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Version

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

*IN RE CATTLE AND BEEF ANTITRUST
LITIGATION*

This Document Relates to:

*CONSUMER INDIRECT PURCHASER
PLAINTIFFS' ACTION*

No. 0:22-md-03031 (JRT/JFD)

**CONSUMER INDIRECT PURCHASER
PLAINTIFFS' REPLY IN SUPPORT
OF MOTION FOR CLASS
CERTIFICATION**

FILED UNDER SEAL

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| Short Cite | Long Cite |
|---------------------|---|
| Amazon Decl. | Declaration of Natalia Parker Regarding Subpoena to Amazon.com, Inc., concurrently filed herewith |
| Compl. | Consumer Indirect Purchaser Plaintiffs’ Sixth Amended Class Action Complaint, ECF No. 757 (Jul. 29, 2024) |
| Costco Decl. | Declaration of Roman Alonzo Regarding Subpoena to Costco Wholesale Corporation, concurrently filed herewith |
| Ex. | Unless otherwise noted, all Ex. 1–103 references are to the Declaration of Shana E. Scarlett in Support of Consumer Indirect Purchaser Plaintiffs’ Motion for Class Certification, ECF Nos. 869, 873 (Sept. 25, 2024), while Ex. 104–134 references are to the Further Declaration of Shana E. Scarlett in Support of Consumer Indirect Purchaser Plaintiffs’ Reply in Support of Motion for Class Certification, concurrently filed herewith |
| Mangum | Corrected Expert Report of Russell W. Mangum III, Ph.D. Regarding Class Certification (Sept. 25, 2024), concurrently filed herewith |
| Mangum Reply | Expert Reply Report of Russell W. Mangum III, Ph.D. Regarding Class Certification, concurrently filed herewith |
| Class Cert. Mot. | Consumer Indirect Purchaser Plaintiffs’ Memorandum of Law in Support of Their Motion for Class Certification, ECF No. 868 (Sept. 25, 2024) |
| <i>Daubert</i> Mot. | Defendants’ Memorandum of Law in Support of Their Motion to Exclude Certain Portions of the Expert Report and Testimony of Dr. Russell W. Mangum, ECF No. 1150 (Jan. 24, 2025) |
| <i>Daubert</i> Opp. | Memorandum of Law in Opposition to Defendants’ Motion to Exclude Certain Portions of the Expert Report and Testimony of Dr. Russell W. Mangum, concurrently filed herewith |
| Omnibus | Defendants’ Corrected Omnibus Brief in Response to Plaintiffs’ Motions for Class Certification, ECF No. 1200 (Mar. 13, 2025) |

| | |
|------------------------------------|--|
| Defs' Opp. | Memorandum of Law in Opposition to Consumer Indirect Purchaser Plaintiffs' Motion for Class Certification, ECF No. 1139 (Jan. 24, 2025) |
| Schachter Decl. | Declaration of Eric Schachter in Support of Consumer Indirect Purchaser Plaintiffs' Reply in Support of Motion for Class Certification, concurrently filed herewith |
| Stiroh | Expert Report of Lauren J. Stiroh, Ph.D., ECF No. 1117 (Jan. 24, 2025) |
| PARTIES | |
| Consumer IPPs | Consumer Indirect Purchaser Plaintiffs |
| Named Plaintiffs | Kenneth Peterson, Jason Falbo, Sharon Dawson-Green, Lisa Melegari, Cindy Abernathy, Andrew Cohen, Marcelo Lopez, Stacey Troupe, Eric Gauchat, Sharon Killmon, Karen Carter, Charlie Morgan, Brent Rasmussen, David Renz, Kent Winchester, Brenda King, Robert Trepper, Michelle Oversen, William Gee, Jacquelyn Watson, John Shupe, Martin Jarmulowicz, Harold M. Nyanjom, Mark Sperry, Dan Campbell, Craig Margulies, Lindsey Lemoi, and Leigh Tiller |
| Defendant Processors or Defendants | Cargill, National, JBS, and Tyson (as defined herein) |
| Cargill | Defendants Cargill, Incorporated and Cargill Meat Solutions Corporation |
| National | Defendant National Beef Packing Company, LLC |
| JBS | Defendants JBS S.A., JBS USA Food Company, Swift Beef Company, and JBS Packerland, Inc. |
| Tyson | Defendants Tyson Foods, Inc. and Tyson Fresh Meats, Inc. |

I. INTRODUCTION

Consumer IPPs have presented a robust record demonstrating why this class should be certified. Defendants struggle to distinguish this case from other, similar commodity protein cases, and their efforts to oppose class certification fall short. Rather, Defendants acknowledge, implicitly, that Consumer IPPs meet three of the four elements of Federal Rule of Civil Procedure 23(a): numerosity, common questions of fact and law, and typicality. They argue only whether common questions of fact and law predominate, ascertainability of the Consumer IPP class, and the named Kansas and Montana representatives are adequate. None of these challenges should succeed.

Common questions of fact and law predominate. Defendants concede there are many issues common to the class (such as liability). In fact, Defendants submit a brief opposing all five class certification motions which addresses the facts common across the cases. This brief alone demonstrates that liability is a common question. But Defendants' other arguments on predominance also fail.

First, Defendants do not challenge critical pieces of Consumer IPPs' expert Dr. Mangum's analyses of the industry – such as the commodity nature of beef, the market power of Defendants, and the barriers to entry that exist in this market. Mangum Reply, ¶¶ 13–24, 29; *see* section III.B.1. But these are all common questions of fact and prove impact.

Second, while Defendants suggest that there is no overcharge common to the class because beef prices are based on individual negotiations, the USDA cutout price served as the market price and provided a common negotiation context. The record evidence and Dr.

Mangum's correlation analyses show that when that market price moved, prices moved together across Defendants, products and customers. As such, Defendants' claim falls short. *See* section III.B.2.

Third, although Defendants criticize Dr. Mangum's use of a model to show impact on a class-wide basis, the type of model he used has repeatedly been accepted by courts to prove common impact. Dr. Mangum's regression model similarly shows impact to the direct purchaser class here. But Dr. Mangum did not stop there: he performed a number of sensitivity tests to ensure there was no pocket of direct purchasers that are uninjured. These sensitivity tests show positive and statistically significant overcharges across year, Defendant, product type, customer type and geographic region. Such robust results show common impact. *See* section III.B.3.

Fourth, Consumer IPPs also show pass-through to the end purchaser at the retail level. Defendants do not challenge the correctness of the pass-through calculations, or whether they are representative of the whole market – nor can they. Consumer IPPs obtained and ran pass-through regressions on ■ million observations and ■ billion in commerce. Mangum Reply, ¶¶ 261–62 (Fig. 35). These third parties account for around 69 percent of the relevant commerce in the Consumer IPP class's distribution channel. Defendants argue that varying pass-through rates mean individual damages overwhelm any predominating common questions. The Eighth Circuit, however, has held that individual

differences in damages are not a reason to preclude certification.¹ And in commodity price-fixing cases, the type of analysis undertaken by Dr. Mangum has been widely accepted by courts, including this Court in *Pork*.² Regardless, Consumer IPPs show that calculating damages is simple math, of the type undertaken daily in class actions. *See* section III.C.

Fifth, Defendants point out no material differences in the state law claims that would allow individualized issues to predominate in this case. Consumer IPPs, as indirect purchasers, bring claims under the state antitrust and consumer laws of 27 jurisdictions. With their opening motion, Consumer IPPs submitted extensive appendices showing how those laws harmonize with federal antitrust laws. *See* section III.D.

Beyond predominance, Defendants also challenge the ascertainability of the Consumer IPP class. But ascertainability requires only that “the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria.”³ Here, the Consumer IPP class is objectively defined, and all class members are certain to have suffered injury. *See* section III.E.

¹ *Custom Hair Designs by Sandy v. Cent. Payment Co., LLC*, 984 F.3d 595, 600–601 (8th Cir. 2020) (affirming certification where “any pricing differences would not affect liability, only damages”). All internal citations and quotations are omitted and emphasis added, unless otherwise indicated.

² *In re Pork Antitrust Litig.* (“*Pork*”), 665 F. Supp. 3d 967, 1012 (D. Minn. 2023) (three classes) (certifying consumer purchaser class where “the average pass-through is approximately 100%,” corroborated by finding three individual, sample distributors having a pass-through rate between 97.8% and 99.8%); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC* (“*Tuna*”), 31 F.4th 651, 677–78 (9th Cir. 2022), *cert. denied sub nom. StarKist Co. v. Olean Wholesale Grocery Coop., Inc.*, 143 S. Ct. 424 (2022) (rejecting argument that a single overcharge “cannot plausibly serve as common evidence for all class members given the individualized differences among those class members”); *In Re Broiler Chicken Antitrust Litig.* (“*Broilers*”), No. 1:16-cv-08637, 2022 WL 1720468 (N.D. Ill. May 27, 2022) (one class).

³ *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016).

Finally, Defendants' attacks on the adequacy of the Kansas and Montana representatives are misplaced. *See* section III.F.

In short, a strong showing supports Consumer IPPs' motion. The Consumer IPP class should be certified.

II. FURTHER PROFFER OF COMMON EVIDENCE

Defendants submitted a lengthy compilation of the "shared elements" of the record applicable to all cases including: the beef and cattle supply chain, the cattle cycle, the prevalence of a market price index for beef, and the common evidentiary record. Omnibus at 1, §§ A, B, and C. In so doing, Defendants demonstrate that this case will ultimately be decided based on a common set of facts, thus underscoring the appropriateness of class treatment. Consumer IPPs address some of Defendants' proffered common evidence here but recognize the Supreme Court's directive that the resolution of the persuasiveness of common evidence is the "near-exclusive province of the jury."⁴

A. The upstream and downstream classes are similar.

Defendants attempt to make much of perceived inconsistencies in the classes' allegations of harm and time periods. *See* Omnibus at 3. But this is not relevant to the certification standard, nor is it true. Each class controls their own complaint, and each must ultimately rise or fall on its own theory of harm. There is no requirement that every class seek to certify the broadest possible class period or group; rather, a district court may choose one possible definition over another in order to ensure that the requirements of Rule

⁴ *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459 (2016).

23 are best satisfied.⁵ The class certification standard “is neither designed nor intended to force all potential plaintiffs who may have been harmed in different ways by a particular defendant to be included in the class in order for the class to be certified.”⁶

Defendants claim the differences in timing are “hard to understand” but cite no support for the idea that class can be certified only if a conspiracy harms its upstream and downstream victims equally and identically. Omnibus at 5. The Supreme Court has recognized when antitrust cases contain monopsony claims from upstream suppliers and monopoly claims from consumers “the two suits would rely on fundamentally different theories of harm.”⁷

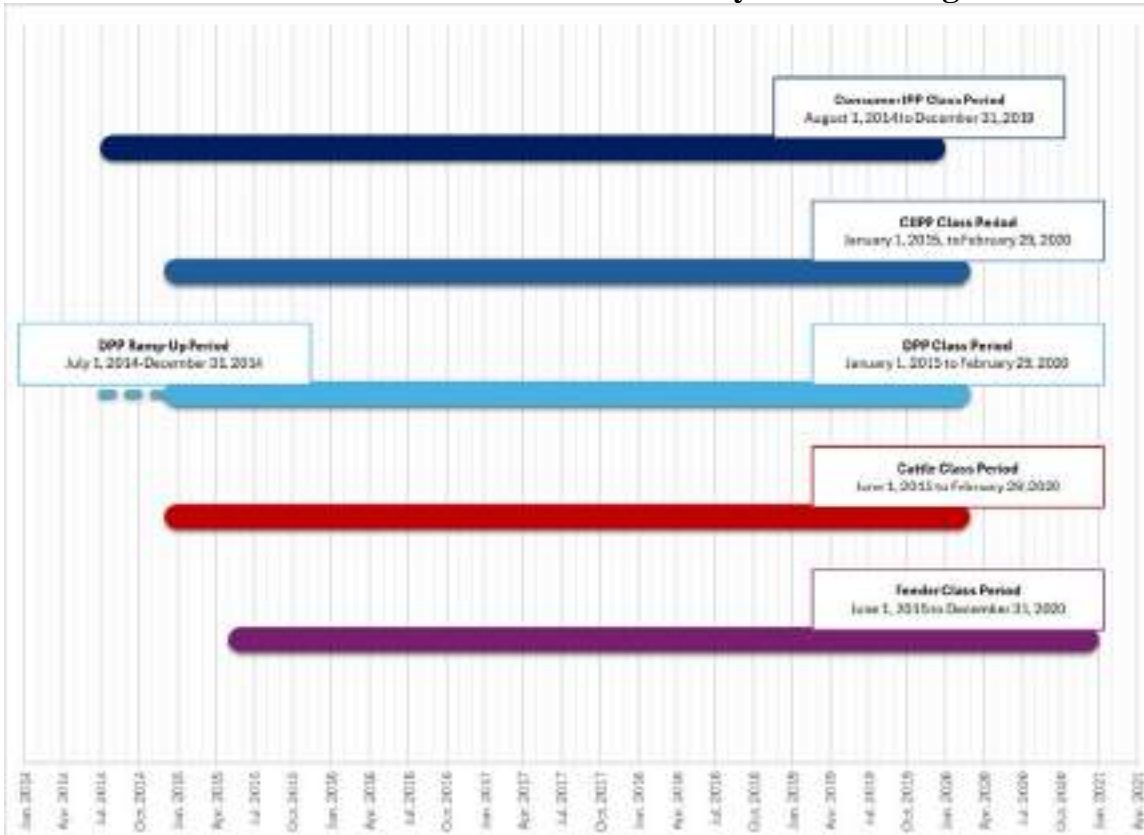
⁵ *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1248 (7th Cir. 2021) (“We have no reason to believe that the district court, acting on its own initiative, would certify a different and broader class; to that extent, the rule that the plaintiff controls her own case applies.”).

⁶ *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 167 (3d Cir. 2015), *as amended* (Apr. 28, 2015).

⁷ *Apple Inc. v. Pepper*, 587 U.S. 273, 287 (2019).

A small amount of scrutiny shows the striking similarities of the timeline of the classes. All begin after a private breakfast meeting with [REDACTED] and [REDACTED] on July 11, 2014:⁸

All Class Periods Start After the July 2014 Meeting



The downstream class products are also substantially similar and are all drawn from the same, most popular primal cuts:

| Primal | DPPs | | CIIPPs | | Consumer IPPs | |
|---------|-------|--------|--------|--------|---------------|--------|
| | Fresh | Frozen | Fresh | Frozen | Fresh | Frozen |
| Brisket | × | × | ✓ | ✓ | × | × |
| Chuck | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Loin | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Rib | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Round | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |

⁸ Defendants acknowledge this common fact. Omnibus at 38, n.133.

And even the downstream classes’ allegedly different exclusions are substantially similar:

| Class Definition Exclusion | DPPs | CIPPs | Consumer IPPs |
|--|------|-------|---------------|
| Cooked | ✓ | ✓ | ✓ |
| Ground or Trim | ✓ | ✓ | ✓ |
| Non-beef ingredients | ✓ | ✓ | ✓ |
| Breaded, Flavored, Marinated, and/or Seasoned | ✓ | × | ✓ |
| Organic or no antibiotics | ✓ | × | ✓ |
| USDA Prime, Wagyu, or “American-Style Kobe Beef” | ✓ | ✓ | ✓ |
| Grass fed | ✓ | × | ✓ |
| Certified humane | ✓ | × | ✓ |
| Halal or Kosher | ✓ | × | ✓ |

The similarities across these classes far outweigh any differences.

B. Defendants selectively apply common evidence.

In their opposition to Consumer IPPs’ Motion, Defendants focus on actual production during the Class Period, without properly accounting for what would have been absent the conspiracy. Defs’ Opp. at 4–5. This is “misleading because it focuses on an irrelevant question.” Mangum Reply, ¶ 46. For example, Defendants rely on Dr. Stiroh’s Figure 2.1 to contend there could be no conspiracy because there was an increase in aggregate amount of cattle slaughtered. Defs’ Opp. at 5. But this argument fails because antitrust impact cannot be measured with visual inspection of absolute decreases or increases in production. Mangum Reply, ¶¶ 45–49. Instead, an empirical investigation must separate the effects of the conspiracy from unrelated supply and demand factors, which Dr. Mangum accomplishes through his direct overcharge model. *Id.*, ¶ 48. Defendants

additionally ignore the “turn” of cattle cycle at the start of the Class Period from a period of contraction to a period of expansion where a greater amount of cattle became available. *Id.*, ¶ 46.

Defendants make the same error when they suggest that there was no anticompetitive effect because price of certain class products “fell” during the conspiracy. Defs’ Opp. at 5. Again, the proper measure of antitrust harm is to compare *but-for* prices to actual prices. Yet in making these two arguments, Defendants illustrate how prices for class products are affected by total industry supply of beef.

III. ARGUMENT

A. Dr. Mangum’s opinions are reliable and admissible.

Here Defendants cross-reference their motion to exclude the testimony of Dr. Mangum. Defs’ Opp. at 13–14. As addressed in the contemporaneously filed *Daubert* Opposition, Dr. Mangum’s opinions on impact and damages are reliable and admissible under Federal Rule of Evidence 702.⁹ But even if the Court granted Defendants’ motion to exclude parts of the testimony of Dr. Mangum (it should not), Defendants overlook the *many* aspects of evidence in this case that are unchallenged. Mangum Reply, ¶¶ 29–44; *see Daubert* Opp. at 6. Overwhelming evidence supports the existence of common impact and class-wide damages.

B. Common questions of fact and law predominate.

Defendants’ main challenge to class certification is directly against Rule 23’s

⁹ *See Daubert* Opp. at 4–29.

requirement that common questions of law and fact predominate. But as the Supreme Court held in *Amchem*, “[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.”¹⁰ And so is predominance readily met here.

1. Consumer IPPs have made a robust showing of impact on all or nearly all direct purchasers.

Dr. Mangum embarks on a well-trod path to show antitrust impact in this case (many components of which are not challenged by Defendants or their expert, Dr. Stiroh). First, Dr. Mangum extensively discusses how the beef industry is characterized by factors that facilitate the successful formation and maintenance of this conspiracy. Mangum, ¶¶ 90–190. This includes the commodity-like nature of beef products (*id.*, ¶¶ 92–97), the inelastic demand for beef (*id.*, ¶¶ 98–101), Defendants’ control over the beef market (*id.*, ¶¶ 102–06), there are barriers to entry preventing any new entrants to the market (*id.*, ¶¶ 107–12), the similar cost structures across the Defendants (*id.*, ¶¶ 113–14), and the opportunities that existed for forming, monitoring, and enforcing collusive conduct (*id.*, ¶¶ 115–90). Dr. Stiroh barely contests these opinions, and even agrees that beef is a commodity, Defendants have control over the beef market, and the barriers to entry that prevent the entrance of new competitors. Ex. 104 at 301:7–22, 302:19–303:2 (Stiroh Tr.).

Dr. Mangum next looked at the extensive record evidence, which shows Defendants used the USDA cutout prices as a reference point when pricing beef (Mangum, ¶¶ 385–98). He then confirmed his qualitative analysis with a quantitative correlation analysis

¹⁰ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

looking at how prices move together across Defendants, geographic locations, and customers. *Id.*, ¶¶ 399–406.

After demonstrating that this market had the characteristics that would suggest prices move together, and that in fact prices did move together, Dr. Mangum turned to his multiple regression analysis to estimate the impact and overcharge at the direct purchaser level. After accounting for the factors that affect prices paid for beef, Dr. Mangum isolated the overcharge that is attributed to the anticompetitive conduct here. Mangum, ¶¶ 407–37. The overcharge regression model shows an estimate of a [REDACTED] percent overcharge on direct purchasers. *Id.*, ¶ 433. Throughout her report, Dr. Stiroh refers to this as a “single, unvarying overcharge” – a term that she herself created.¹¹ But Dr. Stiroh (and Defendants) ignore that Dr. Mangum did test his results and looked at the overcharge on an annual basis, finding that for each year of the class period there were statistically significant and positive coefficients, ranging from [REDACTED] percent. Mangum, ¶¶ 434–37. Dr. Stiroh (and Defendants) do not address Dr. Mangum’s sensitivity test looking at the annual overcharge. Ex. 104 at 305:22–306:7, 307:5–11 (Stiroh Tr.); *see* Mangum Reply, ¶¶ 121–22.

Defendants are wrong to suggest that Dr. Mangum’s showing of common impact rests entirely on his industry and correlation analyses. Defs’ Opp. at 12. The Supreme Court’s instructions many decades ago in *Continental Ore Co. v. Union Carbide & Carbon Corp.* were clear: “plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after

¹¹ Ex. 104 at 305:7–21 (Stiroh Tr.).

scrutiny of each.”¹² So too here; Dr. Mangum provides a series of interlocking analyses and opinions that include his regression analyses to demonstrate common impact to the Consumer IPP class. Mangum, ¶ 407. None must support the entire weight of common impact, but each must be considered “only by looking at it as a whole.”¹³ As such, not one of Dr. Mangum’s qualitative or quantitative analyses bears the weight of the entire analysis (nor need it). Rather, to assess common impact, the Court should consider the weight of these analyses, taken together.

2. Both qualitative evidence and quantitative data proves common impact on direct purchasers.

In the face of this robust showing, Defendants attack two parts of Dr. Mangum’s “common impact” analysis (as they refer to it).

First, Defendants suggest that beef is not negotiated in the context of the USDA market price and is instead subject to individualized negotiations, differences in bargaining power among the direct purchasers, or differentiation in pricing mechanisms. Defs’ Opp. at 17–18. The existence of individual negotiations does not undermine a finding of common impact in a commodity market where products are priced and negotiated in reference to market prices. These arguments were made and dispensed with by the *Broilers*, *Pork*, and *Turkey* courts.¹⁴ This is because “price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated.”¹⁵

¹² *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

¹³ *Id.*

¹⁴ *Broilers*, 2022 WL 1720468, at *15; *Pork*, 665 F. Supp. 3d at 1006; *Turkey*, 2025 WL 264021, at *13.

¹⁵ *Turkey*, 2025 WL 264021, at *14.

But as discussed more extensively in opposition to Defendants’ motion to exclude Dr. Mangum, record evidence shows Defendants using the USDA cutout prices as a “██████████” for Defendants’ beef negotiations.¹⁶ Formula prices tied directly to the USDA market price meant that any individual beef transaction factored that price in. And although Defendants cite anecdotal evidence to suggest that ██████████ might have negotiated “more favorable” terms from National after the Holcomb fire in 2019, Defendants’ expert Dr. Stiroh’s own econometric measurements show that ██████████ suffered an overcharge in its beef purchases. Stiroh, Ex. 7C at 239; *Daubert Opp.* at 12.

Second, Defendants suggest that Dr. Mangum’s correlation analysis suppresses variation in beef pricing because it relies on average monthly prices. Defs’ Opp. at 18–19. Courts have widely accepted these exact types of correlation analyses as a means for an expert to support a finding of common impact in an antitrust class action.¹⁷ Dr. Mangum’s correlation analyses here are no different. Dr. Mangum performed a number of correlations to examine whether an individual customer might be able to avoid impact from the conspiracy, looking across Defendants, geographic locations, and customers. Mangum

¹⁶ *Daubert Opp.* at 7–12; Ex. 105 at 35:24–36:17 (McLaurin Tr.) (when National set beef prices, ██████████).

¹⁷ *Tuna*, 31 F.4th at 671 (“Dr. Mangum first performed a pricing correlation test, which demonstrated that the prices of the Tuna Suppliers’ products moved up or down together regardless of product or customer type, and thus supported the proposition that the Tuna Suppliers’ collusion had a common, supra-competitive impact on their prices.”); *In re Korean Ramen Antitrust Litig.*, No. 13-CV-04115, 2017 WL 235052, at *16 (N.D. Cal. Jan. 19, 2017) (“Mangum’s opinions—based on anecdotal evidence, correlations on prices, and his regression model—provide a reliable and accepted source of classwide proof of impact.”); *Turkey*, 2025 WL 264021, at *23 (rejecting similar challenges to Dr. Mangum’s correlation analyses and finding they supported common impact on the class).

Reply, ¶¶123–32. Dr. Mangum’s findings of high correlation of prices across these groups means that customers would be unable to avoid impact from the alleged conspiracy by switching to other Defendants, by living in any particular geographic location, or purchasing through a particular customer type. *Id.*

And Dr. Mangum explains why the use of monthly price indices, prepared econometrically, for his correlation analyses is appropriate. Mangum, ¶ 400. Some level of aggregation is necessary for the correlation analysis to be functional, reliable, and to provide for sufficient data. Mangum Reply, ¶¶ 131–33. Dr. Mangum’s monthly price indices measure variation appropriately by identifying and evaluating the underlying trends and relationships, controlling for changes in product mix, and other relevant factors. *Id.*

Each of these analyses supports a finding of injury to all or nearly all direct purchasers.

3. Dr. Mangum’s overcharge regression, which tests by year, Defendant, product type, customer type, and geographic region, demonstrates injury to all or nearly all class members.

As a part of his analysis of injury, Dr. Mangum presents the regression analysis he would present to a jury. It accounts for all factors other than the anticompetitive conduct and measures a █████ percent overcharge.¹⁸ Multivariate regression models of exactly this type have been accepted by courts across the country.¹⁹ And courts have rejected the

¹⁸ For further discussion of the details of Dr. Mangum’s regression model, see *Daubert Opp.* at 20–21; Mangum, ¶¶ 407–37; Mangum Reply, ¶¶ 133–75.

¹⁹ See *Kleen*, 831 F.3d at 927 (certifying class and rejecting defense argument that it was “not enough for Purchasers to prove aggregate injury and one aggregate overcharge.”); *Tuna*, 31 F.4th at 677 (rejecting the argument that “regression models involve improper ‘averaging assumptions’ and therefore are inherently unreliable when used to analyze

argument that “it is not enough for Purchasers to prove aggregate injury and one aggregate overcharge.”²⁰

Regardless, Dr. Mangum did not stop his analysis here. In his opening report, Dr. Mangum tested the overcharge for direct purchasers on an annual basis, to ensure there was not some part of the class period that included uninjured purchasers. The results were statistically significant and positive overcharges for all years of the class period. Mangum, ¶¶ 434–37. Finally, in response to Dr. Stiroh’s criticisms, Dr. Mangum conducted sensitivity tests to examine whether there might be a segment of the market that was uninjured (despite the characteristics of this market, the commodity nature of beef, and the market power of the processor Defendants). His findings confirm his original opinions – when looking at Defendant, product type, customer type, and geographic region – each subgroup shows a positive and statistically significant overcharge. Mangum Reply, ¶¶ 167–72, Figure 20.

In opposing class certification, Dr. Stiroh presents “her own analyses based on disaggregated data.” Defs’ Opp. at 21. She performs two tests, a 1,000 customer-specific subregressions, and 1,000 customer-interaction tests. Defs’ Opp. at 22. Dr. Mangum explains at length why these tests should be afforded little weight, because the results are

complex markets.”); *Turkey*, 2025 WL 264021, at *19 (“[T]he Court concurs with the other protein antitrust cases and finds that ‘averaging methodologies are not inherently unreliable’ and are permissible in circumstances where ‘individual negotiations and contracts took place within the greater context of the market [price] that was allegedly manipulated through collusive supply reduction.’”); *Pork*, 2024 WL 2060386, at *23 (rejecting the argument that the plaintiffs “cannot show classwide impact because their models use an averaging approach”).

²⁰ *Kleen*, 831 F.3d at 927.

driven entirely by small sample problems. Mangum Reply, ¶¶ 176–91; *Daubert* Opp. at 24–29. But even taking these results on their face, Dr. Stiroh’s tests show that of the 1,291 customers tested in *any* of the six models across the three downstream class experts (Column C in Stiroh Exhibits 7A–7C), only 43 customers appear as “not impacted” across all three experts’ models. This is only approximately 3.33 percent of the 1,291 customers tested in any of the six models, and less than 1 percent of the DPP class (which includes 4,313 class members). Mangum Reply, ¶ 198.

The problem this presents for Dr. Stiroh, is that she must claim (as she did at her deposition) that if a class member fails *one* of her tests, then they are “uninjured.”²¹ But that is not the law. Rather, an antitrust plaintiff may use any number of methods to show injury and impact.²² *See also Daubert* Opp. at 24–26. Given that the results of these tests demonstrate harm to 96.6 percent of the 1,291 customers tested in any of the six models

²¹ Ex. 104 at 310:15–21 (Stiroh Tr.) (If a direct purchaser has “a statistically significant and positive overcharge in one column [customer specific regressions] but not the other [customer specific interactions], all I can tell you is that the model does not reliably tell you there’s an overcharge for that customer.”).

²² *See, e.g.*, Ex. 134, ABA Antitrust Law Section, *Proving Antitrust Damages: Legal and Economic Issues* at 92 (third ed. 2017); *Mr. Dee’s Inc. v. Inmar, Inc.*, No. 1:19-CV-141, 2021 WL 4224720, at *4 (M.D.N.C. Sept. 16, 2021) (discussing multiple “options” for proving damages, including the before-during-after model, the yardstick model, and the “the difference-in-differences” approach); *In re Elec. Books Antitrust Litig.*, No. 11 MD 2293 DLC, 2014 WL 1282293, at *25 (S.D.N.Y. Mar. 28, 2014) (collecting cases confirming the before-and-after model and yardstick model are two optional, common approaches to proving antitrust impact); *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1062 (E.D.N.Y. 2006), *rev’d on other grounds by McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) (“Courts have approved ‘pre-post,’ ‘yardstick,’ economic model, and cost measurement approaches, based on the facts of the particular case.”); *Broilers*, 2022 WL 1720468, at *7, 20 (denying the defendants’ *Daubert* motions and observing that the experts for the three classes “take somewhat different approaches,” but “all three experts conclude that a conspiracy to restrict Broiler supply caused Broiler prices to increase and that this can be shown by evidence common to the class.”).

and more than 99 percent of the direct purchaser class (which includes 4,313 class members), even Dr. Stiroh's tests show harm to all or nearly all class members.

C. Consumer IPPs establish proof of class-wide damages to the end-consumer.

Having established impact on the direct purchaser class, Consumer IPPs then measure “pass-through” of the overcharge to the consumer class. Dr. Mangum's regression model examines █ million transactions, or \$█ billion in commerce, from 35 third parties in the Consumer IPP distribution channel. Mangum Reply, ¶¶ 260–69. As discussed more in Consumer IPPs' *Daubert* Opposition, these third parties account for 69 percent of the relevant commerce in this case – a robust and reliable measure of pass-through to all or virtually all class members. *Id.* See also *Daubert* Opp. at 34-38.

Defendants do not challenge Dr. Mangum's pass-through regressions. Nor do they suggest a sample of \$█ billion in commerce is insufficient, or that the 35 entities are unrepresentative of the marketplace. Mangum Reply, ¶¶ 260–61. Instead, Defendants claim that Dr. Mangum's robust pass-through analysis generates an “average” that cannot be disaggregated and wrongly conclude that every class member's damages should be calculated individually. Defs' Opp. at 25–26.

Defendants overstate the range of the pass-through rates in this case. In a commodity market with multiple levels of consolidation (first at the beef processor level, then at the distributor level, and again at the retail level), a phenomenon called “overshifting” is commonly observed. This is where a downstream point in the distribution channel will raise prices by *more* than the change in cost. Pass-through rates exceeding 100 percent mean only that an entity saw (for example) an increase in cost of \$1.00 and raised their

prices by more than \$1.00. Dr. Mangum caps all damages at 100 percent pass-through rates. Mangum Reply, ¶ 26. And so the range of pass-through is, more accurately, ██████████ percent. Mangum Reply, ¶ 261, Figure 35. And as Dr. Mangum explains, variations in these empirical estimates are the result of shortcomings in the data and idiosyncratic noise, rather than evidence that resellers failed to mark up their wholesale purchases. Mangum Reply, ¶ 171.

The method Dr. Mangum used to analyze pass through has been accepted by many courts in commodity price-fixing cases, including *Tuna*, *Broilers*, *Pork*, and *Turkey*.²³ Courts have also approved similar weighted-average methodologies in calculating pass-through rates outside of these protein cases.²⁴ And in any event, despite Defendants' outdated and out of circuit case law, the Eighth Circuit has held that individual differences

²³ *Tuna*, 31 F.4th at 683 (rejecting argument that direct purchasers' expert "erred in assuming that all direct purchasers were overcharged by the same percentage and that each class member was subject to the same pass-through rate."); *Broilers*, 2022 WL 1720468, at *19 (certifying consumer purchaser class with "a pass-through rate of about 96 percent"); *Pork*, 2024 WL 2060386, at *12 (certifying consumer purchaser class where "the average pass-through is approximately 100%," corroborated by finding three individual, sample distributors having a pass-through rate between 97.8% and 99.8%); *Turkey*, 2025 WL 264021, at *19 (certifying indirect institutional purchaser class where Dr. Mangum found 99.9 weighted average pass-through rate for the 20 individual direct purchaser resellers).

²⁴ See, e.g., *In re Hard Disk Drive Suspension Assemblies Antitrust Litig.*, No. 19-MD-02918-MMC, 2025 WL 71988, at *17 (N.D. Cal. Jan. 10, 2025) (certifying a class and allowing a pass-through analysis using averages as "the use of 'averaged and aggregated data' in a regression model used to measure impact has been approved by multiple courts."); *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-MD-2143 RS, 2016 WL 467444, at *7 (Feb. 8, 2016) (allowing some degree of averaging and aggregating data); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 614 (N.D. Cal. 2009) (permitting "the use of averaged and aggregated data").

in damages are not a reason to preclude certification.²⁵ Determining a class member’s individual damages is simple math – the kind of math that is undertaken daily in administering indirect purchaser settlements. To show this math can be done, Dr. Mangum calculates a *but-for* price for four of the top products sold during the Class Period as an example:

| Primal | Product Description | Average Price | But For Price |
|--------|-------------------------------|---------------|---------------|
| | | Per LB | Per LB |
| CHUCK | BF CHUCK ROLL NECK-OFF CHOICE | \$2.83 | |
| LOIN | BNLS LOIN STRIP 0X1 CHOICE | \$5.92 | |
| RIB | RIB EYE LIPON HVY CHOICE | \$7.45 | |
| ROUND | INSIDE ROUND XT | \$2.30 | |

Mangum Reply, ¶ 268, Figure 38. Individualized calculations are routine; a simple formula will do.

D. There are no material differences among state antitrust and consumer protection laws which would lead to individualized issues.

Consumer IPPs’ antitrust and consumer protection claims are brought under the laws of 27 jurisdictions. But all these jurisdictions have “harmonized” with the Sherman Act, meaning the core questions of liability will be proven with common evidence.²⁶ These

²⁵ See *Custom Hair Designs*, 984 F.3d at 600–601; *Tyson Foods*, 577 U.S. at 452; *Morales v. Greater Omaha Packing Co.*, 266 F.R.D. 294, 302 (D. Neb. 2010) (“[D]ifferences in the claimed damages or the availability of certain defenses do not defeat typicality[.]”). Consumer IPPs do not share any similarities to the classes in either *Broussard* or *O’Sullivan*, which presented no such analysis or one that could not be determined. *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (damages criticized as only “abstract analysis”); *O’Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 744 (5th Cir. 2003) (defendant’s participation varied, preventing calculations).

Defendants cite to other cases in their opposition that are out of date and out of circuit. See Defs’ Opp. at 28. They relied on many of these same cases in their *Daubert*, and Consumer IPPs distinguish those in that Opposition. See *Daubert* Opp., 37–39.

²⁶ Consumer IPPs provided a statutory basis for each claim for which they seek certification in Appendices A and B. See ECF Nos. 868-2, 868-3.

claims all turn on the same essential questions: does Defendants’ conduct violate antitrust law, did class members suffer a common injury, and are there measurable damages as a result?²⁷ This approach is not novel. Courts regularly certify classes in antitrust indirect purchaser actions under the laws of multiple jurisdictions.²⁸ In fact, “[w]hen common questions of fact and law otherwise predominate, courts rarely deny certification simply because the class spans many states and asserts state-law claims.”²⁹ Unsurprisingly, Defendants have cited no case where certification was denied on this basis alone in the antitrust context.³⁰ Although Defendants suggest that this Court did not address these issues in *Pork*, it certainly did in the context of the commercial indirect purchaser class’s motion

²⁷ See *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 275 (D. Mass. 2004) (“Under both federal and state law, the essential elements of a private antitrust action are the same: proof of a violation by the defendant, a demonstration of injury to the plaintiff, and an approximation of the plaintiff’s damages.”).

²⁸ See, e.g., *Pork*, 665 F. Supp. 3d at 1009 (certifying IPP class under 28 jurisdictions); *Turkey*, 2025 WL 264021, at *28 (certifying IPP class under 29 jurisdictions); *Broilers*, 2022 WL 1720468, at *20 (25 jurisdictions); *Tuna II*, 332 F.R.D. at 346 (32 jurisdictions); *In re Restasis Antitrust Litig.*, 335 F.R.D. 1, 40 (E.D.N.Y. 2020) (32 jurisdictions); *Hosp. Auth. of Metro. Gov’t of Nashville & Davidson Cnty. v. Momenta Pharms., Inc.*, 333 F.R.D. 390, 414 (M.D. Tenn. 2019) (30 jurisdictions); *In re Polyurethane Foam Antitrust Litig.*, 314 F.R.D. 226, 293 (N.D. Ohio 2014) (30 jurisdictions); *Edwards v. Nat’l Milk Producers Fed’n*, No. C 11-04766 JSW, 2014 WL 4643639, at *8 (N.D. Cal. Sept. 16, 2014) (15 jurisdictions).

²⁹ *Polyurethane Foam*, 314 F.R.D. at 292; accord *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md- 2836, 2020 WL 5778756, at *26 (E.D. Va. Aug. 14, 2020).

³⁰ Defs’ Opp. at 28–32. *In re Processed Egg Prods. Antitrust Litig.*, 312 F.R.D. 124, 171 (E.D. Pa. 2015) (denying certification for a “host of reasons” including ascertainably); *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 985 (8th Cir. 2021) (upholding denial based on “individualized findings on whether the plaintiffs actually relied on the alleged misrepresentation.”); *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1156 (8th Cir. 2017) (upholding denial of certification for breach of contract claims because “establishing breach would require examination of how Exxon’s operation of the pipeline affects the plaintiffs, which ... varies depending on where individual class members’ property is located”); *Hale v. Emerson Elec. Co.*, 942 F.3d 401 (8th Cir. 2019) (remanding for failure to conduct an “individualized choice-of-law analysis that is susceptible to meaningful appellate review to ensure that the application of a given state’s ‘law is neither arbitrary or fundamentally unfair.’”).

for class certification.³¹ And Judge Durkin extensively addressed similar issues when certifying the consumer IPP case in *Broilers*.³² Although Defendants challenge Consumer IPPs' unjust enrichment claims, Consumer IPPs do not move to have those state law claims certified.

1. No material differences exist among the state law antitrust claims.

Addressing the 24 antitrust state statutes, Defendants suggest that certification of the Consumer IPP class is inappropriate because the repealer jurisdictions (those which have repealed *Illinois Brick*, and which allow for standing of indirect purchasers) differ regarding the need to prove that overcharges were actually passed through.

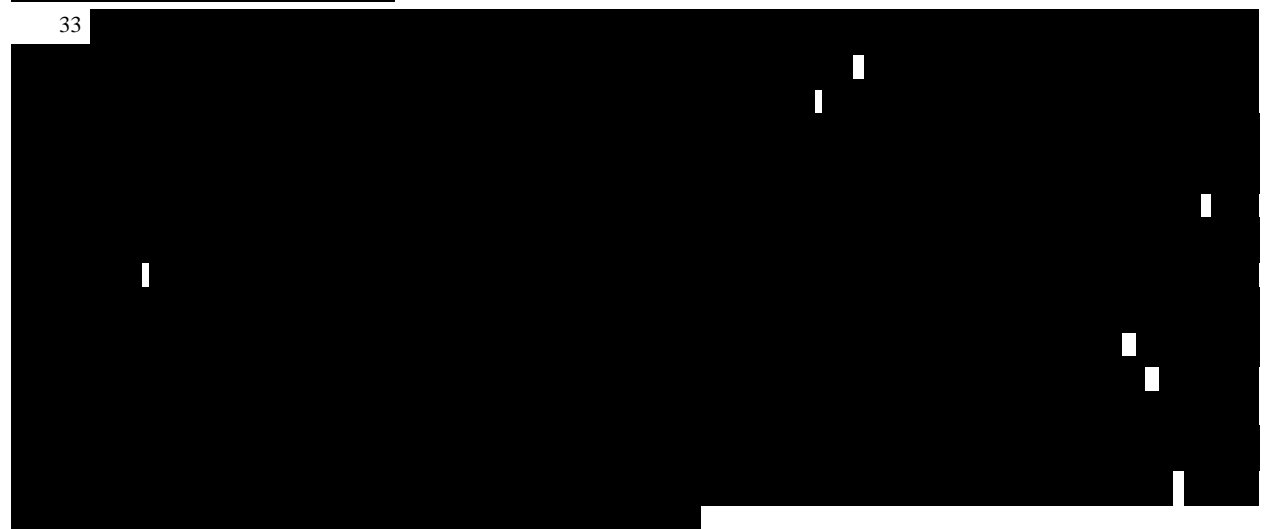
But this argument fails at the outset. As detailed above, Consumer IPPs have presented a robust pass-through analysis examining data across \$[REDACTED] billion in commerce, showing pass-through rates clustering around 100 percent. *See supra* section III.C. This pass-through analysis examines every part of the relevant distribution channels, including a wide range of third-party distributors, different types of companies, different geographic areas, and different levels of the supply chain. Mangum, ¶ 490. And Dr. Mangum calculated the percent of relevant beef sales attributable to each class state, enabling a state-by-state apportionment of damages. Mangum Reply, App'x H. Defendants do not challenge either the correctness of these pass-through calculations or the scope of this pass-through analysis. Mangum Reply, ¶ 251.

³¹ *Pork*, 665 F. Supp. 3d at 1009 (addressing the application of state law to the commercial indirect purchaser class).

³² *Broilers*, 2022 WL 1720468, at *20 (addressing application of state laws to the consumer indirect purchaser class).

This is enough to prove the fact that the overcharge was passed on under every state’s standard. In response to this robust showing, Defendants cite to a handful of out-of-context quotes from a small percentage of direct-action plaintiff retailers. Defs’ Opp. at 31 n.10. But the vast majority of testimony in this case demonstrates that for this commodity product, routine and sustained cost changes of the type incurred due to a long-running conspiracy are passed-through to the consumer.³³ And even if Defendants’ argument was accepted, it raises fact questions for the jury. As courts recognize, “it would be inappropriate to determine ‘complex and intensely factual’ damages issues” at class certification.³⁴

Moreover, Defendants argue only about four states – New York, Illinois, Rhode Island, and South Dakota – when suggesting some states require courts to avoid duplicative damages. Defs’ Opp. at 30. Defendants concede the remaining 20 states where Consumer IPPs brought antitrust claims either expressly authorized IPPs and DPPs to potentially



³⁴ *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1124 (N.D. Cal. 2008).

recover duplicative or are “silent” on the issue.³⁵ And yet that silence roars: each of these states repealed the Supreme Court’s holding in *Illinois Brick* and, in doing so, made clear their intent to allow both direct purchasers and indirect purchasers to recover damages.³⁶ If this Court barred Consumer IPPs from asserting their claims because of duplicate recovery concerns, then that would “‘repeal’ the *Illinois Brick* ‘repealers’ [.]”³⁷

In any event, the four states Defendants reference are not materially different. New York, Illinois, South Dakota, and Rhode Island’s suggestion to avoid duplicative recovery is not implicated where, as here, the direct purchaser class brings claims under federal law but the IPPs bring claims under state law.³⁸

Defendants once again raise the specter of individualized damages issues to suggest that the state law claims cannot be tried together. Defs’ Opp. at 32. But this argument presumes that Consumer IPPs cannot use a representative or statistical sample to show their injury. As the Supreme Court held in *Tyson Foods, Inc. v. Bouaphakeo*, a “representative or statistical sample, like all evidence, is a means to establish or defend against liability.”³⁹ The Supreme Court expressly cautioned that its “permissibility turns not on the form a proceeding takes – be it a class or individual action – but on the degree to which the

³⁵ *Id.*

³⁶ Defendants imply that the Court should be mindful of 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.” But not for states that have repealed *Illinois Brick*.

³⁷ *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-md-2143 RS, 2011 WL 3894376, at *11 (N.D. Cal. Aug. 3, 2011).

³⁸ *In re HIV Antitrust Litig.*, No. 19-CV-02573, 2023 WL 3011624, at *7 (N.D. Cal. Apr. 18, 2023).

³⁹ 577 U.S. at 454–55.

evidence is reliable in proving or disproving the elements of the relevant cause of action.”⁴⁰

Regardless of whether it was an individual or a class trial, each class member would be able to use Dr. Mangum’s pass-through analysis to show injury, and Defendants have no support to show otherwise.

Relying on *Johannessohn* and *Webb*, Defendants suggest the Eighth Circuit is particularly sensitive to state law variances and imply indirectly that a heightened standard exists here.⁴¹ Neither case involved an antitrust claim. *Johannessohn* addressed reliance in a design defect case.⁴² And *Webb* considered state contract, property, and tort laws.⁴³ But here “states’ antitrust laws are harmonious with the Sherman [A]ct.”⁴⁴ Harmonization means that a violation of the Sherman Act constitutes violation of state antitrust law.⁴⁵ As such, Consumer IPPs can simultaneously prove the elements of their state law claims by focusing on the elements of a federal antitrust claim.

⁴⁰ *Id.*; see also *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 376 (8th Cir. 2018) (“The potential need for individualized damages inquiries is not sufficient to overcome the district court’s findings of predominance and superiority”).

⁴¹ Defs’ Opp. at 32 (citing *Johannessohn*, 9 F.4th 981 (8th Cir. 2021); *Webb*, 856 F.3d 1150 (8th Cir. 2017)).

⁴² *Johannessohn*, 9 F.4th at 985 (“[F]raud cases are ill-suited for class actions because they require individualized findings on whether the plaintiffs actually relied on the alleged misrepresentation.”).

⁴³ *Webb*, 856 F.3d at 1157.

⁴⁴ *Pork*, 665 F. Supp. 3d at 1009 (certifying IPP classes under the same antitrust laws claimed here); see also App’x A (ECF No. 868-2).

⁴⁵ Defendants previously acknowledged that the state law antitrust claims for Arizona, California, District of Columbia, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin were harmonized with analogous federal law. *Indirect Sellers* Mot. to Dismiss Reply, ECF No. 211 at 20 (citing ECF No. 142 at 13–15; App’x A (ECF No. 868-2)).

2. Consumer IPPs’ consumer protection claims harmonize with federal antitrust law.

Consumer IPPs’ consumer protection claims are only brought under ten consumer protection statutes which “borrow” a federal antitrust claim as a violation of the state law. App’x B (ECF No. 868-3). Each statute includes language which prohibits unfair methods of competition. *Id.* Because of this streamlined set of statutes, a single standard for liability would easily apply at trial.

Defendants cannot find support that says otherwise, and so they rely on cases in far different areas of law or with far different applications of the consumer protection statutes. Relying on *In re St. Jude Medical, Inc.*, Defendants suggest broadly that state consumer-protection laws vary widely. But there, the Eighth Circuit examined state consumer protection laws as applied to conflicts-of-law analysis – it did not examine antitrust claims with state laws only borrowing predicate acts to find liability as “unfair” or “unlawful.”⁴⁶ The idiosyncratic differences Defendants emphasize are not substantial enough to overwrite the fact that these claims all share common elements. The unfairness requirement in New Mexico’s is “guided by the interpretations given by the federal trade commission and the federal courts.”⁴⁷ Florida, North Carolina, and California are the same.⁴⁸

⁴⁶ 425 F.3d 1116 (8th Cir. 2005); also *Nelson v. Lusterstone Surfacing Co.*, 605 N.W.2d 136, 141 (Neb. 2000) (considering if car sale falls under the state consumer protection act); *LaMotte v. Punch Line of Columbia, Inc.*, 370 S.E.2d 711, 713 (S.C. 1988) (considering if a club’s action against a merchant falls under the state unfair trade practices act); *Phillips v. Apple Inc.*, 725 F. App’x 496, 497 (9th Cir. 2018) (false advertising); *Kwikset Corp. v. Superior Ct.*, 246 P.3d 877, 881 (Cal. 2011) (same).

⁴⁷ N.M. Stat. Ann. § 57-12-4.

⁴⁸ See App’x B (ECF No. 868-3).

Defendants also conclude “the availability and type of damages vary by state” because California limits recovery to restitution.⁴⁹ Again, Defendants ignore the fact that Consumer IPPs have offered a method to show Defendants’ overcharge passed through to consumers; as such, consumers would be entitled to restitution on this overcharge under the California’s UCL. *See supra* section III.C.

In re EpiPen Marketing, Sales Practices & Antitrust Litigation is also inapposite.⁵⁰ There, the district court did not consider whether harmonization existed. And even so, the district court recognized that certification is “warranted when the idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims.”⁵¹

Because the Consumer IPPs have brought their claims under a set of state consumer protection laws which “borrow” an antitrust claim to find liability under the state statute, common issues of fact and law predominate.

3. Statute of limitations variations do not preclude class certification.

Defendants argue varying statute of limitations ought to impede certification. Defs’ Opp. at 38. But Defendants fail to cite a single case that has denied class certification on these grounds. Nor can they, as “potential differences in limitations periods do not preclude

⁴⁹ Defs’ Opp. at 34. Defendants claim there is variance between states, but they only cite to two cases discussing the California Unfair Competition Law (UCL), and do not offer any comparison to other states.

⁵⁰ No. 17-MD-2785-DDC-TJJ, 2020 WL 1180550 (D. Kan. Mar. 10, 2020).

⁵¹ *Id.* at *56 (citation and quotation omitted).

class certification.”⁵² In any event, fraudulent concealment extends the statute of limitations for each claim, and courts have found this issue is appropriate for class-wide resolution.⁵³ Consumer IPPs also provide their damages on an annual basis, so a jury could easily determine damages within different limitations periods. Mangum Reply, ¶¶ 121–22.

E. The Consumer IPP class is objective and ascertainable.

As this Court recognized in *Pork*, ascertainability requires only that “the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria.”⁵⁴ Although Defendants suggest that the Consumer IPP class is not defined by objective criteria, this is simply wrong. As in other commodity-protein cases, the class is objectively defined by: i) the purchase of a class product (chuck, loin, rib, or round primal cuts); ii) processed by a defendant; iii) during the period August 1, 2014 to December 31, 2019; and iv) in a class state. Class Cert. Mot. at 4. Records of those who purchased these products are available from retailers, and Consumer IPPs have already obtained class contact information for approximately one million consumers who fit this class definition and bought beef at Walmart/Sam’s Club.

⁵² *Cox v. Spirit Airlines, Inc.*, 341 F.R.D. 349, 371 (E.D.N.Y. 2022) (citation omitted); *In re Namenda Indirect Purchaser Antitrust Litig.*, 338 F.R.D. 527, 573 (S.D.N.Y. 2021) (“Challenges based on the statute of limitations ... will not bar predominance’ because it goes ‘to the right of the class member to recover, in contrast to underlying common issues of the defendant’s liability.’”); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (“the mere fact that [statute of limitations] concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones.”).

⁵³ *See, e.g., In re Synthroid Mktg. Litig.*, 188 F.R.D. 295, 298 (N.D. Ill. 1999) (certifying the class and identifying as a common question “whether the defendants’ conduct constitutes fraudulent concealment”); *Polyurethane Foam*, 314 F.R.D. at 291 (same). *See also* Compl. at ¶¶ 350–51.

⁵⁴ *Sandusky*, 821 F.3d at 996.

Schachter Decl., ¶ 7. Costco similarly maintains robust records and have submitted a declaration stating they will provide this information to the notice and claims administrator once a class is certified. Schachter Decl., ¶ 7; Costco Decl., ¶ 5. Like Costco, Amazon sells class products and can identify customers associated with those sales transactions. And Amazon confirmed it would agree to direct notice to these beef buyers if a class is certified. Amazon Decl., ¶ 5. In short, a large number of class members – potentially millions – could receive direct notice of their claims based on these purchase records.

For those without records, Consumer IPPs proposed using affidavits at the claims stage, of the type that this Court accepted in *Pork*⁵⁵ and Judge Durkin accepted in *Broilers* for the consumer IPP class.⁵⁶ For the named representatives, Consumer IPPs submitted a chart demonstrating each named class representative’s purchases of class products and the frequency of these purchases. *See* App’x C (ECF Nos. 868-4, 920). Defendants have claimed incorrectly that there is “no proof” these named plaintiffs are class members because some of these class members did not save receipts of their purchases. Defs’ Opp. at 11, 13, 43-44. But of course, the class members’ sworn testimony that they bought beef that fits the class definition is proof.⁵⁷

⁵⁵ *Pork*, 665 F. Supp. 3d at 1011–12.

⁵⁶ 2022 WL 1720468, at *20–21.

⁵⁷ *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 539 (E.D.N.Y. 2017) (recognizing that “because it is unlikely consumers will retain receipts, plaintiff may rely on affidavits for those without a receipt.”); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014) (recognizing that if receipts were required to prove purchases, that “would render class actions against producers almost impossible to bring.”).

Trying to stir up confusion where none exists, Defendants assert that two class representatives bought non-class beef products. Defs' Opp. at 9. To prove harm, class representatives are not required to prove they *only* bought products that are within the class definition. All ordinary consumers, including the class representatives, bought many products that are not in the class definition: jerky, ground beef, or steaks from restaurants. But those purchases are not relevant because they are excluded from the class using an objective definition. Both class representatives have confirmed they purchased class products.⁵⁸

Defendants do not explain why this same information from a class member – affidavits or a sworn statement – would be insufficient. But this is perhaps because even the Defendants themselves do not believe this argument. In opposing certification of the *Cattle* and *Indirect Seller* classes, *the same Defendants acknowledge that the use of affidavits is appropriate* in “certain consumer contexts, where dollar amounts – and thus incentives to falsify – are low, and where affirmative indicia of reliability are present.”⁵⁹ These circumstances are certainly present here.

Defendants next suggest the class is not ascertainable because class members cannot be certain whether the beef they bought was processed by a Defendant. Defs' Opp. at 42.

⁵⁸ Ms. Abernathy bought conventionally raised beef products. Ex. 111 at 113:23-25 (Abernathy Tr.). Ms. Tiller bought class products, including Choice cuts. Ex. 112 at 34:12-19 (Tiller Tr.). Nor should Dr. Mangum be faulted for failing to develop a model that seeks damages for these non-class purchases. *See* Defs' Opp. at 8.

⁵⁹ Mem. in Opp. to Cattle Pls.' and Exchange Pls.' Mot. for Class Certification, ECF No. 1097 at 52 (citing *Pork*, 2024 WL 2060386, at *29). *See also* Defs.' Mem. of Law in Opp. to Indirect Seller Pls.' Mot. for Class Certification, ECF No. 1160 at 34 (acknowledging that courts allow self-identification affidavits “when the stakes for individual class members are low”, such as a consumer indirect purchaser action).

But, much as with pork, beef consumers by beef repeatedly. As Dr. Mangum explains, a consumer “would need to have avoided impact on *every* purchase to have avoided being harmed during the Class Period.” Mangum Reply, ¶ 116. But it is statistically impossible for repeat purchasers have avoided an overcharge *because* they are repeat buyers. For example, survey evidence shows that 91 percent of consumers buy steak 1–2 times per month or more frequently. *See id.*, ¶ 117. And that is for just for just *one class product*. The named representatives reflect the same point; as each testified to buying class beef products multiple times per month. App’x C (ECF Nos. 868-4, 920). In other words, it is essentially statistically impossible to be a beef consumer who purchases class products at least occasionally and *not* have purchased at least one beef product was impacted.

Defendants attempt to distinguish *Pork* – where the same self-identification process was used, and not all named plaintiffs had receipts proving purchases – by suggesting that pork consumers can identify name brands, where beef consumers cannot. *See* Defs’ Opp. at 42–43. But that distinction does not matter here, where Defendants control 80 percent of the market. As a result, there “is effectively 0.0 percent” chance that a consumer who bought beef class products at least once a month only bought from non-Defendants. Mangum Reply, ¶ 118. And even consumers who buy beef less frequently can be certain some of their purchases were slaughtered by Defendants. For example, assuming a consumer exists who buys beef once a year (instead of once a month), the statistical likelihood of that consumer purchasing *only* beef from nondefendants is a whopping 0.017 percent. *Id.* at n.202. In short, Class members can be certain that the beef they bought was

over 80% of the market for processing class products ensures that those consumers who buy beef class products were injured by this conspiracy.

F. The Kansas and Montana representatives are adequate.

Defendants’ challenge to the adequacy of the Kansas and Montana representatives is meritless. As Defendants recognize, the Kansas Antitrust Act was amended in 2013 to harmonize federal and state law and one exclusion was any agreement governed by the provisions of the Packers and Stockyards Act.⁶² But Consumer IPPs have not brought a claim under the Packers and Stockyards act. Defendants fail to state how this exclusion relates to Consumer IPPs or why their “claims are statutorily barred[.]” Defs’ Opp. at 45. And while Montana’s consumer protection is limited to individual actions, “district courts in Montana ... found the MCPA’s preclusion of class actions does not apply in federal court.”⁶³ Here, “[a] state cannot limit this permission to proceed with a class action in federal court by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements.”⁶⁴ As such, Rule 23 governs and the Montana representative is adequate.⁶⁵

IV. CONCLUSION

For these reasons, Consumer IPPs respectfully request that the class be certified.

⁶² Defs’ Opp. at 45.

⁶³ *In re Hard Disk Drive Suspension Assemblies Antitrust Litig.*, No. 19-MD-02918, 2021 WL 4306018, at *23 (N.D. Cal. Sept. 22, 2021).

⁶⁴ *Wittman v. CBI, Inc.*, No. CV 15-105, 2016 WL 3093427, at *6 (D. Mont. 2016).

⁶⁵ This claim was not fully briefed and was primarily dismissed for inadequate pleading in the *Indirect Seller* case. *In re Cattle and Beef Antitrust Litig.*, 687 F. Supp. 3d 828, 845 (D. Minn. 2023).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the United States that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: April 4, 2025

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