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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: CATTLE AND BEEF ANTITRUST LITIGATION This Document Relates To: CONSUMER INDIRECT PURCHASER PLAINTIFFS' ACTION	Case No. 0:22-MD-331 (JRT/JFD) **FILED UNDER SEAL**

MEMORANDUM OF LAW IN OPPOSITION TO CONSUMER INDIRECT PURCHASER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

As this Court recently explained: "A class cannot be certified if more than a *de minimis* portion of the class is uninjured." *In re Pork Antitrust Litig.*, 665 F. Supp. 3d 967, 1006 (D. Minn. 2023). But that is the precise problem here. *Significantly* more than a *de minimis* portion of the proposed class—anywhere from 23.1% to 63.6%—were uninjured by Defendants' alleged conspiracy to reduce the supply and thereby artificially inflate the price of certain beef products. For that reason, among others, the Motion for Class Certification filed by the Consumer Indirect Purchaser Plaintiffs ("Consumers" or "Consumer Plaintiffs") should be denied. *See* Consumer Pls.' Mot. for Class Certification ("Mot."), ECF No. 867; Mem. of Law in Supp of Consumer Pls.' Mot. for Class Certification ("Memo"), ECF No. 868.

Consumer Plaintiffs retained Dr. Russell Mangum to provide a damages opinion on behalf of the putative Consumer class. In doing so, Dr. Mangum failed to reliably test for the percentage of uninjured direct purchasers. Instead, he simply "concluded" (contrary to the realities of the industry) that common impact would exist based on his review of a cherry-picked selection of documents and contracts and a flawed pricing correlation analysis. Then, using a regression model, he defined that common impact: every single direct purchaser was overcharged by [redacted] for every covered beef purchase made during the four-and-a-half years that Consumer Plaintiffs contend the alleged conspiracy lasted.

But running Dr. Mangum's *own* regression model across the same data that he himself used, and without changing any of his variables or specifications, revealed that there were uninjured direct purchasers. A lot of them. Specifically, Defendants' expert Dr.

Lauren J. Stiroh tested Dr. Mangum's model in two different ways to isolate the effects of the alleged conspiracy on individual purchasers. Using Dr. Mangum's model, Dr. Stiroh determined that the percentage of uninjured direct customers ranged from between 23.1% and 63.6%—significantly higher than the 5% to 10% range that courts have found sufficient to deny certification of other classes. Such results are not surprising: beef, far more than other proteins, is sold in a remarkably wide variety of products and cuts, and, as confirmed by testimony from many direct purchasers in this action, wholesalers and retailers often command healthy (and differing) margins on these products. Because there was far more than a *de minimis* percentage of direct purchasers unaffected by Defendants' alleged conduct, there are similarly more than a *de minimis* percentage of Consumer class members that were unaffected, even if the affected direct purchasers passed through to these Consumer Plaintiffs all their purportedly inflated costs. The Consumer class thus fails to satisfy the predominance requirement of Federal Rule of Civil Procedure 23(b)(3), precluding class certification.

Consumer Plaintiffs also fail to satisfy predominance on the issue of damages. Dr Mangum's regressions show *significant* variation in the pass-through rates in just the few dozen actors in the beef supply chain that he evaluated. Consumer Plaintiffs have provided no legal or factual basis to impose the same average pass-through rate on the thousands of other retailers from whom class members purchase beef, and thus have presented no method to calculate their damages. To the contrary, the variation among the entities he did survey establishes that any such assumption would be ill-founded. This additionally and independently warrants denial of certification.

Separately, because Plaintiffs are indirect purchasers, they must seek certification of their claims under the various laws of states that the class representatives purport to represent. But the differences in those various state laws swamp any common issues and preclude a finding of predominance under Rule 23(b)(3). Certification should be denied on this ground as well. Additionally, at least two proposed state classes—Kansas and Montana—lack an adequate representative because state law prohibits the types of claims under which Consumer Plaintiffs seek certification.

Consumer Plaintiffs also fail to propose a class whose members can be ascertained by reference to objective criteria. To be part of the Consumer class, class members must have purchased qualifying beef products from direct purchasers who previously purchased such products from one or more Defendants. But Consumer Plaintiffs have submitted no proof showing that even the 28 *named Plaintiffs* actually purchased beef processed by even one Defendant. And their proposal for identifying class members—to have every class member submit a "self-identification affidavit"—would not remedy that problem, since the named Plaintiffs themselves disclaimed knowledge as to whether their beef purchases were originally sold by the Defendants or another beef producer entirely.

For all of these reasons, the Court should decline to certify the Consumer class.

II. CASE-SPECIFIC BACKGROUND

Plaintiffs are a proposed class of consumers who claim to have been harmed by a years-long conspiracy carried out by Defendants, the nation's four largest beef producers. Plaintiffs allege that Defendants conspired to decrease the supply of beef, which allegedly artificially inflated the prices they charge their direct customers for beef. Claiming these

"overcharges" were then passed through to consumers, Plaintiffs seek to certify a class to recover damages for the difference between the "but-for" prices and the purportedly artificially higher prices they paid for beef.

A. Case-Specific Allegations

Consumer Plaintiffs spend a substantial portion of their brief arguing that Defendants conspired to violate the antitrust laws. To avoid unnecessary repetition, Defendants have summarized their response to the factual arguments common to all Plaintiffs in this MDL in a single omnibus brief. *See* Defs.' Omnibus Brief, ECF No. 1090. Those responses will not be repeated here. But it is important to note two significant industry characteristics undermining Plaintiffs' arguments about a conspiracy, which make it far more likely that—if any injury at all took place—a significant portion of the putative Consumer Plaintiffs class was uninjured.

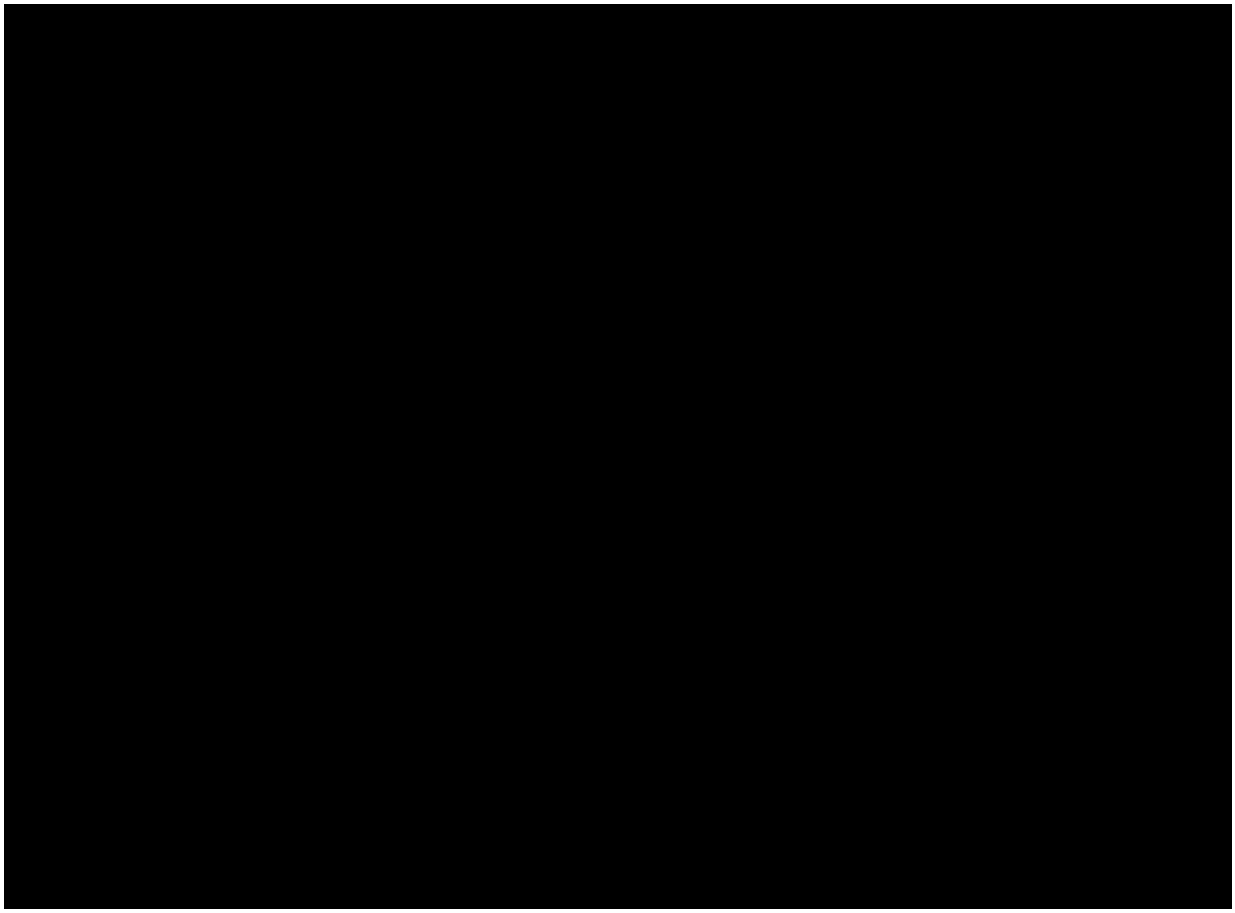
First, Consumer Plaintiffs allege that Defendants conspired with each other, starting on July 31, 2014, to artificially reduce the supply of beef products. Consumer Pls.' Sixth Am. Class Action Compl. ("Complaint" or "Compl.") ¶ 1, ECF No. 757. Yet the data show that Defendants' beef production went up—not down—during that time period:

Net Pounds of Cattle Slaughtered by Net Live Weight, All Defendants

Decl. of Kosta S. Stojilkovic, Ex. 1 (Expert Report of Lauren J. Stiroh, Ph.D. ("Stiroh Report")) 17, Fig. 2.1, ECF No. 1117.

Second, Plaintiffs allege they were harmed by higher beef prices caused by Defendants' conduct. Compl. ¶ 1. But even according to Dr. Mangum's report,

Price Indices of Consumer Class Primals Sold by Defendants



Decl. of David Chiappetta in Supp. of Mot. to Exclude Certain Portions of the Expert Report & Testimony of Dr. Russell W. Mangum, Ex. 1 (Expert Report of Russell W. Mangum III, Ph.D. ("Mangum Report")) 184, Fig. 32.

B. The Proposed Class and Class Representatives

The Consumer Plaintiffs bring 41 claims for relief. Count 1 alleges a violation of Section 1 of the Sherman Act and seeks injunctive and equitable relief. Compl. at 175-176. Consumer Plaintiffs' Motion for Class Certification, however, does not appear to seek certification of a nationwide injunctive relief class under Count 1, *see* Mot. 1-2, and does not even use the word "injunction" once in their brief. *See generally* Memo.

Counts 2 through 41 are an assortment of claims arising under various state laws from 27 "Repealer Jurisdictions,"[1] ranging from state antitrust claims to state consumer protection claims to state-based claims for unjust enrichment. Compl. at 177-225. The Repealer Jurisdictions under which Plaintiffs seek certification are Arizona, California, the District of Columbia, Florida, Illinois, Iowa, Kansas, Massachusetts, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin.[2]

Class Definition. The Consumer Plaintiffs move to certify a damages class of "[a]ll persons and entities who indirectly purchased for personal consumption" certain beef products produced by Defendants in the 27 Repealer Jurisdictions. Mot. 1-2. Unlike the proposed Commercial and Institutional Indirect Purchaser Plaintiff ("CIIPP") class, Consumer Plaintiffs include in their proposed class definition purchases of beef products from four, rather than five, primal cuts: the chuck, loin, rib, or round primal cuts. Mot. 1-2; *see also* Commercial & Institutional Indirect Purchaser Pls.' Mot. for Class Certification 2-3, ECF No. 862. The Consumer Plaintiffs' proposed class definition is silent as to

[1] Repealer Jurisdictions are those states (and the District of Columbia) that have "repealed" through legislation or judicially-made law the U.S. Supreme Court's holding in *Illinois Brick Co. v. Illinois*, which held that indirect purchasers lacked standing to seek damages for antitrust violations committed by the original manufacturer or service provider. 431 U.S. 720, 728-29 (1977). Repealer Jurisdictions permit indirect purchasers to sue those original producers for damages.

[2] The operative Complaint has retained state law claims under Hawaii and South Carolina, *see* Compl. 210, 222, despite there being no named representatives from those states. *See generally id.* Consumer Plaintiffs, however, do not include those two jurisdictions in their certification request. *See* Mot. 1; Memo 4 n.5.

whether the beef is from only fed cattle or if it also includes beef from cows. *See id.* And despite opining that consumers sustained nearly [redacted] dollars in damages, the Consumer Plaintiffs' proposed damages expert, Dr. Mangum, could not answer whether they seek to recover for purchases of beef made from cows. Decl. of Samantha Burke in Supp. of Opp'n to Mot. to Certify ("Burke Decl."), Ex. 1 (Deposition of Russell Mangum ("Mangum Dep.")) 220:6-222:23.

The Consumer Plaintiffs propose to exclude from their class definition purchases of a wide range of beef products: "beef that is marketed as USDA Prime, organic, No Antibiotics Ever ('NAE'), antibiotic free, 100% grass-fed, kosher, halal, certified humane, Wagyu, 'American-Style Kobe Beef,' as well as any products that are ground, marinated, seasoned, flavored, breaded, or cooked." Mot at 1-2.

The Consumer Class, the last class in the cattle-and-beef supply chain, has chosen an alleged conspiracy period that starts *before* all other proposed classes. Their class period covers beef purchases from August 1, 2014, to December 31, 2019. Mot at 1. According to both the Consumer Plaintiffs and their expert, however, [redacted]. Memo 42; Mangum Report 184, Fig. 32.

Class Representatives. The named Plaintiffs in the Consumer Class are 28 individuals. Their beef purchasing habits vary widely across many different dimensions. In opining on the alleged damages of these Plaintiffs and their proposed class, however,

Dr. Mangum did not consider any of those habits, let alone their differences. Mangum Dep. 39:4-46:7.[3]

Discovery revealed that some named Plaintiffs almost exclusively purchased beef products that are *excluded* from the proposed class definition. For example, Plaintiff Cindy Abernathy testified that she buys "[redacted]" Burke Decl., Ex. 2 (Deposition of Cindy Abernathy ("Abernathy Dep.")) 26:12-15; 32:19-33:6, 46:18-47:2. When Plaintiff Leigh Tiller was asked how often the steaks she purchases at Kroger (which she testified are the primary beef products she purchases other than ground beef) are labeled as USDA Prime, she responded: "[redacted]" Burke Decl., Ex. 3 (Deposition of Leigh Tiller) 34:17-19; *see id.* 31:4-8, 21:21-22:4. Each of those products is expressly excluded from the class. Dr. Mangum confirmed that he has "not come up with … with a damage [figure] for consumer class members [like Abernathy and Tiller] that purchased" excluded beef. Mangum Dep. 204:8-24.

Plaintiffs do, however, share two things in common: None had *any* idea whether they purchased beef processed by one or more of the Defendants in this case. (*E.g.*, Burke

[3] Indeed, in Appendix B to his report, an updated version he served on Defendants on December 26, 2024, Dr. Mangum listed the deposition transcripts of just three of these 28 named Consumer Plaintiffs as "Materials Relied Upon," a title which he later clarified was intended not only to list materials actually relied upon (or personally reviewed) but instead materials that simply came "into the possession of [his] firm." Mangum Dep. 50:4-19; *see* Mangum Report, Appendix B.

Decl., Ex. 4 (Deposition of Andrew Cohen) 35:15-18 ([redacted]); *id*. Ex. 5 (Deposition of Mark Sperry) 35:5-9 ([redacted]); *id*. Ex. 6 (Deposition of Craig Marguiles) 88:13-16 ([redacted]); *id*. Ex. 7 (Deposition of Sharon Killmon ("Killmon Dep.")) 42:10-14; *id*. Ex. 8 (Deposition of Marcelo Lopez) 35:22-36:2; *id*. Ex. 9 (Deposition of Lisa Melegari) 40:14-41:10; *id*. Ex. 10 (Deposition of Jason Falbo) 43:16-21; *id*. Ex. 11 (Deposition of Brenda King) 51:5-8; *id*. Ex. 12 (Deposition of Karen Carter) 50:24-51:5; *id*. Ex. 13 (Deposition of Kenneth Peterson) 81:6-9, 87:16-19, 89:4-7, 93:10-13; *id*. Ex. 14 (Deposition of David Renz) 81:25-82:3, 83:15-18, 91:11-14, 96:13-16; *id*. Ex. 15 (Deposition of Sharon Dawson-Green) 81:19-82:18; *id*. Ex. 16 (Deposition of Jacquelyn Watson ("Watson Dep.")) 43:8-12.

And none has submitted proof that any of the beef they purchased was processed by any of the Defendants, or was even a product included within the claim. Many named Plaintiffs kept no receipts of their purported purchases, even after being instructed to do so for this lawsuit. (*E.g.*, Killmon Dep. 20:16-20 (testifying that she was instructed to preserve paper receipts, [redacted]); Burke Decl., Ex. 17 (Deposition of Stacey Troupe ("Troupe Dep.")) 82:3-22 ([redacted]

[redacted]) A few named Plaintiffs did submit documentation of their beef purchases, but most of those receipts record only beef product purchases *excluded* from the proposed class. *E.g.*, Burke Decl., Ex. 18 (Abernathy receipts reflecting excluded beef purchases in this compilation of all of her produced receipts combined); Abernathy Dep. 80:25-93:11 (confirming beef products on receipts in Exhibit 18 were labeled as grass fed, were ground beef, were from brand name not affiliated with any Defendant, or were for precooked or pre-marinated beef); Burke Decl., Ex. 19 (Jacquelyn Watson Deposition Ex. 3, [redacted]).[4] For those beef products that may not be excluded on their face, it is still impossible to tell whether they came from Defendants—as opposed to any other packer—and Plaintiffs have made no attempt whatsoever to show that.

C. Dr. Mangum's Expert Report

As discussed above, the Consumer Plaintiffs submitted the expert report of Dr. Mangum in support of their Motion for Class Certification. In opining on the damages Plaintiffs allegedly sustained from the conspiracy, Dr. Mangum assumed the allegations of the conspiracy were proven and that liability was established. Mangum Dep. 183:6-15.

[4] Ms. Watson also affirmed that she submitted to her attorneys Sam's Club digital receipts showing beef purchases, and testified that she believed those digital receipts predated 2020. Watson Dep. 32:8-12, 57:14-23. Defendants, however, did not receive any such evidence during the course of discovery. Burke Decl. ¶ 21.

Dr. Mangum asserted that the alleged conspiracy would have impacted "all or nearly all direct purchasers … based on" his "industry analysis" of beef pricing and his correlation analysis, which he refers to as "economic and empirical evidence." Mangum Report ¶¶ 387-388; Mangum Dep. 345:7-12, 347:5-14; *see generally* Mangum Report Section IV. Dr. Mangum did not rely on his regression model to find common impact. *See id.* Instead, once he "found" common impact from the beef pricing "industry analysis" and his correlation analysis, he only then used his regression model to purportedly "measure" the overall alleged impact—i.e., the overcharge on beef prices that direct purchasers allegedly paid because of the conspiracy *if* they each suffered an identical overcharge. Mangum Report ¶¶ 407, 408; Mangum Dep. 347:5-348:23. Dr. Mangum's model yielded one unvarying overcharge of [redacted] Mangum Report ¶ 433.

Altogether, this resulted in Dr. Mangum's conclusion that every single covered beef purchase, made by every single direct purchaser, on every single day from July 1, 2014, through December 31, 2019, was subject to an overcharge of [redacted] Mangum Dep. 347:5-348:23; *id*. 197:15-25 ("Q. Is your opinion that each direct purchaser overpaid [redacted] percent for each of their individual beef purchases during the class period? … A. My opinion is the [redacted] percent … can, yes, then be applied to every -- would -- could be applied to every direct purchaser during that time period for every purchase.").

Dr. Mangum then performed another regression analysis on 32 third-party direct purchasers "separately to determine whether the existence of pass-through is consistent across" those third parties. Mangum Report ¶ 487. Even though this analysis showed that the passthrough rates varied greatly among the parties, *id*. at 229, Fig. 56, he opined that,

at least on average, direct purchasers passed through around [redacted] of the purported overcharges they incurred to their customers, i.e., the Consumer Plaintiffs. *Id*. ¶ 490. Accordingly, despite the varying passthrough rates shown in his analysis, according to Dr. Mangum, each Consumer Plaintiff was also overcharged by [redacted] *Id*. ¶ 491.

III. ARGUMENT

The Consumer Plaintiffs fail to satisfy the "'rigorous analysis'" needed to "justify a departure" from "'the usual rule'" disfavoring class actions. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 351 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). They have not shown that common questions predominate over individual ones under Rule 23(b)(3) because there is a large percentage of uninjured class members, they fail to establish common proof of classwide damages, and there are large variations in the state laws under which Plaintiffs bring their claims swamp any common issues under those laws. They also fail to show the class is clearly ascertainable because they have identified no viable classwide objective criteria for identifying class members, and have submitted no proof that even the 28 *named representatives* would be class members. And at least one proposed state-law class lacks an adequate representative because the state-law claims he asserts are statutorily barred against Defendants.

A. The class cannot show common evidence of impact and damages because Dr. Mangum's opinion should be excluded

Consumer Plaintiffs must show classwide impact and damages through "admissible evidence at this stage in the litigation." *Pork*, 665 F. Supp. 3d at 1001 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 454-55 (2016)). To do so here, they rely solely on the expert opinion of Dr. Mangum. *See* Memo 35–48 (analyzing impact and damages and

relying on Dr. Mangum's report); *see infra*, at n.5. But as explained in the accompanying Motion to Exclude Testimony of Dr. Mangum, Dr. Mangum's opinions on impact and damages are inadmissible under Federal Rule of Evidence 702. Certification must be denied on this ground alone. *See, e.g.*, *Series 17-03-615 v. Express Scripts, Inc.*, No. 3:20-CV-50056, 2024 WL 1834311, at *4 (N.D. Ill. Apr. 26, 2024) ("With Mangum's damages models excluded—the only evidence regarding damages common to the class—[the class proponent] cannot carry its burden as to predominance. … [S]o certification of the … proposed damages classes … is denied.").

Certification should separately and independently be denied for multiple reasons under Rule 23, which is governed by a different legal standard, as discussed below.

B. Predominance: The consumer class cannot be certified because Plaintiffs have not met their burden of showing common impact

In evaluating the predominance requirement, a court "must take a 'close look at whether common questions predominate over individual ones.'" *Pork*, 665 F. Supp. 3d at 1001 (quoting *Hudock v. LG Elec. U.S.A., Inc.*, 12 F.4th 773, 776 (8th Cir. 2021)). Though "there are no bright lines for determining whether common questions predominate," *id.* (quoting *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693 (D. Minn. 1995)), the predominance standard is "'far more demanding' than the requirement of commonality," *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 377 (8th Cir. 2013) (quoting *Amchem Products v. Windsor*, 521 U.S. 591, 623-24 (1997)); *see also Pork*, 665 F. Supp. 3d at 1001 (describing this inquiry as "rigorous"). As this Court has observed, predominance is, in

fact, "often the determining factor in declining to certify a class in an antitrust action." *Pork*, 665 F. Supp. 3d at 1001.

"A claim will meet the predominance requirement 'where there exists generalized evidence which proves or disproves an element on a simultaneous, classwide basis, since such proof obviates the need to examine each class member's individual position." *Id* (quoting *In re Potash Antitrust Litig.*, 159 F.R.D. at 693). "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question." *In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-MD-2090, 2012 WL 3031085, at *7 (D. Minn. July 25, 2012) (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)), *aff'd*, 752 F.3d 728 (8th Cir. 2014).

In an antitrust case like this one, class proponents must present "[c]ommon evidence" to "prove (1) that Defendants conspired to violate federal antitrust laws, (2) that class members suffered injury because of the violation ('impact'), and (3) plaintiffs can measure damages." *Pork*, 665 F. Supp. 3d at 1001-02 (citation omitted). "'Impact' generally refers to the injury caused by an antitrust violation." *Id.*

1. The proposed class should not be certified if at least 5%-10% of class members were uninjured

"Predominance is lacking in circumstances where a plaintiff's common proof of impact fails to show that all or nearly all class members were in fact injured." *In re Pre-Filled Propane Tank*, No. 14-02567-MD-W-GAF, 2021 WL 5632089, at *4 (W.D. Mo. Nov. 9, 2021); *see also Blades*, 400 F.3d at 571 (affirming denial of class certification

where "not every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy"). "[C]ircuits have instructed district courts to 'ensure that the class is not defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct.'" *Pork*, 665 F. Supp. 3d at 1006 (quoting *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016)). Stated otherwise, a "class cannot be certified if more than a *de minimis* portion of the class is uninjured." *Id.*; *see also Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) ("[A] class cannot be certified if it contains members who lack standing.").

Though "[t]he Eighth Circuit has not yet determined what constitutes *de minimis*," many "courts have held between approximately five percent and ten percent would justify refusing to certify the class." *Pork*, 665 F. Supp. 3d at 1006 (collecting cases and concluding 3.8% was *de minimis*); *see In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 137 (D.D.C. 2017) ("5% to 6% constitutes the outer limits of a *de minimis* number of uninjured class members").

2. Dr. Mangum fails to demonstrate common impact to direct purchasers

Dr. Mangum concluded that the alleged conspiracy would have impacted "all or nearly all direct purchasers … based on" his "industry analysis" of beef pricing and his correlation analysis.[5] *See supra* Background, Section II. He then used his regression model

[5] In arguing that the alleged conspiracy had common impact on Consumer Plaintiffs, they first point to various "market structure evidence," including market concentration, barriers to entry, low elasticity of demand for beef, and the premise that beef is a

to determine that purported common impact in the form of a single, across-the-board overcharge of [redacted]. *See id*.

Dr. Mangum's conclusion of common impact is, in the first instance, fundamentally flawed. To avoid redundancy, Defendants only briefly summarize as necessary and otherwise incorporate by reference the detailed reasoning and supporting analysis for why Dr. Mangum's analysis does not establish common impact set forth in their Motion to Exclude. *Id*. Even if the Court finds his method admissible under Federal Rule of Evidence 702, it must still perform its "rigorous analysis" to determine whether Consumer Plaintiffs have established common impact under Rule 23. Under that standard, regardless of the Court's conclusion on the separate motion, Dr. Mangum's analysis falls short.

For one, Dr. Mangum's industry analysis relies on a few cherry-picked examples in which Defendants' beef pricing is in some way tied to the USDA cutout price. Mangum Report ¶¶ 395-96. Yet he ignores the extensive evidence demonstrating that individualized negotiations between Defendants and their customers, often without reference to USDA cutout prices, permeate the industry. *See* Stiroh Report ¶¶ 23-32 & ns.40-91 (citing

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commodity product. Memo 36-39. But Dr. Mangum did not rely on those purported factors in his common impact analysis. *See* Mangum Report ¶ 385 ("In the sections above, I concluded that the structure and characteristics of the beef industry made it conducive to the formation and maintenance of the alleged collusion. Another part of my assignment in this case is to determine whether the alleged collusion would likely have affected or impacted all (or nearly all) customers."). Even Plaintiffs themselves describe these as factors that "make[] the beef market ripe for collusion," "more susceptible to collusion," and "subject to cartelization." Memo 37-39. But common impact—and Dr. Mangum's opinions regarding the same—assumes conspiracy is proven in the first place. Plaintiffs' attempt to shoehorn these factors into the common impact analysis is improper and should be disregarded.

extensive evidence demonstrating Defendants' sales of beef products were negotiated and priced on an individualized basis and not tied to an index). Such individualized negotiations, differences in market and bargaining power among the direct purchasers, and differentiation in pricing mechanisms demonstrate substantial variation in pricing, even across customers that purchased the same product from the same Defendant. *See, e.g.*, Stiroh Report 8, Fig. 2.5 (showing significant variation in wholesale strip loin prices across Defendants). And certain direct purchasers wielded significant bargaining power over Defendants, making it highly likely that they and others would have been insulated from any adverse effects of the purported conspiracy. For example, [redacted] *Id.* ¶ 27 & n.65; Burke Decl., Ex. 20 (Deposition of Shawn Spencer) 137:16-139:15.

As for Dr. Mangum's correlation analysis, "correlation analysis may not be common evidence of classwide injury on its own," *Pork*, 665 F. Supp. 3d at 992, n.13,[6] and in fact, Dr. Mangum's correlation analysis masks variation in beef prices charged to different customers. Dr. Mangum's price indices rely on average monthly prices for each beef product, which suppresses the variation in beef pricing that is otherwise present when that

[6] In *Pork*, the Court held that Dr. Mangum's correlation analysis was admissible at the class certification stage since he "uses his correlation analysis merely to supplement his robust regression analysis." Here, Dr. Mangum does *not* rely on his regression analysis to support his opinion regarding common harm.

data is analyzed on a disaggregated, transactional level. Stiroh Report ¶¶ 90-91. Thus, Dr. Mangum's correlation analysis does not support a finding of common impact.

Simply put, Dr. Mangum's theoretical and unsupported conclusion that "all or nearly all" direct purchasers were impacted lacks the "economic and empirical evidence" he claims, meaning Plaintiffs fail to meet their burden to establish predominance of impact under Rule 23. *See* Mangum Report ¶ 387. *E.g.*, *In re Wholesale Grocery Prods.*, 2012 WL 3031085, at *8, *10 (rejecting class certification because plaintiffs "failed to establish that common issues predominate with respect to impact": "The facts and circumstances of this case—with the potential for numerous factors affecting both the price each customer would receive in a competitive environment and the price each customer actually received—require a more searching analysis than merely assuming prices would rise for every class member because competition was reduced overall."); *Blades*, 400 F.3d at 571 (affirming denial of class certification where "not every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy").

3. Dr. Mangum's own regression model shows a significantly more than *de minimis* number of uninjured consumers (*i.e.*, class members)

Given Dr. Mangum's lack of support for his conclusion of common impact, it should come as no surprise that Dr. Mangum's own regression model quantitatively *disproves* common impact.

Dr. Mangum conducted his primary overcharge regression to estimate the effect of the alleged conspiracy to reduce the supply of beef. He used a single "dummy" variable to estimate the impact of the alleged conspiracy across approximately 4,000 direct purchasers,

whose data he pools prior to conducting his analysis, resulting in a single overcharge of [redacted] Mangum Report ¶ 432 & Fig. 50.

Dr. Mangum's single dummy variable cannot detect price variation among different purchasers and different transactions. Because Dr. Mangum had already concluded (unreliably) that all direct purchasers were harmed the same, *see supra*, he was apparently satisfied with concluding that this single overcharge number of [redacted] "applied" equally across all beef purchases from all Defendants for the entire class period – even though his use of a single dummy variable did not (and could not) show it. Mangum Dep. 197:15-25. And he never bothered to check or compare this number by running his regression model across any other direct purchaser datasets, including some of the largest direct purchasers or any individual direct purchasers, even though he had sufficient data to do so. *See. id.* 351:3-10.

His stated justification for refusing to conduct robustness checks against other purchaser subsets or individual purchasers was that he simply had no reason to "actually test common impact"—doing so would be like going "fishing in a … lake" that he has "no reason to believe … there's fish in." *Id*. 351:18-354:18. Testing his results would be a "fishing expedition," according to Dr. Mangum. *Id*. 355:11-13. But (to take Dr. Mangum's fishing analogy), it is Dr. Mangum who *assumes* there are no fish in the lake: concluding that because he cannot see any when looking just at the surface of the lake, there must be no fish. In doing so, Dr. Mangum *assumes* there is identical common impact without actually testing that assumption by looking under the surface. That is improper under Rule 23. *See, e.g., Tucker v. Ford Motor Co.*, No. 4:22-cv-00430, 2023 WL 2662887, at

*9 (E.D. Mo. Mar. 28, 2023) ("The Court cannot 'presume' or 'assume' class-wide impact."); *In re Optical Disk Drive Antitrust Litig.*, 303 F.R.D. 311, 321 (N.D. Cal. 2014) (concluding a regression model designed to determine price impact of alleged conspiracy "assumes the very proposition that [plaintiffs] are now offering it, in part, to show"); *In re Domestic Drywall Antitrust Litig.*, No. 13-MD-2437, 2017 WL 3700999, at *13 (E.D. Pa. Aug. 24, 2017) (concluding that when a model "assumes impact," based on a calculated price increase, that "may be enough to defeat a finding of predominance").

Moreover, when asked why he would not test common impact, Dr. Mangum also said that running his over "less data" than the total data that he fed into his regression model would be "arbitrary." Yet, this was *after* he ran the regression model year-by-year and compared those annual overcharge numbers to his single overcharge for the entire class period. Mangum Report ¶ 434; Memo 44 (referring to this modeling of smaller sets of data a "robustness check"). And *after* he ran his price correlations on only the top selling beef products, rather than all of them, and on only the "top 50 customers" by sales. Mangum Report ¶¶ 403 n.1000; 406. And *after* he ran "separate[]" regressions on 32 different third parties to determine their individual pass-through rates, and then averaged those together to determine the effective pass-through rate. *Id.* ¶ 487. In other words, Dr. Mangum will apparently conduct robustness checks and slice and dice data when it suits him, but not when it comes to checking whether common impact was, in fact, common across all or nearly all direct purchasers—a [redacted].

But what Dr. Mangum did not do, Dr. Stiroh did. Dr. Stiroh has presented her own analyses based on disaggregated data specifically testing whether more than a *de minimis*

percentage of putative class members were uninjured by the alleged conspiracy. She ran Dr. Mangum's own regression—without changing any specifications or explanatory variables—in two different ways: (i) by running one regression *using the data for all direct purchasers* but interacting it with separate dummy variables for each of those top 1,000 customers, and (ii) by running separate regressions for the top 1,000 direct purchasers that had sufficient data to obtain statistically significant results.

As to the first, Dr. Stiroh ran Dr. Mangum's regression using what is called an "interaction" model, where she ran a single regression using the data for all direct purchasers (in other words, the interaction model does not "throw away" any data), but interacted the "class period" dummy variable with separate dummy variables for each of the top 1,000 customers. Stiroh Report ¶¶ 43-49.[7] She found that ***23.1%*** of those direct purchasers had no statistically significant overcharge. Stiroh Report ¶ 44 & Fig. 3.2. On that basis (23.1%), it is easy to conclude that more than a *de minimis* portion of the direct purchasers were unaffected by the alleged conspiracy. *Pork*, 665 F. Supp. 3d at 1006–07. ("[C]ourts have held between approximately five and ten percent would justify refusing to certify the class.") (citing *In re Asacol Antitrust Litig.*, 907 F.3d 42, 45 (1st Cir. 2019) ("[T]he [district] court found that approximately ten percent of the class had not suffered any injury attributable to defendants' allegedly anticompetitive behavior. … We find this approach to certifying a class at odds with both Supreme Court precedent and the law of

[7] This interaction model is well accepted in econometrics. *E.g.*, *E.E.O.C. v. Bloomberg L.P.*, No. 07-cv-8383, 2010 WL 3466370, at *10 (S.D.N.Y. Aug. 31, 2010) (observing that "an interaction model" is "a generally accepted scientific approach").

our circuit. We therefore reverse.")); *see also Vista Healthplan, Inc. v. Cephalon, Inc*., No. 2:06-cv-1833, 2015 WL 3623005, at *20 (E.D. Pa. June 10, 2015) ("I find that this *five percent* … indicates that the prevalence of uninjured class members is more than *de minimis*." (emphasis added)); *In re Intuniv Antitrust Litig.*, No. 1:16-cv-12396, 2019 WL 3947262, at *8 (D. Mass. Aug. 21, 2019) (rejecting a proposed class where "[u]ninjured consumers likely comprise at least *8%* of each putative class, and perhaps considerably more" (emphasis added)).

While Consumer Plaintiffs may point to a recent ruling granting class certification in *In re Turkey Antitrust Litig*, No 1:19-cv-8318, 2025 WL 264021 (N.D. Ill. Jan. 22, 2025) to argue the same result here, importantly, the defendants in that case did *not* offer interactive testing to assess uninjured customers. *See id.* As such, the criticisms raised by plaintiffs in that case regarding the incomplete use of data is inapplicable here. Whether Consumer Plaintiffs have satisfied the rigorous requirements of Rule 23, when 23.1% of putative class members are shown to be uninjured using interactive testing against the proposed class's expert's own model, is an issue of first impression for this Court. The *Turkey* decision has no application on that point (and is, of course, not binding on this Court in any event).

Separate from the interaction model, Dr. Stiroh also ran separate regressions for each of the top 1,000 direct purchasers with sufficient purchase data in both the benchmark period (January 1, 2010 to July 31, 2014) and the damages period (August 1, 2014 to December 31, 2019) used by Dr. Mangum. She ran Dr. Mangum's model as specified on each of these 1,000 customers and found that ***63.6%*** of those customers had no statistically

significant overcharge. Stiroh Report ¶¶ 40-41 & Fig. 3.1. This figure, like the 23.1% found using the interaction model, is plainly sufficient to deny class certification. *See Pork*, 665 F. Supp. 3d at 1006–07. And because such a high percentage of direct purchasers were uninjured, far more than a *de minimis* percentage of Consumer class members were uninjured as well, as there was no overcharge from those unaffected direct purchasers to be passed on to their customers. *See* Stiroh Report ¶ 51 ("Where no overcharge exists at the direct purchaser level, no overcharge can be passed through to indirect purchasers").

Defendants note that in *Turkey*, the defendants showed a large number of uninjured class members through individual testing, but the court deferred the issue to the factfinder, calling it "a classic battle of the experts about the proper approach to the regression analysis that must be left for the factfinder to resolve." *In re Turkey*, 2025 WL 264021, at *17. Respectfully, however, that ruling conflates the Federal Rule of Evidence 702 standard of admissibility of expert testimony with the predominance requirement of Rule 23. The latter is something plaintiffs must prove for the class to be certified. *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 777 (8th Cir. 2013). In other words, whether there are more than *de minimis* uninjured class members is not a question for the factfinder at trial—it is a gatekeeping question for the Court under Rule 23.[8]

[8] The *Turkey* case is further distinguishable in that, as that court observed, the turkey industry has "high levels of vertical integration." *In re Turkey*, 2025 WL 264021, at *8. The cattle-beef industry is the opposite, as Plaintiffs concede. *See* Mem. of Law in Supp of Cattle Pls.' Mot. for Class Certification 5, ECF No. 880. *Turkey*—like *Pork*—does not feature claims from upstream producers or allegations by downstream plaintiffs that the challenged conduct depressed upstream prices.

For all these reasons, class certification should be denied for failure to establish common impact as required under Rule 23(b)(3)'s predominance inquiry. *See Pork*, 665 F. Supp. 3d at 1001-02.

C. Predominance: Consumer Plaintiffs Also Fail to Establish Common Proof of Classwide Damages

To meet the predominance requirement, a class proponent also must show that it can prove "a measure of damages." *In re Wholesale Grocery Prods.*, 2012 WL 3031085, at *8. To satisfy this requirement, the proponent must "produce a reliable method of measuring classwide damages based on common proof." *Kleen Prods. LLC v. Int'l Paper*, 306 F.R.D. 585, 601 (N.D. Ill. 2015). "Class treatment" therefore "may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is clearly inadequate." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003).

Dr. Mangum's damages model is "not susceptible to a mathematical or formulaic calculation." *See id.* The model relies upon a "pass-through" regression analysis that estimates the amount of the overcharges "passed-through" from just 32 third parties—18 distributors and grocery wholesalers, and 14 grocery retailers. Mangum Report ¶ 483; *id.* at 229, Fig. 56. From this regression analysis, Dr. Mangum concludes that "[t]he weighted average, median, and simple average pass-through rates are all around [redacted] percent," and therefore that "100 percent of the overcharge on beef product would have been passed through" to Consumer class members. *Id.* ¶¶ 490-91.

But Dr. Mangum's "weighted average" approach to calculating pass-throughs disguises significant variation among pass-through rates—even for the direct purchasers he analyzed. For example, according to Dr. Mangum's regressions, [redacted] Mangum Report 229, Fig. 56; *see also* Stiroh Report 14 (explaining the substantial variation in the pass-throughs estimated from Dr. Mangum's model).

This substantial variation in pass-through rates makes the calculation of any individual Consumer Plaintiff's purported damages virtually impossible. Consider a scenario (contrary to fact) in which we assume that: a class member purchased all of their beef at only one of the 14 studied grocery retailers, that retailer was a direct purchaser such that no intermediaries with additional cumulative pass-through rates are at issue, the passthrough rate calculated by Dr. Mangum for that retailer is correct, the consumer could determine exactly how much they paid over the Class Period for only those beef products that fall within the Consumer class definition, and Dr. Mangum's unvarying-overcharge figure ([redacted]) was correct. Under those circumstances, it *might* be possible to calculate their individual damages—although, even then, it is unclear which of Dr. Mangum's pass-through rates to use, and the whole exercise is practically unworkable for the millions of putative members of the class.[9]

[9] Under that scenario, does the class member recover damages according to the average 100% pass-through rate that Dr. Mangum calculated? *See* Mangum Report ¶ 419. Or do they recover damages according to the pass-through Dr. Mangum calculated for that

But, even if all these far-reaching assumptions were correct, if the individual purchased beef at *any* other of the thousands of retailers in the country, a damage calculation is simply impossible because that retailer's passthrough rate is unknown. And given the substantial variation found just in those 14 retailers analyzed by Dr. Mangum (for example, [redacted] passes on nearly *double* as much as [redacted] according to Dr. Mangum (Mangum Report 229, Fig. 56), any effort to estimate the consumer's damages would be pure speculation. *See Hoekman v. Educ. Minnesota*, 335 F.R.D. 219, 243 (D. Minn. 2020) (observing the court should not be "required to resort to speculation" when certifying a class).

This is *not* simply an issue of administrating differences in individual class members' (otherwise accurate) damages calculations on the backend of a class action, which this Court has held does not warrant denial of certification. To the contrary, here, Dr. Mangum provides no reliable "mathematical or formulaic calculation" in the first place. *See Bell*, 339 F.3d at 307.

Stated differently, Consumer Plaintiffs present no way to accurately calculate damages while also demonstrating predominance of common issues. Because his pass-through methodology cannot be accurately applied on a classwide basis to calculate

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particular retailer? *See id*. 229, Fig. 56. The former would yield a knowingly inaccurate calculation of damages even under Dr. Mangum's model; the latter would require individualized calculations for that particular consumer. These equally problematic outcomes would exist not just for that consumer, but for every consumer in the proposed class, and either the inaccuracy or the hyper-individualized nature of the inquiry would exponentially increase the more realistic the hypothetical consumer becomes (e.g., someone who purchases beef at multiple retailers).

damages, individualized calculations would not only predominate—as demonstrated above, they would be impossible. The Court should therefore deny certification. *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342-343 (4th Cir. 1998) ("We have previously recognized that the need for individual proof of damages bars class certification in some antitrust cases."); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 744 (5th Cir. 2003) (explaining that, when the damages claims "focus almost entirely on facts and issues specific to individuals rather than the class as a whole," then the damages phase "may degenerate in practice into multiple lawsuits separately tried"); *see also In re Processed Egg Products Antitrust Litig.*, 312 F.R.D. 124, 159 (E.D. Pa. 2015) ("The case law understandably allows for averages and aggregations, but only if the court is convinced that the averages and aggregations are not masking individualized issues that are likely to predominate should the class action move forward."); *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 494 (N.D. Cal. 2008) ("While averaging may be tolerable in some situations, the record here shows that it has in fact masked important differences between products and purchasers.").

D. Predominance: Consumer Plaintiffs cannot show predominance because of material variations in the many state laws governing their claims

Class certification should be denied for lack of predominance for an additional, independent reason: differences among the state laws under which the Consumer class brings claims swamp any common issues.

When a proposed Rule 23(b)(3) class spans multiple states, the court must rigorously analyze whether differences in state law give rise to individual issues that defeat

predominance. *See, e.g.*, *Hale v. Emerson Elec.*, 942 F.3d 401, 403 (8th Cir. 2019) ("[V]ariations in state law may swamp any common issues.") (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996)). While this Court certified the two indirect purchaser classes in the *Pork* litigation, it noted that the material variations in laws there made it "a close call." 665 F. Supp. 3d at 1009. But the defendants in Pork did not formally brief the issue of predominance as related to state law issues as to the consumer class. *See id.* ("Though Defendants only challenge the Commercial IIPPs on these grounds, the Court will also consider this issue as it pertains to the Consumer IPPs."). As explained for the first time to this Court in the context of the consumer class, the variations across laws warrant a different outcome here, for they swamp any common issues and render a class action unmanageable. *See In re Processed Egg Prods*., 312 F.R.D. at 143 (rejecting "attempt[] to place 21 square pegs into a single round hole, asking the Court to envision 21 statewide classes under the antitrust laws of 21 states, the consumer protection laws of seven states, and the unjust enrichment laws of 17 states, all tried in a single proceeding as if it were a nationwide class under federal antitrust law").

1. State antitrust laws vary as to whether and to what extent Consumer Plaintiffs may recover

First, state antitrust statutes differ substantially regarding calculation of damages and the need to prevent duplicate recovery. *Illinois Brick* limits antitrust standing to direct purchasers, while permitting direct purchasers to recover damages whether or not they passed overcharges downstream to their customers. *Illinois Brick*, 431 U.S. at 731-43; *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 633 (7th Cir. 2002). States

recognizing the standing of indirect purchasers to recover antitrust damages—i.e., the 27 Repealer Jurisdictions under which Consumer Plaintiffs bring their claims—differ significantly regarding the need to prove that overcharges were actually passed through.

For example, some states permit a double recovery. *See K-S Pharmacies Inc. v. Abbott Labs.*, No. 94CV002384, 1996 WL 33323859, at *12 (Wis. Cir. Ct. May 17, 1996) (citing Wis. Stat. § 133.18 and declining to read a pass-on defense or any obligation to apportion damages into Wisconsin law).

But some states place the responsibility on the *court* to take "all steps necessary" to avoid duplicative damages, although the exact language differs. *See, e.g.*, N.Y. Gen. Bus. Law § 340(6) (providing "in *any action* in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability" (emphasis added)); 740 Ill. Comp. Stat. § 10/7 (similar); R.I. Gen. Laws § 6-36-7(d) ("[C]ourts *shall exclude* from the amount of monetary relief awarded in the action any amount of monetary relief which duplicates amounts which have been awarded for the same injury" (emphasis added)); S.D. Codified Laws § 37-1-33 ("In any subsequent action arising from the same conduct, the court *may take any steps necessary* to avoid duplicative recovery against a defendant."). This language is broad enough to encompass the situation here where direct purchasers are, in this same MDL, trying to recover for damages that were eventually passed on to this class of consumer purchasers.

Still other states are silent on the issue. *See, e.g.*, W. Va. Code § 47-18-9 (failing to direct a court to prevent a duplicative recovery).

The factual record developed in this MDL shows substantial variation in the extent to which any overcharges were passed through, making this a critically important issue for the factfinder at trial.[10] Indeed, Defendants have pursued discovery regarding this issue to aid their evaluation of the indirect purchasers' claimed pass-through and attempt to avoid or minimize the injustice of double recovery of the extreme damages plaintiffs claim in this case. Mem. of Law in Opp. to Direct Action Pls.' Meijer and Supervalu's Mot. for a Protective Order Striking Topic 33 of Defs.' Second Am. Notice of Rule 30(b)(6) Dep., ECF No. 1036. This has included discovery regarding sales by certain direct purchasers to their customers, through party discovery, third-party discovery, and motion practice. *See generally id.*; Decl. of Jon B. Jacobs in Supp. of Defs.' Opp. to Commercial & Institutional Indirect Purchaser Pls.' Mot. for Class Certification ¶ 15, ECF No. 1133. The issue of which participants in the supply chain paid a purported overcharge is a central factual issue for the indirect classes in this case.

Certifying a single Consumer class presents this problem acutely. With more layers in the distribution chain—Direct Purchasers, CIIPPs, and large consumer-facing Direct

[10] *Compare, e.g.*, Burke Decl. Ex. 21 (30(b)(6) Deposition of Raley's Arizona, LLC) 160:2-161:12 [redacted] *and id.* Ex. 22 (Deposition of David Neitzel) 78:2-16, 115:12-116:9 [redacted] *and id.* Ex. 23 (30(b)(6) Deposition of Save Mart Supermarkets, LLC) 223:19-226:22 [redacted] *with id.* Ex. 24 (30(b)(6) Deposition of Affiliated Foods) 160:9-161:18 [redacted]

Action Plaintiffs like [redacted]—and without state-by-state apportionment of damages, there is an even greater likelihood that one group of plaintiffs recovers more than they are entitled to under state law.

State-law variation on damages makes any classwide trial untenable. As already discussed above, significant differences in pass-through rates (even under Dr. Mangum's own analysis) mean that damages are highly individualized and fact-intensive (and likely impossible to ultimately calculate), requiring an assessment of which products a Consumer class member purchased from which retailer. And the wide variations in state laws necessitate such individualized analysis for each of states in which a Consumer resides. Accordingly, damages calculations would turn on complicated questions of pass-through and duplication, individualized as to each class member, with different mechanisms and burdens of proof for different states. Plaintiffs do not explain how the Court or a jury could manage these inquiries in a single trial.

Moreover, the Eighth Circuit's concerns regarding state-law variation are magnified here. *See Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 986 (8th Cir. 2021); *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1157 (8th Cir. 2017). Any attempt to elide differences in state laws by allowing common damages determinations across the class would upend the statutory and legal regime each state has chosen. Rule 23 should not be used to override a state's determination to foreclose double recovery when permitting indirect purchasers to sue. Nor should Rule 23 negate the core principle in *Illinois Brick* that the federal courts should limit antitrust damages to a single recovery by a single level of the supply chain. *See Illinois Brick*, 431 U.S. at 731-43.

2. State consumer protection laws vary materially

Second, as the Eighth Circuit has recognized, "state consumer-protection laws vary considerably, and courts must respect these differences." *In re St. Jude Med., Inc.,* 425 F.3d 1116, 1120 (8th Cir. 2005) (cleaned up). These variations mean that a jury attempting to decide liability would be faced with multiple standards.

For instance, "[t]he state laws at issue here use a variety of tests to define the form of conduct that will qualify as anticompetitive or unfair conduct prohibited under the consumer statutes." *In re EpiPen Mktg., Sales Pracs. & Antitrust Litig.,* No. 17-md-2785, 2020 WL 1180550, at *55 (D. Kan. Mar. 10, 2020). In New Mexico, for example, Consumer Plaintiffs must show that Defendants' conduct "takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree" or "results in a gross disparity between the value received by a person and the price paid." N.M. Stat. § 57-12-2(E). Other states "consider the following factors: (1) whether the practice offends public policy, the common law, or otherwise; (2) whether it is immoral, unethical, oppressive, or unscrupulous; or (3) whether it causes substantial injury to consumers." *In re EpiPen,* 2020 WL 1180550 at *55 (discussing, among others, Florida, North Carolina, and Vermont); *see also, e.g., Nelson v. Lusterstone Surfacing Co.,* 605 N.W.2d 136, 142 (Neb. 2000) (requiring conduct "have an impact upon the public interest"); *LaMotte v. Punch Line of Columbia, Inc.,* 370 S.E.2d 711, 713 (S.C. 1988) (same). "And, in California, there is internal dissonance about the test courts should use," with courts applying "two different tests to determine what is an unfair practice under the California Unfair Competition Law." *In re EpiPen,* 2020 WL 1180550 at * 55 & n.65.

The availability and type of damages vary by state. In some states, plaintiffs are entitled to damages, whereas in others they are limited to "injunctive relief and restitution." *Phillips v. Apple Inc.,* 725 F. App'x 496, 498 (9th Cir. 2018) (discussing California Unfair Competition Law). As with state antitrust claims noted above, this matters for purposes of guarding against duplicative damages. "A restitution order against a defendant … requires both that money or property have been lost by a plaintiff, on the one hand, *and* that it have been acquired by a defendant, on the other." *Kwikset Corp. v. Superior Ct.,* 246 P.3d 877, 895 (Cal. 2011) (emphasis added). A "loss by the plaintiff without any corresponding gain by the defendant" is not recoverable. *Id.*

The fact that this Court has previously held that Consumer Plaintiffs' antitrust-based theory of their case, as pled, may be brought under state consumer protection laws does not solve the issue. Even if an antitrust claim ***may*** be brought under consumer protection statutes, Consumer Plaintiffs still must prove the elements of their case as required by each statute. This presents another myriad of complex legal issues that the Court would have to administer at trial.

3. Unjust enrichment laws vary significantly

Third, unjust enrichment claims are not suitable for multi-state class treatment because "the states' different approaches to, or elements of, unjust enrichment are significant." *Rapp v. Green Tree Servicing, LLC,* 302 F.R.D. 505, 513 (D. Minn. 2014) (quoting *Thompson v. Bayer Corp.,* No. 4:07-CV-00017, 2009 WL 362982, at *4 (E.D. Ark. Feb. 12, 2009)); *see In re Sears, Roebuck & Co.*, No. 05-CV-4742, 2006 WL 3754823 at *1 n. 3 (N.D. Ill. 2006) ("[U]njust enrichment is a tricky type of claim that can have

varying interpretations even by courts within the same state, let alone among the fifty states."); *accord, e.g., In re Processed Egg Prods*., 312 F.R.D. at 164 (denying class certification and explaining "courts have noted the extent to which unjust enrichment laws vary across states and found them unmanageable in a single class litigation"); *In re Baycol Prod. Litig.,* 218 F.R.D. 197, 214 (D. Minn. 2003) (similar); *Tyler v. Alltel Corp.,* 265 F.R.D. 415, 423 (E.D. Ark. 2010); *In re Prempro Prod. Litig.,* 230 F.R.D. 555, 563 (E.D. Ark. 2005) (similar). Consumer Plaintiffs have provided no analysis of state unjust enrichment laws—not even a chart of bare citations comparing laws across the relevant states.

The most significant differences in unjust enrichment laws concern the connection that must be shown between plaintiffs and defendants. Some states—for example, Kansas, Maine, Michigan, and New York—require plaintiffs to show a *direct benefit* conferred on the defendant. *See Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd.*, 910 P.2d 839, 848 (Kan. 1996) ("an essential prerequisite to such liability for unjust enrichment in a case between [two parties] not in privity is the acceptance, by the one sought to be charged, of benefits rendered under such circumstances as reasonably to notify him or her that the one performing such services expected to be compensated therefor by the one sought to be charged"); *Rivers v. Amato*, 2001 WL 1736498, at *4 (Me. Super. Ct. June 22, 2021); *Smith v. Glenmark Generics, Inc., USA*, 2014 WL 4087968, at *1 (Mich. Ct. App. Aug. 19, 2014) (per curiam) ("caselaw does not specifically state that the benefit must be received *directly* from the plaintiff, but these decisions make it clear that it must); *Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1018 (N.Y. 2007) (finding that "the connection between the purchaser

of tires and the producers of chemicals used in the rubber-making process is simply too attenuated to support" an unjust enrichment claim).

This Court has previously concluded that Kansas and Maine have no "direct benefit" requirement based on language in cases disavowing a "privity" requirement. *Pork*, 495 F. Supp. 3d at 793-94. "Privity of contract, however, is not the same as a requirement that the plaintiff has conferred a benefit directly on the defendant that, absent payment, would be unjust for the defendant to retain." *In re Aftermarket Filters Antitrust Litig.*, No. 08 C 4883, 2010 WL 1416259, at *2 (N.D. Ill. Apr. 1, 2010). And in the case *Pork* relied on for this point, *Aladdin Elec. Assocs. v. Town of Old Orchard Beach*, the direct benefit element finding was "supported by the record and uncontested" on appeal, 645 A.2d 1142, 1144 (Me. 1994). Thus, the court's discussion of privity went to the third element, whether the defendant's retention of the payment would be unjust. *See id.*

Arizona and North Dakota impose a slightly different requirement—a *connection* between the benefit received and the detriment suffered. *See Brown v. Pinnacle Restoration LLC*, No. 1-Ca-CV 12-0440, 2013 WL 3148654, at *2 (Ariz. Ct. App. June 18, 2013) (finding that a "connection between [the] alleged enrichment and [the] alleged impoverishment" is required under Arizona law but that payments through a third party were sufficient because they were "intended to provide a benefit directed to" the plaintiff); *Apache Corp. v. MDU Res. Grp., Inc.*, 603 N.W.2d 891, 895 (N.D. 1999) ("it is sufficient if another has, without justification, obtained a benefit at the direct expense of the complainant, who then has no legal means of retrieving it. … The essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant

from the plaintiff which would be inequitable to retain"); *Pork*, 495 F. Supp. 3d at 796 (finding a "connection" requirement under North Dakota law). Others specify that this "connection" must not be "too remote." *Southard v. Visa US.A., Inc.,* 734 N.W.2d 192, 199–200 (Iowa 2007). Other states similarly hold that the party receiving a benefit from the plaintiff "has to know that he has received a benefit," and the "more attenuated their relationship, the less likely it is that a defendant would be aware that it is receiving a benefit at plaintiffs expense." *Abraham v. WPX Energy Production, LLC*, 20 F. Supp. 3d 1244, 1278 (D.N.M. 2014).

Unjust enrichment laws vary in other material ways. For example, some states hold that a downstream antitrust plaintiff cannot establish unjust enrichment where the defendant has separately disgorged any overcharge to upstream plaintiffs, and thus has not "unjustly retained" any money. *E.g., Kanne* v. *Visa U.S.A., Inc.,* 723 N.W.2d 293, 302–03 (Neb. 2006); *Bennett* v. *Visa U.S.A. Inc.,* 198 S.W.3d 747, 756 (Tenn. Ct. App. 2006). As discussed above, this presents difficult problems of allocation and proof that will apply to some claims and not others. Many states prohibit unjust enrichment claims where a plaintiff has an adequate remedy at law, while others do not. *See Thompson,* 2009 WL 362982, at *6 (collecting cases). That Plaintiffs here purport to plead causes of action in the alternative only exacerbates, not eliminates, this issue. Under Plaintiffs' argument, the Court will face administering a slew of individualized "alternative" claims (with different standards, as explained above) for some states, and not for others.

4. The jury would be forced to consider myriad statutes of limitations

Finally, a jury would have to navigate the numerous limitations periods applying not just to each state, but to different claims within each state. For example:

State	Antitrust Limitations Period	Consumer Protection Limitations Period	Unjust Enrichment Limitations period
California	4 years (Cal. Bus. & Prof. Code § 16750.1)	4 years (Cal. Bus. & Prof. Code § 17208)	2 years (Cal. Civ. Proc. Code § 339(1))
District of Columbia	4 years (D.C. Code § 28-4511(b))	3 years (D.C. Code § 12-301(8))	3 years (D.C. Code § 12-301)
Illinois	4 years (740 Ill. Comp. Stat. § 10/7(2))	3 years (815 Ill. Comp. Stat. § 505/10a(e))	5 years (735 Ill. Comp. Stat. § 5/13-205)
Minnesota	4 years (Minn. Stat. § 325D.64(1)	6 years (Minn. Stat. § 541.05)	6 years (Minn. Stat. § 541.05)
New York	4 years (N.Y. Gen. Bus. Law § 340(5))	3 years (N.Y. C.P.L.R. § 214)	6 years (N.Y. C.P.L.R. § 213(1))
North Carolina	4 years (N.C. Gen. Stat. § 75-16.2)	4 years (N.C. Gen. Stat. § 75-16.2)	3 years (N.C. Gen. Stat. § 1-52(1))
Utah	4 years (Utah Code Ann. § 76-10-3117(2))	5 years (Utah Code Ann. § 13-2-6(6)(b))	4 years (Utah Code Ann. § 78B-2-307)
Wisconsin	6 years (Wis. Stat. § 133.18(2))	3 years (Wis. Stat. § 100.18(11)(b)(3))	6 years (Wis. Stat. § 893.43)

Managing these different limitations period would overwhelm any common issues at trial. Thus, because all these state-law variations swamp common issues, the Court should decline to certify the proposed Consumer class.

E. Ascertainability: Certification should be denied because the Consumer class is not clearly ascertainable

It is "elementary" that "in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *Sandusky Wellness Ctr.,*

LLC v. Medtox Sci., Inc., 821 F.3d 992, 995 (8th Cir. 2016). The proposed Consumer class fails that test because no objective classwide criteria exists by which to identify class members. Specifically, Plaintiffs' proposed criteria would require individualized, fact-intensive inquiries, and the record itself affirmatively shows that such individualized inquiries fail to demonstrate class membership.

Ascertainability pertains to the "identification of the class members." *McKeage v. TMBC, LLC*, 847 F.3d 992, 998 (8th Cir. 2017). The ascertainability inquiry "is intertwined with [the Court's] analysis of standing," which requires a plaintiff to establish "injury in fact" that is "fairly traceable to the challenged action of the defendant, and likely [to] be redressed by a favorable decision." *Cope v. Let's Eat Out, Inc*., 319 F.R.D. 544, 551–52 (W.D. Mo. 2017). To identify those class members and their purported standing, ascertainability requires that "'objective indicator[s]' [be] available to determine who belonged to the class." *Taqueria El Primo LLC v. Illinois Farmers Ins. Co.*, 651 F. Supp. 3d 1068, 1071 (D. Minn. 2023) (J. Tunheim) (citing *Sandusky*, 821 F.3d at 997); *Hoekman*, 335 F.R.D. at 243 ("[Ascertainability] requires that class members can 'be identified by reference to objective criteria.'") (quoting *McKeage*, 847 F.3d at 998)). The necessary objective must allow members to "be identified without individualized fact-finding or mini-hearings." *Berry v. Hennepin Cnty.*, No. 20-CV-2189, 2024 WL 358123, at *3 (D. Minn. Jan. 31, 2024). Conversely, if "a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification."

Goyette v. City of Minneapolis, No. 20-CV-1302, 2023 WL 2014792, at *8 (D. Minn. Feb. 15, 2023).

Sandusky, the Eighth Circuit's seminal ascertainability case, illustrates why the ascertainability requirement is not satisfied here. *See* 821 F.3d at 996. In *Sandusky*, the plaintiff alleged that a medical company violated the Telephone Consumer Protection Act by sending unsolicited faxes, and sought certification of "all persons" who, within a specified time period, "were sent [faxes] regarding lead testing services by or on behalf of [the defendant]" and "which did not display a proper opt out notice." *Id*. The district court denied class certification, concluding the class was "not ascertainable" because individualized inquiries would be needed to determine who actually received the fax and suffered injury. *See id*. at 997-98. The Eighth Circuit reversed because the record contained "fax logs [from the defendant] showing the numbers that received each fax." *Id*. at 997. This constituted an "objective criteria that ma[de] the recipient" of the faxes—and thus, the class members—"clearly ascertainable." *Id*.; *see also McKeage*, 847 F.3d at 993 (affirming denial of decertification when class members were identifiable "according to objective," binary criteria—i.e., whether their purchase contracts contained a Missouri choice-of-law provision); *H & T Fair Hills, Ltd. v. All. Pipeline L.P.*, No. 19-CV-1095, 2021 WL 2526737, at *5 (D. Minn. June 21, 2021) (finding class members ascertainable by objective criteria of defendants' own property records, which showed where defendant "holds easements on each parcel that could give rise to a crop loss claim"). Under these standards, Consumer Plaintiffs' proposed class is not clearly ascertainable for two reasons.

First, Consumer Plaintiffs do not come close to identifying class members pursuant to classwide "objective criteria" like the fax logs in *Sandusky*. *See* 821 F.3d, at 997. Citing this Court's decision in *Pork*, but without actually applying its reasoning, Consumer Plaintiffs suggest "self-identification affidavits" for ascertaining class members. Memo 50. Plaintiffs never explain what such affidavits must contain in order to satisfy Rule 23's ascertainability requirement. Regardless, self-identification affidavits would be an improper vehicle for showing a clearly ascertainable class exists under the facts of this case.

As *Sandusky* holds, class members must be identifiable by reference to some *classwide* objective criteria. A recent case from within the Eighth Circuit, *St. Louis Heart Center v. Vein Centers for Excellence, Inc.*, No. 4:12-CV-174, 2017 WL 2861878 (E.D. Mo. July 5, 2017), illustrates why Plaintiffs' "self-identification affidavits" proposal fails under *Sandusky's* requirements. *St. Louis Heart Center*, like *Sandusky*, involved the plaintiff's alleged receipt of junk faxes in violation of the Telephone Consumer Protection Act. 2017 WL 2861878, at *1-2. But unlike *Sandusky*, there were no fax logs to identify class members. *Id*. at *3. The plaintiff (like Consumer Plaintiffs here) therefore "argue[d] that potential class members should be able to identify themselves in response to notice." *Id*. Like here, the plaintiff "provide[d] no details on[] the use of 'a claim forms process or affidavits.'" *Id.* And in any event, the court rejected the proposal: "Reliance on claims forms or affidavits is especially troublesome because of the nature of the proof required. Whether someone can actually remember receiving a specific junk fax sent many years earlier raises credibility issues best determined by a trier of fact after testimony subject to

cross-examination." *Id*. Because the court would be "required to conduct mini-hearings on the merits of each case in order to identify class members," the class was not clearly ascertainable. *Id*. (citation omitted).

So too here. A "clearly ascertainable" class is one that does not rely on "individualized fact-finding or mini-hearings." *Berry*, 2024 WL 358123, at *3 (D. Minn. Jan. 31, 2024). "The Court should 'not be required to resort to speculation, or engage in lengthy, individualized inquiries' to ascertain the class." *Hoekman*, 335 F.R.D. at 243. But Plaintiffs' "self-identification" proposal would require exactly that: individualized fact-finding to determine whether the beef the proposed class members claimed to have purchased was processed by one of the Defendants (or another beef producer entirely), was made from one of the primals specifically identified in the class definition, and is otherwise covered by the class definition. The class is therefore not clearly ascertainable.

Second, the record affirmatively shows that self-identification would not work in practice. Not one of the 28 named Plaintiffs could state whether *any of* the beef that they purchased during the class period was processed by *any* of the Defendants, let alone how much. *See supra* at 17. At best, some named Plaintiffs merely *assumed* that, based on statistical likelihood, their beef purchases *could* have been produced by one or more Defendants. *See* Troupe Dep. 36:11-20 (testifying that [redacted]).

Additionally, unlike in the *Pork* case, very few named Plaintiffs could not even identify any brands of beef they purchased during the class period. *See Pork*, 665 F. Supp. 3d at 1011–12 (referencing portions of the named representatives' testimony "that illustrate

repeated purchase of pork products from the same brands" in support of finding the class clearly ascertainable). The named Plaintiffs who could identify brands named ones that are either not the Defendants' brands, are brands excluded from the class definition, or are Defendants' brands that they explicitly *do not* purchase. *E.g.*, Abernathy Dep. 44:18-45:13 (testifying she likes to purchase products by the Applegate and Thousand Acres brands, neither of which is affiliated with any Defendant); Watson Dep. 42:20-43:3 (testifying she purchases Ballpark, Oscar Mayer, and Johnsonville); Burke Decl., Ex. 25 (Deposition of Lindsey Lemoi) 66:1-6 [redacted]. In short, even the *named* Consumer Plaintiffs could not establish that they would be members of the class at deposition. It is unclear why or how an affidavit after the fact would be any different.

Beyond the named Plaintiffs' own inability to demonstrate class membership, there is no other evidence in the record to support their class membership. Consumer Plaintiffs have produced virtually no evidence showing that any beef they have purchased was processed by one of the Defendants as opposed to any other beef processor. Indeed, just a small handful of the 28 named Plaintiffs produced *any* receipts reflecting *any* beef purchases at all. The receipts that were produced show that the beef purchases are not part

of the class definition for one or more reasons.[11] And even setting aside those deficiencies, Plaintiffs make no attempt to connect any of those beef purchases (excluded under the class definition or not) to Defendants. *See generally* Memo. Indeed, despite having years to develop discovery and facts related to relevant supply and distribution chain information, Consumer Plaintiffs have proffered no evidence showing that any particular beef product at any particular store originated from the Defendants. That is quite unlike the circumstances in *Sandusky*, where the plaintiffs offered objective evidence and concrete proof from the defendants' records connecting the class members to the defendants.

At bottom, Plaintiffs ask this Court to certify a class of consumers based on nothing more than the unsupported premise that at some point in time, the class members likely purchased beef—within the class definition of "beef"—that was processed by one or more of the Defendants. That is not enough to establish ascertainability. *See Goyette*, 2023 WL 2014792, at *8 (certification improper when class is "defined too broadly"); *Hoekman*, 335 F.R.D. at 243 ("The Court should 'not be required to resort to speculation, or engage in lengthy, individualized inquiries' to ascertain the class."). And Plaintiffs' all-too-vague proposal to employ "self-identification affidavits" cannot solve that problem.

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[11] For example, Cindy Abernathy's receipts, combined with her deposition testimony, demonstrate that the beef products she purchased are excluded from the class because they were: (i) specifically labeled as grass-fed beef, (ii) ground beef, and/or (iii) pre-cooked or pre-marinated beef. *See* Burke Decl. Ex. 18; Abernathy Dep. 80:25-93:11. Likewise, Jacquelyn Watson produced over 150 pages of receipts, but the beef products reflected in those receipts were either ground beef or further processed beef, such as pepperoni or hot dogs, which are excluded from the class definition. *See* Burke Decl. Ex. 19; Watson Dep. 86:10-92:1 (going through receipts and confirming beef products). *id.* 84:20-85:1 (undersigned representing that Exhibit 3 were Ms. Watson's produced receipts combined into one document for ease of reference).

F. Adequacy: The Kansas and Montana Representatives are inadequate representatives

Although Consumer Plaintiffs bring claims under the Kansas antitrust statute, Kan. Stat. Ann. § 50-101 & § 50-112 ("KRTA"), by its own terms, "[t]he Kansas restraint of trade act shall not be construed to apply to … any association, trust, agreement or arrangement that is governed by the provisions and application of 7 U.S.C. § 181 *et seq.*, the packers and stockyards act." Kan. Stat. Ann. § 50-163(e) (emphasis added). As the Kansas Attorney General explained, this exclusion was created in 2013 to help bring the KRTA in line with the state's federal harmonization provision. Derek Schmidt & Lynette R. Bakker, *Kansas Antitrust Developments in the 21st Century: A Perspective from the Attorney General's Office*, 68 U. Kan. L. Rev. 875, 899 (2020). The Kansas legislature's decision to prohibit KRTA claims against agreements governed by the PSA had the additional benefits of "decreas[ing] the case load of state courts and provid[ing] certainty to the industry by stating in statute that it must comply with one set of laws–the PSA." Joshua A. Ney, *The Revised KRTA: O'Brien and the Legislative Response*, 53 Washburn L.J. 265, 290 n.153 (2014). Because these claims are statutorily barred, Plaintiffs cannot show that they are adequate class representatives to bring such claims. *E.g.*, *Ramthun v. Bryan Career College-Inc.*, 93 F.Supp. 3d 1011, 1029 (W.D. Ark. 2015) (finding that class representatives did not make out "a cognizable claim, and certification would be improper on that basis") (citing *Halvorson*, 718 F.3d at 779).

Likewise, Consumer Plaintiffs are inadequate representatives to bring claims under the Montana Consumer Protection Act, Mont. Code Ann. §§ 30-14-101–160, because that

statute explicitly states that consumers may bring an individual action "but not a class action" to recover damages. Mont. Code Ann. § 30-14-133; *see In re Cattle & Beef Antitrust Litig.*, 687 F. Supp. 3d 828, 845 (D. Minn. 2023) (dismissing with prejudice claim of Feeder Cattle Class under Montana Consumer Protection Act).

IV. CONCLUSION

For all of these reasons, the Court should deny the Consumer Indirect Plaintiffs' Motion for Class Certification.

Dated: January 24, 2025

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