either had to accept the formula *in toto*, or reject it. That is because the formula calculates a precise damage amount for each sale; it does not generate a range of results.

B. The District Court Has Subjected Defendants To A Risk of Double Recovery, Thus Violating Their Due Process Rights.

Plaintiffs decry as "nonsense" defendants' argument that they risk double-recovery suits brought by cattle producers who have opted-out of the class. (Opp. 53.) In support, plaintiffs refer to the "district court's statements on the issue" (*id.*) that "'[t]here is no risk of multiple liabilities being incurred by defendants'" (*id.*, *quoting* A260-61). But that is not the case. After initially maintaining that no class judgment would be entered that awarded damages based upon opt-out sales, the district court ultimately did exactly that. (A266-268.) If just one opt-out were to file an individual lawsuit against defendants and were to recover damages, there would be a double recovery.

Saying that the "district court will deal with this issue in the claims process" (Opp. 54) is beside the point for three reasons. First, the jury's rejection of Schroeder's formula means that there is no way to "deal with this issue." It is a problem that cannot be fixed. Second, the district court has already decided "this issue" – it entered a $9.25 million final judgment. Third, with a judgment entered, the only remaining issue is the distribution of the $9.25 million. And defendants may lack standing to participate in a future claims process: "[w]here the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members." *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990); *see also Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003) ("[D]efendant has no interest in how the class members apportion and distribute a damage fund among themselves"), *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 543 U.S. 924 (2004). In other words, "[t]he judgment on the merits stripped [the defendants] of any present interest in the fund. Thus, [the defendants have] no cognizable interest in further litigation . . . over the . . . money

belonging to the class." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481 n.7 (1980).[8]

Plaintiffs suggest that it may be necessary to "empanel another jury" to determine the damages to the class, and say that there is no Seventh Amendment problem because "the issues of liability and damages are sufficiently distinct as to not require overlapping determinations of the same issue by different juries." (Opp. 54 n.4.) Plaintiffs ignore two critical facts: (1) the damages issue has already been tried to a jury, and (2) the jury rejected plaintiffs' damages proof. While plaintiffs might prefer another shot with a new jury, the Seventh Amendment forbids that kind of second chance. *See 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") (internal footnote omitted).

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[8] Conveniently, plaintiffs speculate that the district court may reduce damages for opt-outs during future proceedings. (Opp. 26 (arguing that "any claims process will account for opt-outs, *likely* with a corresponding reduction in the damages awarded") (emphasis added).) But this cannot occur: a final judgment has already been entered, fixing the dollar amount that the defendants must pay to the class.

C. Even Apart From The Failure To Exclude Opt-Outs, The Jury's Award Has No Basis In The Evidence.

Reversal is necessary for another reason: the jury relied upon sheer speculation in determining damages. Plaintiffs offer no clue as to how the jury arrived at $9.25 million.[9] One thing is clear: the jury did not use the damage estimates produced by Schroeder's formula. Because this was the only basis that plaintiffs offered for calculating damages, there is no evidence to support the jury's award.

Plaintiffs can hardly take direct issue with the proposition that jury awards of damages "'must not be speculative or conjectural.'" *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1491 (8th Cir. 1992), *quoting Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 893 (8th Cir. 1978). But they indirectly assault this fundamental principle by arguing that any award of damages for less than the total amount calculated by Schroeder must stand. That is not the law.

To be sure, there are certain cases in which the evidence supports a non-speculative damage award of less than the full amount sought by

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[9] Plaintiffs repeatedly provide inaccurate descriptions of the amount of the verdict against each defendant. *Compare* Opp. 3 & 23 *with* A254 (verdict form). They also inaccurately state that a Swift buyer, rather than a Swift beef salesperson, called the USDA. *See* Opp. 21; A323:12-21.

plaintiffs, but the key point in those cases – as even plaintiffs concede – is that the verdict must be consistent with the "mathematical limitations" of the evidence. (Opp. 48.) For example, in *Children's Broadcasting Corp. v. The Walt Disney Co.*, 357 F.3d 860 (8th Cir. 2004), the dispute involved misappropriated business information, and the damage amount turned on how much of a head-start the misappropriated information provided. The evidence was that the head-start was anywhere from one week to eleven months. *Id.* at 864. Consequently, when the jury returned a verdict for less than the full amount plaintiffs claimed, the reduction was supported by the evidence: the jury apparently found the head-start was less than eleven months.

Here, by contrast, plaintiffs offered no evidence that would have permitted the jury to calculate an amount for a given day that differed from the daily amount yielded by the Schroeder formula. The damages calculation involved a complicated regression formula developed by a Ph.D. economist. *See* A663 (reproduction of formula). It was well beyond the ken of a lay juror to develop a new formula. Indeed, plaintiffs' "all or nothing" tactic with respect to the jury's acceptance of Schroeder's formula is best illustrated by their calculated decision not to introduce the formula

into evidence. How could the jury possibly "adjust" Schroeder's damages by tweaking his formula when the formula itself was not part of the evidence available to the jury in its deliberations?

The amounts calculated by the Schroeder formula were the *only* evidence plaintiffs provided for damages. The jury was presented with "take-it-or-leave-it" amounts, and the jury "left it." Plaintiffs therefore failed to prove damages to a reasonable degree of certainty. *See Amerinet*, 972 F.2d at 1491 (damages "'must be capable of reasonable ascertainment'"), *quoting Admiral Theatre Corp.*, 585 F.2d at 893. As a result, judgment as a matter of law should be entered for defendants.

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

A. Having Rejected Schroeder's Formula For Purposes Of Determining Damages, No Reasonable Juror Could Have Relied Upon That Same Formula To Establish Impact.

Plaintiffs argue that the jury could have rejected "Schroeder's testimony on the amount of damages," but still accepted his "testimony on the fact of damage having been incurred class-wide." (Opp. 40.) Ordinarily that might be true, but in this case it is not. Plaintiffs' evidence for both damages and liability was the same – Schroeder's formula. That

is, Schroeder based his opinion that there was class-wide impact on the results of his formula. The formula was the only evidence plaintiffs offered to show that each and every class member was injured by the challenged conduct. (A749:13-24.)[10] Because the jury rejected Schroeder's formula for purposes of calculating damages, they could not have relied upon it to prove impact. To the contrary, the legal standard to prove injury is more demanding than that used to prove damages. *See Amerinet*, 972 F.2d at 1493-94 ("relaxed standard of proof with regard to the *amount* of antitrust damages does not apply" to "proving fact" of "antitrust injury") (emphasis added).

The jury may well have rejected Schroeder's formula because of the "Back to the Future" problem. Specifically, Schroeder relied upon corrections to the afternoon boxed beef reports to calculate the impact of the error on sales that took place throughout that day (A790:12-23), even though many cattle were sold (and prices were negotiated) before the afternoon boxed beef prices were published. (A818:8-12; A289; A302; A789:1-790:23.) Plaintiffs do not explain how damages for sales in the

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[10] Plaintiffs do not argue that there was any evidence of impact other than Schroeder's formula. (Opp. 38-42.)

morning could properly have been determined based on afternoon reports that had not yet been issued when the sale price was struck.

B. Plaintiffs Cannot Show Impact For Every Class Member Because Some Class Members Hedged.

Plaintiffs assert that hedging is an affirmative defense that mitigates damages. (Opp. 44.) That is incorrect. Mitigation of damages takes place *after* damages have been suffered. For example, if your roof is damaged because of a neighbor's negligence, you must cover the hole with a tarpaulin before the thunderstorm hits. But the hedges at issue here were entered into *before* mandatory price reporting began. (A710:1-10; A795:25-796:9.) Thus, the hedges had nothing to do with limiting any loss purportedly caused by defendants' alleged misconduct. To the contrary, producers who hedged were not harmed at all, because the hedges removed the price risk associated with the cattle. (A795:25-796:18.)

Plaintiffs assert that this Court "has held that hedging 'performs an 'insurance' function'" and, thus, is governed by the collateral source rule. (Opp. 44, *quoting Cargill*, 452 F.2d at 1158.) But what this Court actually explained was that,

> since a futures contract permits the *immediate fixing of the price* of a transaction that will not be consummated until a future

> date, futures trading performs an "insurance" function. For the seller of agricultural products confronted with the risk of price decline prior to sale . . . the futures market offers a form of "price insurance" which *guarantees the futures price agreed to even if market prices subsequently rise or fall prior to the date of delivery.*

Cargill, 452 F.2d at 1158 (emphasis added). Thus, if a class member successfully hedged before April 2, 2001, he was not injured because he "fix[ed]" or "guarantee[d]" a price before mandatory price reporting went into effect. And the record makes clear that many cattle sold during the error period were hedged before April 2, 2001. (A710:7-10; A795:14-24.)

Under these circumstances, the collateral source rule does not apply. As this Court has held:

> The doctrine is not applicable where the plaintiff is reimbursed and by reason of the reimbursement loses his complete interest in the claim, by transfer or otherwise, to his indemnitor. When this occurs the indemnitor is subrogated to the entire claim and becomes the only real party in interest. To allow the plaintiff to assert the collateral source doctrine under such circumstances could subject a defendant in various situations to multiple claims arising out of the same damage.

Minnesota v. U.S. Steel Corp., 438 F.2d 1380, 1384 n.9 (8th Cir. 1971) (internal quotation marks omitted).

Plaintiffs are therefore wrong to argue that "the burden rested on the Packers, not Plaintiffs, to prove [hedging] as a factor that mitigated

damages." (Opp. 44.) But even if it had been defendants' burden to address hedging, plaintiffs made it impossible for defendants to do so, because plaintiffs persuaded the district court to prohibit defendants from cross-examining Schroeder about hedging. (A794:17-798:8) (rejected offer of proof.) As the district court said, "we're not going to try [hedging] here with all of those details." (A691:17-18.) The district court then precluded defendants from arguing hedging to the jury in closing. (A897:18-898:3.)

Although the district court noted in its opinion that "[q]uestions as to claims of successful hedgers who are class members remain to be answered" (A262),[11] the court nonetheless subsequently entered a final judgment of $9.25 million that indisputably includes cattle sales by producers who hedged. As noted in Part II.B, *supra*, any remaining claims proceeding is merely to allocate the $9.25 million that the district court has already determined the defendants owe. Thus, defendants are being held

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[11] The district court also noted that the jury's damage awards may have been lower than the amounts yielded by Schroeder's formulas because, "[f]or all we know, the jury may have bought, wholly or in part, the arguments of defendants [that successful hedgers were not damaged] and reduced the damages accordingly." (A262.) But the court had precluded defendants from cross-examining Schroeder on hedging or from arguing hedging during closing, so the jury could not possibly have "bought . . . the arguments of defendants."

liable for sales by producers who hedged and could not have been harmed by the USDA's error.

To prove that defendants were liable, plaintiffs were obliged to show that "every member of the . . . class[ ] . . . suffered impact." *Blades v. Monsanto Co.*, 400 F.3d 562, 571 (8th Cir. 2005). But class members who hedged cannot have been injured. Having failed to distinguish class members who hedged from those who did not, plaintiffs failed to prove impact for each and every class member. Because this was an essential element of their liability case, judgment as a matter of law should have been entered for defendants.

IV. THE DISTRICT COURT SHOULD HAVE DECERTIFIED THE PLAINTIFF CLASS WHEN THE JURY REJECTED PLAINTIFFS' CLASS-WIDE PROOF OF IMPACT AND DAMAGES.

Plaintiffs' motion for class certification was predicated on the claim that they could use Schroeder's formula to prove impact and damages on a class-wide basis. The jury, however, rejected Schroeder's formula, and there is no other class-wide proof of impact or damages. Without a method to prove impact and damages on a class-wide basis, common issues do not predominate over individual issues. And based on the jury award, there is

no way to know which class members suffered impact (and therefore established liability) or the amount of damages for each such class member.

It was error for the district court to enter a judgment in favor of the class without any proof of class-wide impact or damages. For that reason, judgment as a matter of law should be entered for defendants. At minimum, however, the district court should have decertified the class; a class certification order "may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C).

CONCLUSION

Contrary to plaintiffs' arguments, this is far from a routine jury case. There are multiple, independent reversible errors. For these reasons, defendants respectfully request that this Court reverse the district court's judgment and enter judgment as a matter of law for defendants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 6,780 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.

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