No. 04-

United States Court of Appeals For the Eighth Circuit

HERMAN SCHUMACHER, et al.

Plaintiffs-Respondents,

v.

TYSON FRESH MEATS, INC., et al.

Defendants-Petitioners.

Appeal from the United States District Court for the District of South Dakota, No. Civ. 02-1027, Hon. Charles B. Kornmann, United States District Judge

BRIEF OF THE AMERICAN MEAT INSTITUTE AND NATIONAL MEAT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR LEAVE TO APPEAL PURSUANT TO RULE 23(f) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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STATEMENT OF *AMICI CURIAE*'S IDENTITY, INTEREST IN THE CASE, AND AUTHORITY TO FILE THIS BRIEF

Amicus curiae American Meat Institute (AMI) is a national trade association representing packers, processors, suppliers, and distributors of meat and meat food products. *Amicus curiae* National Meat Association (NMA) is a national trade association that has served as an advocate for the meat industry since 1946. NMA members include packers, processors, and distributors of meat and meat products. Among its members are many small and family-owned packers.

The class certification order in this case depends on an expansive and erroneous reading of the Packers and Stockyards Act (PSA), an important statute regulating the activities of AMI and NMA members. That order threatens a broad swath of the industry with crushing liability simply because the United States Department of Agriculture (USDA) made a mistake. *Amici* have a strong interest in ensuring that the certification order and its breathtakingly broad interpretation of the PSA – the only interpretation under which this case could proceed as a class action – are corrected immediately.

Although this case involves four large packers, the deleterious implications of the certification decision would bear heavily on many smaller businesses who procure cattle and process meat all over the country. Applying to these firms the sweeping reading of the PSA adopted here, one that turns packers into virtual insurers of the

producers from whom they buy livestock, would have serious consequences for their day-to-day operations and subject them to serious financial peril. *Amici* have submitted a motion for leave to file along with this brief.

INTRODUCTION

This is an important case arising under the PSA, 7 U.S.C. §§ 181-229. Plaintiffs claim that defendants (four of the largest meatpackers in the country) violated Section 202(a) and Section 202(e) of the Act. Section 202(a) makes it unlawful for a packer to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device." 7 U.S.C. § 192(a). Section 202(e) makes it unlawful for a packer to "[e]ngage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices." *Id*. § 192(e). The words of the statute – "unfair," "unjust[]," "deceptive," "manipulati[ve]" – are the language of moral opprobrium, not the language of strict liability or insurance.

The essence of plaintiffs' claim is that they were injured when they sold cattle to the defendants at prices that were depressed because the USDA distributed inaccurate information about the aggregate prices at which the packers sold "boxed beef" in the downstream market. Plaintiffs have made no allegation that defendants were in any way responsible for USDA's mistakes. Rather, plaintiffs assert that (1) the packers *knew* that USDA was misreporting boxed-beef prices; (2) plaintiffs

did *not* know that the prices reported by USDA were incorrect; (3) defendants intentionally misrepresented (or at least intentionally withheld) information concerning the true nature of market conditions; and (4) the resulting imbalance of information induced plaintiffs to sell their cattle at artificially depressed prices. The district court relied heavily on those allegations in denying defendants' motion to dismiss.

Although those allegations are necessary to survive a motion to dismiss, they are antithetical to a class action. Certification is permissible only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3). If liability requires proof that a seller was deceived by a defendant's deliberate misrepresentations, as the language of the PSA suggests and as the district court indicated in denying the motion to dismiss, common questions are overwhelmed by individualized questions: What did a specific buyer say to a specific seller in a specific transaction? Was that seller deceived or misled by the buyer's statements? How (if at all) did the deception affect the price of their transaction? Because these essential individualized questions predominate over common questions, class certification is improper in cases of this kind.

In an attempt to avoid this fatal problem, the district court's class certification ruling erroneously reinterpreted the PSA so broadly that it scarcely matters what any defendant or any plaintiff knew or did. Individualized questions no longer predom-

inate because as a practical matter, under the district court's reinterpretation of the PSA, defendants are strictly liable for any economic harm suffered by the plaintiffs as a result of USDA's mistakes. This misguided reading of the Act would condemn as "deceptive" a transaction in which no one was deceived and as "unfair" a sale in which buyer and seller had identical information.

Rule 23(f) was added in 1998 to allow for permissive interlocutory appeals of especially misguided or significant class certification decisions. This Court has not yet "refin[ed] a circuit standard for review of such petitions," *Liles* v. *Del Campo*, 350 F.3d 742, 746 n.5 (8th Cir. 2003), but other Circuits have recognized that review is appropriate when a certification decision is manifestly erroneous or when interlocutory review would spare the parties and the district court the burden of litigating to a final judgment that is likely to be reversed on appeal because of legal error that is apparent now. Review should be granted in this case.

ARGUMENT

I. THE DISTRICT COURT'S CLASS CERTIFICATION ORDER IS BASED ON AN UNTENABLE INTERPRETATION OF THE PACKERS AND STOCKYARDS ACT

The PSA was enacted in 1921, primarily "to regulate anticompetitive trade practices in the livestock and meat industry in accord with the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation such as the Clayton

Act and the Fair Trade Commission Act." *Farrow* v. *U.S. Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985) (internal quotation marks omitted). Under Section 202(a) it is unlawful for a packer to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device." 7 U.S.C. § 192(a). Section 202(e) makes it unlawful for a packer to "[e]ngage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices." *Id*. § 192(e).

At the heart of this case are inaccurate reports prepared and disseminated by USDA concerning the prices packers were receiving for boxed beef. Under the Livestock Mandatory Reporting Act of 1999, 7 U.S.C. §§ 1635-1636h, USDA is required to collect information from packers on the prices they receive for boxed beef. Those data are then aggregated and published, under procedures designed to ensure that an individual packer cannot discern the prices charged by competing packers. 7 U.S.C. § 1636. Because of normal variations between one packer's prices and another's, differences between the boxed-beef price that an individual packer reports and the aggregated price information that the government disseminates are common. For a short period of time when USDA first began to disseminate this information, it incorrectly reported prices for Choice and Select beef because of the mistaken inclusion of "no-roll" beef prices in the aggregated price data. Am. Cplt. ¶ 38.

The published boxed-beef price does not, however, set even the "baseline" price that individual producers receive for cattle. Cattle are sold in many locations in open spot markets, in which there is no single price. Instead, livestock prices are determined through negotiation on a transaction-by-transaction basis, and are influenced by many factors, including the futures market for live cattle; cattle supplies at any given time, including prices paid for similar cattle in the area; the weather in any given place; the price of feed; the quality of the cattle coming up for slaughter; and the premiums that market participants believe are appropriate for particularly valuable animals. Many of those factors are subjective and location-specific; the nature and outcome of the negotiations varies significantly from one transaction to another.

The allegations in the Amended Complaint appear to reflect a correct understanding that, in this context, a valid claim under Section 202(a) or 202(e) requires proof that (1) the packers *knew* that USDA was misreporting boxed-beef prices and intentionally misrepresented the true nature of market conditions to extract a lower price; (2) plaintiffs did *not* know that the prices reported by the government were incorrect; and (3) the resulting imbalance of information induced plaintiffs to rely on defendants' conduct in deciding whether to sell their cattle and at what price.[1/] As the

[1/] See Am. Cplt. ¶¶ 42-43 (alleging that defendants knew the publicly reported prices were wrong); ¶ 44 (alleging reliance on the reported prices); ¶¶ 46, 53 (alleging that defendants knowingly circulated false information about market conditions);

district court recognized, those allegations were necessary for plaintiffs' PSA claims to survive defendants' motions to dismiss. Cf. *Douglas County Bank & Trust Co.* v. *United Fin. Inc*., 207 F.3d 473, 479 (8th Cir. 2000) ("[A]ctual knowledge of true facts prevents a claim of fraud.").

In denying those motions, the court described plaintiffs' theory as one that would require evidence *both* that defendants knew about USDA's mistake while plaintiffs did not *and* that defendants had somehow made affirmative use of that imbalance of information in negotiating the price at which they purchased plaintiffs' cattle. Motion-to-Dismiss Order 6 (Sept. 26, 2003) (relying on allegations that "defendants knew plaintiffs were relying on incorrect data" and that "defendants' agents affirmatively referred to the reported boxed beef prices in negotiating for the purchase of plaintiffs' livestock").[2/]

¶¶ 47, 54 (alleging that plaintiffs lacked accurate information about the price of boxed beef); ¶ 48 (alleging that transactions were "based on" plaintiffs' ignorance of the actual boxed-beef prices); ¶¶ 53-54, 56 (alleging that defendants' misrepresentations, and failure to correct plaintiffs' ignorance about USDA's error, constituted unfair and deceptive practices and had the effect of manipulating prices).

[2/] See also Motion-to-Dismiss Order 8 ("The question is whether defendants had a statutory duty under the PSA to refrain from deceptively using plaintiffs' *misconceptions* as to the price of boxed beef, *using* the same against plaintiffs in negotiating for the purchase of plaintiffs' cattle.") (emphasis added); *id*. at 9 ("Instead, plaintiffs contend that defendants' failure to correct plaintiffs' misconceptions * * * that boxed beef prices were accurate constituted an unfair, deceptive, or manipulative practice under the PSA."); *ibid*. (concluding that fraud had been pleaded

Although such evidence is necessary to bring a claim sounding in fraud under Section 202, claims requiring this kind of highly individualized proof of knowledge and reliance are ill suited for class certification. See FED. R. CIV. P. 23(b)(3) advisory committee notes ("[A]lthough having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed."). "'The reliance element of * * * fraud and negligent misrepresentation claims [is] not readily susceptible to class-wide proof;' rather, 'proof of reasonable reliance * * * depend[s] upon a fact-intensive inquiry into what information each [plaintiff] actually had.'" *Gunnells* v. *Healthplan Servs, Inc.*, 348 F.3d 417, 435 (4th Cir. 2003) (quoting *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 341 (4th Cir. 1998)), cert. denied, 72 U.S.L.W. 3750 (U.S. June 14, 2004).[3/]

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adequately because plaintiffs alleged that defendants made "affirmative misrepresentations" and that those representations "materially entered into the price plaintiffs were willing to accept for their livestock").

[3/] See also *Moore* v. *PaineWebber, Inc.*, 306 F.3d 1247, 1253 (2d Cir. 2002) ("Where there are material variations in the nature of the misrepresentations made to each member of the proposed class, however, class certification is improper because plaintiffs will need to submit proof of the statements made to each plaintiff, the nature of the varying material misrepresentations, and the reliance of each plaintiff upon those misrepresentations in order to sustain their claims."); *Sprague* v. *Gen. Motors Corp.*, 133 F.3d 388, 398 (6th Cir. 1998) (claims involving "proof of what statements were made to a particular person, how the person interpreted those statements, and whether the person justifiably relied on those statements to his detriment" are not

In the present case, insofar as liability turns on the packers' and producers' relative awareness of USDA's mistaken price data – and on whether particular defendants made misrepresentations about the reliability of those data on which particular plaintiffs relied in deciding to sell their cattle – proof of liability requires fact-intensive inquiries into the circumstances of individual transactions. Such inquiries, by their very nature, are not common to the class as a whole. To address these essential questions, the action necessarily will "degenerate into multiple lawsuits separately tried." FED. R. CIV. P. 23(b)(3) advisory committee notes. In a similar case, involving allegations of fraudulent conduct in connection with the sale of property where "separate oral and written representations by the defendants allegedly caused the injuries to each plaintiff" and where there were "divergent degrees of reliance upon [defendants'] oral and written representations," this Court recognized that class certification was improper. *Darms* v. *McCulloch Oil Co.*, 720 F.2d 490, 493 (1983).

The district court was aware of these commonality and predominance problems. The solution it devised, however, was entirely inappropriate. Abandoning the

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susceptible to classwide treatment). Thus, the Fifth Circuit has held that "claims for money damages in which individual reliance is an element are poor candidates for class treatment, at best." *Patterson* v. *Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001); see also *McManus* v. *Fleetwood Enterps., Inc.*, 320 F.3d 545, 549-550 (5th Cir. 2003); *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue.").

approach that it had followed at the motion-to-dismiss stage, the court certified the class action based on a novel reading of the PSA so capacious that it renders wholly irrelevant the packers' knowledge and intent *as well as* the knowledge and reliance of the producers. Only by such misconstruction was the court able to conclude that common questions predominated over those affecting only individual class members.

In particular, the court deemed the following matters *legally irrelevant*:

- "Whether defendants did not know during the alleged class period that the prices being reported were wrong" (*i.e.* what each *defendant* knew about USDA's error) (Motion-to-Dismiss Order 7);[4/]

- "Whether some producers thought the USDA numbers were wrong" (*i.e.* what each *plaintiff* knew about the error) (*ibid.*);

- "Whether some producers heard one or more representatives of the defendants say that the 'box is down' or something similar" (*i.e.* whether defendants made actual misrepresentations on which plaintiffs might have relied) (*ibid.*);[5/] and

- "Whether some producers did not monitor the USDA boxed beef prices reports and paid no attention to such items" (*i.e.* whether each plaintiff

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[4/] See also Motion-to-Dismiss Order 5 ("The question would then be: have the packers, *regardless of what they knew or should have known* during the class period, used or taken advantage of an unfair practice (keeping all the 'excess value' of the cattle) or of a deceptive practice (USDA error).") (emphasis added).

[5/] See also *id.* at 18 ("I reject any contention by defendants that resolution of the PSA claims will require individualized proof of whether statements were made by representative of defendants that 'the box is down' in negotiating for the purchase of fed cattle or whether class members relied on any such representations.").

even knew about the misreported prices and thus could possibly have relied on them) (*ibid.*).

Similarly, the district court held that commonality and predominance did not break down even in the face of significant differences within the class, including: (1) some class members believed that USDA's reported prices were wrong whereas others did not;[6/] (2) some class members allege that they heard certain defendants make misrepresentations about the accuracy of USDA's prices whereas others admit they heard no such thing;[7/] and (3) some class members claim to have relied on the reported prices whereas others clearly did not. In the district court's view, "*[n]one of the foregoing matters at all in determining whether the defendants engaged in or used an unfair practice or device*." Class Cert. Order 10 (emphasis added).

This approach, although essential to the court's finding that common issues predominate over individual issues, represents a seriously misguided reading of Section 202. This Court has applied to the PSA the "firmly established" principle that "in the interpretation of a statute its words are to be taken according to the meaning given in common usage*." Bruhn's Frozen Meats of Chicago, Inc.* v. *USDA*, 438 F.2d

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[6/] Indeed, at least two of the named plaintiffs in this case admitted that they suspected, from the beginning of the class period, that the prices being published by USDA were inaccurate. Koch Dep. 206-207; Callicrate Dep. 117.

[7/] For example, none of the named plaintiffs could recall a single misrepresentation by defendant Excel Corp. Callicrate Dep. 153; Koch Dep. 204-206; 219-221.

1332, 1338 (8th Cir. 1971). The key terms in Section 202(a) – "unfair," "deceptive," "device" – clearly focus attention on both the culpability of the defendant and the vulnerability of the plaintiff to being injured by defendant's conduct. A "device" is a "scheme to deceive," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 618, and "[t]o *deceive* is to induce someone to believe in a falsehood." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 251 (2d ed. 1995). It is difficult, if not impossible, to deceive someone who has identical (or better) information about the subject of the alleged deception. To be "deceptive," after all, something must "have the power to mislead." WEBSTER'S THIRD at 585.

Thus, the actual circumstances of each transaction are crucial to the kind of assessment called for by the statute: What did the packer know? What did he say to the producer from whom he was buying cattle? What did the producer know? What did he believe? To ignore this obvious proposition – and therefore to determine that this kind of transaction-specific inquiry is immaterial – is simply to ignore the language and the purpose of the PSA. Cf. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976) (when the word "deceptive" is used in conjunction with "device," it "strongly suggest[s]" an intent to "proscribe knowing or intentional conduct").

It is for just these reasons that Section 202 has been interpreted to require some showing of *intentional* wrongdoing on the defendant's part:

> The fact that a given provision does not expressly specify the degree of injury or the type of intent required, does not imply that these basic indicators of the line between free competition and predation are to be ignored. Surely words such as "unfair" and "unjustly" in Section 202(a) * * * require some examination of the seller's intent and the likely effects of its acts or practices under scrutiny.
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> * * *
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> [I]n Section 202(a), Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged.

Armour & Co. v. *United States*, 402 F.2d 712, 717, 722 (7th Cir. 1968). The Act's unfairness language must be taken seriously in determining whether a packer's conduct rises to the level of a violation of Section 202(a). *IBP, Inc*. v. *Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) ("The statutory language requires that the practice or device be unfairly or unjustly discriminatory and not merely discriminatory."). The class certification order here, however, does just the opposite. By deeming the parties' respective knowledge irrelevant, that order effectively reads the concepts of unfairness and deception out of the Act. The district court thus unacceptably dissociated liability under Section 202 from any showing that any defendant tried to *deceive* any plaintiff or that any plaintiff was susceptible to being deceived.

Any possible doubt about the meaning of the statute's language is resolved by the USDA regulation addressing the precise conduct at issue in this case:

> No packer, live poultry dealer, stockyard owner, market agency, or dealer shall *knowingly* make, issue, or circulate any false or misleading reports, records, or representation concerning the market conditions or the prices or sale of any livestock, meat, or live poultry.

7 C.F.R. § 201.53 (emphasis added). The agency's position that Section 202 forbids only *knowing* deception is entitled to deference. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984); *Van Wyk* v. *Bergland*, 570 F.2d 701, 705 (8th Cir. 1978).

The practical effect of the district court's interpretation of the PSA is to convert packers into insurers who are strictly liable for any economic injury suffered by producers as a result of USDA's mistakes. According to the logic of the certification decision, if USDA's reporting mistakes *in any way* caused plaintiffs to receive less for their cattle than they would have received had boxed-beef prices been reported accurately, the packers are obliged to make up the difference – even if they did not cause and did not know about the misreporting and, what is worse, even if the plaintiffs did.

Even a less expansive version of Section 202 liability – which would deem any information imbalance affecting a livestock purchase an unfair or deceptive practice – would fundamentally and inappropriately change the relationship between packers and producers. In the absence of a duty to disclose, silence is generally not considered fraudulent. "[O]ne who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so.

And the duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'" *Chiarella* v. *United States*, 445 U.S. 222, 228 (1980); see also *Bonilla* v. *Volvo Car Corp*., 150 F.3d 62, 69-70 (1st Cir. 1998) (in the absence of a legal, professional, or contractual duty to disclose, "there is no general obligation of the seller to tell the buyer everything negative that the buyer might be interested in learning about the transaction or item to be purchased"). Section 202 does not require packers to shoulder this kind of liability, which is akin to that associated with a fiduciary or a trustee, not with a buyer of goods in a free market. See *Mahon* v. *Stowers*, 416 U.S. 100, 106-108 (1974) (rejecting the argument that the PSA imposes a "trust relationship" or "an implicit fiduciary obligation" on packers in their commercial dealings with cattle sellers). Although Section 202 describes a number of actions that packers must *refrain* from taking, the Act imposes neither an express nor an implied duty on packers to disclose information to the producers from whom they purchase livestock. Cf. *Jackson* v. *Swift Eckrich, Inc,*. 53 F.3d 1452, 1458 (8th Cir. 1995) ("We are convinced that the purpose behind § 202 of the PSA * * * was not to so upset the traditional principles of freedom of contract.").

Insofar as the district court relied on the "manipulating or controlling prices" language of Section 202(e), its approach was equally inappropriate. Both *manipula-*

tion and *control* suggest a degree of intentional activity on the defendant's part, or at least a change in the price of the good directly traceable to the defendant's actions. Thus, in analogous contexts – for example, the consumer protection provisions of the Commodities Exchange Act, 7 U.S.C. § 25(a)(1)(D) – "manipulation" means "an *intentional* exaction of a price determined by forces other than supply and demand," which requires specific intent on the defendant's part. *Frey* v. *CFTC*, 931 F.2d 1171, 1175 (7th Cir. 1991). Similarly, the Supreme Court relied heavily on the use of the word "manipulative" in Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j, when it held that the Act included a scienter requirement, which foreclosed liability without "knowing or intentional practices." *Hochfelder*, 425 U.S. at 198-199 (observing that manipulative "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities"); see also *id.* at 199 n.21 (citing definition of "manipulate" as "to manage or treat artfully or fraudulently; as to manipulate accounts" and "[t]o force (prices) up or down, as by matched orders, wash sales, fictitious reports * * *; to rig").

Against this backdrop, a determination that the packers here manipulated prices within the meaning of the PSA requires, *at a minimum*, an inquiry into relative knowledge about USDA's mistakes and into whether such knowledge was misused. Given that those mistakes were not brought about by the packers, how could it be said that

a packer wholly unaware of the government's misreporting was engaged in any manipulation whatsoever? Similarly, if a producer knew that the published prices were wrong, how could it be that he (or the price he received for his cattle) was manipulated, regardless of the packer's actions?

The district court's flawed analysis cannot be salvaged by treating, as an unresolved common question of *law*, whether individualized factual determinations are required. See Class Cert. Order 6 ("common legal question also exists as to whether it may be presumed that sellers relied on the boxed beef price reports" and "a common legal question exists as to whether there is any legal requirement for plaintiffs to prove that the packers knew or at least should have known * * * that the USDA reports were incorrect"). A district court cannot certify a class merely by declining to resolve legal issues whose resolution would make certification impossible. See *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672, 675-676 (7th Cir. 2001) (rejecting approach whereby "the district judge certified the class without resolving factual and legal disputes that strongly influence the wisdom of class treatment" and holding that, "where it is not possible to evaluate impending difficulties without making a choice of law," then the "judge must make a preliminary inquiry into the merits"). If liability depends on reliance, a class properly can be certified *only* if a classwide presumption of reliance is legally justified. See *Newton* v. *Merrill Lynch*, 259 F.3d 154, 172 (3d

Cir. 2001).[8/] The decision whether to presume reliance, however, *must* be made at the class certification stage. Class certification cannot be appropriate whenever a plaintiff merely *argues* for a presumption of reliance.

II. THIS COURT SHOULD CLARIFY THAT RULE 23(f) PETITIONS MAY BE ACCEPTED TO CORRECT A MANIFESTLY ERRONEOUS CLASS CERTIFICATION ORDER

Rule 23(f) recognizes that class certification decisions stand apart from other kinds of nonfinal rulings by trial courts. Class certification dramatically raises the stakes and increases the complexity of litigation. As it has in this case, certification often transforms a relatively modest set of individual claims into a multi-million-dollar lawsuit that threatens massive financial liability on the defendants. See *Szabo*, 249 F.3d at 675. Class certification also brings into play a host of difficult issues that will not arise at all if certification is denied, including the adequacy of class representation, how to provide proper notice to absent class members, the reasonableness of proposed settlements, and the appropriateness of attorneys' fees.

[8/] Thus, when the Supreme Court (in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988)) allowed reliance to be presumed in certain federal securities fraud cases, it recognized that, where that presumption does not apply, individual issues of reliance will typically "overwhelm[] the ones common ones," making class certification inappropriate. *Id*. at 242; see also *Gunnells*, 348 F.3d at 345 (reversing class certification order where district court incorrectly presumed reliance because, in the absence of that presumption, "individualized inquiry will be required to show that Plaintiffs actually relied on the Agents' alleged misrepresentations"); *West* v. *Prudential Secs. Inc.*, 282 F.3d 935 (7th Cir. 2002) (same).

In addition, class certifications often "force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." FED. R. CIV. P. 23(f) advisory committee notes; see also *Tardiff* v. *Knox County*, 365 F.3d 1, 3 (1st Cir. 2004) ("One reason for [23(f)] review is a threat of liability so large as to place on the defendant an irresistible pressure to settle."). "[C]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).

Although this Court has not yet articulated the standards under which it will evaluate Rule 23(f) petitions, other circuits have held that interlocutory review is appropriate when a "district court's class certification decision is manifestly erroneous." *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002) ("Rule 23(f) review would be warranted * * * if for no other reason than to avoid a lengthy and costly trial that is for naught once the final judgment is appealed.").[9/] Review and reversal of the class certification here would spare the parties

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[9/] See also *Newton* v. *Merrill Lynch*, 259 F.3d at 164 ("[A]n error in the class certification decision that does not implicate novel or unsettled legal questions may still merit interlocutory review given the consequences likely to ensue."); *Lienhart* v. *Dryvit Sys., Inc.*, 255 F.3d 138, 145 (4th Cir. 2001) ("[A] careful and sparing use of Rule 23(f) may promote judicial economy by enabling the correction of certain manifestly flawed class certifications prior to trial and final judgment."); *Prado-Steiman ex rel. Prado* v. *Bush*, 221 F.3d 1266, 1274-1275 (11th Cir. 2000) ("Inter-

and the district court the costs and burdens of lengthy and complex litigation. Without review, defendants will either succumb to unfair pressures to settle a case that lacks merit or, in the event of a litigated final judgment for plaintiffs, will secure reversal of the judgment only after enormous cost. This court should review the district court's manifest error in certifying a class action.

CONCLUSION

Defendants' petitions for leave to appeal should be granted.

Respectfully submitted,

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June 22, 2004

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locutory review may be appropriate when it promises to spare the parties and the district court the expense and burden of litigating the matter to final judgment only to have it inevitably reversed by this Court on an appeal after final judgment.").

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2004, I caused copies of the foregoing Brief of the American Meat Institute and the National Meat Association As *Amici Curiae* in Support of the Petition for Leave to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) to be served by First Class United States Mail, postage prepaid, on the following:

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