

**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

Nos. 20-1045, 20-1127

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In Re: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION

THE KROGER CO.; SAFEWAY, INC.; ROUNDY'S SUPERMARKETS, INC.;  
WALGREEN CO.; HY-VEE, INC.; ALBERTSONS LLC; THE GREAT ATLANTIC &  
PACIFIC TEA COMPANY, INC.; H.E. BUTT GROCERY COMPANY; SUPERVALU  
INC.; PUBLIX SUPERMARKETS, INC.; GREAT EAGLE, INC.; WINN-DIXIE  
STORES, INC.,

Appellants in 20-1045

v.

ROSE ACRE FARMS; UNITED EGG PRODUCERS, INC.; UNITED STATES EGG  
MARKETERS, INC.

Rose Acre Farms,  
Appellant in 20-1127

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On Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Civil No. 2-08-md-02002)  
District Judge: Hon. Gene E.K. Pratter

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Argued January 26, 2021

Before: JORDAN, MATEY, *Circuit Judges*, and HORAN,\* *District Judge*.

(Opinion filed: March 15, 2021)

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\* Honorable Marilyn J. Horan, District Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

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OPINION\*\*

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MATEY, *Circuit Judge*.

We return for another chapter in the long-running dispute over allegations of price-fixing in the egg industry. In this installment, the Appellants argue the District Court improperly instructed the jury on the elements of an antitrust conspiracy. But the instruction reflected both the case they tried and the law. And any murkiness around the challenged instruction is more than clarified by the whole of the Court’s charge. So we will affirm.

### I. BACKGROUND

Over a decade ago, several large national grocery stores<sup>1</sup> (together, “Appellants” or “Direct Action Plaintiffs”), sued United Egg Producers (“UEP”), United States Egg Marketers (“USEM”), and Rose Acre Farms,<sup>2</sup> alleging a horizontal conspiracy to reduce supply—and consequently inflate prices—of domestic eggs in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. UEP and USEM are leading egg-producer trade groups, while

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\*\* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

<sup>1</sup> Kroger Co., Safeway Inc., Walgreen Co., Hy-Vee, Inc., Albertsons LLC, the Great Atlantic & Pacific Tea Company, H.E. Butt Grocery Company, Roundy’s Supermarkets, Inc., Publix Super Markets, Inc., Supervalu Inc., Giant Eagle, Inc., and Winn-Dixie Stores, Inc.

<sup>2</sup> Along with several other defendants, the remainder of whom settled prior to trial.

Rose Acre Farms is the nation's second largest egg producer.<sup>3</sup> The Direct Action Plaintiffs allege that, beginning in 1999, UEP, USEM, and Rose Acre hatched a plot to reduce egg supply in three parts: (1) short-term supply measure recommendations, including early-induced molting, early slaughter of hens, and reduced chick hatch rates; (2) the UEP Certified Program, requiring producers to follow a list of guidelines like cage-space restrictions; and (3) a coordinated export program to maintain a deflated domestic supply.

Like many Section 1 cases, the Appellants never found the smoking gun directly proving a conspiracy. Instead, they presented evidence suggesting motive (higher prices) and means (the three industry programs). Naturally, Appellees countered with evidence of a mix of innocuous and laudable reasons for each.

Trial ran nearly a month and, relevant to this appeal, the District Court instructed the jury:

Under the Sherman Act, a restraint of trade is illegal only if it is found to be unreasonable. Therefore, you must determine, first, whether there was a contract, agreement, combination, or conspiracy that restrained trade; and if so, second, whether the restraints challenged here—that is, A, the UEP recommended short-term measures; B, the UEP Certified Program as challenged; and C, the USEM export program—are together unreasonable. These three alleged restraints must all be part of a single conspiracy, as opposed to, for example, three different conspiracies that were independent of each other.

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<sup>3</sup> A class of “direct purchasers” brought a similar suit. *See In re Processed Egg Prods. Antitrust Litig.*, 962 F.3d 719, 721–22 (3d Cir. 2020) (“*Processed Egg Products I*”). The direct purchaser class action went to trial first; the jury returned a verdict for the Defendant-Appellees, and we later affirmed.

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