IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CHARLES MORRIS, et al.	)	
	)	
Plaintiffs,	)	Case No. 4:15-cv-00077
	)	
v.	)	
	)	Judge: Honorable Joseph H. McKinley
TYSON CHICKEN, INC., et al.	)	
	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO DEFENDANT TYSON CHICKEN, INC.'S MOTION TO CERTIFY OR RECONSIDER SUMMARY JUDGMENT DECISION

I. INTRODUCTION AND SUMMARY.

Tyson's motion to certify the summary judgment decision for interlocutory appeal, or in the alternative reconsider it, Dkt. No. 252, fails to substantiate its requests. Throughout it ignores controlling authority. It also misstates the case law it does cite and the decision it challenges.

Indeed, it wholly elides the fact that its primary request for interlocutory review "'under [29 U.S.C] § 1292(b) is granted sparingly and only in exceptional cases.'" *Bullock v. Otto Imports, LLC*, No. 4:19-CV-00149-JHM, 2020 WL 5043140, at *1 (W.D. Ky. Aug. 26, 2020) (McKinley, J.) (quoting *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002)). "[A]ttractive as it may be to refer difficult matters to a higher court for advance decision, such a course of action is contrary to our system of jurisprudence." *Schall v. Suzuki Motor of Am., Inc.*, No. 4:14-CV-00074-JHM, 2017 WL 2960540, at *1 (W.D. Ky. July 11, 2017) (McKinley, J.) (citing *United States ex rel. Elliot v. Brickman Grp. Ltd., LLC*, 845 F. Supp. 2d 858, 863 (S.D. Ohio 2012)).

Moreover, in order for the Court to even consider whether to exercise is discretion under § 1292(b) the movant "must make three different showings": (i) that it seeks to appeal a "controlling question of law," (ii) over which there is "a substantial ground for difference of opinion," and (iii) the appeal could "materially advance the ultimate termination" of the matter. *Bullock*, 2020 WL 5043140, at *1. Of particular relevance here, whether facts satisfy the legal standard is not a "controlling question of law" under § 1292(b). *Id.* To establish a substantial ground for disagreement on a "controlling question of law" a movant must show "there is little precedent," the issue is one of "first impression," there is a "difference" within the circuit split, or a circuit split. *Schall*, 2017 WL 2960540, at *1. Finally, an appeal is more likely to materially advance this litigation "'early in the proceedings,'" not when the case is "'nearing trial.'" *Id.* at *3 (quoting *Newsome v. Young Supply Co.*, 873 F. Supp. 2d 872, 876 (E.D. Mich. 2012)).

Thus, by seeking to appeal a summary judgment ruling, Tyson immediately places its request in jeopardy. More importantly, none of the three holdings Tyson points to presents a disputed issue of law. As a result, Tyson distorts the summary judgment decision to read in non-existent holdings and argues Plaintiffs will not be able to make out the established elements, neither of which is a basis to appeal under § 1292(b).

Specifically, Tyson states it wishes to appeal whether its "status" as a monopsonist—the sole buyer for Plaintiffs' chicken growing services—is sufficient conduct to violate the Packers and Stockyards Act ("PSA"). Dkt. No. 252, at 1 (emphasis in original). But the summary judgment decision contains no such holding. Indeed, Tyson later admits the Court determined it could be liable because Plaintiffs can show Tyson possesses anticompetitive monopsony power and uses that power by "tak[ing] action that harms" its growers, *id.* at 18, as well as showing that conduct likely harmed competition. The conduct required—that Tyson possessed and used its

anticompetitive monopsony power—is exactly what Tyson states is mandated by the PSA. *Id.* at 2. In other words, even Tyson does not suggest there is a substantial ground for difference over the true nature of the Court's holdings.

Accordingly, Tyson goes on a lengthy aside regarding the sufficiency of Plaintiffs' evidence to establish Tyson's anticompetitive conduct. But, "'§ 1292(b) is not appropriate for securing early resolution of disputes concerning whether the trial court properly applied the law to the facts.'" *Bullock*, 2020 WL 5043140, at *1 (quoting *U.S. ex rel. Elliott*, 845 F. Supp. 2d at 864). The Court's determination that there is a dispute of fact is not a "controlling legal question" that can support interlocutory review. *Zanaty v. Harris*, No. 2:07-CV-1089-RDP, 2008 WL 11423847, at *2 (N.D. Ala. Aug. 29, 2008) (question for interlocutory appeal is only "whether the court applied the correct legal standard to disputes of fact"); *see also In re City of Memphis*, 293 F.3d at 351 (discretionary evidentiary rulings are not grounds for an interlocutory appeal because they do not present the "legal question of the type envisioned by § 1292(b)").

Next, Tyson states interlocutory review is necessary so it can contest whether it is sufficient for Plaintiffs to show Tyson's conduct was likely to harm competition, rather than that it actually harmed competition. But, as Tyson recognizes, the Sixth Circuit has held PSA violations can be shown through establishing the conduct likely harmed competition. Dkt. No. 252, at 9. Thus, there can be no substantial grounds for difference of opinion on this issue. The appeal could only reaffirm the controlling law. This is especially true as the Sixth Circuit's decision is in line with a plethora of other circuit authority, and Tyson points to none going its way.

Relying on its erroneous standard, Tyson asserts Plaintiffs cannot show "Tyson's practice actually injured competition." *Id.* (emphasis in original). However, yet again, this presents an improper dispute of fact, not an issue of law that could justify interlocutory review. It is also

inconsistent with the record. The Court's summary judgment decision explains "[t]here is evidence in the record that Tyson exercised monopsonist power in [a] way that adversely impacts" competition. Dkt. No. 246, at 5. Given this finding, whether showing likely harm to competition is sufficient may become irrelevant, which is yet another reason the Court should not certify the summary judgment decision for interlocutory review. Under controlling authority, that the issue may become moot prevents interlocutory review of that issue. *In re City of Memphis,* 293 F.3d at 351.

Finally, Tyson claims it should be allowed an appeal to argue its activities can only be shown to likely harm competition if they are shown to likely harm the output of chickens across the nation rather than harm Tyson's Robards chicken growers. Once again, this issue has already been resolved against Tyson in the Sixth Circuit. *Parchman v. U.S. Dep't of Agric.*, 852 F.2d 858 (6th Cir. 1988). Tyson does not bother to address that case or the other authority Plaintiffs provided at summary judgment holding against Tyson under the PSA and in all antitrust cases alleging a monopsony. *See e.g.*, *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1134-36 (10th Cir. 2002) (collecting antitrust cases holding that in cases alleging monopsony power plaintiffs do not need to "prove end-user impact"). Thus, here too, there is no substantial ground for disagreement.

Turning to its alternative request for reconsideration, Tyson effectively concedes this request is baseless. Tyson explains reconsideration could only be warranted if it established "clear errors of law resulting in manifest injustice." Dkt. No. 252, at 21. Yet the remainder of its brief seeks to prove the summary judgment decision resolved "open question[s]" that warrant another look. *Id.* at 11. The Court could not have committed clear error if it were treading new ground as Tyson claims, and it certainly did not do so here where its decisions relied on established law.

Tyson may be disappointed that it will be held to account for its misconduct, but its arguments are unworthy of the motion it filed, let alone the relief it requests. Thanks largely to Tyson's delay tactics, Plaintiffs have been waiting more than five years to obtain relief. During that period Tyson has terminated the contract of the lead Plaintiff, Charles Morris, making his recovery in this suit particularly important to him and his family. Plaintiffs deserve better than to have to untangle omissions of relevant findings and case law to reach a jury. Tyson's motion should be denied and the case set for trial.

II. ARGUMENT

a. The Court did not hold Tyson's status as a monopsonist is sufficient to prove a PSA claim such that Tyson's first issue to appeal does not exist.

Tyson claims it should be allowed to appeal whether "being an alleged monopsonist … prove[s] a violation of the PSA," Dkt. 252 at 5, but the summary judgment ruling contains no such holding. Instead, it states Plaintiffs can prevail by showing Tyson possessed and used its anticompetitive power in a way that is likely to harm competition. Dkt. No. 246, at 5-7. As Tyson's purported issue is not presented by the summary judgment decision no interlocutory appeal could be warranted to raise its question. Moreover, the actual holding is entirely consistent with the conduct Tyson itself explains is required under the PSA, meaning there is no legal dispute to be certified. Tyson attempts to sneak in a fact dispute as to whether Plaintiffs can make out the required elements, but that is an issue for trial, not interlocutory appeal. Thus, if the Court were to look beyond Tyson's misrepresentation of the summary judgment decision, Tyson cannot justify its request.

Indeed, contrary to Tyson's claim that the summary judgement decision allows it to be liable based on the status of its Robards production facility as a monopsony, the summary judgment decision explains: "Being an alleged monopsonist does not alone prove a violation of the PSA, but

the PSA is violated when a monopsonist engages in certain practices that result in or are likely to result in anti-competitive effects." *Id.* at 5; *see also id.* (explaining there is a dispute of fact because Plaintiffs produced evidence "Tyson acted on its monopsony power in several ways"). Going further, the Court rejected Plaintiffs' argument that the PSA's prohibition on deceptive practices could be given a broader construction, stating that even for claims of deceptive practices Plaintiffs need to show "proof of a practice by a monopsonist that has or is likely to impact adversely on competition." *Id.* at 6-7. Nothing in the summary judgment decision can reasonably be construed as holding that the Robards complex's status as a monopsonist is sufficient conduct to prove a PSA claim.

In reaching this holding, the opinion relies on Tyson's preferred authority, *Been v. O.K. Industries Inc.*, *id.* at 5, which articulates the same elements as the summary judgment decision: where, as here, the PSA is read to contain antitrust elements it "is violated when a monopsonist engages in specific practices that result in or are likely to result in the anticompetitive effects the PSA was designed to prevent." *Been*, 495 F.3d 1217, 1234 (10th Cir. 2007). This is precisely the standard Tyson states it will ask the Sixth Circuit to adopt if allowed to appeal. Dkt. No. 252, at 2. In sum, when the summary judgment decision is properly read, there is no legal dispute, let alone a substantial one.

Seemingly recognizing as much, Tyson pivots to improperly disputing whether Plaintiffs can make out the standard stating, "Plaintiffs did not provide any evidence the Robards Complex engaged in any practices that actually injure or were likely to injure competition." Dkt. No. 252, at 5 (emphasis in original); *see also id.* at 18. Elsewhere, however, Tyson concedes its motion must present a "'question of law'" to justify interlocutory review, not this dispute of fact. *Id.* at 4 (quoting *In re City of Memphis*, 293 F.3d at 350).

This argument is also contrary to the Court's findings. The Court determined Plaintiffs produced substantial evidence that Tyson used its anticompetitive power and that drove down Plaintiffs' returns. Dkt. No. 246, at 5-6. That holding, despite Tyson's assertions to the contrary, was well-grounded in the record. *See* First Stiegert Report, Dkt. No. 242-1 ¶¶ 18, 41-45, 48-58, 61-62, 84, 87, 94-108.[1] Regardless, a court's application of an agreed-to legal standard to the record is not a basis for interlocutory appeal. *Bullock*, 2020 WL 5043140, at *1.

Moving yet farther from a cognizable issue for interlocutory review, Tyson spends pages attackiing Plaintiffs' exert Dr. Kyle Stiegert, purportedly to show Plaintiffs will be unable to prove their case if this Court required them to show Tyson engaged in anticompetitive practices. Dkt. No. 252, at 6-7. This contention is not only irrelevant to this motion, *Bullock*, 2020 WL 5043140, at *1, but baseless. Tyson points to Dr. Stiegert's damages methodology—where he created the standard "but-for" world to determine how Plaintiffs were damaged, by backing out Tyson's anticompetitive conduct—and argues this discussion does not show Tyson engaged in anticompetitive practices. Dkt. No. 252, at 6-7. Yet, by definition, the "but-for" world is a world without Tyson's misconduct. Tyson conveniently overlooks the remainder of Dr. Stiegert's report that describes how Tyson engaged in anticompetitive conduct. First Stiegert Report, *supra*.[2]

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[1] Dr. Stiegert's full report was first filed in the record unredacted and under seal at Dkt. 180.

[2] To the extent Tyson's footnotes try to make Plaintiffs' evidence of Tyson's practices a question of law, suggesting Plaintiffs need show Tyson possessed and used it anticompetitive power, and also that those practices were "unfair," "unreasonable" or "deceptive" Dkt. No. 252, at 13 n.5, this question is waived by solely being presented in the footnotes. Further, Tyson's suggestion finds no basis in law. Where cases have read antitrust elements into the PSA, they explain they do so because the statute's actual text of "unfair" and "unreasonable" is too vague to be applied. *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 362-63 (5th Cir. 2009); *see also id.* at 365 (Jones, J., concurring). In requiring plaintiffs to prove a defendant possessed and used anticompetitive power, the courts sought to replace those standards with a more concrete one, not simply add onto the vague test. Plfs.' MSJ Opp., Dkt. No. 222, at 14. Further still, the Court determined Tyson's conduct that violated the PSA also violated Tyson's contract with Plaintiffs, damaging them, which is surely "unfair." Dkt. No. 246, at 7-8.

Getting back to the true issue, Tyson's contention that the Sixth Circuit must weigh in on whether Tyson's Robards complex's monoposony power establishes a PSA violation raises a legal question that does not exist in this case. The Court held Plaintiffs need to show that power resulted in anticompetitive practices—exactly as Tyson states is required under the law. The Court determined Plaintiffs could make out those facts, and whether that is true is a question for trial not interlocutory appeal. Tyson cannot wish away that record to delay judgment.

b. This Court applied binding case law to hold Plaintiffs only need to show a likely harm to competition, but also held Plaintiffs can show more, making an interlocutory appeal to challenge that standard particularly improper.

In asking this Court to allow it to appeal whether it is sufficient for Plaintiffs to show Tyson's anticompetitive practices are likely harm to competition, Tyson is asking this Court to certify the question whether the word "or" means "or." Tyson recognizes courts, including the Sixth Circuit, have held a plaintiff can prevail under the PSA by showing a defendant's conduct "injures or is likely to injure competition," and Tyson wishes to appeal whether the word "or" allows courts to "split" that statement into two tests. Dkt. No. 252, at 9. Tyson's desire to affirm basic grammar does not warrant interlocutory review.

This is especially true because numerous courts, including the Sixth Circuit have already rejected the argument that plaintiffs need to show the defendant's conduct actually harmed competition, rather than was likely to harm competition. The Sixth Circuit has held PSA claims can be proven by showing "those practices that will *likely* affect competition adversely." *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277 (6th Cir. 2010) (emphasis added) (quoting *Wheeler*, 591 F.3d at 357). An earlier Sixth Circuit decision stated the Act "does not require … actual injury" to competition, rather a plaintiff only needs to "establish the likelihood that an arrangement will result in competitive injury." *Parchman*, 852 F.2d at 864. This makes perfect sense as "Congress

intended the PSA to have a broader scope than the antitrust laws." *Been*, 495 F.3d at 1231. A panel could only affirm these holdings.

Were that not enough, the Eighth Circuit has also explained, "a practice which is likely to reduce competition and prices paid to farmers for cattle can be found an unfair practice under the [PSA]," and that the PSA "does not require … actual injury before a practice may be found to be unfair and in violation of the Act." *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999). The Ninth Circuit has similarly written, "[U]nfair practices under § 202 [of the PSA] are not confined to those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint of competition." *De Jong Packing Co. v. U.S. Dep't of Agric.*, 618 F.2d 1329, 1337 (9th Cir. 1980). Further, the Seventh Circuit, in a section of its opinion titled "Likelihood of Competitive Injury," stated the case law "does not specify that competitive injury must be proved." *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968). Instead, it is sufficient to show the challenged conduct "*might* lessen competition." *Armour*, 402 F.2d at 720 (emphasis added); *id.* at 722 ("Armour's coupon program might violate Section 202(a) if it would probably result in competitive injury, tend to restrain trade or create a monopoly."); *see also Sanders v. Koch Foods, Inc.*, No. 3:19-CV-721-DPJ-FKB, 2020 WL 3621322, at *6 (S.D. Miss. July 2, 2020) ("[P]ractices that will likely affect competition adversely violate the Act."); *Breaking Free, LLC v. JCG Foods of Alabama, LLC*, No. 4:18-CV-01659-ACA, 2019 WL 1513978, at *5 (N.D. Ala. Apr. 8, 2019) ("[T]enuous" allegations "that Defendants' acts are likely to harm competition" is sufficient to state a PSA claim). That a plaintiff only needs to show conduct that is likely to harm competition is the well-established standard under the PSA, over which there is no substantial dispute.

Because Tyson's request to appeal this standard is groundless, it again tries to shoehorn in a dispute of fact, which cannot justify interlocutory review. It argues that when Plaintiffs' evidence comes in it will be insufficient when compared to two out-of-circuit cases, *London v. Fieldale Farms Corp.* 410 F.3d 1295, 1304–05 (11th Cir. 2005), and *Been*, 495 F.3d 1217, which Tyson claims effectively required evidence of actual anticompetitive effect. Dkt. No. 252, at 14-15. This should be irrelevant given the controlling Sixth Circuit authority on this matter. But Tyson is also wrong as to what those cases required. *London* rejected the claim there because the plaintiff did not present any evidence the integrator actually or likely injured the market. *London*, 410 F.3d at 1305 (plaintiffs "did not present any evidence at trial" that challenged conduct "adversely affected or was likely to adversely affect competition"). *Been* remanded for a trial to determine whether Plaintiffs can show the defendant "engage[d] in specific practices that are likely to injure competition." *Been*, 495 F.3d at 1234. And, once again, the Court's determination that the record meets that established legal standard does not present a question for interlocutory review. *Bullock*, 2020 WL 5043140, at *1.[3]

Moreover, here too Tyson misrepresents the summary judgment decision, which determined Plaintiffs could make out Tyson's heightened standard of actual harm to competition making Tyson's request for interlocutory review of this matter all the more improper. The Court determined Plaintiffs may be able to show that Tyson actually "exercised monopsonist power in a way that adversely impacts" competition. Dkt. No. 246, at 5; *see also, e.g.*, First Stiegert Report, Dkt. No. 242-1 ¶¶ 18, 41-45, 48-58, 61-62, 84, 87, 94-108 (providing evidence that Tyson's

[3] As Plaintiffs explained in their summary judgment briefing, Dkt. No. 222, at 7-9, Tyson's reliance on *London* and *Been* for examples of what sort of evidence could prove a PSA claim is peculiar. Tyson has not identified and Plaintiffs could not locate any court that has read *London* in the same way as Tyson. Further, the *Been* district court on remand directly contradicts Tyson's reading of what sort of evidence the Tenth Circuit required.

practices at the Robards complex actually harmed competition). This would mean the question of whether a likely harm to competition is sufficient (and what evidence can show that) would become moot. Under Sixth Circuit law, this is yet another reason the Court should not certify the question of whether a likely or actual harm to competition is required. *In re City of Memphis*, 293 F.3d at 351.

In sum, there is no plausible legal dispute that Plaintiffs can prove their case by demonstrating a likely harm to competition. Tyson's efforts to create a dispute over whether Plaintiffs' trial evidence will meet that test is the sort of hypothetical that should not be presented to courts, let alone certified under § 1292(b). Moreover, the record undermines Tysons suggestion that anything about the "likely" standard could warrant appeal at this time.

c. Controlling law establishes the PSA allows farmers to prosecute harms to their operations.

Finally, Tyson states it wishes to appeal whether plaintiffs can "show an adverse effect on 'competition' by showing an adverse effect on broiler farmers" (also known as "growers") rather than the market for their goods. Dkt. No. 252, at 16. That is, whether Plaintiffs can prove their case by showing Tyson's conduct did or was likely to harm competition among them or must they show it harmed consumers. Dkt. No. 222, at 4-9 (Plaintiffs discussing this issue in their summary judgment briefing). Yet, the cases, including those on which Tyson relies and those in the Sixth Circuit, endorse the rule that growers can show a PSA violation by proving the conduct is likely to harm competition among chicken growers.

Parchman, controlling authority Tyson overlooks, affirmed a PSA violation based on evidence that, on two dates, individual ranchers were harmed by a single stockyard. *Parchman*, 852 F.2d at 864, 866. In that case, the Sixth Circuit considered whether a stockyard weighing cattle "at less than their true and correct weights" could violate the PSA. *Id.* at 863. The court explained

that the purpose of the PSA's prohibition on "'unfair' and 'deceptive' practices" is to protect a competitive marketplace and those individual underpayments to ranchers were sufficient to violate PSA. *Id.* at 864. Again, a panel could only affirm this holding.

Although that should be sufficient, *Been*, on which Tyson relies, also endorses the rule that the PSA can be violated by a company using its anticompetitive power to "depress[] prices to the growers," and found that a plaintiff need not show a harm to chicken consumers. *Been*, 495 F.3d at 1234. Lest there be any doubt, the *Been* district court on remand from the Tenth Circuit stated the plaintiffs could prove their PSA claim with an expert who testified the defendant possessed anticompetitive power and wielded that power to "unilaterally and arbitrarily reduced grower pay or production." *Been v. O.K. Indus., Inc.*, No. CIV-02-285-RAW, 2008 WL 11389388, at *2 (E.D. Ok. July 3, 2008). It continued, "[c]learly, the Tenth Circuit did not place the burden on plaintiffs to demonstrate defendants' market share in the output market" and thus the extent to which its anticompetitive practices harmed consumers. *Id.*

Likewise, *In re Pilgrim's Pride Corp.*, on which Tyson also relies, holds "Growers might show an anticompetitive effect on their own level" and establish a PSA violation. *In re Pilgrim's Pride Corp.*, 448 B.R. 896, 903 (Bankr. N.D. Tex. 2011). To argue otherwise, Tyson quotes a later decision in that case that does not address the PSA claim, but rather interprets a release agreement between the parties. *In re Pilgrim's Pride Corp.*, 453 B.R. 691, 694 (Bankr. N.D. Tex. 2011). Moreover, Plaintiffs were unable to locate the language Tyson purports to quote from that opinion. Tyson also points to the Fifth Circuit decision in the matter. That opinion explains the PSA claim failed because the defendant acted in response to competitive market forces, not that plaintiffs showed the defendant engaged in anticompetitive conduct, but that caused harm at the wrong level of the market. *In re Pilgrim's Pride Corp.*, 728 F.3d 457, 462 (5th Cir. 2013).

Tyson's other citations similarly concern instances in which the plaintiff failed to prove any anticompetitive activities at any level of the market, and do not speak to whether Plaintiffs can rely on conduct against them to prove a PSA violation. Tyson emphasizes the cases hold "[t]ermination of a contract" does not prove a PSA claim. Dkt. No. 252, at 16. But, it concedes in a footnote that this was because the defendants were not shown to have possessed anticompetitive power when they terminated the contracts; the case do *not* stand for the proposition that mistreatment of growers can never violate the PSA. *Id.* at 9 n.4. Indeed, in *Sanders*, the plaintiffs "essentially acknowledge[d] that the resulting harm to competition is yet to be shown" in any way, at any level. *Sanders*, 2020 WL 3621322, at *6. The opinion goes on that the plaintiff could have established a PSA claim by showing the defendant had anticompetitive power and "eliminat[ed]" a particular producer. *Id.* In other words, *Sanders* indicates a plaintiff grower can prove a violation by showing the defendant possessed and used anticompetitive power against growers if that is likely to harm competition, exactly what the summary judgment decision held and Tyson argues against. *Id.* In *Mims v. Cagle Foods JV, LLC*, Tyson's other authority, it appears the plaintiff did not allege a harm to competition whatsoever. *Mims v. Cagle Foods JV, LLC*, 148 Fed App'x 762, 766 & n.2. (11th Cir. 2005) (unpublished). Regardless, its holding is simply that a plaintiff cannot rely on "[t]ermination of a contract" alone, without any evidence the defendant possessed anticompetitive power, to prove a PSA claim. *Id.* It does not suggest Plaintiffs need to show Tyson used its anticompetitive power to manipulate national chicken prices.

Tyson turns to policy arguments to try to create a dispute over what sort of anticompetitive conduct can violate the PSA, Dkt. No. 252, at 17, but such an argument cannot trump the established, controlling case law. Moreover, Tyson's preferred rule that Plaintiffs must show it used its anticompetitive power to move consumer prices would be inconsistent with antitrust law

generally, *Telecor Communciations Inc.*, 305 F.3d at 1134-36, as well as the purpose of the PSA. While the relevant provisions of the PSA are interpreted to have antitrust elements, they contain no antitrust language, 7 U.S.C. § 192(a), (b), and thus they must be treated as "broader than antecedent antitrust legislation." *Been*, 495 F.3d at 1228. Courts must balance their antitrust construction of the PSA against the fact that the law was passed to prevent "possible depression of producers' prices." *Farrow v. U.S. Dep't of Agr.*, 760 F.2d 211, 215 (8th Cir. 1985); *see also* Been, 495 F.3d at 1233 ("[T]he PSA prevent[s] those practices that facilitate the [company's] arbitrary manipulation of prices" within growers' contracts.). Thus, it would be very odd (if not entirely incorrect) to hold the PSA cannot apply based on a defendant's harm to growers, which would make the PSA more stringent than standard antitrust laws. Regardless, Tyson provides no support for its theory, undermining its request for interlocutory review.

Once again, the Court is presented with much-ado-about-nothing. Tyson cannot point to any authority that supports its position, therefore it must proceed by ignoring binding authority and cherry picking language that when read in context is entirely consistent with this Court's ruling. As a result, no interlocutory appeal is warranted.

d. Tyson's remaining arguments add nothing.

Given that the PSA case law places the Court's decision squarely within it, Tyson's alternative request for reconsideration is baseless. Tyson suggests there is clear error, but in truth, the most favorable argument it can muster is that others could dispute this Court's holdings, not that they were clearly erroneous. Dkt. No. 252, at 11, 21. Thus, Tyson has not established a basis for reconsideration. Further, as shown above, its disputes are groundless, meaning reconsideration would be error.

Tyson also emphasizes this case is significant to it, Dkt. No. 252, at 20, but that is not a sufficient reason for interlocutory review or reconsiderations. Moreover, proceeding through the normal course is yet more significant to Plaintiffs, particularly those like Charles Morris whose contracts Tyson has chosen to terminate during the course of this litigation. Plaintiffs have been waiting for years to reach the merits and have produced a record that establishes Tyson is unlawfully using its power to harm them. In fact, Plaintiffs' evidence establishes they may be able to prove their case under any and all articulations of the law. These facts establish further delay would not materially advance the litigation, and in fact would be unfairly prejudicial.

III. CONCLUSION

For the foregoing reasons, Tyson's motion should be denied.

RESPECTFULLY SUBMITTED this 14th day of December, 2020.

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CERTIFICATE OF SERVICE

On this the 14th day of December, 2020, I hereby certify that a copy of the foregoing has been sent via the District Court electronic filing system and by email to:

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