

# Status Update and Emerging Issues Raised from the Agricultural Processor Antitrust Class Action Cases Thus Far

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(**Disclaimer:** Any views expressed herein are my own and do not necessarily represent those of Husch Blackwell or any of its attorneys or clients.)

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## Overview of Presentation

- Discuss general antitrust law framework applicable to price fixing and market allocation
- Review status of civil antitrust damages actions alleging price fixing and market allocation filed against processors of poultry, beef, pork, turkey and canned seafood
- Discuss theories of liability and issues of legal sufficiency of proof raised in those cases
- Discuss how the emergence of evidence of direct price fixing may impact these cases
- Discuss other legal issues raised by these cases as appropriate

## General Legal Framework

- Sherman Act §1 condemns price-fixing and market allocation between competing firms
- Violation turns on proof of agreement which need not be express or written but must be sufficient to show commitment to a common scheme by the participants
- Price-fixing and market allocation claims may be brought either civilly or criminally
- Criminal §1 allegations typically stem from state or federal antitrust investigations involving indictments by a grand jury
- Criminal convictions require proof of agreement beyond a reasonable doubt and often turn on knowledge of the inner workings of the alleged conspiracy that can only come from participants who agree to testify before the grand jury and at trial in exchange for leniency (but typically must plead guilty to obtain leniency)
- Private parties often band together to bring follow-along civil class action suits to recoup damages suffered as a result of supracompetitive prices charged by the conspirators based on criminal convictions or pleas; such actions benefit from *res judicata*
- Civil price-fixing cases typically allege intricate proof of circumstantial evidence from which a judge or jury may reasonably infer agreement to raise fix or stabilize prices; such cases do not require direct proof of price fixing or market allocation and apply a preponderance of the evidence standard
- The processor class actions that have been brought so far in poultry, beef and pork were brought as civil circumstantial evidence cases; some have been on the books for years
- Evidence of direct price fixing between executives of the competing processors has begun to emerge in the form of criminal pleas and indictments in poultry although the criminal investigation is said to be ongoing

- Where such evidence emerges, courts struggle to accommodate new allegations while not unduly prolonging long-standing cases
- Serial Motions to Dismiss rulings followed by repleading suggest some of the allegations fall short under *Trinko* and *Iqbal*
- Evidence of mere conscious parallelism insufficient to prove agreement, need more; in concentrated markets competing firms are expected to monitor competitors' pricing (particularly where there is a high degree of price transparency) and take competitive response into account
- Plaintiffs' counsel recently bolstered such allegations by referring to confidential insider witnesses to corroborate pieces of actual price fixing agreements with mixed results, but perhaps setting the stage for direct evidence of conspiracy to come forward
- In cases where Motions to Dismiss have been denied, courts are permitting wide-open discovery
- In ruling on Summary Judgment Motions courts will assess whether plaintiffs have met evidentiary burden under *Matsushita* and *Kodak* to show evidence that tends to exclude the possibility of independent action by the alleged conspirators
- Sufficiency often turns on proof of "plus factors" to infer agreement: motive to enter into a conspiracy such as declining demand or price; actions contrary to economic interests; and evidence implying a traditional conspiracy such as a substantial amount of interfirm communication to go along with parallel conduct; however, there is no requirement to show a direct price fixing conspiracy

#### General questions-

- Why is the ag industry conducive to these types of claims?
- What market indicators might signal a conspiracy to price fix according to these cases?
- What is sufficient to overcome the requirements of a Motion to Dismiss for antitrust violation allegations?
- What is the potential discovery burden?
- What other issues of interest emerge from an examination of these cases?
  - Information sharing/Agri-Stats
  - Use of confidential employee testimony in complaints to buttress indirect evidence of price fixing

#### Open questions-

- DOJ investigation of actual price fixing in poultry said to be ongoing; latest indictment suggests possibility that as many as 10 suppliers are implicated
- DOJ also issued antitrust CIDs to look at beef and pork pricing; not clear what these investigations uncovered
- USDA looking at cattle pricing; under MOU can refer cases to DOJ
  - *How will these developments impact ongoing cases?*
  - *Will these cases end with a bang or a whimper?*

## TAKEAWAYS REGARDING GENERAL QUESTIONS

### Why is the ag industry conducive to these types of claims?

The industry is structured in a way that limited information sharing and coordination could affect the market

- Horizontally consolidated; decades of mergers; combined share of top firms (4-firm concentration ratio) typically 80% or more of US production for each of these products
- Commodity industry; fungible products produced, often using similar or identical processes; sold to wide variety of purchasers using standardized product categories
- Inelasticity of demand; demand does not fall off materially in response to price increases; other proteins not regarded as substitutes
- High barriers to entry; cost of processing plants; costs and delays in permitting for new greenfield plants
- Executives move frequently from company to company and meet frequently in connection with trade groups
- Routine information exchange allegedly facilitated by Agri-Stats

### What market indicators might signal a conspiracy to price fix according to these cases?

- *In Re Broiler Chicken Antitrust Litig.*
  - Market concentration
  - Intra-competitor sales to rationalize production
  - Increased export sales
  - Industry switch to variable price contracts
  - Decreased flocks to unprecedented levels
  - Pricing moves relentlessly upward despite fluctuations in economic trends
- *In Re Pork Antitrust Litig.*
  - Market concentration
  - Prices rose, but production failed to rise to match demand, indicating anticompetitive restraint
  - Prices were previously correlated with feed costs, but the relationship between the two diverged during the conspiracy period
  - Parallel herd-size reductions
  - Coordinated shift over time to formula contracts away from cash purchases
  - Coordinated diversion to export markets
- *In Re Packaged Seafood Products*
  - Market concentration
  - Tuna prices stabilized or rose despite downward shift in demand
  - Coordinated reduction in output resulting from industry-wide move to smaller can size
  - Coordinated resistance to more use of costly fishing technology deemed more environmentally-responsible
- *Pacific Agri-Products Inc. v. JBS USA Food Company Holdings (Beef)*
  - Market concentration
  - Spread between feed costs and price of cattle

- *In Re Cattle Antitrust Litigation, Erbert & Gerbert's Inc. v. JBS USA Food Company Holdings (Beef)*
  - Market concentration
  - Supply and demand changes not explaining the changes in price
  - Parallel herd-size reductions
  - Coordinated shift to formula contracts away from cash purchases
- *Orlean Wholesale Grocery Cooperative v. Agri Stats (Turkey)*
  - Market concentration
  - Production failing to rise to match demand combined with prices increasing
  - Divergence from historical relationship between feed costs and prices

*What is sufficient to overcome the requirements of a Motion to Dismiss for antitrust violation allegations?*

- 12(b)(6) Motions denied in *In Re Broiler Chicken Antitrust Litig.*, *In Re Packaged Seafood*, *In Re Pork and Olean Wholesale Grocery Cooperative (Turkey)*
- Arguably sufficient to establish agreement in Motion to Dismiss context
- *In Re Broiler Chicken Antitrust Litig.*
  - The combination of: 1) public statements of intent and a call to cut production, 2) Agri Stats as a means of communication, and 3) meeting at conferences
- *In Re Packaged Seafood*
  - Cases filed after evidence of alleged direct price fixing came to light
  - Court's ruling denying Motions to Dismiss came after several guilty pleas and indictments had been entered and all parties were aware of ongoing criminal investigation
  - Detailed allegations of collusive conduct in amended complaints reflect release to Plaintiffs of nearly 2 million pages of documents previously only available to the grand jury; less reliance on indirect evidence
- *In Re Pork Antitrust Litig.*: recent Court ruling (Judge Tunheim) denying Motions to Dismiss require Plaintiffs to provide sufficient details of the acts in furtherance of the conspiracy and timing of those acts by each Defendant to meet the pleading standard for collusive agreement to cut herd sizes and divert sales to export markets. Court does not require Plaintiffs to provide details about the inner workings of the conspiracy before undertaking fact discovery. Agreement factors in *In Re Broiler Chicken* were basically the same, so presumably these were enough
  - The combination of: 1) public statements of intent and a call to cut production, 2) Agri Stats as a means of communication, and 3) meeting at conferences
- *Beef Actions*: Court ruling (also Judge Tunheim) granting Motions to Dismiss states that pleading is otherwise sufficient except for providing sufficient details of each Defendants acts in furtherance of conspiracy and the timing of those acts (see next section for conduct alleged)

- *Orlean Wholesale Grocery Cooperative v. Agri Stats* (Turkey): Proof of agreement- Court denied Motions to Dismiss as to rule of reason information exchange claims based on:
  - Production and pricing information deciphered by each participating company about its competitors exchanged through Agri-Stats
  - Competitively-sensitive information exchanged by participation in Agri-stats and through numerous opportunities to collude at frequent industry trade meetings
  - Parallel conduct: increased prices and slowed production as illustrated by a chart which showed “dramatic” divergence of prices and production beginning in 2015
    - “This divergence allegedly occurred in a market with characteristics that make it particularly likely that an information exchange will have anticompetitive effects”
  - Divergence of historic relationship between feed costs and wholesale turkey prices
- Sufficient for parallel conduct plus factors in Motion to Dismiss
  - *In Re Broiler Chicken Antitrust Litig.*: the opinion doesn’t specifically comment on plus factors, but the complaint mentioned similar conditions to the those listed in the Pork complaint
    - The conduct is not required to be simultaneous or uniform to be parallel (11/20/17 Opinion on the Motion to Dismiss)
    - The extensive data provided on the timing of the production cuts and the industry-wide production levels was sufficient
  - *In Re Packaged Seafood*: Less reliance on market indicators and plus factors in amended complaints in light of emergence of evidence of direct price fixing
  - *In Re Pork Antitrust Litig.*: the below factors were sufficient plus factors to buttress parallel conduct:
    - Collusive and constrictive nature of the industry
    - Inelasticity of pork demand
    - Trade associations where producers would meet regularly
    - Actions were taken by some defendants against their own self-interests
    - Pricing practices
    - The court also mentioned other potential factors enlightened by other cases
      - Shared motive to conspire
      - Action against self-interest
      - Market concentration
      - High-level of interfirm communication existing in conjunction with the parallel actions
  - *Beef Actions*: The Court concludes
    - “[t]he plus factors identified and discussed by Plaintiff[s] are undoubtedly strong and are of the type often used to support an inference of an agreement.”

- “The fed-cattle market is highly concentrated; indeed, the four Defendants make up 83% of the market, compared to eight firms controlling a similar share of the pork-processing market.”
- “Demand for fed cattle, as a commodity, is similarly inelastic.”
- “The Defendants belong to trade associations and regularly communicate through them, along with attending conferences together.”
- “Plaintiffs also allege that Defendants engaged in actions against self-interest, such as importing cattle from abroad when domestic prices were low.”
- “The market-wide change in pricing practices from cash sales to formula contracts also serve as a plus factor.”
- Orlean Wholesale Grocery Cooperative v. Agri Stats (Turkey): Opinion does not label plus factors but implicitly identifies several
  - Motive: declining profitability
  - Market concentration: nine Turkey Defendants control eighty percent of the market
  - Against interest: providing competitively-sensitive production and pricing information to Agri-Stats knowing it would be shared with competitors
  - Traditional conspiracy: frequent industry meetings

What is the potential discovery burden

- Discovery required by the court in the period before the Motion to Dismiss was ruled on:
  - In Re Broiler Chicken Antitrust Litig.:
    - Subpoenas to third-party telephone companies and co-conspirators may be allowed (11/13/17 Order)
    - Documents submitted to state AG offices (9/28/17 Order)
    - Rule 26(a)(1) disclosures
    - Organizational charts with names and titles of individuals who had responsibilities relating to
      - Member of board of directors
      - All executives with title of Direct, Vice President, or higher
        - Especially those involved with the association groups
      - Investor and/or creditor relations
      - Anyone involved with Agri Stats entries
      - Supervisors of departments responsible with transactions with other defendants and co-conspirators
    - Phone directories of everyone on the charts
    - Identification of email system and retention policy
    - List of non-custodial data sources
    - Document retention policies in effect Jan 1, 2007- Sept 2, 2016
    - Employee Technology Use Policies in effect Jan 1, 2007- Sept 2, 2016
    - Disclosures of whether have downloaded phone records, and from which carriers
    - List of known data source likely to contain discoverable ESI that is not accessible under Rule 26(b)(B) or 26(b)(2)(C)(i)

- Court commented in late September 2020 on the extent of discovery taken- discovery of more than 8 million documents (totaling millions more in pages), 220 depositions taken with more than 100 to go
        - Still two years out from scheduled trial
- *In Re Packaged Seafood:*
  - Certain document and deposition discovery stayed because of grand jury investigation
  - Relatively full-blown discovery allowed except as might directly interfere with pending criminal trials
- *In Re Pork Antitrust Litig.:*
  - Parties had already agreed to some discovery
    - Rule 26(a) disclosures
    - Serving initial disclosures
    - Producing readily available organization charts
  - Order Regarding Disclosure of Information. Had to provide:
    - Rule 26(a)(1) disclosures
    - Organizational Charts of purchasers, direct purchaser plaintiffs, indirect purchaser plaintiffs
    - Identification of email system used and length of time email is retained on the system
    - List of non-custodial data sources that may contain discoverable ESI
    - Document retention policies
    - Employee Technology Use Policies
    - List of know data sources likely to contain discoverable ESI that is not reasonably accessible under Rule 26(b)(B) or 26 (b)(2)(C)(ii)
- *In Re Cattle Antitrust Litigation:* the following is the discovery required by the court in the period before the Motion to Dismiss was ruled on
  - Rule 26(a)(1) disclosures
  - Rule 34 requests
  - Organization Charts identifying relevant parties
  - Identification of email system used and length of time email is retained on the system
  - List of non-custodial data source that may contain discoverable ESI
  - Document retention policies
  - Employee Technology Use Policies
  - List of know data sources likely to contain discoverable ESI that is not reasonably accessible under Rule 26(b)(B) or 26 (b)(2)(C)(ii)
  - Recent ruling partially lifting the stay on discovery in anticipation of Motions to Dismiss, “Court will order Defendants to review the documents they produced to the DOJ in response to the June 2020 CIDs and to produce to Plaintiffs all non-privileged documents that are relevant to any of Plaintiffs’ claims in these cases.”
- *Orlean Wholesale Grocery Cooperative v. Agri Stats* (Turkey): N/A

## **A FEW THOUGHTS REGARDING OPEN QUESTIONS**

- Compare Chicken and Tuna; one (chicken) initiated and litigated for years before evidence of direct price fixing emerged and one (tuna) just starting as criminal investigations began to bear fruit
- Cases have not reached summary judgment phase yet; likely to see Plaintiffs' summary judgment motions on liability or certain claims
- Dilemma created by mismatch of timing of criminal convictions versus civil lawsuits
  - See Judge Durkin's proposed solution of bifurcated trial under Federal Rule of Civil Procedure 42 in Chicken
- Courts in Beef and Turkey have evaluated the use of purported confidential employee witness testimony to bolster indirect evidence of price fixing with mixed results; Judge Tunheim gave little weight to such testimony (concerning the existence of an illegal collusive agreement) in overcoming Motions to Dismiss, while the Court in Turkey seems to credit such testimony (regarding Agri-Stats as a conduit for competitively-sensitive information as used by subscribers) to some degree
- What about prior civil settlements with certain Defendants before criminal allegations came to light? What is the likelihood of future settlements in cases with ongoing criminal investigations?
- What opens the door to issue preclusion? Who/how many must plead guilty or be convicted to achieve preclusive/res judicata effect?
- How many of these massive cases involving different agricultural products in markets demonstrating indicia of collusion will turn out to harbor direct price fixing cartels in whole or in part?
- How will these cases ultimately get resolved? A round of bankruptcies? A common fund settlement as in tobacco?
- The role of information exchanges: Is the use of subscription services such as Agri-Stats a problem in industries with fungible end products?
- How do the operative facts in the Processed Egg Products Antitrust cases in the 3<sup>rd</sup> Circuit which yielded defense verdicts differ from these cases?

## **DOCKET REVIEWS**

### **Chicken**

In Re Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772 (N.D. Ill. 2017)

- Docket Number: No. 16-cv-08637
- Court: N.D. Ill.
- Parties:
  - Plaintiffs: Direct Purchaser Plaintiffs, Indirect Purchaser Plaintiffs, End User Plaintiffs; Full List: Maplevale Farms, John Gross and Company, Inc., Fargo Stopping Center, Sargent's, Bodega Brew Pub, Don Chavas Mexican Restaurant, Barthers International, Cedar Farms Co., Ferraro Foods, Ferraro Foods of North Carolina, Joe Christiana Food Distributors, Sullot Corporation, Alpine Special Treatment enter, Piggly Wiggle Alabama Distributing Co., Affiliated Foods,



Merchants Distributors, Associated Grocers of New England, Big Y Foods, Fareway Stores, Woodman's Food Market, Winn-Dixie Stores, Sysco Corporation, US Foods, Action Meat Distributors, Jetro Holdings, WeLoveCaesar, The Kroger Co. Hy-Vee, Albertsons Companies, Associated Grocers of the South, Meijer, Meijer Distribution, OSI Restaurant Partners, Publix Super markets, Supvalu, Wakefern Food Corporation, Ahold Delhaize, W. Lee Flowers & Co, Howard Samuels as Trustee in Bankruptcy for Central Grocers, BJ's Wholesale Club, Steeple Down River, Associated Wholesale Grocers, Maximum Quality Foods, United Supermarkets, Krispy Krunchy Foods, Cheney Bros, Quirch Foods, Darden Restaurants, Sherwood Food Distributors, Hooters of America, Associated Grocers, Brookshire Grocery Company, Schnuck Markets, Checkers Drive-In Restaurants, Unified Grocers, Associated Grocers of Florida, Save mart Supermarkets, Giant Eagle, Bi-Lo Holdings, Bashas, Walmart, Conagra Brands, Pinnacle Foods, Kraft Heinz Food Company, Nestle USA, Nestle Purina Petcare Company, Services Group of America, WalMart, Sam's, Restaurants of America, LTP Management Group, Gibson, Greco & Wood, Hooter Management Corporation, Anaheim Wings, Gaslamp Wings, Mission Valley Wings, Oceanside Wings, Costa Mesa Wings, Rancho Bernardo Wings, Ontario Wings, Hollywood Wings, South Gate Wings, Wings Over Long Beach, Bonita Plaza Wings, Downtown Wings, PJ Food Services, Sumner Country Restaurant and Creamery, El Pollo Loco, Boston Market Corporation, Barbeque Integrated, FIC Restaurants, Johnny Rockets Group, Direct Purchaser Plaintiffs, Commercial and Institutional Indirect Purchaser Plaintiffs, End-User Consumer Plaintiffs, Indirect Purchaser Plaintiffs, United States of America, Commonwealth of Puerto Rico, Various Individuals

- Defendants: Koch Foods, JCG Foods of Alabama, JCG Foods of Georgia, Koch Meats, Tyson Foods, Tyson Chicken, Tyson Breeders, Tyson Poultry, Pilgrim's Pride Corporations, Perdue Farms Inc., Sanderson Farms, Inc., Sanderson Farms, Inc. (Foods Division), Sanderson Farms, Inc. (Production Division), Sanderson Farms, Inc. (Processing Division), Wayne Farms, Mountaineer Farms, Inc., Mountaineer Farms, LLC Mountaineer Farms of Delaware, Inc., Peco Foods, Foster Farms, House of Raeford Farms, Simmons Foods, Fieldale Farms Corporation, George's Inc, George's Farms, O.K. Foods, O.K. Farms, O.K. Industries, Mar-Jac Poultry, Harrison Poultry, Agri Stats, Norman W Fries, Claxton Poultry Famr, Mar-Jac Poultry Ms, Mar-Jac Poultry AL, Mar-Jac AL/MS, Mar-Jac Poultry, Mar-Jac Holdings, Perdue Foods, Foster Poultry Farms, Simmons Prepared Foods, Amick Farms, The Amick Company, Amick-OSI Broilers, Amick-OSI Processing, Case Foods, Case Farms, Case Farms Processing, Mar-Jac Holdings
- Intervenor: United States of America
- Theories of Liability:
  - Class Period: January 1, 2008 to present
  - Before the Class Period, only Pilgrim's, Tyson, and a few other producers cut their supply, which they realized wasn't enough to raise prices
  - Jan 23-25, 2008, all of the defendants attended the IPPE conference in Atlanta, Georgia, where they allegedly decided to collude

- Traded detailed information through submission of the information to Agri Stats, and used earnings calls and public statements to signal one another
- Case Timeline:
  - 9/2/2016- Complaint filed by Maplevale Farms
    - Defendants provided financial, strategic, and production information to one another through Agri Stats (a co-conspirator)
      - Even though there are other services that do this, and Agri Stats is nominally anonymous benchmarking, only Agri Stats does it in such detail that a subscriber could determine producer-specific production, cost, and efficiency data
      - Agri Stats has a “Bottom Line Report” that only top executives are given access to, and it’s sufficiently detailed so execs can identify the competitors. Additionally, Tyson, Pilgrim’s, and Sanderson are public companies that are required to report financial data publicly, so they can be identified
      - Agri Stats also had question and answer presentations where they could be subtly asked about the identity of the competitors
      - Agri Stats exact methods are not yet clear, but plaintiffs believe that its survey methodology involves direct electronic data submissions on a daily, weekly, monthly basis
      - There is no non-conspiratorial reason for the companies to use Agri Stats
    - Coordinated production cuts to stabilize and then increase the price of broilers from 2008-2012, then continued depressing broiler supply to maintain historically high prices
      - Tyson and Pilgrim’s tried to reduce their production, but this wasn’t enough to raise prices,
      - All producer/processors met at the IPPE industry conference,
      - On Tyson’s 2008 earnings call, Tyson CEO said they had no choice by the raise prices substantially
      - On Pilgrim’s 2008 earnings call, the CFO called to action all of the producers to lower their production, and went on to say he thought the industry needed to coordinate their actions to reduce production
      - On Sanderson’s 2008 earnings call, CEO said he anticipated that the industry would cut production
      - After Pilgrim’s cut production and announced they would, instead of filling in the supply gap, a lot of other defendants also cut supply
      - Compliant includes more detail on earnings calls and announcements of production cuts, supporting a claim of parallel behavior
      - Overtime, there were 2 waves of quick, coordinated production cuts in 2008-2009 and 2011-2012, cutting production to record lows

- The complaint alleges the specific methods used to cut production, such as egg breaking
    - The structure and characteristics of the broiler market make conspiracy economically plausible
      - The vertically integrated producers have many access points to control the production process
        - The complaint identifies which part of the process each defendant was manipulating
      - Commodity product in which competing producers use same production methods and produce fungible products
      - Market has inelastic supply and demand
      - No substitutes for broilers, and the industry has experienced high consolidation
      - High barriers to entry
    - Outlines opportunities to collude
      - Members of several broiler-related trade associations
        - National Chicken Council- Producer CEOs are routinely on the board of directors and meet at least quarterly, and has 3 annual meetings, and they talk about pricing etc. at these meetings, both formally and informally
        - Georgia Dock Index- Unaudited pricing survey of poultry executives of competing companies based on aspirational pricing; often diverged from other published indices; some supply contracts set to Georgia Dock price
        - All members of United States Poultry & Egg Export Council, Poultry Federation, International Poultry Expo, International Poultry Council and sat on Georgia Dock Advisory Committee
      - Investor Conferences
      - Competitor Plant Tours
      - Merger, Acquisition, and Capital Financing Discussions
- 10/28/16- Direct Purchaser Plaintiff's Amended and Consolidated Class Action Complaint filed
  - Substantially similar supporting content to the original Complaint
- 10/28/16- Indirect Purchaser Plaintiff's Consolidate Amended Class Action Complaint filed
- 10/31/16- Direct Purchaser Complaint again amended
- 12/16/16- Commercial and Institutional Indirect Purchaser Plaintiff's Third Amended Consolidated Class Action Complaint is filed
- 12/16/16- End-User Consumer Plaintiff's Consolidated Amended Class Action Complaint is filed
- 1/27/17- Various Defendant's Motions to Dismiss are filed
- 3/15/17- Response to Motions to Dismiss filed
  - All Plaintiffs Opposition to Defendants Motion to Dismiss the Direct Purchaser Plaintiffs Second Amended and Consolidated Complaint



- The amount of sharing with Agri Stats is unusual in a way that is a plausible means of communication
  - Regular opportunities to share information
- Business strategies during the time period are indicative of conspiracy
  - Intra-competitor sales to manage production numbers
  - Increased sales outside of the United States to lower US product, switch from fixed price to variable price contracts, decreased number of breeder flocks to unprecedented numbers
- 2/7/18- DPP's Third Amended and Consolidated Class Action Complaint
- 2/12/18- End-User Consumer Plaintiff's Second Consolidated Amended Class Action Complaint
- 2/20/18- Commercial and Institutional Indirect Purchaser Plaintiffs Fourth Amended Consolidated Class Action Complaint
- 3/28/18- Agri Stats file Motion to Dismiss claims in the following cases
  - Affiliated Foods v. Claxton Poultry Farms
  - Sysco Corporation v. Tyson Foods
  - US Foods v. Tyson Food
  - All End-User Consumer Indirect Purchaser Plaintiff Actions
- 3/30/18, 5/29/18- Affirmative Defenses filed by many of the defendants against various parties. Some defenses include:
  - Statute of Limitations
  - Plaintiffs have not suffered an injury in fact/ or any injury cognizable under Antitrust laws
  - Plaintiffs lack standing
  - Injuries were not proximately caused by the defendant
  - Failed to exercise reasonable care to mitigate any damages
  - Waiver
  - Estoppel
  - Ratification of and consent to the conduct of the defendant
  - Conduct was immune under Noerr-Pennington doctrine
  - Improper multiple damage awards sought
  - Right to offset claims settled with other parties
  - Any damages that were passed to other parties are not appropriately recovered
- 8/30/18- Sanderson Farms filed Affirmative Defenses against various plaintiffs
- 8/31/18- Pilgrim's Pride, Peco Foods, Perdue and Mar-Jac filed various Affirmative Defenses
- 9/4/18- Simmons, Koch, Mountaineer, Wayne Farms filed various Affirmative Defenses
- 10/23/18-10/25/18- Harrison Poultry, Perdue, Mar-Jac, O.K. Foods, Peco Foods, Tyson Foods and House of Raeford Farms filed Affirmative Defenses to Trustee in Central Grocers Bankruptcy
- 11/13/18- Commercial and Institutional Indirect Purchaser Plaintiff's Fifth Amended Consolidated Class Action

- 12/19/18- Pilgrim's Pride, Perdue, Raeford Farms, Simmons, Peco Foods, Harrison Poultry, Mountaineer Farms, George's Farms, Fieldale Farms Corporation, Mar-Jac, O.K. Farms offered Affirmative Defenses to various plaintiffs
  - Harrison Poultry's complaint contained a jury demand
- 1/10/19- (Settlement) Motion by Plaintiff Commercial and Institutional Indirect Purchaser Plaintiffs for Settlement and Motion for Preliminary approval of Settlement with Fieldale Farms Corporation- Settlement for \$1,400,000
- 1/23/19- Amended Complaint by Commercial and Institutional Indirect Purchaser Plaintiffs
- 2/14/19- Peco Foods and Mar-Jac Poultry, Perdue Farms, Simmons Foods, O.K. Farms, Mountaineer Farms, Foster Farms, Sanderson Farms, Fieldale Farms, Tyson, Pilgrim's Pride filed answers to the complaints by various plaintiffs with a jury demand
- 4/18/19-4/22/19- Various amended complaints
- 6/21/19- Motion by Intervenor United States of America to Intervene and Stay Discovery amidst a DOJ probe into the industry
- 6/26/19- Various responses to Motion by Intervenor
- 6/27/19- Order granting Motion to Intervene and Stay Discovery, Discovery is stayed until 9/27/19
- 6/27/19-8/5/19- Various sealed document orders and answers to complaints
- 7/19/19- Meijer and Amick Farms stipulate to a dismissal
- 8/5/19- DOJ subpoenaed Tyson
- 9/10/19- DOJ subpoenaed Sanderson Farms
- 10/14/19- Case Farms Processing filed a Motion to Dismiss for Failure to State a Claim against Services Group of America
- 10/18/19- Joint Motion to Dismiss for Failure to State a Claim by all defendants in regards to the Commonwealth of Puerto Rico's Complaint
- 10/23/19- Motion to Dismiss for Failure to State a Claim by Case Farms Processing regarding Walmart's and Amigo Meat's Complaints
- 12/9/19- Court issued Order that Winn- Dixie could not file a separate claim against Fieldale in wake of settlement- Winn-Dixie Action dismissed
- 12/20/19- Order granting approval of DPPs Motion for Preliminary Approval of the settlement with Peco Foods, George's Inc, George's Farms, and Amick Farms- Settlement over \$13,000,000- 1/8/20- Corrected Order
- 3/3/20- Winn-Dixie's motion for entry of judgement under Federal Rule of Civil Procedure 54(b) against Fieldale is denied
- 3/5/20- Motion to Dismiss made by Case Farms was denied
- 5/13/20- Maplevale Farm Class Plaintiff's entered Motion for Entry of an Order Requiring Remote Deposition for Certain Categories of Witnesses hoping to resume depositions of employees
- 6/3/20- a federal grand jury in the U.S. District Court in Denver, Colorado indicted executives from Pilgrim's and Claxton Poultry; this is the first indictment in the investigation
  - Jayson Penn- President and CEO of Pilgrim's/JBS
  - Roger Austin- Former VP of Pilgrim's/JBS

- Mikell Fries- President and board member of Claxton
  - Scott Brady- Vice President of Claxton
- 6/25/20- Memo Opinion and Order granting in large part Motion for Entry of an Order Requiring Remote Depositions (details below in discovery section)
- 9/22/20- Memorandum Opinion and Order denying Defendants’ motion to strike or sever newly-filed consolidated and amended complaints including claims for bidrigging
  - “Substantial relationship between the alleged bid-rigging claim and the alleged supply reduction and Georgia Dock price index manipulation claims”
  - “Discovery for all three claims is thoroughly intertwined in terms of the scope of relevant documents, document custodians, and deponents”
  - “Legal rulings, factual findings, or settlements regarding any of the claims will undoubtedly impact the others”
  - Finds the four recently filed direct-action complaints to be related and ordered them reassigned and consolidated at least for pretrial purposes
  - “No principled reason to force the bid-rigging claim to proceed in a separate action”
  - “However, it cannot be denied that the bid-rigging claim is *new*, while the supply reduction and Georgia Dock claims have been in the case since its inception four years ago. In that time, an immense amount of motion practice and discovery has occurred. This sprawling case already consists of: 56 related actions, 40 direct actions, and three classes (including every purchaser of chicken meat in the United States), with each complaint more than 100 pages long; 252 attorney appearances and more than 3,800 entries on the docket; discovery of more than 8 million documents (totaling millions more in pages), hundreds of document custodians, 220 depositions taken with more than 100 to go.”
  - “On top of all that, the parties agree that the bid-rigging claims will require more document discovery and likely re-taking of hundreds of depositions. This additional discovery will take time that is not accounted for in current Scheduling Order No. 14, which has no room to spare, and yet anticipates a trial that is still two years away.”
  - “Furthermore, the government has indicated that it will seek to stay much of any permitted bid-rigging discovery to protect its criminal prosecution. The Court notes that it is commonplace for civil actions based on the facts underlying criminal charges to be stayed during the pendency of the criminal proceedings”
  - “The upshot is all three claims belong together in the same case, but they cannot proceed together. Federal Rule of Civil Procedure 42 provides the solution to this conflict. In accordance with the Court’s authority under Rule 42, and in order to expedite and economize the process of bringing the supply reduction and Georgia Dock claims to resolution, the bid-rigging claim is bifurcated from the original two claims. *See Chlopek v. Fed. Ins. Co.*, 499 F.3d 692, 700 (7th Cir. 2007) (under Rule 42, judicial economy is a sufficient basis to order bifurcation).”

- “There is no prejudice to Plaintiffs in resolving the original claims first. Proof of any of the three claims is sufficient to prove liability under the Sherman Act. Under Plaintiffs’ theory of the case, all three claims are means to the same end of manipulating Broiler prices”
    - “The direct-action plaintiffs should prepare and file a consolidated complaint by October 23, 2020. Defendants should file their consolidated answer by November 23, 2020.”
    - “It is unclear to the Court whether the putative classes intend to amend their complaints to include bid-rigging claims. And it is not apparent to the Court that the bid-rigging claim is necessarily amenable to class treatment. But if class plaintiffs intend to amend their complaints to include bid-rigging claims, those amended complaints should also be filed by October 23, 2020”
  - 10/7/20- federal grand jury in the U.S. District Court in Denver, Colorado issued a three-count superseding indictment charges 10 executives and employees at major broiler chicken producers for their participation in a conspiracy to fix prices and rig bids for broiler chicken products from at least 2012 until at least early 2019; the six additional indictments name (best guess as to employer)
    - Timothy Mulrenin, Perdue Farms (formerly at Tyson Foods)
    - William Kantola, Koch Foods
    - Jimmie Little, Pilgrim’s Pride/JBS
    - William Lovette, Pilgrim’s Pride/JBS
    - Gary Roberts, current employer not known (formerly at Tyson Foods)
    - Rickie Blake, George’s Foods (prior partial settlement by company)
- Status of Discovery:
  - 12/21/16- Order Regarding Disclosure of Information entered
    - Disclosure Period: Jan 1, 2007- Sept 2, 2016
    - Required information
      - Rule 26(a)(1) disclosures
      - Organizational charts with names and titles of individuals who had responsibilities relating to
        - Member of board of directors
        - All executives with title of Director, Vice President, or higher
          - Especially those involved with the association groups
        - Investor and/or creditor relations
        - Anyone involved with Agri Stats entries
        - Supervisors of departments responsible with transactions with other defendants and co-conspirators
      - Phone directories of everyone on the charts
      - Identification of email system and retention policy
      - List of non-custodial data sources
      - Document Retention Policies in effect Jan 1, 2007- Sept 2, 2016



- Employee Technology Use Policies in effect Jan 1, 2007- Sept 2, 2016
  - Disclosures of whether have downloaded phone records, and from which carriers
  - List of known data sources likely to contain discoverable ESI that is not accessible under Rule 26(b)(B) or 26(b)(2)(C)(i)
- 4/21/17- Order entered denying the End-User Plaintiff's Motion requesting leave to issue preservation subpoenas to halt the routine destruction of evidence
  - The court denied the motion because it would be a burdensome endeavor to preserve all that information, and the court doesn't think the risk of destruction before a ruling on the Motion to Dismiss is entered outweighs that burden
  - Court didn't think the amount of data the plaintiffs were requesting was proportional
- 9/20/17- Plaintiffs File Motion for Entry of Order Granting Discovery Under the Cable Act
  - Direct Purchaser Plaintiffs, Commercial and Institutional Indirect Purchaser Plaintiffs, and End-User Consumer Plaintiffs made this Motion because some of the telephone carriers said they would only preserve the information pursuant to subpoenas from court orders, governmental agencies, or enforcement agencies
- 9/28/17- Court granted discovery under the Cable Act with an Order that made the subpoenas issued by the plaintiffs to telephone companies have the weight of a court order
- 9/28/17- Court issued Order granting in part the Plaintiff's request that Defendants who had received Antitrust Civil Investigative Demands from the Florida AGs turn over some documents already produced to the Florida AG
- 10/13/17- Defendants submit Motion to Stay Production Obligations Imposed by Plaintiffs' Subpoenas Served on Third Parties
  - Contesting subpoenas served on 5 telephone carriers, non-Defendant Pilgrim Enterprises, and 3 third-party producers (Claxton, Harrison, and Mar-Jac)
  - Want the court to issue an Order precluding Plaintiffs from subpoenaing third parties before ruling on Motion to Dismiss, or at least require a showing of necessity to the court before any production subpoena is issued
- 11/13/17- Court submitted Order granting in part and denying in part the Defendant's Motion to Stay Production Obligations Imposed by Plaintiffs' Subpoenas Served on Third Parties
  - The motion is granted regarding subpoenas served on non-party Pilgrim Enterprises
  - The motion is denied regarding subpoenas served on the telephone companies
  - The motion is denied regarding subpoenas served on the Co-Conspirators
- (11/20/17- Motion to Dismiss is denied)

- 12/22/17- Order resolving some discovery disputes, notably asking for follow up briefs on what downstream data Defendants want the Plaintiffs to be required to preserve
- 1/3/18- Order detailing Methodology for Electronically Stored Info
- 1/26/18- DPP's Supplemental Brief Regarding Discoverability of Downstream Data
- 2/14/18- Defendants file Motion for Protective Order to Preclude Non-Parties' Production of Document as to Non-Custodians
- 2/21/18- Memorandum Order to Limit Broad Downstream Data
  - The court rejects the Defendants' arguments that DPP and CIIPP downstream data is important to class certification and the merits of the Plaintiffs claims
  - The ruling is without prejudice and leaves open the possibility that a motion may be granted if the Defendants can more specifically define what they're looking for
- 4/13/18- Tyson's 2/14/18 Motion for Protective Order to Preclude Non-Parties' Production of Document as to Non-Custodians is denied without prejudice in this Order
- 7/17/18- Order not requiring Tyson, Koch and Mountaineer to produce a large number of emails
- 7/26/18- Argi Stats Motion for a Protective Order is denied- Agri Stats is still required to perform EUCP's proposed custodial search of ESI for the outlined timeframe
- 10/8/18- Motion by defendants to enforce deposition protocol orders
- 10/8/18- various motions regarding depositions and allowing production of documents by third parties
- 6/27/19- Order granting Motion to Intervene and Stay Discovery, Discovery is stayed until 9/27/19
  - Only pauses depositions of current and former employees of broiler chicken producers, all other depositions and written discovery can continue
- 9/20/19- Motion by Intervenor to Stay Discovery → the judge extended the stay, but didn't say for how long
- 5/13/20- Maplevale Farm Class Plaintiff's entered Motion for Entry of an Order Requiring Remote Deposition for Certain Categories of Witnesses hoping to resume depositions of employees
- 5/19/20- Maplevale Farms Motion to Compel Production of Additional Structured Data, Contracts, and 30(b)(6) Testimony is granted in part and denied in part
  - Parties agree to address questions about current usage of Agri Stats
  - Court denies Plaintiffs request to ask about current governmental investigations
  - Court denies Plaintiff request to ask about spoliation of evidence
- 6/25/20- Memo Opinion and Order granting in large part Motion for Entry of an Order Requiring Remote Depositions
  - Required parties to file an agreed remote deposition protocol by 7/15/20

- 7/29/20- Plaintiffs request leave to conduct limited evidentiary discovery as necessary to address the authenticity and admissibility of documents produced by parties in this litigation after the close of fact discovery granted in part.
  - Court will allow limited evidentiary discovery along the lines that Plaintiffs envision after the close of fact discovery or even before it closes.
- 9/22/20- Memorandum Opinion and Order denying Defendants' motion to strike or sever newly-filed consolidated and amended complaints including claims for bidrigging (see discussion above)
- Settlements:
  - 8/4/17- Motion of Preliminary Approval of Settlement Between Direct Purchaser Plaintiff Class and Fieldale Farms Corporation and for Conditional Certification of the Proposed Settlement Class- Settlement of \$2,250,000
  - 6/22/18- Order Granting Direct Purchaser Plaintiff's Motion to Approve a Plan of Notice of Settlement with Defendant Fieldale Farms Corporation
  - 1/10/19- Motion by Plaintiff Commercial and Institutional Indirect Purchaser Plaintiffs for Settlement and Motion for Preliminary Approval of Settlement with Fieldale Farms Corporation- Settlement for \$1,400,000
  - 12/20/19- Order granting approval of DPPs Motion for Preliminary Approval of the settlement with Peco Foods, George's Inc, George's Farms, and Amick Farms- Settlement over \$13,000,000- 1/8/20- Corrected Order
  - 6/22/20- Motion by Commercial and Institutional Indirect Purchaser Plaintiffs for Settlement and Motion for Preliminary Approval of Settlement with Defendant Amick Farms
  - 7/9/20- Order grants motion by Commercial and Institutional Indirect Purchaser Plaintiffs for preliminary approval of \$2.95 million settlement by indirect purchasers with Amick Farms LLC
  - 8/31/20- Motion by Direct Purchaser Plaintiffs requesting \$13 million settlement with Peco Foods, George's Inc, George's Farms, and Amick Farms
- Opinions:
  - 11/20/17- (Opinion) Opinion and Order denying Motion to Dismiss except claims under Arkansas law
    - Reasoning regarding Plaintiff's Conspiracy claim
      - Plausibly alleged parallel conduct
        - Conduct not required to be simultaneous or uniform, just had to allege production cuts at the same time
      - Alleged factual circumstances that plausibly demonstrate that parallel conduct was a product of conspiracy
        - Court found it persuasive that the Defendants conduct was unusual in comparison to the industry's history of regular production increases, and that the conspiracy strategy of restraining production then increasing production to reap the benefit of price increase is not implausible

- Circumstances are indicative of formation of agreement and communication in execution of that agreement
  - Public statements of intent to cut production were persuasive of an agreement to cut production
  - The amount of sharing with Agri Stats is unusual in a way that is a plausible means of communication
  - Regular opportunities to share information
- Business strategies during the time period are indicative of conspiracy
  - Intra-competitor sales to manage production numbers
  - Increased sales outside of the United States to lower US product, switch from fixed price to variable price contracts, decreased number of breeder flocks to unprecedented numbers
- 9/22/20- Memorandum Opinion and Order denying Defendants’ motion to strike or sever newly-filed consolidated and amended complaints including claims for bidrigging (see discussion above)

NEW CASE: *Colvin v. Tyson Foods, Inc. et al*, Case No. 2:20-cv-02464-HLT-JPO (D. Kan. 2020); Defendants include Tyson, Pilgrim’s Pride, Perdue Foods, Koch Foods, and Sanderson Farms; complaint alleges wage-fixing and “no-poaching” agreements between poultry processors

## **Pork**

In Re Pork Antitrust Litig., No. 18-cv-1776, 2019 U.S. Dist. LEXIS 20038 (D. Minn. 2019)

- Docket Number: No. 18-cv-1776 (D. Minn.)
- Court: District of Minnesota
- Parties:
  - Plaintiffs: 3 groups
    - Direct Purchaser Plaintiffs (DPPs)
    - Consumer Indirect Purchaser Plaintiffs (IPPs)
    - Commercial and Institutional Indirect Purchaser Plaintiff (CIPs)
  - Defendants: Agri Stats, Clemens Food Group, Hormel Foods Corporation, Indiana Packers Corporation, JBS USA, Seaboard Foods, Smithfield Foods, Triumph Foods, Tyson Foods, The Clemens Family Corporation, Hormel Foods, LLC, JBS USA Food Company, JBS USA Food Company Holdings, Mitsubishi Corporation (Americas), Seaboard Corporation, Tyson Fresh Meats, Tyson Prepared Foods, Hatfield Quality Meats, Erbert & Gerbert’s, Inc.
- Theories of Liability:
  - Starting in 2009, defendants discretely conspired to decrease pork production and/or limit production increases to raise the price of pork
  - Made public statements about needing to decrease production aimed to signal continued conspiracy to the others
  - Used Agri Stats to share competitive information

- Is the kind of industry (integrated, commodity, horizontally concentrated, high barriers to entry) that collusion like this would affect the market
- Case Timeline:
  - 6/28/18- Complaint Filed
  - 8/17/18- Amended Complaint Filed
  - 9/21/18- 13 putative antitrust class actions consolidated for pretrial
  - 10/23/18- Defendants filed 11 motions to dismiss; Defendants filed motion to stay discovery
  - 2/7/19- (Discovery) Defendants' Motion to Stay Discovery is granted in part and denied in part [ Doc. No. 193] (details in the Discovery section)
  - 8/8/2019- Ruling on Defendants' Motions to Dismiss
    - Facts pertinent to the court
      - Horizontally concentrated (only a few companies that buy, slaughter, and process) and vertically integrated industry
        - Reasons it is horizontally concentrated
          - Entering the industry is cost prohibitive
          - The pigs are already sold in multi-year contracts to the current processors
        - Commodity product, so not much differentiation in the product offering, and the price is the only thing that distinguishes the product
        - Plaintiffs allege that the concentration of industry and the commodity product makes this the perfect environment for collusion to happen
      - Plaintiffs allege
        - Ability to collude
        - Need to collude- horizontally integrated and commodity, so if one raises the price, that one would lose, if all raise the price, all win
        - Motivation to collude- Pork prices were flat between 2000 and 2009
      - Starting in 2009, Defendant Smithfield openly acknowledged that price-stagnation inherent in the pork industry was an issue, and mentioned that his efforts to fix the price decrease required the industry to start cutting back on pig operations
      - Smithfield CEO acknowledged he had spoken to other producers and was aware they would be liquidating
      - Tyson, Hormel, and JBS acknowledged they expected to see production decreases in 2010, and public statements like this continued over the next few years
      - Agri Stats offered the processors benchmarking services, and sharing information → though the data is anonymized, it's so detailed that it's easy to figure out which producer they're talking about

- Opinion:
  - Sherman Act Section 1 violation requirements: 1) there was a contract, combination, or conspiracy, 2) the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis, 3) the restraint affected interstate commerce
  - Horizontal price fixing is per se illegal without inquiry into actual harm, so just have to prove that they entered into an agreement with competing retailers to limit production and increase price
  - Question: is the parallel conduct alleged by the plaintiff sufficient for 12(b)(6) standard of whether there was an agreement?
  - 8<sup>th</sup> circuit held that parallel conduct can survive 12(b)(6) if buttressed by plus factors, such as 1) shared motive to conspire, 2) action against self-interest, 3) market concentration, 4) high-level of interfirm communication exist[ing] in conjunction with the parallel actions
  - Plaintiff has sufficiently identified strong plus factors (collusive and constrictive nature of the industry, the inelasticity of pork demand, trade associations attended by the Defendant, actions taken by some defendants against their own self-interests, pricing practices), however they did not sufficiently allege parallel behavior
    - Did not adequately plead the temporal proximity of the production cuts
    - Nothing supporting assertion that they took on production cuts
- Ordered:
  - Defendant's Joint Motion to Dismiss Direct Purchaser Plaintiff's Complaint the Federal Law Claims in the Indirect Purchaser Plaintiff's Complaints- Granted
  - Defendant's Joint Motion to Dismiss the State Law Claims in the Indirect Purchaser Plaintiff's Complaints- Granted
  - Consumer Indirect Purchaser Plaintiff's First Amended Complaint- Dismissed without prejudice
  - The Commercial and Institutional Indirect Purchaser Plaintiff's First Amended Complaint- Dismissed without prejudice
  - Each class of consolidated plaintiffs had 90 days to file an amended complaint
- 11/6/2019- Second Amended Complaints Filed
  - Amended Complaint by Direct Purchaser Plaintiffs and Consolidated Class Action Complaint
  - Consumer Indirect Purchaser Plaintiffs Second Amended Consolidated Class Action Complaint- Sealed
  - Commercial and Institutional Indirect Purchaser Plaintiffs- Sealed

- 1/15/2020- Third Amended Complaints Filed
  - Direct Purchaser Plaintiff’s Third Amended and Consolidated Class Action Complaint
    - This complaint fleshed out the reductions and moves that each company was making, presumably to address the court’s concern that the plaintiffs had not sufficiently demonstrated parallel behavior in their first complaint
    - Pointed to central role of Agri-Stats as both facilitator and means of detecting cheating on the alleged collusive agreement
  - Commercial and Institutional Indirect Purchaser Plaintiffs’ Third Amended and Consolidated Class Action Complaint
- 1/15/2020- Joint Motion to Dismiss/General the Federal Law Claims in Plaintiffs Amended Complaints
  - Joint Motion to Dismiss/General the Federal Law Claims in Plaintiffs Amended Complaints
  - Various motions in support were also filed by the individual defendants
- 10/16/20- Order – Joint Motion to Dismiss denied except as to one Defendant (Indiana Packers)
  - Memorandum Opinion by Judge Tunheim focuses on how deficiencies of initial complaints have been dealt with
  - The court notes that the DPP Complaint contains new, specific allegations related to each Defendant
  - Regarding the allegation of parallel herd-size reductions and coordinated diversion to export markets, the Court finds “that these allegations, when viewed as a whole, are sufficient to plausibly plead parallel conduct against all Defendants, except Indiana Packers. The new allegations give individualized content to what the original pleading showed: after nearly a decade of sustained growth, pork supply decreased. The initial decrease comes from three specific sources—sizeable reductions by Smithfield, Tyson, and Triumph, the first, second, and sixth largest producers. This comports with the industry picture as a whole.”
  - The Court requires proof of relatively little detail about the inner workings of the conspiracy itself: “Given the inherent difficulty of obtaining solid information of an antitrust conspiracy—especially one involving sophisticated commercial entities—the evidence that Plaintiffs have marshalled is sufficient to survive the relatively low bar of the pleading stage.”
- Status of Discovery:
  - 2/7/19- A Motion to Stay Discovery was granted in part and denied in part while the motion for dismissal was being evaluated [Doc. No. 193]
    - Was a motion to stay discovery during the pendency of the Motion to Dismiss
    - The factors the court considered in determining a decision to stay discovery<sup>1</sup>

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<sup>1</sup> Citing Dufrene v. ConAgra Foods, Inc., No. 15-cv-3796 (WMW/LIB), 2016 WL 10651947, at \*2 (D. Minn. Apr. 7, 2016); TE Connectivity, 2013 U.S. Dist. LEXIS 117719, 2013 WL 4487505, at \*2.

- The scope of the discovery
- The potential harm to the plaintiff if discovery is delayed
- The potential hardship or injustice to the defendant if the discovery proceeds
- The resources of the parties and the court
- (Court decided not to consider this factor as the Motion to Dismiss was still pending)- Merits of the motion
- Outcome
  - Parties had already agreed to some discovery
    - Rule 26(a) disclosures
    - Negotiating ESI protocol
    - Serving initial disclosures
    - Producing readily available organization charts
  - Order Regarding Disclosure of Information. Had to provide:
    - Rule 26(a)(1) disclosures
    - Organizational charts of purchasers, direct purchaser plaintiffs, indirect purchaser plaintiffs
    - Identification of email system used and length of time email is retained on the system
    - List of non-custodial data sources that may contain discoverable ESI
    - Document Retention Policies
    - Employee Technology Use Policies
    - List of known data sources likely to contain discoverable ESI that is not reasonably accessible under Rule 26(b)(B) or 26 (b)(2)(C)(ii)
- Dispositive Motions
  - 8/8/19- Defendant's 1<sup>st</sup> Motion to Dismiss was granted without prejudice
  - 10/16/20- Defendants' Combined Motion to Dismiss was denied except as to Indiana Packers (see description above)
- Settlements- N/A

## **Packaged Seafood (Tuna)**

### **In Re Packaged Seafood Products Antitrust Litigation**

- Docket Number: 3:15-md-02670
- Court: S.D. Cal.
- Parties:
  - Plaintiffs: Various parties; Direct Action Plaintiffs, Direct Purchaser Plaintiffs, Commercial Food Preparer Plaintiffs, Indirect Purchaser End-Payer Plaintiffs
  - Defendants: Bumble Bee, LLC; Tri-Union Seafoods, LLC; Starkist Co.; Tri-Marine International, Inc.; King Oscar, Inc.; Dongwon Industries Company, Ltd.; Thai Union Frozen Products LLC; Del Monte Foods Co.; Chicken of the Sea International; Christopher Lischewski



- Theories of Liability:
  - Facing a decline in per capita consumption of tuna, Defendants collusively agreed to restrict capacity, allocate customers, and fix prices at artificially high levels
  - Defendants formed a horizontal cartel which coordinated list and net price increases of packaged tuna, collusively reduced can size, and resisted more costly environmentally-responsible fishing technologies
  - Defendants coordinated anticompetitive conduct and monitored cheating on collusive agreements through various industry trade groups
  - Defendants acted against their individual economic interests by not seeking to increase market share under these demand conditions
  - DOJ's ongoing criminal price-fixing investigation uncovered actual direct price fixing resulting in criminal indictments and guilty pleas by several Defendant companies and their executives
- Case Timeline:
  - 12/9/15- MDL Panel transfers dozens of actions filed around the country to S.D. Cal.
  - 1/20/16- DOJ seeks to intervene for the limited purpose of requesting a stay on certain document discovery based on empaneling grand jury in the N.D. Cal investigating price fixing in the packaged seafood industry
  - 5/4/16- Court approves joint stipulation by parties and DOJ staying certain discovery until 12/31/16
  - 5/23/16- Individual Plaintiffs and putative Plaintiff classes file amended complaints referring to DOJ grand jury investigation and incorporating allegations of direct price fixing
  - 11/21/16- Court approves second stay on certain document discovery at request of DOJ until 3/31/17 and depositions until 9/30/17
  - 12/7/16- DOJ files status report informing Court of filing of first criminal information arising out of grand jury investigation
  - 12/31/16- DOJ files status report informing Court of filing of second criminal information arising out of grand jury investigation
  - 3/14/17- Order - Court grants in part and denies in part Motions to Dismiss by parent companies of two Defendants on state and federal causes of action with leave to replead
    - Court denies the Parent Defendants' Motions to Dismiss as to direct involvement in the conspiracy and grants the Parent Defendants' Motions to Dismiss as to alter ego and agency theories of liability
  - 5/8/17- Individual Plaintiffs and putative Plaintiff classes file heavily-redacted amended complaints under seal including additional counts reflecting release of nearly 2 million pages of documents previously only available to the grand jury
  - 6/1/17- DOJ files another status report informing Court of the filing of additional criminal cases by the grand jury
  - 7/24/17- DOJ seeks extension of stay of depositions through March 2018

- 9/26/17- Order – Court grants in part and denies in part various pending Motions to Dismiss
  - Judge Sammartino states “the factual footing has shifted since the Court issued its prior Orders. Whereas previously the United States Department of Justice had merely convened a Grand Jury to investigate potential violations of the Sherman Act ...in the packaged seafood industry, there have now been multiple guilty pleas either entered or agreed to pursuant to the Grand Jury investigation, including by senior executives of the Bumble Bee Corporation...and the Bumble Bee Corporation itself. Furthermore, Tri-Union has confirmed to counsel for Plaintiffs that it has sought leniency from the DOJ for its participation in the alleged conspiracy, and a former StarKist and Del Monte executive, Stephen Hodge, has pled guilty to participating in the same conspiracy...The ensuing Complaints therefore contain much more information than their predecessors.
  - Before analyzing the sufficiency of Plaintiffs’ factual allegations under different federal and state statutes, the Court observes, “[a]s a reminder, the Court has already determined that Plaintiffs validly pled a plausible conspiracy. And Plaintiffs now need only plead a plausible—not even likely— connection between the conspiracy and [certain Defendants.]”
- 1/3/18- Order – compelling Defendant Bumble Bee to answer a broad interrogatory about agreements with other Defendants overruling Defendant’s objection that to answer would require it to violate grand jury secrecy in view of the fact that Bumble Bee as a company and two of its senior executives entered guilty pleas
- 4/1/18- New round of heavily-redacted amended complaints filed that recite numerous guilty pleas
- 5/29/18- Class certification motions filed
- 9/7/18- DOJ again seeks limited stay to keep former Bumble Bee CEO, Christopher Lischewski, now sued in his individual capacity, from taking the deposition of three unindicted Chicken of the Sea executives who would testify against him in his upcoming criminal trial
- 11/5/18- Court grants requested stay of Lischewski deposing Chicken of the Sea executives but refuses to stay depositions of the three by Plaintiffs’ counsel because to do so would likely delay discovery in the civil case by a year [Lischewski convicted by jury of price fixing in 12/19]
- 1/28/19- Plaintiffs file numerous dismissals of claims over the next few months in various lawsuits reflecting settlements or partial settlements by Del Monte, Bumble Bee, Starkist, Chicken of the Sea and Tri-Union
- 7/30/19- Order – Granting class certification motions
- 9/19/19- Parties file numerous cross-motions for summary judgment
- 12/20/19- Court grants interlocutory appeal to 9<sup>th</sup> Circuit of class certification

- 2/14/20- Bumble Bee informs Court that it has filed bankruptcy and has been sold to FCF invoking automatic stay in bankruptcy
- 3/3/20- Order - Plaintiffs' partial summary judgment motions against Bumble Bee denied without prejudice, subject to automatic bankruptcy stay
- 5/27/20- Order – Court refuses to stay proceedings pending appeal of class certification to 9<sup>th</sup> Circuit

## **Beef**

### In Re Cattle Antitrust Litigation

- Docket Number: 19-cv-01222
- Court: D. Minn.
- Parties:
  - Plaintiffs: Various individual parties
  - Defendants: Tyson Foods, Tyson Fresh Meats, JBS, JBS USA Food Company, Swift Beef Company, JBS Packerland, Cargill, Cargill Meat Solutions Corporation, Marfrig Global Foods, National Beef Packing Company, John Does 1-10
- Theories of Liability:
  - Confidential informant alleged that packers coordinated to:
    - Reduce slaughter volumes so producers would have oversupply and accept lower cash prices for cattle
    - Slash cattle purchases during slaughter reductions
    - Coordinating their procurement system
    - Importing foreign live cattle to depress demand to US fed cattle
    - Refrain from expanding their slaughtering capacity
  - Actively traded live cattle options and futures which strongly correlate with cash spot prices, and made the prices of the options and futures artificial
  - Executives made public statements that affirmed their tactics of restraining production and dealing in options and futures
  - Economic analysis supports existence of conspiracy
    - Supply and demand drivers don't explain the price collapse
    - Joint Motion to Dismiss No other alternative explanations are supported
  - The cattle market is conducive to collusion
    - Trade organizations and opportunities to collude
    - Consolidated
    - High Barriers to entry
- Case Timeline:
  - 5/7/19- Complaint filed
  - 7/10/19- Ranchers Cattlemen Action Legal Fund United Stock Growers of American v. Tyson Foods, Sevy v. Tyson Food, and Wright v. Tyson Foods were consolidated
  - 7/15/19- Amended Complaint for the consolidated suit was filed- claims are largely similar to original complaint

- 9/13/19- Cargill, Swift Beef Company, JBS USA Food Company, JBS Packerland, JBS S.A., Tyson, and National Beef Packing Company filed
- 10/4/19- Amended Consolidated Complaint filed
- 11/13/19- Defendants filed Motions to Dismiss
- 9/28/20- Consolidated Cases – Order – Motions to Dismiss granted with leave to replead (includes at least R-CALF and NFU direct purchaser plaintiffs and indirect purchasers in *Peterson* case)
  - Judge Tunheim (same Judge as in *Pork*) applies the same logic as in dismissal of initial claims in *Pork*: “Because Plaintiffs have not pleaded their direct evidence with sufficient detail and because they have not pleaded parallel conduct sufficient to support an inference of a price-fixing conspiracy, the Court will grant Defendants’ Motions to Dismiss”
  - Reviewing the facts alleged in the pleadings the Court spent some time analyzing the inferences to be drawn from unnamed confidential witnesses who would allegedly testify about direct evidence of a collusive agreement between certain packers –
    - Witness 1 was a quality-assurance officer at a Defendant’s “slaughter plants located within the Texas Panhandle/Western Kansas region . . . for over 10 years until his employment ceased in 2018.” Plaintiffs recount details of “multiple discussions” that Witness 1 had with the head of fabrication (“Fabrication Manager”) at their plant, where “the Fabrication Manager explained that all of the Packing Defendants reduced their purchase and slaughter volume in order to reduce fed-cattle prices when Packing Defendants viewed fed-cattle prices as being ‘too high’ for their liking.” Plaintiffs further allege that the Witness 1 and the Fabrication Manager had a discussion sometime in 2015 or early 2016 where the Fabrication Manager “specifically admitted that the Packing Defendants had an ‘agreement’ to reduce their purchase and slaughter volumes in response to what they perceived to be high cattle prices.”
    - Witness 2 was a feedlot manager, “who managed a 35,000 head commercial feedlot in the Panhandle region from 2012 until early 2016.” Witness 2 described an anticompetitive “queuing convention,” in which the price for cash sales are set not by competitive bidding...If no buyer offers a higher price, the producer must return to the first bidder and offer a right-of-first refusal because that packer remains “on the cattle.” (Id.) Witness 2 described the negative consequences of a failure to adhere to this convention; producers could be blackballed or boycotted for breaking with it. Additionally, the four Defendants would allocate who made the first bid each week by “draw[ing] cards in his office.”
    - “Because of the lack of detail regarding the firms by which the Confidential Witnesses were employed, Plaintiffs do not adequately explain their jobs and how their interactions in those

jobs would lead to them acquiring the knowledge they allegedly possess”

- As in *In re Pork*, the Court concludes that although “Plaintiffs’ cited plus factors are strong, the allegations at this point regarding parallel conduct are sparse and conclusory.” They do little to allege how the individual Defendants acted and instead resort to group pleading, arguing that the market did this or that. “Without specific information regarding each Defendant, the Court has no basis to analyze which, how many, or when any of the individual Defendants may have affirmatively acted[.]”
- Status of Discovery:
  - 4/14/20- Court issued Order on Discovery Pending Resolution of Motion to Dismiss. Required Disclosures include:
    - Rule 26(a)(1) disclosures
    - Rule 34 requests
    - Organization Charts identifying relevant parties
    - Identification of email system used and length of time email is retained on the system
    - List of non-custodial data source that may contain discoverable ESI
    - Document Retention Policies
    - Employee Technology Use Policies
    - List of known data sources likely to contain discoverable ESI that is not reasonably accessible under Rule 26(b)(B) or 26 (b)(2)(C)(ii)
    - Not required to provide:
      - Documents and purchase/sale data produced to government regulators
  - 4/14/20: Protective Order ruling discovery was also issued
  - 9/10/20: Order granting in part partial lift of stay of discovery pending motions to dismiss regarding some documents produced in response to CIDs issued by DOJ’s Antitrust Division
    - Although, “Plaintiffs have not persuaded the Court that they are entitled to do an end-run around either Rule 26 or Rule 34 simply by asking for documents produced to a government regulator, even if that regulator is investigating similar claims to those advanced by Plaintiffs”
    - Nevertheless, “Because the documents have already been gathered and organized for production to the DOJ, because the great majority of those documents are highly likely to be relevant to Plaintiffs’ claims and to be of assistance in the discovery-related tasks the Court authorized in its April Order, and in view of the absence of any showing that reviewing that group of documents for relevance and confidentiality would impose a significant incremental burden on any Defendant, the Court will order Defendants to review the documents they produced to the DOJ in response to the June 2020 CIDs and to produce to Plaintiffs all non-privileged documents that are relevant to any of Plaintiffs’ claims in these cases.”
- Dispositive Motions- N/A

- Settlements-N/A
- Opinions-N/A

Pacific Agri-Products, Inc. v. JBS USA Food Company Holdings

- Docket Number: 19-cv-02720
- Court: D. Minn.
- Parties:
  - Plaintiff: Pacific Agri-Products, Inc.
  - Defendants: JBS USA Food Company Holdings, JBS S.A. Swift Beef Company, JBS Packerland, Inc., Tyson Foods, Tyson Fresh Meats, Cargill, Cargill Meat Solutions Corporation, National Beef Packing Company, Marfrig Global Foods
- Theories of Liability:
  - A witness alleged that packers:
    - Coordinated to reduce slaughter volumes so producers would have oversupply and accept lower cash prices for cattle
    - Closed or idled plants and refrained from expanding capacity
  - Took opportunities to collude at national conferences
  - Signaled the reductions through earnings calls and public statements
- Case Timeline:
  - 10/16/19- Complaint filed
- Status of Discovery-N/A
- Dispositive Motions-N/A
- Settlements-N/A
- Opinions- N/A

Erbert & Gerbert's Inc. v. JBS USA Food Company Holdings et al

- Docket Number: 20-cv-01414
- Court: D. Minn.
- Parties:
  - Plaintiffs: Erbert & Gerbert's, Inc.
  - Defendants: JBS USA Food Company Holdings, Tyson Foods, Cargill, National Beef Packing Company
- Theories of Liability:
  - A confidential informant witness alleged that packers:
    - Coordinated to reduce slaughter volumes so producers would have oversupply and accept lower cash prices for cattle
    - Closed or idled plants and refrained from expanding capacity
  - Took opportunities to collude at national conferences
  - Signaled the reductions through earnings calls and public statements
- Case Timeline:
  - 6/18/20- Complaint filed
- Status of Discovery-N/A
- Dispositive Motions- N/A
- Settlements- N/A

- Opinions- N/A
- Joined Cases: Peterson v. Agri Stats, 19-cv-01129

Samuels et al. v. Cargill, Inc. et al.

- Docket Number: 20-cv-01319
- Court: D. Minn.
- Parties:
  - Plaintiffs: Howard Samuels, Central Grocers, Strack and Van Til Super Market, SVT LLC
  - Defendants: Cargill, JBS USA Food Company Holdings, National Beef Packing Company, Tyson Foods
- Theories of Abuse:
  - Confidential informant witness (who was a quality assurance officer) learned from a fabrication manager that the manager was in contact with counterparts at other plants, and that the defendants:
    - Agreed to reduce slaughter volumes
    - Defendant idled and closed plants and refrained from expanding processing capacity
  - Defendants used evening calls to communicate reductions
- Case Timeline:
  - 6/6/20- Complaint filed- see theories of abuse above
- Status of Discovery-N/A
- Dispositive Motions-N/A
- Settlements-N/A
- Opinions-N/A

## **Turkey**

- Until this point, the Turkey industry had been left out of the class action trend

Olean Wholesale Grocery Cooperative v. Agri Stats

- Docket Number: No. 19-cv-8318
- Court: N.D. Ill.
- Parties:
  - Plaintiffs: Olean Wholesale Grocery Cooperative and John Gross Company (Direct Purchaser Plaintiffs)
  - Defendants: Agri Stats, Butterball, Cargill Meat Corporation, Cargill, Inc., Cooper Farms, Inc., Farbest Foods, Inc., Foster Farms, LLC, Foster Poultry Farms, Hormel Foods Corporation, Hormel Foods, LLC, House of Raeford Farms, Inc., Kraft Foods Group Brands LLC, Kraft Heinz Foods Company, Perdue Farms, Inc., Perdue Foods LLC, The Hillshire Brands Company, Tyson Foods, Inc., Tyson Fresh Meats, Inc., Tyson Prepared Foods, Inc.
    - Includes processors, integrators, and co-conspirators

- Theories of Liability:
  - Had opportunities to collude and make agreements at various industry association events, execs served on the same boards as each other, etc.
  - Defendants entered into an agreement to exchange information through Agri Stats
  - During the collusion period, there were market indicators of anticompetitive behavior
    - Prices rose, but production failed to rise to match demand, indicating anticompetitive restraint
    - Prices were previously correlated with feed costs, but the relationship between the two diverged during the conspiracy period
- Case Timeline:
  - 12/19/2019- Complaint filed by John Gross and Company, Inc. and Olean Wholesale Grocery Cooperative
    - Agri Stats collected and disseminated competitor behavior, which was used to facilitate widespread collusion
      - Agri Stats collected and disseminated disaggregated financial information and production data to others in the Boiler Industry
      - These reports were so detailed that competitors could easily figure out which competitor the information was about
      - Agri Stats allegedly purposefully circulated information to top executive to facilitate agreement on supply, constraints, and price
    - Defendants entered into an agreement to exchange information through Agri Stats
      - Metrics that were shared via Agri Stats
        - Subscribers allowed to compare their prices against national average and top 25% average price
        - Reports comparing performance, sales, prices, and costs
        - Integrators could share info on business metrics, sales, production
      - This information was unnecessary to achieve benefits to consumers, and clearly was meant to improve the profitability of the co-conspirators
      - Separate reports issued to the Turkey industry to integrator defendants
    - Courts evaluate the relative market to assess competitive effects of concerted action
      - Only a single market for turkey, high barriers to entry in the market, extremely consolidated, they have market power and it's a commodity market
    - Industry-wide production cuts facilitated through the information exchanged on Agri Stats
    - During the conspiracy period, there were market indicators of anticompetitive behavior
      - Prices rose, but production failed to rise to match demand, indicating anticompetitive restraint



- Prices were previously correlated with feed costs, but the relationship between the two diverged during the conspiracy period
  - Defendants had many opportunities to collude
    - Many turkey-related trade associations and numerous regular meetings and events, many execs serve on the boards of these associations, namely
      - National Turkey Federation
      - North American Meat Institute
- 3/31/20- Motions to Dismiss and any responsive pleadings were originally required to be submitted by 3/31/20, plaintiff's responses were due 4/30/20, and defendant's replies in support of their motions were due 5/21/20
  - March 30, 2020- Deadlines were extended by 21 days due to Coronavirus
  - Through various orders, continued to be extended due to the COVID Pandemic
- 4/13/2020- Sandee's Catering v. AgriStats Inc. was filed separately
- 5/8/2020- Defendant's submitted an agreed motion to reassign Sandee's Catering and establish a master docket number for it
- 6/16/2020- Defendants filed Motions to Dismiss
  - Kraft- Motion to Dismiss for Failure to State a Claim
  - Cooper Farms- Motion to Dismiss for Failure to State a Claim
  - Farbest Foods- supplemental Motion to Dismiss for Failure to State a Claim
  - All Other Defendants- Motion to Dismiss for Failure to State a Claim
- 10/19/20- Memorandum Opinion and Order- Joint Motion to Dismiss denied except with respect to *per se* allegations which are dismissed without prejudice
  - "Stating a rule of reason claim requires alleging that Defendants entered into an agreement that causes anti-competitive effects and that those anti-competitive effects outweigh any pro-competitive benefits. The rule of reason also requires Plaintiffs to plead that the exchange had an anti-competitive effect on a given market in a given geographical area."
  - "Plaintiffs allege that the Turkey Defendants agreed to "regularly exchange detailed, timely, competitively sensitive and non-public information about their operations" via Agri Stats. Each Turkey Defendant contributed data to Agri Stats with the "understanding that it would be reciprocated" by other Turkey Defendants. Turkey Defendants knew of each other's participation in the information exchange because Agri Stats listed its participants in the report. Moreover, although Agri Stats ostensibly anonymized the data in the reports, the data was so detailed that Turkey Defendants were able to infer which data corresponded to which Defendant."
  - "These allegations are sufficient to allege a hub-and-spoke conspiracy among the Turkey Defendants and Agri Stats."
  - "Given that Turkey Defendants allegedly knew that each of them were participating in the information exchange and could decipher the data pertaining to each producer—and because executives of the Turkey Defendants allegedly had regular opportunities to meet and discuss

production targets at various trade association meetings—Plaintiffs have alleged enough to plausibly suggest the existence of a hub-and-spoke conspiracy among the Turkey Defendants to exchange competitively sensitive information with one another through Agri Stats.”

- “Plaintiffs adequately allege an anti-competitive effect—namely, price increases and slowed production—resulting from the information exchanged through Agri Stats.”
- *Per se* allegations unsupported: “As detailed above, courts evaluate claims of unlawful information exchanges under the rule of reason. Throughout most of the Complaint, plaintiffs acknowledge this and allege facts that support that theory. Then, in a conclusory paragraph, Plaintiffs state that “[t]he alleged contract, combination, or conspiracy is also a per se violation of the federal antitrust laws.” This is not a plausible allegation; courts evaluate information exchange claims under the rule of reason, so the per se allegation is dismissed without prejudice.”

- Status of Discovery- N/A
- Dispositive Motions- N/A
- Settlements- N/A
- Opinions- N/A