November 15, 2022

Delivered via e-mail to Lee.Berger@usdoj.gov

Lee Berger
Chief | Civil Conduct Task Force
Department of Justice Antitrust Division
450 Fifth Street NW, Suite 8600
Washington, DC 20530

Re: Comment on Proposed Final Judgments, Stipulations, and Competitive Impact Statement in United States v. Cargill Meat Solutions Corp., et al, Civil Action No. 22-cv-01821, Published in Federal Register (87 FR 57028) on Sept. 16, 2022

Dear Mr. Berger:

Farm Action is a farmer-led advocacy organization dedicated to building a food and agriculture system that works for everyday people instead of a handful of powerful corporations. Our network includes farmers, ranchers, rural community leaders, food system workers, and policymakers across the country. We submit this comment in support of the Proposed Final Judgments, Stipulations, and Competitive Impact Statement filed by the Justice Department's Antitrust Division in *United States v. Cargill Meat Solutions Corp.*, Civil Action No. 22-cv-01281, on September 16, 2022 (collectively, the "**Consent Decree**").

The Consent Decree resolves violations of the Sherman Act and the Packers and Stockyards Act alleged by the United States in its Complaint (the "**Complaint**") filed in Maryland District Court (the "**Court**") on July 25, 2022, against three poultry processors (the "**Processing Defendants**"), a consulting firm, and its principal (collectively, the "**Defendants**").[1] Before entering the Consent Decree, the Court must evaluate its resolution of Count One of the Complaint for violations of the Sherman Act (the "**Antitrust Claim**") and its resolution of Count Two of the Complaint for violations of the Packers and Stockyards Act (the "**P&S Act Claim**") under different standards. On the one hand, the Court must find that entry of the Consent Decree's

[1] The Processor Defendants are Cargill Meat Solutions Corp. and Cargill, Inc. (collectively, "**Cargill**"), Wayne Farms, LLC ("**Wayne**"), and Sanderson Farms, Inc. ("**Sanderson**"). The remaining Defendants are Webber, Meng, and Company, Inc., d/b/a WMS & Company, Inc. ("**WMS**"), and G. Jonathan Meng ("**Meng**").

resolution of the Antitrust Claim "is in the public interest" under the Tunney Act.[2] On the other hand, since the Tunney Act does not cover claims under the Packers and Stockyards Act,[3] the Court must find that the Consent Decree's resolution of the P&S Act Claim is "fair, adequate, and reasonable" and "is not illegal, a product of collusion, or against the public interest."[4]

Although this comment will focus primarily on the P&S Act Claim, we wish to also emphasize our view that the Consent Decree's resolution of the Antitrust Claim is firmly "within the reaches of the public interest" under the Tunney Act.[5] Since consolidation began increasing in the poultry- and other meat-processing industries in the 1980s, the average hourly wage for poultry-processing workers has declined by nearly 40 percent — amounting to a meager $11 an hour in 2015.[6] At that level, the average poultry-processing worker's wage was nearly half the average manufacturing worker's wage in 2020[7] — even as poultry-processing workers endured dramatically worse working conditions than other workers in the private sector. Between 2015 and 2018, meat- and poultry-processing workers faced twice the risk of amputations as the average worker in private industry — and more than 50 percent reported other injuries such as carpal tunnel syndrome, "trigger finger," tendinitis, rotator cuff injuries, lower back injuries, and chronic pain and numbness.[8] The exploitation of these workers even extends to rampant abuse by plant managers, who have been reported to routinely deny workers bathroom breaks, use racial slurs, deride workers for complaining about pain or illness, and even place

---

[2] *See* 15 U.S.C. § 16(e).

[3] The Tunney Act only applies to "consent judgment[s] submitted by the United States" in "civil proceedings brought . . . under the antitrust laws[.]" *See* 15 U.S.C. § 16(b); *See also* 15 U.S.C. § 16(a-b, e-f). As the term "antitrust laws" is defined under 15 U.S.C. § 12, it does not include the Packers and Stockyards Act. 15 U.S.C § 12. Accordingly, consent decrees resolving claims brought under the Packers and Stockyards Act are not subject to the Tunney Act. *Cf. FTC v. Circa Direct LLC*, 2012 WL 2178705, at *4 (D.N.J. June 13, 2012) (consent decree for FTC Act UDAP claims not subject to Tunney Act).

[4] *See United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999).

[5] *See United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995).

[6] OXFAM, LIVES ON THE LINE: THE HUMAN COST OF CHEAP CHICKEN 19 (Oct. 2015).

[7] *See* Eli Hoff, *GRAPHIC: Meat Processing Workers earn an Average of $15.53 Per Hour*, THE COUNTER (July 23, 2021) (noting average manufacturing employee earned $20.08 an hour in 2020) https://thecounter.org/graphic-meat-processing-workers-average-15-53-per-hour/.

[8] Between January 2015 and August 2018, the Department of Labor's Occupational Safety and Health Administration (OSHA) received 770 reports of amputations, in-patient hospitalizations, or eye loss from meat and poultry plants. These figures do not cover injuries from employers in the 22 states which have state-based OSHA programs covering private sector workers. HUMAN RIGHTS WATCH, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING: WORKERS RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS (Sept. 4, 2019). Of the tens of thousands of companies who report injuries to OSHA, Tyson Foods is ranked fifth, Pilgrim's Pride is thirteenth, Cargill Meat Solutions is sixteenth, and JBS USA is seventeenth. Smithfield, National Beef, and Koch Foods round out the top thirty. HUMAN RIGHTS WATCH, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING: WORKERS RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS (Sept. 4, 2019). Workers are often exposed to noxious chemicals, environmental contaminants, and biological hazards, such as feces, blood, and pathogens. Workers have even been known to develop antibiotic resistance from absorbing antibiotics from chicken flesh. HUMAN RIGHTS WATCH, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING: WORKERS RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS (Sept. 4, 2019); OXFAM, LIVES ON THE LINE: THE HUMAN COST OF CHEAP CHICKEN 26 (Oct. 2015).

bets on how many workers will get Covid-19 following their refusal to implement health-protective measures during the pandemic.[9]

No one chooses to work for bosses like these. The workers of the poultry processing industry only labor under ever-worsening conditions for ever-worsening wages because their ability to choose their employer has been severely limited by the Defendants and their co-conspirators throughout the poultry processing industry, who have consolidated power over local and national labor markets as amply described in the United States' Complaint. If entered, the Consent Decree would break up the collusive arrangements between dominant poultry processors that have suppressed workers' wages and benefits; destroy the infrastructure of consulting firms and information exchanges that facilitated those arrangements; and impose stringent monitoring and collaboration requirements on the Defendants that will enable enforcers to root out collusive conduct in this evidently corrupt industry and secure compliance with the law going forward. In other words, this Consent Decree would provide efficacious — and properly tailored — remedies that would end the antitrust violations alleged by the United States and prevent their recurrence. That, in principle, is more than enough for the Consent Decree to deserve the Court's approval under the Tunney Act — and we hope the Court acts accordingly.[10]

For the reasons detailed more fully below, we believe the Consent Decree's resolution of the P&S Act Claim likewise deserves the Court's approval.

---

[9] *See* Oxfam, Lives on the Line: the Human Cost of Cheap Chicken 35 (Oct. 2015); Human Rights Watch, "When We're Dead and Buried, Our Bones Will Keep Hurting: Workers Rights Under Threat in US Meat and Poultry Plants (Sept. 4, 2019); Katie Shepherd, "Tyson Foods managers had a 'winner-take-all' bet on how many workers would get covid-19, lawsuit alleges", Washington Post (Nov. 19, 2012). Being denied a bathroom break is so common that workers often intentionally reduce their fluid intake, or wear diapers at work to avoid urinating on themselves. Oxfam, Lives on the Line: the Human Cost of Cheap Chicken 35 (Oct. 2015). One survey of 266 slaughter workers in Alabama found that nearly 80 percent were not allowed to take bathroom breaks when needed. Another survey of Minnesota slaughter workers revealed that 86 percent of workers were allowed fewer than two bathroom breaks per *week*, on average. Oxfam, No Relief: Denial of Bathroom Breaks in the Poultry Industry 3 (May 2016).

[10] *Cf. United States v. Apple, Inc.*, 889 F.Supp.2d 623 (S.D.N.Y. 2012) (finding ample factual foundation for government's decision regarding proposed final judgment in civil antitrust suit against publishers of trade electronic books (e-books) alleging a conspiracy to raise, fix, and stabilize prices of e-books in violation of Sherman Act, as required for court's approval of consent decree pursuant to Tunney Act, because government provided detailed allegations as to existence of conspiracy, described contents of agreements between defendants and their effect on market, and explained how proposed judgment would end price-fixing and prevent its recurrence).

I. Legal Standard for Evaluating Consent Decree Under Packers and Stockyards Act

In *United States v. North Carolina*,[11] the United States Court of Appeals for the Fourth Circuit endorsed "the general principle that settlements are encouraged."[12] Even so, a district court is not required to blindly accept a proposed settlement's terms.[13] "Rather, before entering a consent decree the court must satisfy itself that the agreement is 'fair, adequate, and reasonable' and 'is not illegal, a product of collusion, or against the public interest.'"[14] In deciding whether a proposed settlement is fair, adequate and reasonable, a district court is required to assess the strength of the plaintiff's case.[15] In making this assessment, the court need not conduct "a trial or a rehearsal of the trial," but it must still "take the necessary steps to ensure that it is able to reach an informed, just, and reasoned decision."[16] Factors bearing upon this determination include the extent of discovery that has occurred, the stage of the proceedings, the absence of collusion in the settlement, and the experience of counsel who negotiated the settlement on behalf of the plaintiffs.[17]

II. The Consent Decree Is Fair, Adequate, and Reasonable

The fairness, adequacy, and reasonableness of a proposed consent decree are judged "by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement."[18] In conducting this analysis, the Court should, "absent any showing of collusion or bad faith," give "the opinion of competent counsel . . . great weight."[19] The opinion of counsel for the government, specifically,

---

[11] *See United States v. North Carolina*, 180 F.3d 574 (4th Cir. 1999). The Fourth Circuit's decision in this case, *id.* at 581 n. 5, indicated that the controlling Fourth Circuit cases that should guide a district court in determining whether to enter a consent decree are *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), and *Carson v. American Brands, Inc.*, 606 F.2d 420, 430 (4th Cir.1979) (en banc) (Winter, Circuit Judge, dissenting), *adopted by Carson v. American Brands, Inc.*, 654 F.2d 300, 301 (4th Cir.1981) (en banc) (per curiam).

[12] *See United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999).

[13] *See id.*

[14] *See id.* (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)).

[15] *See id.*

[16] *See id.* (quoting *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172–73 (4th Cir. 1975)).

[17] *See id.*

[18] *See United States v. Baltimore County, Maryland*, 2021 WL 2000480, at *4 (D. Md. May 19, 2021) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)). *See also Carson v. American Brands, Inc.*, 606 F.2d 420, 430 (4th Cir.1979) (en banc) (Winter, Circuit Judge, dissenting), adopted by *Carson v. American Brands, Inc.*, 654 F.2d 300, 301 (4th Cir.1981) (en banc) (per curiam).

[19] *See Carson v. American Brands, Inc.*, 606 F.2d 420, 430 (4th Cir.1979) (en banc) (Winter, Circuit Judge, dissenting), *adopted by Carson v. American Brands, Inc.*, 654 F.2d 300, 301 (4th Cir.1981) (en banc) (per curiam). *See also Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) ("While the opinion and recommendation of experienced counsel is not to be blindly followed by the trial court, such opinion should be given weight in evaluating the proposed settlement.").

is entitled to "particularly strong" deference where "a consent decree has been negotiated by the Department of Justice on behalf of [itself] or [another] federal administrative agency specially equipped, trained, or oriented in the field [at issue in the case]."[20] Although the Court must develop an "adequate" record to "reach an intelligent and objective opinion of the probabilities of ultimate success should the [settled] claim be litigated," it should "view the merits of the decree in the light most favorable to its entry."[21]

A. The United States Is Likely to Succeed on the Merits

The United States is likely to succeed on the merits because its Complaint states a *prima facie* claim under the Packers and Stockyards Act that is unlikely to be rebutted at trial.[22] Specifically, the United States has alleged that Sanderson and Wayne have violated Section 202(a) of Packers and Stockyards Act's prohibition on

---

[20] *See United States v. Westvaco Corp.*, 2016 WL 4492704, at *4 (D. Md. Aug. 26, 2016) (quoting *United States v. City of Welch, W. Va*, 2012 WL 385489, at *2 (S.D.W. Va. Feb. 6, 2012) (quoting *United States v. Cannons Eng'g Corp.*, 720 F.Supp. 1027, 1035 (D. Mass. 1989))). *See also United States v. Baltimore County, Maryland*, 2021 WL 2000480, at *9 (D. Md. May 19, 2021) (quoting *Am. Canoe Ass'n, Inc. v. EPA*, 54 F. Supp. 2d 621, 625 (E.D. Va. 1999) (quoting *Bragg v. Robertson*, 54 F. Supp. 2d 653, 660 (S.D.W.Va.1999))) ("[I]n a complex case settled by consent decree, 'where a government agency charged with protecting the public interest has pulled the laboring oar in constructing the proposed settlement,' the court 'accord[s] substantial weight to the agency's expertise and public interest responsibility.'").

[21] *See Flinn v. FMC Corp.*, 528 F.2d 1169, 1172-73 (4th Cir. 1973) ("So long as the record before [the district court] is adequate to reach an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated and form an educated estimate of the complexity, expense and likely duration of such litigation, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise, it is sufficient."); *Carson v. Am. Brands, Inc.*, 606 F.2d 420, 421–22 (4th Cir. 1979) (describing *Flinn* as "posit[ing] a rule that, when a district court is presented with a consent decree, it should view the merits of the decree in light favorable to its entry."), *rev'd on other grounds in*, 450 U.S. 79, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981).

[22] *See United States v. Baltimore County, Maryland*, 2021 WL 2000480, at *4 (D. Md. May 19, 2021) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)) (finding that claim resolved by consent decree would "be likely to succeed on the merits" were the case to proceed to trial because "the [defendant] would be unlikely to rebut the United States' *primary facie case*").

"unfair, unjustly discriminatory, or deceptive practice[s] or device[s]"[23] by engaging in deceptive practices "regarding" and "through" their contracts with poultry growers for the raising of poultry for slaughter.

i. *The Applicable Law*

The elements of a "deceptive practices" claim under Section 202(a) have not received authoritative construction in binding Fourth Circuit or Supreme Court precedent.[24] Therefore, the Court has a "responsibility to attempt to reach the correct result based on the well-established methods of statutory interpretation."[25] In doing so, the Court may — and, in our opinion, ought to — follow the United States Department of Agriculture's (USDA's) interpretation of the governing provision in its recent Proposed Rule entitled "Inclusive Competition and Market Integrity under the Packers and Stockyards Act" (the "**ICMI Rule**").[26]

As indicated in the Notice of Proposed Rulemaking it published in conjunction with the ICMI (the "**ICMI Notice**"), the USDA conducted a comprehensive analysis of Section 202(a) of the Packers and

---

[23] Section 202 of the Packers and Stockyards Act of 1921, as amended and supplemented, is codified in 7 U.S.C. 192, which provides in relevant part:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or
>
> (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or
>
> (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
>
> (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
>
> (f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or
>
> (g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e).

[24] *See M&M Poultry, Inc. v. Pilgrim's Pride Corp.*, 2015 WL 13841400, at *9 (N.D.W. Va. Oct. 26, 2015).

[25] *See Wheeler v. Pilgrim's Pride Corp.,* 591 F.3d 355, 382 (5th Cir. 2009) (Garza, J., dissenting).

[26] *See* Agriculture Marketing Service, USDA, Proposed Rule: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 FR 60010, 60031-33 (October 3, 2022).

Stockyards Act — which ranged over the Section's text, its statutory context, its legislative history, the case law that has developed under it, and the USDA's own administration of the Act over the past century — to determine what "deceptive practices" fall within the prohibition of Section 202(a).[27] Based on this analysis, the agency found that the Act "reaches beyond common-law fraud" and "is not limited to false statements and omissions," but also "requires honest dealing" and imposes "affirmative duties to be truthful" on regulated entities. Further, particularly in cases dealing with ensuring the integrity of payment systems reliant on equipment or information wholly within the control of the processor, "the Act does not require proof of particularized intent."[28] Against this background, the agency concluded that "violative deceptions under the Act include false statements or omissions that prevent or mislead [a reasonable recipient] from making an informed decision" or otherwise adversely "affect the conduct or decision of [such] recipient."[29]

Pursuant to its delegated authority to promulgate implementing regulations under Section 407 of the Packers and Stockyards Act, the USDA proposed the following regulation to identify certain practices in the formation and performance of contracts that it "considers deceptive in violation of Section 202(a) of the Act":

> § 202.306 Deceptive practices.
>
> (a) *Prohibited Practices*. A regulated entity may not engage in the specific deceptive practices prohibited in paragraphs (b) through (e) of this section with respect to any matter related to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry.
>
> (b) *Contract formation*. A regulated entity may not make or modify a contract by employing a pretext, false or misleading statement, or omission of material fact necessary to make a statement not false or misleading.
>
> (c) *Contract performance*. A regulated entity may not perform under or enforce a contract by employing a pretext, false or misleading statement, or

---

[27] *See* Agriculture Marketing Service, USDA, Proposed Rule: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 FR 60010, 60031-33 (October 3, 2022).

[28] *See* Agriculture Marketing Service, USDA, Proposed Rule: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 FR 60010, 60033-34 (October 3, 2022) (citing *Parchman v. U.S. Dep't of Agric.*, 852 F.2d 858, 864 (6th Cir. 1988)) ("Even if a regulated entity does not intentionally set out to deceive with respect to the weight of the livestock, the Act does not require proof of a particularized intent. . . . The live poultry dealer's honesty is vitally important to poultry growers. Because much of the payment system relies on information that is wholly within the live poultry dealer's control, deception is particularly dangerous [in that context].").

[29] *See* Agriculture Marketing Service, USDA, Proposed Rule: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 FR 60010, 60031-33 (October 3, 2022).

omission of material fact necessary to make a statement not false or misleading.[30]

In describing some of the "general circumstances" that fall within the "focus" of the proposed rule, the USDA suggested they would include instances "where a live poultry dealer's poultry nutrition adviser provides misleading advice to a contract grower, where a swine production contract provides false information regarding manure compliance procedures, or where a packer provides false or misleading information about cash market trading in livestock." A live poultry dealer's provision of unfavorable inputs to certain producers — despite making statements denying differences in treatment — is also flagged. All these examples of potentially prohibited conduct under the ICMI Rule correspond to violative deceptions raised in the case law and existing regulations — which the USDA found to include not only "obvious falsehoods," but also instances of regulated entities failing to disclose potential conflicts of interest, leveraging asymmetries in market intelligence against farmers, employing sales tactics that omit relevant information, and making secret payments or commercial bribes.

Given the thoroughness of consideration evident in the ICMI Notice, the validity and expertness of its reasoning, and its consistency with the USDA's longstanding interpretation of the Packers and Stockyards Act, we urge the Court to follow the USDA's lead in defining "deceptive practices" under Section 202(a).[31] As described in the ICMI Notice, these include (i) any practice that satisfies the elements of a prohibited practice under the proposed 9 CFR § 201.306; and (ii) all other false statements or omissions that prevent or mislead a reasonable recipient from making an informed decision or that otherwise adversely affect the conduct or decision of such recipient.

ii. Competitive Injury Is Not Required

The USDA has consistently taken the position that neither anticompetitive intent, anticompetitive harm, nor a likelihood of anticompetitive harm is an essential element of a valid Section 202(a) claim.[32]

---

[30] *See* Agriculture Marketing Service, USDA, Proposed Rule: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 FR 60010, 60055 (October 3, 2022) (Proposed 9 CFR 201.306 in relevant part).

[31] *See United States v. Mead Corp.*, 533 U.S. 218, 228, 121 S. Ct. 2164, 2172, 150 L. Ed. 2d 292 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)) ("The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

[32] *See Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1239 (10th Cir. 2007) (Hartz, J., concurring in part, dissenting in part) ("[T]he USDA has consistently taken the position that in order to prove that a practice violates the broad prohibitions in §§ 202(a) and (b) . . . of the PSAA, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury.") (quoting 1 John H. Davidson et al., Agricultural Law § 3.47, at 244 (1981)). *See also In Re: Ozark Cnty. Cattle Co., Inc.*, 49 Agric. Dec. 336 (U.S.D.A. Mar. 19, 1990) ("The Department has consistently taken the position that in order to prove [a claim under] § 202(a) or § 312(a) of the Act, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury; and that it is the Department's duty to stop unlawful practices in their incipiency prior to actual injury.") (citing *In re ITT Continental Baking Co.*, 44 Agric. Dec. (748, 781 (1985), final order, 44 Agric. Dec. 1971 (1985)); *In re Walti, Schilling & Co.*, 39 Agric. Dec. 119, 149-50 (1978); *In re Hines*, 35 Agric. Dec. 113,

Importantly, in the ICMI Notice, the USDA indicates that the "specific prohibitions" set forth in the proposed regulation are, in its considered judgment, sufficient to demonstrate a violation of Section 202(a). This judgment is unequivocally entitled to substantial *Skidmore* deference.

To determine "[t]he fair measure of deference [owed] to an agency [interpreting] its own statute," courts may "look to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[33] The proposed ICMI Rule and corresponding Notice are part of an ongoing, formal notice-and-comment rulemaking process. The USDA interpretation of Section 202(a) expressed in these agency pronouncements is the direct product of a year-long series of investigations, hearings, and studies — which was itself informed by the USDA's experience with more than half a dozen rulemakings under the Packers and Stockyards Act launched since 2010.[34] Perhaps most importantly, the ICMI Rule reflects the agency's century-old interpretation of the essential elements of a deceptive-practices claim under Section 202(a)[35] — and it was proposed as part of a package of interlacing rulemakings the USDA has proposed in recent months to revitalize the Packers and Stockyards Act for the 21st Century.[36] All of these facts tip the *Skidmore* factors in favor of deference to the USDA.

If objectors to the Consent Decree argue that the Fourth Circuit's opinion in *Philson v. Goldsboro Milling Company*[37] binds the Court to find that "harm to competition" is an essential element of a valid Section 202(a) claim, their argument is meritless. To begin with, *Philson* is an unpublished decision from 1998. Under Fourth Circuit Court of Appeals Local Rule 32.1: "Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs . . . in the district courts within this Circuit is disfavored[.]" Moreover,

---

123-24 (1976); *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 161-76 (1974), rev'd, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman v. USDA*, 363 F.2d 81, 85 (5th Cir. 1966); *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961); *Hyatt v. United States*, 276 F.2d 308, 312 (10th Cir. 1960); *Daniels v. United States*, 242 F.2d 39, 41- 42 (7th Cir.), cert. denied, 354 U.S. 939 (1957)).

33 *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

34 *See* Agriculture Marketing Service, USDA, Proposed Rule: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 FR 60010, 60010-15 (October 3, 2022).

35 *See* 1 John H. Davidson et al., Agricultural Law § 3.47, at 244 (1981)) ("[T]he USDA has consistently taken the position that in order to prove that a practice violates the broad prohibitions in §§ 202(a) and (b) . . . of the PSA, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury."). *See also In Re: Ozark Cnty. Cattle Co., Inc.*, 49 Agric. Dec. 336 (U.S.D.A. Mar. 19, 1990) ("The Department has consistently taken the position that in order to prove [a claim under] § 202(a) or § 312(a) of the Act, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury; and that it is the Department's duty to stop unlawful practices in their incipiency prior to actual injury.")

36 *See* Agriculture Marketing Service, USDA, Proposed Rule: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 FR 60010, 60010-15 (October 3, 2022); Agriculture Marketing Service, USDA, Proposed Rule: Transparency in Poultry Grower Contracting and Tournaments, 87 FR 34980 (June 8, 2022); Agriculture Marketing Service, USDA, Proposed Rule: Poultry Growing Tournament Systems: Fairness and Other Concerns, 87 FR 34814 (September 6, 2022). *See also* Executive Order 14036 of July 9, 2021, "Promoting Competition in the American Economy," 86 FR 36987 (July 14, 2021).

37 *See* 1998 WL 709324 (4th Cir. 1998).

"unpublished opinions have no precedential value in the Fourth Circuit."[38] *Philson* is only entitled to the weight it generates by the persuasiveness of its reasoning[39] — and, as district courts in the Fourth Circuit have now repeatedly held, *Philson*'s reasoning is threadbare and unpersuasive.[40]

The leading case evaluating the persuasiveness of *Philson*'s reasoning — which consists entirely of a single paragraph[41] — is *M&M Poultry, Inc. v. Pilgrim's Pride Corporation.* In that case, Judge Bailey provided a thorough, scholarly analysis to show: (1) that the *Philson* court failed to undertake a meaningful analysis of Section 202(a) under settled principles of statutory interpretation in the Fourth Circuit; (2) that a construction of Section 202(a) which requires a plaintiff to prove anticompetitive effects is irreconcilable with the specific text of Section 202(a), its immediate context, and the structure of the Act as a whole; and, finally, (3) that the legislative history provides no actual support for reading into Section 202(a) a requirement of anticompetitive effects not indicated by its text. Notably, the defendant in *M&M Poultry* — Pilgrim's Pride, which is surely as sophisticated and deep-pocketed a litigant as they come — declined to appeal Judge Bailey's decision. We hope the Court will review Judge Bailey's well-considered opinion, as well as the numerous other district, circuit, and administrative decisions that have rejected the notion that "harm to competition" is an essential element of a Section 202(a) claim.[42]

---

[38] *See M&M Poultry, Inc. v. Pilgrim's Pride Corp.*, 2015 WL 13841400, at *9 (N.D.W. Va. Oct. 26, 2015) (citing *Hentosh v. Old Dominion Univ.*, 767 F.3d 413, 417 (4th Cir. 2014)).

[39] *See M&M Poultry, Inc. v. Pilgrim's Pride Corp.*, 2015 WL 13841400, at *9 (N.D.W. Va. Oct. 26, 2015) (citing *Hentosh v. Old Dominion Univ.*, 767 F.3d 413, 417 (4th Cir. 2014)).

[40] *See M&M Poultry, Inc. v. Pilgrim's Pride Corp.*, 2015 WL 13841400, at *6-10 (N.D.W. Va. Oct. 26, 2015); *Triple R Ranch, LLC v. Pilgrim's Pride Corp.,* 456 F. Supp. 3d 775, 778 (N.D.W. Va. 2019).

[41] This paragraph constitutes the entirety of the *Philson* court's analysis:

> According to the Philsons, the trial court inaccurately stated the law when it instructed the jury that the Philsons were required to prove that the defendants' conduct was likely to affect competition adversely in order to prevail on their claims under the Packers and Stockyard Act, 7 U.S.C. § 192(a). This argument is without merit. Section 192(a) prohibits live poultry dealers from engaging in or using "any unfair, unjustly discriminatory or deceptive practice or device." While the Philsons correctly observe that it is unnecessary to prove *actual* injury to establish an unfair or deceptive practice, a plaintiff must nonetheless establish that the challenged act is *likely* to produce the type of injury that the Act was designed to prevent. *See, e.g., Farrow v. United States Dep't of Agriculture,* 760 F.2d 211, 215 (8th Cir.1985) ("The Packers and Stockyards Act does not require that the Secretary prove actual injury before a practice may be found unfair. '[T]he purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered.' Accordingly, the Secretary need only establish the likelihood that an arrangement will result in competitive injury to establish a violation." (citations omitted)); *see also Parchman v. United States Dep't of Agriculture,* 852 F.2d 858, 864 (6th Cir.1988) (quoting *Farrow*). The district court's instruction that the Philsons needed to prove the defendants' conduct was likely to cause injury was therefore a correct statement of the law.

Philson v. Goldsboro Mill. Co., 1998 WL 709324, at *4 (4th Cir. 1998).

[42] *See M&M Poultry, Inc. v. Pilgrim's Pride Corp.*, 2015 WL 13841400, at *6-10 (N.D.W. Va. Oct. 26, 2015); *Schumacher v. Tyson Fresh Meats, Inc.*, 434 F.Supp.2d 748, 753-54 (D.S.D. 2006) (holding that "Section 202 of the PSA is broader than its antecedent antitrust legislation" and, in reference to § 202(a) specifically, "does not prohibit only those unfair and deceptive practices which adversely affect competition"); *Kinkaid v. John Morrell & Co.*, 321 F.Supp.2d 1090, 1103 (N.D. Iowa 2004) ("[O]nly a strained reading of the statute could require that practices that are 'unfair' or 'deceptive' within the meaning of § 192(a) must *also* be 'monopolistic' or 'anticompetitive' to be prohibited."); *Gerace v. Utica Veal Co., Inc.*, 580 F.Supp. 1465, 1469–70

Beyond the arguments that Judge Bailey and others have made against following *Philson* and the three similar decisions in other circuits,[43] we will add that each of these decisions follows a freewheeling approach to statutory construction that is dramatically out-of-step with — and impermissible under — current interpretive doctrine. Instead of "beginning by examining the key statutory terms,"[44] all of these decisions ignored the terms of Section 202(a) as all but "empty vessels" and reasoned the requirement of anticompetitive harm into existence based on threadbare, practically ahistorical arguments about the "antitrust ancestry" of the Act and

---

(N.D.N.Y.1984) (holding it is unnecessary to allege anticompetitive harm under § 202(a)); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968) ("However, the statutory prohibitions of Section 202 of the Packers and Stockyards Act are broader and more far-reaching than the Sherman Act or even Section 5 of the Federal Trade Commission Act. Section 202(a) of the Act does not require the Government to prove injury to competition. The Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers *and* consumers at the expense of middlemen.") (emphasis added) (internal citations omitted); *Wilson & Company v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) ("[T]he language in Section 202(a) of the Act does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language. To repeat, that section provides it shall be unlawful for any packer to 'engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce.'). *See also In re Ozark County Cattle Co., Inc.,* 49 Agric. Dec. 336, 365 (1990), 1990 WL 320312; *In Re: W. States Cattle Co.*, 47 Agric. Dec. 992, 1050 (U.S.D.A. June 23, 1988); *In Re: Corn State Meat Co., Inc.*, 45 Agric. Dec. 995, 1023 (U.S.D.A. May 8, 1986).

[43] In addition to the Fourth Circuit in *Philson*, only three other Circuit Courts — the Fifth, Sixth, and Eleventh Circuits — have categorically held that anticompetitive harm is an essential element of any Section 202(a) claim. Of those, only the Fifth and Eleventh carefully considered the issue and explained their reasoning.

The Seventh Circuit has only held that anticompetitive harm is required to prove a Section 202(a) claim that is analogous to a price discrimination claim under the Clayton Act (and, perhaps, other claims that are likewise prohibited under the antitrust laws). *See Armour & Co. v. United States*, 402 F.2d 712, 717 (7th Cir. 1968) ("Our conclusion, derived from case law and legislative history, is that a coupon program of this nature does not violate Section 202(a), absent some predatory intent or some likelihood of competitive injury."). The Eighth Circuit has held that proving anticompetitive harm is sufficient to make out a Section 202(a) claim, but has not held that it is necessary to make such a claim. *See IBP, Inc. v. Glickman*, 187 F.3d 974 (8th Cir. 1999); *Farrow v. U.S.D.A.*, 760 F.2d 211 (8th Cir. 1985). *See also Schumacher v. Tyson Fresh Meats, Inc.*, 434 F.Supp.2d 748, 753-54 (D.S.D. 2006) (discussing above-mentioned 8th Circuit cases). The Ninth Circuit has held similarly, affirming a district court's finding that collusive conduct between Washington State beef packers that created a likelihood of competitive harm violated Section 202(a), but not that such a likelihood is required for conduct to violate the Section. *See De Jong Packing Co. v. U.S. Dept. of Agriculture*, 618 F.2d 1329 (9th Cir. 1980). To the extent these cases contained more general expressions on the interpretation of Section 202(a), "[i]t is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *See* In Re: Corn State Meat Co., Inc., 45 Agric. Dec. 995, 1025 (U.S.D.A. May 8, 1986) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821)). *See also Humphrey's Executor v. United States*, 295 U.S. 602, 626-27 (1935) (applying *Cohens* "maxim" to limit numerous expressions in *Myers v. United States*, 272 U.S. 52 (1926) to "narrow point actually decided"); *Osaka Shosen Kaisha Lina v. United States*, 300 U.S. 98, 102-04 (1937) (likewise with respect to *Taylor v. United States*, 207 U.S. 120, 124-125 (1907)).

Although the Tenth Circuit held in *Been v. O.K. Industries, Inc.*, that anticompetitive harm is required for claims of unfair practices under Section 202(a), it expressly indicated that its opinion in *Been* does not extend to claims of deceptive practices nor disturb earlier decisions affirming deceptive-practice claims without requiring anticompetitive harm. *See* 495 F.3d 1217 (10th Cir. 2007) (distinguishing earlier case that was "silent" on competitive injury because "it involved an act alleged to be deceptive, as opposed to unfair," and stating "[w]e are concerned here only with whether *unfairness* requires a showing of a likely injury to competition, not whether deceptive practices require such a showing").

[44] *See Bostock v. Clayton County*, 140 S.Ct. 1731, 1737 (2020) ("[We] begin by examining the key statutory terms in turn" before "confirming our handiwork against this Court's precedents.").

monopolization being the only "evil" that motivated Congress to pass it.[45] This kind of "antitrust antitextualism"[46] turns legitimate statutory interpretation on its head.

Notwithstanding ongoing debate over the merits of competing theories of statutory interpretation in academia, federal court practice has moved decidedly in a textualist direction.[47] Before the 1990s, the default paradigm for statutory interpretation was the one articulated in *Holy Trinity Church v. United States* — that the "letter" (text) of a statute must yield when it conflicts with its "spirit" (purpose). Over the past three decades, however, the Supreme Court's cases have advanced a new paradigm,[48] instructing judges not only to start with the statutory text, but also to follow an increasingly structured process for determining whether the text's meaning is plain or ambiguous, whether it leads to "absurd results," and when, how, and why, to resort to legislative history.[49]

---

[45] *See Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (conducting no textual analysis); *Id.* at 364 (Jones, C.J., concurring) ("The words of the act are, on their face, empty vessels[.]"); *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir.2005) (conducting no textual analysis and relying on the PSA's legislative history, "antitrust ancestry," and "policy considerations"); *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (2010) (following other circuits in holding that "the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act" without further analysis).

[46] Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205 (2021) ("[In implementing the antitrust laws,] [t]he courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. . . . This Article uses 'antitextualism' as shorthand for the phenomenon of ignoring any bona fide construction of what a statute means, whether in the plain meaning of its words, linguistic or substantive interpretive canons, legislative history, or other ordinary markers of legislative meaning.").

[47] *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L. J. 788, 793 (2018) (underscoring the influence of textualism in the courts) (citing John F. Manning & Matthew C. Stephenson, Legislation and Regulation: Cases And Materials 60 (2d ed. 2013) ("Over the last quarter-century, textualism has had an extraordinary influence on how federal courts approach questions of statutory interpretation. When the Court finds the text to be clear in context, it now routinely enforces the statute as written.")). *See also* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3, 32-34 (2006) (noting that "textualism has so succeeded in discrediting strong purposivism that it has led even nonadherent to give great weight to statutory text" and citing empirical and anecdotal evidence in support); Abbe Gluck, *Symposium: The Grant in* King—*Obamacare subsidies as textualism's big test*, SCOTUSblog (Nov. 7, 2014) ("Textualists have spent three decades convincing judges of all political stripes to come along for the ride, and have had enormous success in establishing 'text-first' interpretation as the general norm."); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U.L. REV. 351, 353, 354–57 (1994) (reviewing existing and offering new contributions to the empirical evidence of textualism's influence and concluding that "there can be no doubt that textualism has asserted a powerful hold over the Supreme Court's statutory interpretation jurisprudence").

[48] A number of studies corroborate the trends of reduced reliance on legislative history and enhanced reliance on textual cues at the Supreme Court. *See, e.g.*, James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222 (2006) (documenting that in workplace law cases, "the Court's reliance on legislative history declined from 51 percent during the Burger years to 29 percent in the Rehnquist era"); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 386 (1999) (reporting that in the six years before Justice Scalia's appointment, the Court averaged 3.47 citations of legislative history per opinion and that the average in the twelve years after his appointment dropped to 1.87); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 356-63 (1994) (discussing the Rehnquist Court's shift toward arguments based on semantic meaning and linguistic canons); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 252-60 (1999) (documenting a dramatic increase in the Court's citation of dictionaries in the Rehnquist era).

[49] *See infra* notes 54-71.

Under this framework, "statutory texts are not just common law principles or aspirations to be shaped and applied as judges think reasonable."[50] Judges are "bound, not only by the ultimate purposes Congress selected" for a statute, but also "by the means it has deemed appropriate — and prescribed — for the pursuit of those purposes" in the statutory text.[51] This elevation of the text as the touchstone of legislative meaning cuts against both expansive and crabbed interpretations of statutes. On the one hand, the Supreme Court has emphasized that "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone" in the statutory text.[52] On the other hand, it has recognized "that the reach of a statute often exceeds the precise evil to be eliminated" and, accordingly, that judges may not "restrict the unqualified language of a statute to the particular evil [they believe] Congress was trying to remedy[.]"[53]

Today, the proper starting point for interpreting a statutory provision is the plain meaning of the provision's text.[54] A court may look beyond a statute's words to legislative history or to canons of interpretation only if the statute's words are ambiguous or if their plain meaning leads to absurd results.[55] Otherwise, the court must enforce the provision as written.[56]

Even when a court finds ambiguities in a provision's text, the court may resort to the legislative history of the provision and apply the various canons of interpretation only to resolve those specific ambiguities.[57] The task of the judge in this context is not to go on a freewheeling search for the unexpressed intentions of legislators

---

[50] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, Book Review, 129 Harv. L. Rev. 2118, 2135 (2016) ("Under the structure of our Constitution, Congress and the President — not the courts — together possess the authority and responsibility to legislate. As a result, clear statutes are to be followed. Statutory texts are not just common law principles or aspirations to be shaped and applied as judges think reasonable.").

[51] *See* John F. Manning, *Second-Generation Textualism*, 98 Calif. L. Rev. 1287, 1316-17 (2010) (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994) (Scalia, J.)).

[52] *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

[53] *See Brogan v. United States*, 522 U.S. 398, 403 (1998) (Scalia, J.). *See also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (Scalia, J.) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

[54] *See, e.g.*, *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Barnhardt v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002).

[55] *See, e.g.*, *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992).

[56] *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

[57] *See Lamie v. U.S. Trustee*, 540 U.S. 526, 531, 534 (2004) (declining to resort to legislative history of statutory provision even though the provision was "ungrammatical," because the provision was clear on the question at hand); *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (noting that courts look beyond statutory text only when "resolution of a question of federal law turns on a statute" and "the statutory language is unclear" on that question); *United States v. Donruss Co.*, 393 U.S. 297, 303 (1969) (examining legislative history because "the language of the statute does not provide an answer to the question before us"). *See also Exxon Mobil Corp. v. Allapatah Services, Inc.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of *otherwise ambiguous terms*.") (emphasis added).

and imaginatively reconstruct the text's semantic import to capture those background intentions — it is simply to "find the meaning of the words used."[58] Accordingly, a court may examine and rely upon legislative history in interpreting a statutory text only to the extent it "shed[s] a reliable light on the enacting legislature's understanding of otherwise ambiguous terms."[59]

The "absurdity doctrine" provides no more hospitable grounds for courts to "read[] additional terms into unambiguous statutory language[.]"[60] Formally, a provision's plain meaning leads to "absurd results" if it produces results that "no reasonable person could intend"[61] or, at a minimum, results that "are demonstrably at odds with the intentions of [the provision's] drafters."[62] In its broadest sense, the absurdity doctrine may permit the courts to reject the plain meaning of a statutory text if its effect would "subvert an important state or federal interest,"[63] or would render other provisions of the statutory scheme unworkable.[64] In recent decades, however, the Supreme Court has endorsed progressively narrower interpretations of this doctrine. On the one hand, it has made clear that the absurdity doctrine does not permit the courts to "soften the clear import of Congress' chosen words" simply because "those words lead to a harsh outcome"[65] — much less because they lead to

---

[58] *See* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 394, 391-96 (2012) (Section 67 on "the false notion that the purpose of interpretation is to discover intent"). *See also Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (declining to "read an absent word into the statute" where the statute evinces a "plain, nonabsurd meaning"); *Bates v. United States*, 522 U.S. 23, 29 (1997) (holding that courts "ordinarily" should "resist reading words or elements into a statute that do not appear on its face"); *United States v. Sisson*, 399 U.S. 267, 297 (1970) (noting that courts are not "free to pour [into vague statutory terms] a vintage that we think better suits present-day tastes"); *Iselin v. United States*, 270 U.S. 245, 251 (1926) (quoted in *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004)) ("What the government asks is not a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.").

[59] *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568-69 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic materials. Extrinsic materials have a role to play in statutory construction only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

[60] *See M&M Poultry, Inc. v. Pilgrim's Pride Corp.*, 2015 WL 13841400, at *8 (N.D.W. Va. Oct. 26, 2015) (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) and citing *Bates v. United States*, 522 U.S. 23, 29 (1997)) ("Under well-settled principles, however, courts must refrain from reading additional terms into unambiguous statutory language such as this. if the text of the statute evinces 'a plain, nonabsurd meaning,' then the court should not 'read an absent word into the statute.').

[61] *See* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 235-239 (2012) (Section 37 on the Absurdity Doctrine). *See also Sebelius v. Cloer*, 569 U.S. 369, 381 (2013); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring).

[62] *See Lamie*, 540 U.S. 526, 536-38 (2004); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242-43 (1989).

[63] *See, e.g.*, *Lamie v. U.S. Trustee*, 540 U.S. 526, 537 (2004) (examining whether implementing plain meaning of bankruptcy code provision would "undermine the prompt and effectual administration of federal bankruptcy law").

[64] *See, e.g.*, *Johnson v. Sawyer*, 120 F.3d 1307, 1319 (5th Cir. 1997). *See also Lamie v. U.S. Trustee*, 540 U.S. 526, 536-38 (2004).

[65] *See Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (quoting *U.S. v. Locke*, 471 U.S. 84, 95 (1985)) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding.").

outcomes that are merely "anomalous," "odd," or "counterintuitive."[66] On the other hand, the Court has refused to apply the absurdity doctrine where a plain meaning's effect was flagged or anticipated by the legislative history — and even where contemporaneously-enacted provisions simply show that Congress was "thinking about" the implications embedded in the statutory text.[67] All in all, the Court has described the absurdity doctrine as one of last resort — "rarely" to be invoked "to overturn unambiguous legislation."[68]

Fundamentally, under prevailing statutory interpretation doctrine, the courts have an obligation to give effect to Congress's legislative intent, and absent ambiguity in its words or absurdity in its results, the language of a statute is Congress's "authoritative statement" of its intent.[69] Within this framework, "even the most formidable policy arguments cannot overcome a clear statutory directive."[70] For, in the end, the task of judges is "to discern and apply the law's plain meaning as faithfully as [they] can — not to assess the consequences of each approach and adopt the one that produces the least mischief."[71]

All of this cuts deeply against the validity of the Fourth Circuit's decision in *Philson* as well as against the validity of the decisions from other Circuits that have read a requirement of anticompetitive harm into Section 202(a). In other areas of law, the textualist turn discussed above has, in recent years, spurred a majority of the Supreme Court to adopt novel statutory interpretations,[72] to reject long-established statutory

---

[66] *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005). *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, at 342-45 (1979) (finding that potentially "ruinous" effect on small businesses "cannot govern our reading of the plain language of [antitrust provision]").

[67] *See Exxon Mobil Corp. v. Allapath Servs., Inc.*, 545 U.S. 546, 571 (2005) ("This is not a case where one can plausibly say that concerned legislators might not have realized the possible effect of the text they were adopting. Certainly, any competent legislative aide who studied the matter would have flagged this issue if it were a matter of importance to his or her boss, especially in light of the Subcommittee Working Paper. There are any number of reasons why legislators did not spend more time arguing over [the statute], none of which are relevant to our interpretation of what the words of the statute mean. "); *Demarest v. Manspeaker*, 498 U.S. 184, 185 (1991) (finding plain meaning of witness-fee provision mandating payment of witness fees to incarcerated witnesses in *habeas* trials not absurd where statutory provisions enacted around the same time explicitly denied payments to prisoners called as witnesses, which showed that "Congress was thinking about incarcerated individuals when it drafted the statute").

[68] *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 441 (2002).

[69] *See United States Chamber of Commerce v. Whiting*, 563 U.S. 582, 599 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2004)).

[70] *See BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1542 (2021). *See also Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) ("[N]o amount of policy-talk can overcome a plain statutory command. Our only job today is to give the law's terms their ordinary meaning. . . . [W]ords are how the law constrains power.").

[71] *See BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1542 (2021). *See also Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1494 (2020) ("[T]he place for reconciling competing and incommensurable policy goals like [the ones advanced by the parties] is before policymakers. This Court's limited role is to read and apply the law those policymakers have ordained[.]"); *United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("Even if we were more persuaded than we are by these policy arguments, the result in this case would be unchanged. Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.").

[72] *See* Tara Leigh Grove, *Which Textualism?*, 134 Harv. L. Rev. 1, (2020) (explaining that the majority's textualist interpretation of Title VII to prohibit discrimination based on sexual orientation in *Bostock v. Clayton County* "disregard[ed] over 50 years of uniform judicial interpretation of Title VII," including the unanimous holdings of all ten circuit courts that had previously considered the issue) (citing *Bostock v. Clayton County*, 140 S. Ct. 1731, 1833 (2020) (Kavanaugh, J., dissenting) ("In the first 10 Courts of Appeals to consider the issue, all 30 federal judges agreed that Title VII does not prohibit sexual orientation discrimination. 30 out of 30 judges.")).

implementation rules among the Circuit Courts,[73] and even to overturn its own controlling statutory precedents.[74] We hope the Supreme Court will do the same in the context of the Packers and Stockyards Act sometime soon. Until then, we urge the District Court to follow the USDA's construction of Section 202(a) as the only one that accords with well-established methods of statutory interpretation.

iii. *The Complaint States a* Prima Facie *Claim Under Section 202(a)*

Evaluated under the proper statutory standard for "deceptive practices," the Complaint states a *prima facie* claim for relief under Section 202(a). Specifically, the Complaint alleges that Sanderson and Wayne's contracts with growers compensate growers using a payment system known as the "tournament system."[75] Under this system, the grower's base level of compensation is adjusted up or down by the processor depending on how the grower performs relative to other growers on defined metrics in the judgment of the processor.[76] The growers' contracts entitle Sanderson and Wayne to select and modify those metrics at their discretion. The contracts also entitle Sanderson and Wayne to select, provide, and require growers to use the chicks, feed, and other major inputs that determine, in large part, how a grower will perform.[77] Finally, Sanderson and Wayne are entitled to determine both the number of flocks they will place with a grower and the stocking density of such flocks.[78]

According to the Complaint, Sanderson and Wayne do not adequately disclose the risks inherent in these one-sided contractual arrangements — both at contract formation and during contract performance.[79] In particular, the United States alleges that:

- First, the processors' contracts with growers "omit or inadequately describe material key terms and risks" — such as the minimum number of placements or the minimum stock density the grower is

[73] *See Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1494 (2020) (Gorsuch, J.) (overturning a longstanding "willfulness" requirement adopted by several circuits in implementing the Lanham Act because it could not "be reconciled with the statute's plain meaning"); *Cooper Indus., Inc. v. Aviall Servs. Inc.,* 543 U.S. 157, 125 S. Ct. 577 (2004) (relying on the plain text to reverse scores of contrary circuit decisions).

[74] *See* Margaret L. Moses, *The Pretext of Textualism: Disregarding* Stare Decisis *in* 14 Penn Plaza v. Pyett, 14 Lewis & Clark L. Rev. 825 (2010) (examining the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, which overturned *Alexander v. Gardner-Denver Co.*' and reinterpreted the Federal Arbitration Act on textualist grounds to permit employers to enforce forced-arbitration clauses in collective bargaining agreements).

[75] *See* Antitrust Division, U.S. DOJ, *Notice: United States v. Cargill Meat Solutions Corp., et al; Proposed Final Judgments and Competitive Impact Statement*, 87 FR 57028, 57029, 57033, 57042-43, 57047-48 (2022) (pages 212-217, 225-226, 260-262, and 279-280 of Complaint).

[76] *See id.*

[77] *See id.*

[78] *See id.*

[79] *See id.*

guaranteed — in a manner that "camouflage[s]" or "conceal[s]" the financial risks implicated in a contract, and that "mislead[s]" growers or "otherwise inhibit[s]" their ability to reasonably assess expected returns on investment.[80]

- Second, the contracts fail to disclose information at the processors' disposal about actual levels of compensation for poultry growers within their respective tournament systems — creating an asymmetry of information between the processor and the grower with respect to the "financial impact of the grower's investment."[81]

- Finally, the processors "omit," both in the growers' contracts and in other interactions with growers, "material information relating to the variability of inputs that can influence grower performance" and other information growers need to "determine the fairness of the tournament" according to which they get paid.[82]

As a result of these deceptions by the processors, growers have been unable to reasonably assess the range of financial outcomes to expect from contracts with Sanderson and Wayne; anticipate and manage the risks that arise from Sanderson and Wayne's actions under those contracts; or properly compare contracts from competing processors.[83] The Complaint concludes by alleging that Sanderson and Wayne engaged in deceptive practices both "regarding" and "through" their grower contracts.[84] Specifically, the Complaint alleges that the processors failed to "disclose material information" that (1) is "necessary [for growers] to make informed decisions about their contracting opportunities" before entering them; and that (2) "the grower needs to effectively compete in the tournament system and . . . evaluate their likely return and risks" during a contract's performance.[85]

Taking the detailed allegations in the Complaint as true, no reasonable argument can be made that the information which the processors failed to disclose to growers was immaterial or that growers could make informed decisions without this information. Accordingly, under the USDA's well-considered interpretation of the governing statute, the United States has alleged a *prima facie* claim for a violation of Section 202(a) of the Packers and Stockyards Act.

---

[80] *See id.* at 57042.

[81] *See id.*

[82] *See id.*

[83] *See id.*

[84] *See id.* at 57042, 57047.

[85] *See id.*

B. The Proposed Relief is Fair, Adequate, and Reasonable Under the Circumstances

The relief proposed in the Consent Decree is fair because it was the product of extensive, arms-length bargaining between sophisticated parties and counsel. It is adequate because it rectifies the adverse aspects of the growers' contracts about which growers were deceived and ensures the integrity of the tournament payment system operated by the processors going forward. Finally, it is reasonable because, in the context of the power imbalance between growers and processors, the proposed relief is required to appropriately remedy the processors' alleged deceptions and secure compliance with the law.

Under the terms of the Consent Decree, Sanderson and Wayne are prohibited from reducing the base compensation made to any grower as a result of that grower's performance or as a result of the grower's performance in comparison with that of other growers.[86] The processors are allowed to offer incentive payments over base compensation based on grower performance, but those are capped to 25% of the sum of total payments paid for broiler flocks processed at a single facility on an annual basis.[87] Within 75 business days after entry of the Consent Decree, the processors must offer each grower a modification of their contract reflecting these terms. Finally, Sanderson and Wayne must comply with the disclosure requirements in Section V of a proposed rule by the USDA entitled "Transparency in Poultry Grower Contracting and Tournaments,"[88] which was specifically designed by the agency to "improve transparency and forestall deception in the use of poultry growing arrangements."[89]

To ensure Sanderson and Wayne's compliance with these terms, the Consent Decree provides for the appointment of a court monitor and requires the processors to cooperate with investigation requests by the Antitrust Division.[90] Further, it prohibits the processors from retaliating against any employee, grower, or third party for disclosing information to the monitor, an antitrust enforcement agency, or a legislature.[91]

---

[86] *See* Antitrust Division, U.S. DOJ, *Notice: United States v. Cargill Meat Solutions Corp., et al; Proposed Final Judgments and Competitive Impact Statement*, 87 FR 57028, 57050-54 (2022) (Sections IV through IX of Proposed Final Judgment).

[87] *See* Antitrust Division, U.S. DOJ, *Notice: United States v. Cargill Meat Solutions Corp., et al; Proposed Final Judgments and Competitive Impact Statement*, 87 FR 57028, 57050-54 (2022) (Sections IV through IX of Proposed Final Judgment).

[88] *See* Antitrust Division, U.S. DOJ, *Notice: United States v. Cargill Meat Solutions Corp., et al; Proposed Final Judgments and Competitive Impact Statement*, 87 FR 57028, 57050-54 (2022) (Sections IV through IX of Proposed Final Judgment).

[89] Agriculture Marketing Service, USDA, Proposed Rule: Transparency in Poultry Grower Contracting and Tournaments, 87 FR 34980, 34981 (June 8, 2022).

[90] *See* Antitrust Division, U.S. DOJ, *Notice: United States v. Cargill Meat Solutions Corp., et al; Proposed Final Judgments and Competitive Impact Statement*, 87 FR 57028, 57050-54 (2022) (Sections IV through IX of Proposed Final Judgment).

[91] *See* Antitrust Division, U.S. DOJ, *Notice: United States v. Cargill Meat Solutions Corp., et al; Proposed Final Judgments and Competitive Impact Statement*, 87 FR 57028, 57050-54 (2022) (Sections IV through IX of Proposed Final Judgment).

i. *Fairness*

The fairness of the Consent Decree to Sanderson and Wayne is unimpeachable. First, although no formal discovery has occurred in this litigation, the parties reached an agreement on the Consent Decree after a multi-year investigation by the United States and months of settlement negotiations between the United States and the Defendants.[92] These negotiations almost certainly included the exchange of sufficient information for the Defendants — undoubtedly represented by capable and sophisticated counsel — to evaluate the strength of the United States' claims and the appropriate relief.[93] Even if the Court has concerns about whether the United States has insufficiently alleged an injury to competition as part of its Section 202(a) claim, the Court may presume that "those expert attorneys on the defense side would not have agreed to the proposed terms [of the Consent Decree] if they were not convinced of a real and powerful probability" that Sanderson and Wayne would be found liable.[94] As the Second Circuit stated in its influential opinion in *SEC v. Citigroup*, it is neither necessary nor proper for a district court to be concerned with "protect[ing] a private, sophisticated, counseled litigant" such as Sanderson or Wayne "from a settlement to which it freely consents."[95]

---

[92] *See United States v. Baltimore County, Maryland*, , 2021 WL 2000480, at *9 (D. Md. May 19, 2021) (finding consent decree was fair because, *inter alia*, "[al]though no formal discovery occurred in this litigation, the parties reached the Agreement after a multi-year investigation by the United States and over a year of settlement negotiations, which included the exchange of sufficient information to evaluate the strength of the United States' claims and the appropriate relief"); *United States v. City of Welch, W. Va*., 2012 WL 385489, at *3 (S.D.W. Va. Feb. 6, 2012) (finding proposed consent decree was fair because, *inter alia*, it was "based on months of arm's length negotiations" during which "the United States, the State, counsel for [City of] Welch, and engineers and representatives from the City government of Welchange have engaged in numerous settlement discussions prior to the filing of the Complaint"); *United States v. Westvaco Corp.*, , 2016 WL 4492704, at *5 (D. Md. Aug. 26, 2016) (finding proposed consent decree was fair because, *inter alia*, it was "reached with the assistance of a magistrate judge through an arms-length negotiation by Westvaco and the Government" and was "reviewed and approved by Westvaco's management as well as the Assistant Attorney General . . .").

[93] *See United States v. Baltimore County, Maryland*, , 2021 WL 2000480, at *9 (D. Md. May 19, 2021) (finding consent decree was fair because, *inter alia*, "[al]though no formal discovery occurred in this litigation, the parties reached the Agreement after a multi-year investigation by the United States and over a year of settlement negotiations, which included the exchange of sufficient information to evaluate the strength of the United States' claims and the appropriate relief"); *United States v. Baltimore Police Dep't.*, 249 F. Supp. 3d 816, 818 (D. Md. 2017) (finding consent decree was fair because, *inter alia*, although "no discovery has occurred as part of the instant litigation" and "Defendants [had not] admitted wrongdoing or liability," the fairness of the consent decree "can be inferred from Defendants' evident cooperation in [the United States'] investigation of Baltimore policy practices and their ready embrace of a negotiated resolution of this case based upon that investigation"); *United States v. Westvaco Corp.*, , 2016 WL 4492704, at *5 (D. Md. Aug. 26, 2016) (finding proposed consent decree was fair because, *inter alia*, it was "counsel for both parties are experienced and well-versed in the issues of this specific litigation as well as CAA enforcement cases generally").

[94] *See United States v. Baltimore Police Dep't.*, 249 F. Supp. 3d 816, 818 (D. Md. 2017).

[95] *See U.S. S.E.C. v. Citigroup Glob. Markets Inc.*, 673 F.3d 158, 165 (2d Cir. 2012) (questioning "whether it is a proper part of the [district] court's legitimate concern to protect a private, sophisticated, counseled litigant from a settlement to which it freely consents" and "doubt[ing]" that "a court's discretion extends to refusing to allow such a litigant to reach a voluntary settlement in which it gives up things of value without admitting liability").

ii. Adequacy

The adequacy of the amount and form of relief proposed in the Consent Decree must be evaluated in light of the purposes of the Packers and Stockyards Act and the remedies it provides for plaintiffs.[96] It is well recognized that the purpose of the Act is to ensure "fair competition *and* fair trade practices in livestock marketing and in the meatpacking industry."[97] If this case were litigated and the United States were to prevail, Sanderson and Wayne would be "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of [their] violation" of the Act.[98] The United States would also be entitled to seek all other remedies "existing at common law or by statute" in addition to those provided by the Act, including equitable relief.[99]

By prohibiting Sanderson and Wayne from reducing growers' base compensation based on performance, the Consent Decree would cure the fundamental risk embedded in the growers' contracts and about which Sanderson and Wayne deceived growers. It would also prevent Sanderson and Wayne from abusing their control over the tournament payment system — and the asymmetry of information that control creates — to further deceive or otherwise injure growers with respect to the compensation they are entitled to under their contracts. By also capping the amount of "incentive" compensation that Sanderson or Wayne may provide as a percentage of the total compensation paid to growers at any one processing facility, the Consent Decree also provides a simple way to prevent the processors from sidestepping the Consent Decree by substituting large amounts of incentive compensation for across-the-board reductions in base compensation.

The provisions of the Consent Decree requiring Sanderson and Wayne to comply with the USDA's proposed transparency regulations, cooperate with the court-appointed monitor and the Antitrust Division, and provide regular compliance reports, will help secure the processors' compliance with the Consent Decree. The relief proposed in the Consent Decree restructures the relationship between growers and the processors to remedy its primary deceptive features and deprive the processors of opportunities for future abusive conduct against growers. It is also worth noting that entry of the Consent Decree would not affect the rights of private growers to bring their own deceptive-practice claims against Sanderson, Wayne, and other poultry processors.

---

[96] *See United States v. Baltimore County, Maryland*, , 2021 WL 2000480, at *6 (D. Md. May 19, 2021) (finding the relief proposed in consent decree was adequate, *inter alia*, because "[i]t is clear that the agreed upon injunctive and individual relief, including priority hiring, back pay, and retroactive seniority, outlined above, comports with the purposes of Title VII in that it is intended to cure the discriminatory effect of the challenged exams and prevent future discrimination in the County's hiring for entry-level police officer and cadet positions").

[97] *See H.R. 85–1048 at 1 (1957), reprinted in 1958 U.S.S.C.A.N. 5212, 5213 (emphasis added).*

[98] *See* 7 U.S.C. § 209(a).

[99] *See* 7 U.S.C. § 209(b).

Therefore, we believe the Consent Decree sufficiently advances the purpose of the Act to secure fair trade practices in poultry markets and should be considered adequate by the Court.[100]

iii. Reasonableness

The relief proposed in the Consent Decree is "within the range of reasonableness."[101] Although movants for the entry of a Consent Decree are certainly not required to show that the proposed relief is narrowly, or even exclusively, tailored to cure the alleged violations,[102] in this case the proposed restructuring of the contractual relationship between Sanderson/Wayne and their growers is necessary to remedy the processors' alleged deceptions — particularly in the context of the "power of the [processors] over their vertical relationships" with growers.[103]

Poultry processors like Wayne and Sanderson control nearly every aspect of the poultry supply chain, from genetic lines and hatcheries, to feed mills and medication, to transportation and processing — essentially every activity except raising the birds. These poultry processors (called "integrators" in the industry) have used a combination of horizontal concentration and vertical integration to exercise near-complete control over contract growers. Nationally, poultry processing has a four-firm concentration ratio of around 60 percent following the recent merger involving the Processing Defendants, but at the regional level poultry farmers generally have only one or, at most, two processors they can access. [104] This essentially strips them of any bargaining power and forces them to accept the terms of whatever processing contract is offered. More than 95 percent of poultry production[105] occurs under contract for integrators. There is no open market for live poultry ready for

---

[100] *Cf. United States v. Baltimore County, Maryland*, , 2021 WL 2000480, at *9 (D. Md. May 19, 2021) ("In sum, the Court is satisfied that the Agreement provides adequate relief in the form of a detailed process that will replace the challenged exams [for county police], comply with Title VII without compromising public safety, and provide appropriate make-whole relief to individuals adversely affected by the use of the challenged exams.").

[101] *United States v. Westvaco Corp.*, 2016 WL 4492704, at *5 (D. Md. Aug. 26, 2016).

[102] *See Fed. Trade Comm'n v. Circa Direct LLC*, 2012 WL 3987610, at *3 (D.N.J. Sept. 11, 2012) ("In the consent decree context, the source of the court's authority to award relief is the agreement of the parties, not the complaint upon which the action was originally based, and a court may even order broader relief than could have been awarded after a trial on the merits.") (citing *City of El Paso, Tex. V. El Paso Entertainment, Inc.*, 2012 WL 874675, at *8 (5th Cir. Mar. 5, 2012); *People Who Care v. Rockford Bd. of Educ. School Dist. No. 205*, 961 F.2d 1335, 1337 (7th Cir.1992); *Harris v. Pernsley*, 820 F.2d 592, 603 (3d Cir.1987)).

[103] *See* Agriculture Marketing Service, USDA, Proposed Rule: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 FR 60010, 60031 (October 3, 2022).

[104] MARY K. HENDRICKSON ET AL., THE FOOD SYSTEM: CONCENTRATION AND ITS IMPACTS: SPECIAL REPORT TO FAMILY FARM ACTION ALLIANCE 9 fig. 4 (2020) https://farmaction.us/concentrationreport/.

[105] *See, e.g.,* JAMES M. MACDONALD, ECON. RES. SERV., U.S. DEP'T OF AGRIC., ECON. INFO. BULL. NO. 126, TECHNOLOGY ORGANIZATION, AND FINANCIAL PERFORMANCE IN U.S. BROILER PRODUCTION (June 2014) https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=7733.2 (97 percent of broilers raised under contract in 2011 in U.S.); *Broiler Chicken Industry Key Facts 2021*, NAT'L CHICKEN COUNCIL https://www.nationalchickencouncil.org/about-the-industry/statistics/broiler-chicken-industry-key-facts/ (last visited Apr. 19, 2022) (Approximately 95 percent of broiler chickens are produced on [contract] farms, with the remaining 5-= percent raised on company-owned farms); Dan Nosowitz, *After a*

processing, so commercial (*i.e.*, non-specialty) poultry growers have no viable alternatives to the contract growing system.[106] While contract growers own everything that depreciates, such as infrastructure and equipment, integrators own the one thing on the poultry farm that accrues value: the actual bird. Contract growers incur significant debt to build facilities to the integrators' exacting standards.[107] In 2016, the average loan to a beginning chicken farmer was $1.4 million,[108] most commonly used to construct and update chicken housing. A report by the Small Business Administration found that, without an integrator contract, the value of the grower's facilities plummeted anywhere from 62–94 percent, making the facilities themselves "worthless."[109] Without a contract, growers have no reasonable methods for making money with the highly specialized facilities they have gone into debt to construct.

The disparity between the level of commitment required by a contract grower (who frequently cannot walk away without facing bankruptcy) and the commitment offered by an integrator is startling. While the growers take on millions of dollars in debt, most contracts are very short-term, with 42 percent of them being only flock-to-flock, and only 31 percent being longer than five years.[110] Because broiler genetic lines, hatcheries, and feed are all owned by the integrator, growers have little control over the health or growth outcomes of their birds, and by extension, little control over their end income in the tournament system.[111] Almost a quarter of all growers only have one integrator doing business in their area,[112] but even where multiple integrators are available, options are limited. A new integrator may require a grower to construct expensive updates to existing facilities, or simply refuse to deal. At least one lawsuit has alleged that overlapping integrators have informal

---

Decade, the USDA 'Addresses' Unfairness in Meat Production, MODERN FARMER (Jan. 23, 2020) https://modernfarmer.com/2020/01/after-a-decade-the-usda-addresses-unfairness-in-meat-production/ ("In the poultry sector, the big producers—Tyson, Pilgrim's, Perdue—have an incredible amount of control over the farmers who actually raise their chickens. Those farmers aren't technically employees; usually, they're contract growers, theoretically independent but in practice totally dependent on the whims of the big corporations. These companies provide the chicks, the feed and the medicine; the farmers raise the birds. Roughly 97 percent of chicken in the US is raised this way.").

[106] C. ROBERT TAYLOR & DAVID A. DOMINA, RESTORING ECONOMIC HEALTH TO CONTRACT POULTRY PRODUCTION 3 (May 13, 2010) (Report prepared for Joint U.S. Dep't of Just. and U.S. Dep't of Agric./ GIPSA Public Workshop on Competition Issues in the Poultry Industry, May 21, 2010).

[107] *What Debt in Chicken Farming Says About American Agriculture*, RURAL ADVANCEMENT FOUND. INT'L (July 12, 2016) https://www.rafiusa.org/blog/what-debt-in-chicken-farming-says-about-american-agriculture/.

[108] OFF. OF INSPECTOR GEN., EVALUATION REP. NO. 18-13, EVALUATION OF SBA(A) LOANS MADE TO POULTRY FARMERS 5 (Mar. 6, 2018).

[109] OFF. OF INSPECTOR GEN., EVALUATION REP. NO. 18-13, EVALUATION OF SBA(A) LOANS MADE TO POULTRY FARMERS 8 (Mar. 6, 2018).

[110] RURAL ADVANCEMENT FOUND. INT'L, UNDER CONTRACT: FARMERS AND THE FINE PRINT, VIEWERS GUIDE 17 (2017).

[111] It is worth noting that broiler genetics itself is a highly concentrated industry. Only two companies supply more than 91 percent of commercial breeding stock for broilers globally: Tyson subsubsidiary Cobb-Vantress, and EW Group/ Aviagen. *See* PAT MOONEY, ETC GROUP, BLOCKING THE CHAIN: INDUSTRIAL FOOD CONCENTRATION, BIG DATA PLATFORMS AND FOOD SOVEREIGNTY SOLUTIONS 20 (2018).

[112] OFF. OF INSPECTOR GEN., EVALUATION REP. NO. 18-13, EVALUATION OF SBA(A) LOANS MADE TO POULTRY FARMERS 2 (Mar. 6, 2018).

no-poach agreements, whereby each integrator declines to do business with a grower contracted with another integrator in the region.[113]

The near-complete control exercised by integrators like Sanderson and Wayne over their tournament systems creates intractable asymmetries of information about market prices, poultry inputs, and poultry grading that leave growers powerless to police — or even catch — deceptive conduct by integrators. While the USDA publishes expanses of statistics on most agricultural industries, the hyper-vertically integrated character of the poultry market has come to elude capture because of the reduced opportunity for commercial exchanges where data can be gathered.[114] This has made access to adequate information about market conditions highly exclusive. Using pay-to-play weekly reports produced by the data consultancy Agri Stats, integrators have until recently been able to access (purportedly anonymous) information on farmer pay, flock size, processing statistics, market prices, and other proprietary information. Growers, however, had not been granted similar access to the consultancy's data.[115]

In the context of these deep inequalities of power and information between integrators and growers, any remedy that falls short of prohibiting Sanderson and Wayne from reducing the base compensation of growers would be hollow and unenforceable. On the one hand, a less far-reaching remedy that allows Sanderson and Wayne to retain the discretion to reduce payments to growers based on performance would leave undisturbed all the fundamental mechanisms in growers' contracts "regarding" and "through [which]" the processors have allegedly deceived growers. On the other hand, any such remedy would require the Antitrust Division and the Court to police individual payment reductions for specific flocks to determine whether any deceptive or unfair practices went into the growing process that produced them. Such an enforcement process would be akin to a game of "Whac-A-Mole," and frankly, neither the Antitrust Division nor the Court have enough hands. Moreover, because integrators like Sanderson and Wayne exercise integrated control over their growers, the growing process, and the tournament systems they operate[116] — indeed, so much control that in 2018 the Small Business Administration determined that a contract poultry grower had no independence and operated as an employee of their processor[117] — it is difficult to see how enforcers would even find out about the "moles" of deception in the supply chain to "whack" them in the first place.

---

[113] *See, e.g.,* Complaint, *In re* Broiler Chicken Grower Litigation, No. 6:17-CV-00033-RJS (E.D. Okla. 2017).

[114] Christopher Leonard, *Is the Chicken Industry Rigged?* Bloomberg: Businessweek (Feb. 15, 2017) https://www.bloomberg.com/news/features/2017-02-15/is-the-chicken-industry-rigged.

[115] *See generally* Pat Mooney, ETC Group, Blocking the Chain: Industrial Food Concentration, Big Data Platforms and Food Sovereignty Solutions (2018).

[116] C. Robert Taylor & David A. Domina, Restoring Economic Health to Contract Poultry Production 1 (May 13, 2010) (Report prepared for Joint U.S. Dep't of Just. and U.S. Dep't of Agric./ GIPSA Public Workshop on Competition Issues in the Poultry Industry, May 21, 2010).

[117] Off. of Inspector Gen., Evaluation Rep. No. 18-13, Evaluation of SBA Loans Made to Poultry Farmers 7, 9 (Mar. 6, 2018).

Because the proposed relief is reasonably tailored to remedy the alleged violations in an enforceable manner, the Court should find that the Consent Decree is reasonable.[118]

III. The Consent Decree Is Not Illegal, a Product of Collusion, or Against the Public Interest

The Consent Decree is based on an allegation of "a probable violation of the law" and no contention can be made that any of its provisions are illegal.[119] Nothing remotely suggests that the settlement was a product of collusion. Finally, taking into account the information in this comment, the Competitive Impact Statement filed by the United States, and the USDA's recent notices of proposed rulemaking regarding the ICMI and transparency regulations, we believe the Consent Decree is manifestly in the public interest. It enforces the law against brazen violations that had gone unchecked for decades. It ends an unjust payment system that Sanderson and Wayne have used to deprive poultry growers of their independence and extract untold wealth from rural communities. Most importantly, it vindicates the will of Congress, and the public it represents, that farmers and ranchers should not be "submerged" into "cogs in the wheel" of giant corporations with distant headquarters — that the people who toil on the land in this country will not be subjugated into "mere servant[s]" who have "no voice in shaping business policy" and are "bound to obey orders issued by others."[120]

---

[118] *Cf. Maryland, Dep't of the Env't v. GenOn Ash Mgmt., LLC*, 2013 WL 2637475, at *5 (D. Md. June 11, 2013) (finding "[t]he $1.9 million penalty agreed upon [in consent decree] is reasonable, particularly insofar as it includes separate remedial requirements and additional penalties if those requirements are not met. Moreover, the settlement agreement closes three pending federal lawsuits, as well as a counterclaim pending in the Circuit Court for Charles County relating to the Faulkner site, thus resolving four separate litigations."); *United States v. City of Welch, W. Va.*, 2012 WL 385489, at *3 (S.D.W. Va. Feb. 6, 2012) (finding consent decree under Clean Water Act was "adequate and reasonable" because it was "designed to penalize Welch appropriately for the violations of the CWA and to serve as a deterrent to future similar conduct by Welch" in a manner consistent with statutory requirements, and because "it requires a comprehensive injunctive relief program designed to substantially reduce and eliminate CSO discharges"); *United States v. Westvaco Corp.*, 2016 WL 4492704, at *5 (D. Md. Aug. 26, 2016) ("The agreement reached by the parties results in Westvaco paying $1.6 million to fund projects that will address the harm in areas that suffered from the excess emissions. Had the case proceeded through the scheduled evidentiary hearing, the Court would have required Westvaco to pay an amount determined by the Court for remedial actions. This is the result achieved by the Consent Decree. The Court finds no principled basis upon which to find that the agreed amount of $1,600,000 is not within the range of reasonableness. Moreover, the agreement provides for prompt remedial actions and avoids the delay and uncertainty of appellate proceedings.").

[119] *See League of Women Voters of Virginia v. Virginia State Board of Elections*, 458 F.Supp.3d 442, 451 (2020) (citing *Kasper v. Board of Election Comm'rs of the City of Chicago*, 814 F.2d 332, 342 (1987)) (considering it "significant" to legality of proposed consent decree that "Plaintiffs have pleaded a probable violation of federal law"). *See also L.J. v. Wilbon*, 633 F.3d 297, 311 (4th Cir. 2011) (rejecting objection to district court's entry of consent decree for "fail[ure] to ensure that there was a substantial federal claim supporting the decree" because plaintiffs had "a valid cause of action" under the applicable law).

[120] *See* Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 Wis. L. Rev. 531, 532 (2000) (quoting *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897)) (explaining that, "in the first substantive decision interpreting the Sherman Act, Justice Peckham, no liberal or protectionist" noted that the antitrust laws reflected the wisdom that "It is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man . . . into a mere servant or agent of a corporation . . . having no voice in shaping the business policy . . . and bound to obey orders issued by others"); William E. Rosales, Comment, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening*, 2004 Wis. L. Rev. 1497, 1497-98 ("Congressmen on both sides of the aisle during the debates on the legislative proposal — now known as the Packers and Stockyards Act of 1921 ('P&S Act') — expressed concerns about the increasing consolidation in the agricultural sector and fear of a rising food dictator. Congressman Marvin Jones proclaimed that, although a food dictator would be efficient in its centralized control of the channels of trade of meat products and might be desirable in order to sustain life in the country, it would be unwise for the same reasons that it would be unwise for this country to have a dictator or a king as its head of government. Congressman Jones argued that the 'primary necessity' of government was the 'making of men' and posited the theory that 'if every line of endeavor had

IV. Conclusion

For the reasons set forth above, we hope the Court will enter the Consent Decree in its entirety. Thank you for giving us the opportunity to comment on this important matter.

Sincerely,

Joseph Van Wye
Policy and Outreach Director
Farm Action

---

one dictator at its head with all other men working for him, the manhood of [the] country . . . and vital force of the men who make up this country would be submerged and would become mere cogs in the wheel.'").