IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

M&M POULTRY, INC.,

Plaintiff,

v. **Civil Action No. 2:15-cv-32 (BAILEY)**

PILGRIM'S PRIDE CORPORATION,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

I. Introduction

Pending before this Court is defendant Pilgrim's Pride Corporation's Motion to Dismiss [Doc. 15], filed June 30, 2015. After two brief extensions, the plaintiff's Response [Doc. 20] and defendant's Reply [Doc. 23] were filed on July 24, 2015, and August 7, 2015, respectively. With leave of Court, the plaintiff filed a Surreply on August 17, 2015 [Doc. 26]. The Motion has been fully briefed and is ripe for decision. For the reasons that follow, the Motion is **DENIED**.

II. Factual and Procedural History

Plaintiff filed this action in this Court on May 8, 2015, asserting federal and state law claims [Doc. 1]. This Court has original jurisdiction under 28 U.S.C. § 1331 as this action involves alleged violations of the federal Packers and Stockyards Act of 1921 (Count I). The Amended Complaint, filed June 15, 2015 [Doc. 12] also asserts claims for Breach of Contract (Count II), Breach of the Covenant of Good Faith and Fair Dealing (Count III), and

Tortious Interference With a Contract (Count IV).

The Amended Complaint alleges that since 1996, M&M "has been actively involved in caring for poultry" under poultry grower agreements. (Amended Complaint "Am. Compl." at ¶ 6). M&M is comprised of six chicken houses, which can house approximately 148,000 birds (id. at ¶ 7), all located in Grant County, West Virginia. (Id.). The sole owner of M&M is David Mongold. (Id. at ¶¶ 1, 6).

Pilgrim's Pride ("Pride") is in the business of breeding, processing, packing, producing, selling and distributing poultry. (Id. at ¶ 8). Plaintiff alleges Pride is the only supplier of poultry in the area. (Id. at ¶ 11). For purposes of raising its poultry, Pride enters into poultry growing arrangements and production agreements with a farmer, or grower, who provides a facility, at his/her own cost, to shelter, feed and otherwise care for the chickens on a flock to flock basis. (Id.). Under the poultry growing agreement, Pride provides the feed and medication, requires that the feeding and watering equipment meet its specifications, and determines the amount, type, quality, frequency and time of delivery to – and pick up from – the grower's farms of chicks, feed and medication. (Id.).

The poultry grower agreement also requires the grower to provide the facilities, labor, materials and utilities necessary to raise the poultry. (Id.). In exchange for poultry growing services, Pride compensates growers based on what M&M characterizes as the "tournament system." (Id. at ¶ 12). Under this system, M&M was ranked against other Pride growers whose flocks were also processed at the Moorefield facility, based upon the "Marketable Broiler Live Weight" (basically the weight of the chickens when fully grown), divided by the "Weighted Average Formula Cost" (the cost of feed and medication Pride had to supply to care for the chickens). (Id.).

According to the Amended Complaint, the tournament system "pits each grower against the other" for pay. (Id. at ¶ 13). Growers who outperform others receive more pay. (Id. at ¶¶ 13 - 15). Plaintiff alleges that Pride "defrauded [it] through the tournament system and subjected [it] to unlawful practices by unilaterally imposing and utilizing a ranking system that [Pride] arbitrarily and capriciously manipulated. By ranking individual growers . . . [Pride] . . . arbitrarily punish[es] . . . less successful grower[s] based upon criteria which are under the total control of [Pride], and which are never revealed, explained or discussed with the growers." (Id. at ¶ 13). Further, the plaintiff alleges that this system is "designed to increase [Pride's] profits at the expense of, and to the severe detriment of, its growers, including plaintiff, and thereby decreasing the profits of its growers, including plaintiff." (Id. at ¶ 14).

Plaintiff alleges Pride "wrongfully placed plaintiff in competition with other growers while requiring [it] to accept chicks that are genetically different, and chicks in varying degrees of health." (Id.). Similarly, "the feed supplied by [Pride] is of dissimilar quantity, quality and consistency, and is often delivered inappropriately and in an untimely manner." (Id.). Plaintiff alleges that these, among other practices of the tournament system "insure[s] [Pride's] ability to wrongfully control its cost of operations at the expense of its growers, including plaintiff" and creates a system "that is unfair, unjustly discriminatory and deceptive, as well as unduly and unreasonably preferential, and unduly and unreasonably prejudicial to plaintiff and [its] fellow growers." (Id. at ¶¶ 15-16).

Plaintiff alleges that all the key variables of the tournament system, which ultimately determines growers' compensation, "are entirely under [Pride's] control and . . . subject to manipulation without detection" and which plaintiff alleges Pride did to artificially depress

M&M's payouts. (Id. at ¶ 18). Some of the key variables plaintiff alleges Pride "knowingly and willfully" manipulated include: furnishing plaintiff substandard food, furnishing to plaintiff diseased chicks; failing to provide medication for the chicks; and deliberately and in bad faith taking certain actions such as delaying weighing the birds, which resulted in "inaccurate and deceptive weighing;" all of which resulted in financial loss to the plaintiff. (Id. at ¶¶ 21-24).

Since 2009, M&M has entered into at least two poultry growing agreements with Pride. (Id. at ¶ 6). The poultry growing agreement is memorialized in a written document known as a "Broiler Production Agreement." (Id.). The most recent Pride Broiler Production Agreement ("BPA") executed by M&M was on February 24, 2012. (Id.).

Afterwards, M&M alleges that Pride imposed arbitrary and unjustified requirements on M&M including, among other things, "requiring M&M to allow [Pride] access to its bank and utility records when not required under the [BPA] nor required of other growers," "requiring M&M to set up an escrow account for the payment of utilities when there had never been an interruption in service," and "requiring M&M to incur advances on its mortgage to pay for utilities when there had never been an interruption in service." (Id. at ¶ 25).

The parties carried on under the BPA for over two years. On June 6, 2014, Pride provided notice of its intent to terminate the BPA over a dispute concerning M&M's failure to pay utility bills. (Id. at ¶¶ 28, 33-36). M&M claims that Pride's reason for terminating the BPA is "complete pretext, and does not even qualify as a minor breach of the [BPA]." (Id. at ¶ 33). The plaintiff alleges in the Amended Complaint that "[t]he utilities on the farm were never shut down for any reason during plaintiff's tenure as a grower for [Pride] except

in a circumstance where foul weather or negligence of a third party occurred. Even then, a 'backup' industrial generator . . . was on the farm to forestall any problems." (Id.). Furthermore, plaintiff alleges that "[a]ny billing discrepancies on plaintiff's utility bills were the admitted fault of the utility company, and not as a result of plaintiff's failure to pay, a fact well known to defendant." (Id. at ¶ 34).

When terminating the BPA, Pride was "required to provide 90 days notice to plaintiff of its intent to terminate the [BPA]." (Id. at ¶ 29). After citing to various Pride correspondence between May 28, 2014, and August 18, 2014, M&M claims that Pride failed to provide M&M the required 90 days' notice. (Id. at ¶¶ 28-31).

M&M alleges that Pride's unilateral decision to terminate the BPA and cease sending flocks to M&M as of June 6, 2014 left it with no means of paying the mortgage that M&M had on the farm, and with no means of staying current on its utility bills, which was Pride's purported reason for terminating the BPA. (Id. at ¶ 32).

Pride purportedly provided M&M with inferior chicks, feed and medicine and erroneously weighed the poultry. Plaintiff alleges these, and other "wrongful acts of the defendant negatively affect the competitive process for grower services . . . thereby creat[ing] a likelihood of competitive injury." (Id. at ¶ 44). These actions based on the PSA claims caused M&M to incur substantial damages, including the effective loss of its business, bankruptcy and the imminent loss of its property. (Id. at ¶¶ 46, 50). As a direct and proximate result of the intentional acts of the defendant and its agents, plaintiff suffered damages and, if evicted from its property through bankruptcy, will suffer even more significant damages including but not limited to imminent loss of its property, loss of profits, loss of goodwill, attorneys' fees and other legal expenses. (Id. at ¶ 53).

The Agreement

The BPA states, among other things:

G. RESPONSIBILITIES OF THE INDEPENDENT GROWER:

1) Basic Housing. The Independent Grower [M&M] shall provide and maintain proper housing, equipment, litter and utilities in accordance with the Company's [Pilgrim's] specifications and applicable regulations.

2) Husbandry Methods. The Independent Grower agrees to follow applicable laws and regulations as well as the Company's written and verbal management recommendations, including, but not limited to, watering, feeding, brooding, sanitation, litter, vaccination, medication, house environment, lighting, pest control and biosecurity.

(See Exhibit "Exh." 1 attached at §§ G.1, G.2).

Providing utility services to M&M's six poultry houses is vital to satisfying Pride's and industry animal welfare standards. M&M promised to satisfy those standards in order to eliminate harm and suffering of the poultry while under M&M's care. BPA § G.8 states

8) Animal Welfare. Company maintains a program of animal welfare that is designed to eliminate unnecessary harm and suffering for poultry in the day-to-day operation of our production processes. Independent Grower represents and warrants that Independent Grower will comply with the Company and industry standards regarding animal welfare including, but not limited to, the following provisions:

A. Independent Grower will follow live production practices that avoid unnecessary suffering, prevent destructive behavior, and prevent disease while promoting good animal health.

B. Independent Grower will also follow the guidelines for animal welfare promulgated by the Company, included with the Grower guidelines, with the intent to promote the humane treatment and well-being of poultry through the production process.

C. Any Independent Grower who violates the Company animal welfare policy and associated procedures will be subject to termination of their Broiler Production Agreement.

(Id. at § G.8).

H. RESPONSIBILITIES OF COMPANY AND INDEPENDENT GROWER:

1) Best Efforts. The Company and Independent Grower agree to use their best efforts in maintaining the broilers in such a manner that optimizes uniformity, health, livability, and the performance of the broilers to market age. If Independent Grower fails to use best efforts in management and/or housing of broilers and/or maintenance, or operation of equipment, the Company has the right (at its option) to suspend placements of chicks until such deficiencies are corrected.

(Id. at § H.1).

On June 30, 2015, pursuant to Fed. R. Civ. P. 12(b)(6), defendant Pride moved to dismiss all Counts with prejudice for failure to state a claim upon which relief could be granted. Pride first asserts that M&M fails to allege the requisite elements to support its claims and neglects to show that Pride's conduct had an anticompetitive effect; that the documents central to M&M's claim demonstrate that Pride's conduct had nothing to do with competition but, if it did, Pride's acts were based on a valid business justification – that is, M&M's material breach of the contract (the alleged failure to pay utility bills) resulting in the threat of harm to the poultry; that M&M's PSA claims seeking monetary damages based on Pride's conduct cannot be based on "a likelihood of competitive injury;" and that the PSA precludes M&M's claim based on a violation of 9 CFR § 201.100(h). Further, Pride asserts if it could bring such claim, it did not violate the regulation because it provided the requisite notice and is not obligated to place chicks during the 90-day interim time period.

Next, Pride argues the breach of contract claim should be dismissed because its

termination letter demonstrates that it provided M&M with 90-days' notice of termination. Pride also asserts the poultry grower agreement expressly authorizes it to suspend chick placements based on M&M's alleged breach.

Pride also argues M&M's good faith and fair dealing claim is not viable as a matter of law because it is not a stand-alone claim under West Virginia law. Further, Pride asserts that even if this Court construes this claim as one based on a breach of the BPA, the claim should nevertheless be dismissed because M&M fails to cite any provision of the BPA that was breached.

Finally, Pride argues M&M's tortious interference with a contract claim should be dismissed because it is unsupported in law and fact. Pride asserts no interference existed because it cannot tortiously interfere with its own contract with M&M. Pride further states that its communications with the bank that issued the mortgage did not cause M&M's alleged damages.

III. Defendant's Motion to Strike

In its Reply brief [Doc. 23], the defendant moves this Court to strike Exhibits 2 - 5 of the plaintiff's Response [Doc. 20] because these were not attached or incorporated into the Amended Complaint. Rule 12(f) of the Federal Rules of Civil Procedure allows a district court to strike, either on proper motion by a party or on its own initiative, any redundant, immaterial, impertinent, or scandalous matter in any pleading. Fed. R. Civ. P. 12(f). However, a motion to strike is generally viewed with disfavor, as "it is a drastic remedy." *See* ***Waste Mgmt. Holdings, Inc. v. Gilmore***, 252 F.3d 316, 347 (4th Cir. 2001).

The newspaper articles attached as Exhibits 2 and 3 discuss Pride's 2008 bankruptcy. This Court does not see the relevance of Pride's previous bankruptcy at this point and will strike these Exhibits pursuant to Fed. R. Ev. 401. This Court is at a loss, however, under what grounds defendant seeks to strike Exhibit 4, which is simply a copy of ***Philson v. Goldsboro Mill. Co.***, 164 F.3d 625 (4th Cir. 1998), an unpublished Fourth Circuit case that defendant relies heavily upon in its Motion to Dismiss. Such attachment is appropriate. This Court will also permit the filing of Exhibit 5, which contains proposed rules from the Grain Inspection, Packers and Stockyards Administration, USDA.

IV. 12(b)(6) Motion to Dismiss Standard

A complaint must be dismissed if it does not allege "'enough facts to state a claim to relief that is *plausible* on its face.' ***Bell Atl. Corp. v. Twombly***, 127 S. Ct. 1955, 1974 (2007) (emphasis added)." ***Giarratano v. Johnson***, 521 F.3d 298, 302 (4th Cir. 2008). When reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must assume all of the allegations to be true, must resolve all doubts and inferences in favor of the plaintiffs, and must view the allegations in a light most favorable to the plaintiffs. ***Edwards v. City of Goldsboro***, 178 F.3d 231, 243-44 (4th Cir. 1999).

When rendering its decision, the Court should consider only the allegations contained in the Complaint, the exhibits to the Complaint, matters of public record, and other similar materials that are subject to judicial notice. ***Anheuser-Busch, Inc. v. Schmoke***, 63 F.3d 1305, 1312 (4th Cir. 1995). In ***Twombly***, the Supreme Court, noting that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires

more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," ***id***. at 1964-65, upheld the dismissal of a complaint where the plaintiffs did not "nudge[ ] their claims across the line from conceivable to plausible." ***Id***. at 1974.

V. Choice of Law

When determining rights under a contract, West Virginia follows the rule of *lex loci contractus*: the law of the state where a contract is made and is to be performed governs the rights of the parties. ***Poffenbarger v. New York Life Ins. Co.***, 277 F.Supp. 726, 730 (S.D. W.Va. 1967). The general rule with regard to choice of law in contract cases is stated in Syllabus Point 2 of ***General Electric Co. v. Keyser***, 166 W. Va. 456, 275 S.E.2d 289 (1981):

> "'The law of the state in which a contract is made and to be performed governs the construction of a contract when it is involved in litigation in the courts of this state.' Syl. Pt. 1 (in part) ***Michigan Ntnl. Bank v. Mattingly***, 158 W.Va. 621, 212 S.E.2d 754 (1975)."

The Amended Complaint states that the BPA was to be performed within the State of West Virginia. Accordingly, the substantive laws of West Virginia will govern.

In addition, the BPA contains a "Choice of Law and Venue" provision, which states that "the substantive laws of the State in which the farm is located shall govern the interpretation of this Agreement and/or the Exhibits hereto, and all other dealings between Independent Grower and Company, even if the choice of law rules of that State would otherwise allow for the application of the substantive laws of a different state." [Doc. 15-1

at §H.17].

VI. *Chevron* Deference

The plaintiff asks this Court to give deference to the USDA's "long-standing assertion that competitive injury is not required under § 192(a)-(b)." [Doc. 20 at 16]. The Supreme Court has articulated two levels of deference to be accorded to agency action. "The first and higher level of deference is known as '***Chevron*** deference' based on the Supreme Court case ***Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.***, 467 U.S. 837 (1984). This level of deference is given 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." ***United States v. Mead Corp.***, 533 U.S. 218, 226-27 (2001). In such cases, the regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. ***Id***.

In ***Chevron***, the Supreme Court dictated that courts should presume "that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *See* ***Smiley v. Citibank***, 517 U.S. 735, 739, 116 S. Ct. 1730 (1996). Therefore, the Court established a two-step test for reviewing an agency's statutory construction. The first step begins with determining "whether Congress has directly spoken to the precise question at issue." ***Chevron***, at 842-43, 104 S. Ct. 2778. If Congress' intent is clear, "the court, as well as the agency, must give effect to the unambiguously expressed

intent of Congress." ***Id***. If there is ambiguity in the statute, the court must then determine whether the agency's construction of the statute is reasonable. ***Id***. at 844, 104 S. Ct. 2778. The agency's construction of the statute is given "substantial deference," ***Blum v. Bacon***, 457 U.S. 132, 141-142, 102 S. Ct. 2355, and will be upheld unless it is "arbitrary, capricious, or manifestly contrary to the statute." ***Chevron***, at 844, 104 S. Ct. 2778.

The above does not apply in this case. The Secretary has not promulgated a regulation applicable to the practices alleged in this case, and the USDA has no authority to adjudicate alleged violations of § 192 by live poultry dealers. The means of enforcing §192 against live poultry dealers is to file suit in federal district court under 7 U.S.C. § 209(a), as the plaintiff has done. Pursuant to § 209, liability may be enforced either by complaint to the Secretary of Agriculture "as provided in section § 210 of this title," or through proceedings instituted in federal district court. 7 U.S.C. § 209(b). Under § 210, however, only stockyard owners, market agencies, and dealers (not including live poultry dealers) may be found liable in proceedings before the Secretary of Agriculture. Additionally, the Secretary may issue cease and desist orders and assess civil penalties against packers and swine contractors, but not poultry dealers, under 7 U.S.C. § 193. This Court will note, however, that the agency's views "may be accepted by a court only as they have power to persuade." ***First Am. Kickapoo Operations, LLC v. Multimedia Games, Inc.***, 412 F.3d 1166, 1174 (10th Cir. 2005)(citing ***Skidmore v. Swift***, 323 U.S. 134, 140, 65 S. Ct. 161 (1944)).

VII. Discussion

A. Packers and Stockyards Act

This Court must first determine whether a showing of injury – or likelihood thereof – to competition is a necessary element to sustain a claim under the Packers and Stockyards Act of 1921 ("PSA"). PSA § 192 states, in relevant part:

> It shall be unlawful for any packer or swine contractor with respect to livestock meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect . . ..

7 U.S.C. § 192(a)-(b).

In 1935, Congress amended the PSA to include "live poultry dealers and handlers." The PSA authorizes the Secretary of Agriculture to enjoin violations of Section 202(a)[1] by packers and swine contractors. See 7 U.S.C. § 193. The PSA does not, however, authorize the Secretary to enjoin violations by live poultry dealers. Those injured as a result of a violation by a live poultry dealer may bring an action in federal district court to recover "the full amount of damages sustained in consequence of such violation." 7 U.S.C. § 209(a).

A "live poultry dealer" is defined by the PSA as "any person engaged in the business

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[1] Section 202 of the PSA is codified at 7 U.S.C. § 192. Throughout this opinion, the two have been used interchangeably.

of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another . . .." 7 U.S.C. § 182(10). As both plaintiff and defendant fall within the parameters of the PSA's live poultry dealer definition, both are subject to the prohibitions of §192(a)-(b).

The central issue presented by the case is whether the plaintiff must allege anticompetitive injury or a likelihood thereof to state a claim under §192(a)-(b). The defendant believes answering this question in the negative "is something that eight circuit courts, the Supreme Court, and Congress will not do . . .." [Doc. 23 at 2]. The defendant urges this Court to "decline plaintiff's invitation to commit reversible error." (Id. at 3). Disregarding defendant's ominous advice, this Court has determined to entertain plaintiff's request. As the Supreme Court has stated: "This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." ***Zuber v. Allen***, 396 U.S. 168, 185 n.21, 90 S. Ct. 314 (1969). And although certain circuits have held that only practices that harm competition violate these sections, "the holdings of other circuits do not relieve this [court] of its responsibility to attempt to reach the correct result based on the well-established methods of statutory interpretation. Predictability may be important, but it does not trump the correct result." *See* ***Cooper Indus., Inc. v. Aviall Servs. Inc.***, 543 U.S. 157, 125 S. Ct. 577 (2004) (relying on the plain text to reverse scores of contrary circuit decisions).

The PSA was enacted to regulate the business of packers by forbidding them from engaging in "unfair, discriminatory, or deceptive practices in [interstate] commerce, or to

subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business." ***Stafford v. Wallace***, 258 U.S. 495, 513, 42 S. Ct. 397, 401 (1992). "The chief evil feared [in 1921 was] the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys." ***Id.***, 258 U.S. at 514-15, 42 S. Ct. at 401.

Section 192(a)'s broad mandate against unfair, unjustly discriminatory or deceptive practices in the poultry business was added to the PSA in 1935. "Although the 'chief evil' may have been 'the monopoly of the packers,' the structure of the statute suggests that 'unfair' or 'deceptive' practices are prohibited separately and apart from anticompetitive or 'monopolistic' practices, where these classes of conduct are prohibited in separate subsections. *Compare* 7 U.S.C. § 192(a) *with* § 192(e). Thus, notwithstanding authorities to the contrary, . . . only a strained reading of the statute could require that practices that are 'unfair' or 'deceptive' within the meaning of § 192(a) must also be 'monopolistic' or 'anticompetitive' to be prohibited. *Accord* ***Wilson & Co. v. Benson***, 286 F.2d 891, 895 (7th Cir. 1961) ('[T]he language in section [192(a)] of the Act does not specify that a "competitive injury" or a "lessening of competition" or a "tendency to monopoly" be proved in order to show a violation of the statutory language'). Moreover, because the PSA is 'remedial legislation,' it must be construed liberally. ***Farrow v. USDA***, 760 F.2d 211, 214 (8th Cir. 1985). Therefore, . . . 'anticompetitive' injury is *not* required to prove an 'unfair' or 'deceptive' practice within the meaning of § 192(a)." ***Kinkaid v. Tyson Fresh Meats, Inc.***, 321 F.Supp.2d 1090, 1102-03 (June 18, 2004 N.D. Iowa)(emphasis in original).

The defendant argues that "every circuit court addressing this issue has determined that a plaintiff must plead and prove harm to competition or likelihood thereof in order to prevail under subsections (a) and (b)." [Doc. 16 at 12]. The defendant asks this Court to give existing case law as strained a reading as it does the statute itself. For instance, defendant cites to ***Philson v. Goldsboro Milling Co.***, 1998 WL 709324 (4th Cir. 1998)(unpublished), to support its assertion that PSA §§ 192(a) and (b) require an anticompetitive effect in the Fourth Circuit. Defendant's reliance on ***Philson*** is misplaced.

In ***Philson***, the Court upheld a jury instruction stating that the plaintiff, who had brought a claim under § 192(a) was "required to prove that the defendants' conduct was likely to affect competition adversely in order to prevail." ***Philson***, at *4. "[While] it is unnecessary to prove *actual* injury to establish an unfair or deceptive practice . . . a plaintiff must nonetheless establish that the challenged act is *likely* to produce the type of injury that the Act was designed to prevent. *See, e.g.,* ***Farrow v. United States Dep't of Agriculture***, 760 F.2d 211, 215 (8th Cir. 1985) ('The Packers and Stockyards Act does not require that the Secretary prove actual injury before a practice may be found unfair. "[T]he purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered." Accordingly, the Secretary need only establish the likelihood that an arrangement will result in competitive injury to establish a violation.' (citations omitted)); *see also* ***Parchman v. United States Dep't of Agriculture***, 852 F.2d 858, 864 (6th Cir. 1988)(quoting ***Farrow***)." ***Philson***, at *4. This constitutes the entirety of the Court's analysis.

Proper statutory analysis begins with the plain text of the statute. *See* ***Permanent***

Mission of India to the United Nations v. City of New York, 551 U.S. 193, 197 (2007). "It is well established that when a statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." ***Lamie v. United States Trustee***, 540 U.S. 526, 534 (2004). The Supreme Court describes this rule as the "one, cardinal canon before all others." ***Connecticut Nat'l Bank v. Germain***, 503 U.S. 249, 253 (1992). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." ***Id***.

The Fourth Circuit has stated that:

> When engaging in statutory interpretation, we "first and foremost strive to implement congressional intent by examining the plain language of the statute." ***United States v. Passaro***, 577 F.3d 207, 213 (4th Cir. 2009). "[A]bsent ambiguity or a clearly expressed legislative intent to the contrary," we thus give a statute its "plain meaning." ***United States v. Bell***, 5 F.3d 64, 68 (4th Cir. 1993). A statute's plain meaning is determined by reference to its words' "ordinary meaning at the time of the statute's enactment." ***United States v. Simmons***, 247 F.3d 118, 122 (4th Cir. 2001). We remain mindful that in "interpreting the plain language of a statute, we give the terms their ordinary, contemporary, common meaning, absent an indication Congress intended" the statute's language "to bear some different import." ***Stephens ex rel. R.E. v. Astrue***, 565 F.3d 131 (4th Cir. 2009) (quotations omitted).

United States v. Abdelshafi, 592 F.3d 602, 607 (4th Cir. 2010).

As the Fourth Circuit has stated:

> We construe the statute in accordance with two principles of statutory construction: plain English and common sense. *See* ***First United Methodist Church v. United States Gypsum Co.***, 882 F.2d 862, 869 (4th Cir. 1989) (stating that common sense is the "most fundamental guide to statutory construction"), *cert. denied*, 493 U.S. 1070 (1990); ***Sutton v. United States***, 819 F.2d 1289, 1292 (5th Cir. 1987) (stating that the courts have a duty to construe the language in a statute consistent with its plain meaning); ***The King v. Inhabitants of St. Nicholas***, 4 Neville & Manning 422, 426-27 (Eng. K.B. 1835) (Denman, C.J.) ("[W]here I find the words of a statute perfectly clear I shall adhere to those words, and shall not allow myself to be diverted from them by any supposed consequences of one kind or the other . . .."), *cited in* **I *Kent's Commentaries***, 467-68, n. d (1836).

Kofa v. U.S. INS, 60 F.3d 1084, 1088-89 (4th Cir. 1995).

Common sense and plain English lead to the inescapable conclusion that Sections (a) and (b) do not require any showing of anticompetitive or monopolistic behavior. Certain courts have improperly read the same into the statute. Under well-settled principles, however, courts must refrain from reading additional terms into unambiguous statutory language such as this. If the text of the statute evinces "a plain, nonabsurd meaning," then the court should not "read an absent word into the statute." ***Lamie***, 540 U.S. at 538, 124

S. Ct. 1023; *see also* ***Bates v. United States***, 522 U.S. 23, 29 (1997) (holding that courts "ordinarily" should "resist reading words or elements into a statute that do not appear on its face.").

As clearly stated in the statute, Section 192(a) prohibits "unfair, unjustly discriminatory, or deceptive practices or devices." Section 192(b) prohibits "undue or unreasonable" preferences, advantages, or disadvantages. Neither of the sections the plaintiff alleges in its Amended Complaint appear on their face to limit their application to only those acts or devises which have an adverse effect on competition. Accordingly, this Court is of the opinion that such words should not be read into this language.

To further support this position, "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" ***Dean v. United States***, 556 U.S. 568, 572 (2009) (quoting ***Russello v. United States***, 464 U.S. 16, 23 (1983)). The express language of the subsections immediately following Sections 192(a) and (b) contain the following additional language: "(c) . . . if such . . . has the tendency or effect of restraining commerce or of creating a monopoly;" "(d) . . . for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly . . . or of restraining commerce;" "(e) . . . with the effect of manipulating or controlling prices, or of creating a monopoly . . . or of restraining commerce." 7 U.S.C. §§ 192(c)-(e). If Congress intended to limit subsections (a) and (b) to prohibit only those acts which "restrain[] commerce" or which have the effect of "creating a monopoly," it easily could have done so; however, it did not. Accordingly, this Court is guided by ***Dean*** and

Russello to presume that Congress acted intentionally in excluding this language from §§ 192(a) and (b).

In its Motion to Dismiss, the defendant states that "eight circuits[2] decided that PSA §192(a) and (b) require an anticompetitive effect." [Doc. 16 at 12]. This statement is misleading for two reasons. First, the Fourth Circuit case upon which the defendant relies, ***Philson v. Goldsboro Milling Co.***, is an unpublished decision from 1998. Pursuant to Fourth Circuit Court of Appeals Local Rule 32.1: "Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs . . . in the district courts within this Circuit is disfavored . . .." Furthermore, unpublished opinions have no precedential value in this Circuit. *See* ***Hentosh v. Old Dominion Univ.***, 767 F.3d 413, 417 (4th Cir. 2014). Additionally, this Court finds any precedential value in the ***Philson*** decision to be of limited utility in its analysis of the instant case as "[it] is only entitled to the weight [it] generate[s] by the persuasiveness of [its] reasoning." ***Id***. The defendant argues ***Philson*** should be given great weight, suggesting that the Fourth Circuit chose not to publish because no further precedent was needed. This novel theory was first suggested by the ***Wheeler*** Court, which cited no law for such an absurd proposition. 591 F.3d at 360.

As the plaintiff astutely points out, two subsequent district court opinions in the Eighth Circuit rejected ***Philson's*** reading of ***Farrow***. The ***Kinkaid*** case, cited above, stated "that only a strained reading of the statute could require that practices that are 'unfair' or 'deceptive' within the meaning of § 192(a) must also be 'monopolistic' or 'anticompetitive' to be prohibited." 321 F.Supp.2d at 1103.

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[2] For a thorough analysis of what each Circuit has held, this Court directs the reader to Judge Garza's dissent in ***Wheeler***.

Similarly, in ***Schumacher v. Tyson Fresh Meats, Inc.***, 434 F.Supp.2d 748, 753-54 (D.S.D. 2006), the district court of South Dakota held that "[t]he terms 'unfair, unjustly discriminatory, or deceptive practice or device' . . . are not defined, and their meaning must be determined by the facts of each case within the purposes of the [PSA]." The court, recognizing the two-fold purpose of the Act – "to assure fair competition *and* fair trade practices in livestock marketing" – went on to state that:

> [sections] (c), (d), and (e), address activities that have an adverse effect on competition by creating a monopoly. "However, the language in section (a) of the Act does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language." ***Wilson & Company v. Benson***, 286 F.2d 891, 895 (7th Cir. 1961). Instead, section (a) of the PSA refers to "unfair" or "deceptive" practices. The Eighth Circuit has held that a practice is "unfair" under § 192(a) "if it injures or is likely to injure competition." ***Farrow v. United States Dept. of Agriculture***, 760 F.2d 211, 214 (8th Cir. 1985). This statement obviously states the law. Defendants would have the court read ***Farrow*** as holding that a practice is unfair *only* if it injures or is likely to injure competition. That is simply not the law. It is akin to a statement that red is a color. This does not tell us that blue is not a color. The PSA must be broadly construed as condemning "any practices that inhibit the fair trading of livestock" by those persons and entities covered under the Act. The lack of competition between buyers, resulting in the

> possible depression of producer's prices was *one* of the evils at which the PSA was directed. ***Id***. at 215 (emphasis supplied) (citing ***Swift & Co. v. United States***, 393 F.2d 247, 253 (7th Cir. 1968))."

Schumacher, 434 F.Supp.2d at 752.

In ***Wilson v. Benson***, 286 F.2d 891 (7th Cir. 1961), the petitioner challenged an order of the Secretary of Agriculture concerning alleged discriminatory activities. Specifically, the petitioner argued that the order could not stand because there was no finding or conclusion that its program of price-cutting was for the purpose of acquiring a monopoly or eliminating a competitor. The Court of Appeals stressed that "the language in section 202(a) of the Act does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language." ***Wilson***, 286 F.2d at 895. Further, the Court found it necessary to remind the reader exactly what the statute *does* state. The Court very intentionally stated: "To repeat, that section provides it shall be unlawful for any packer to 'engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce.'" ***Id***.

A good example of how courts have strained for whatever reason to read a requirement of anticompetitive affect into the statute exists in ***Been v. O.K. Industries, Inc.***, 495 F.3d 1217 (10th Cir. 2007), wherein the Court reached its conclusion in strange fashion:

> The Growers note, however, that we have also resolved cases under § 202(a) without any mention that the relevant practice injures competition. They direct our attention to ***Peterman v. USDA***, 770 F.2d 888 (10th Cir. 1985), in which we upheld the Secretary's determination that a meat packer

> was guilty of deceptive trade practices, including its "bait and switch" tactic, whereby the packer would advertise one product and then convince customers seeking the product to buy a more expensive one instead. ***Id***. at 890. To the extent our silence on the competitive injury requirement is relevant, this case is distinguishable because it involved an act alleged to be deceptive, as opposed to unfair. We are concerned here only with whether unfairness requires a showing of a likely injury to competition, not whether deceptive practices require such a showing. We therefore join the those (sic) circuits requiring a plaintiff who challenges a practice under § 202(a) to show that the practice injures or is likely to injure competition.

495 F.3d at 1230.

Judge Hartz' dissent in ***Been*** stated an interesting point: "In my view a practice may be 'unfair' under § 202(a) or the (PSA) even though it causes no competitive injury. [T]he majority opinion's conception of competitive injury . . . appears to be broad enough that many, perhaps all, of the practices that could properly be labeled unfair would satisfy its competitive-injury requirement." ***Been v. O.K. Indus., Inc.***, 495 F.3d 1217 (10th Cir. 2007)(Hartz, J., dissenting).

Perhaps the most damage done to the statute was in ***Terry v. Tyson Farms, Inc.***, 604 F.3d 272 (6th Cir. 2010). In that case, the Court stated that this issue "has been addressed by seven of our sister circuits, with consonant results. All of these courts of appeals unanimously agree that an anticompetitive effect is necessary for an actionable claim under subsections (a) and (b)." ***Id***. at 276. The Court provided little analysis of the statute and mistakenly lumped all cases together in one broad sweep, which the Court referred to as a "tidal wave." ***Id***. at 277. As discussed above, the Courts of appeals have in fact not reached unanimity on this issue. Fortunately, although typically causing much

destruction and chaos before receding, tidal waves inevitably return to the sea, allowing rebirth, and eventually the tides will turn.

This Court will plagiarize a large portion of Judge Emilio Garza's dissent in the ***Wheeler*** case, which was joined by six of the panel members, and which this Court finds to be a well-reasoned analysis of the PSA and the compounded folly of the courts that have interpreted sections 192(a) and (b) as requiring an element of competitive injury:

> The Growers sued PPC under the PSA. Specifically, the Growers alleged that PPC's refusal to afford them an opportunity to operate under the same terms as an insider, is "unfair and unjustly discriminatory" and affords Mr. Pilgrim an "undue or unreasonable preference or advantage" in violation of § 192(a) and (b). The Growers raised additional claims against PPC, as well, that need not be described in detail for the purposes of the appeal. PPC moved for summary judgment arguing that the Growers did not allege an adverse effect on competition, as required to prevail under § 192(a) and (b). The district court found no such requirement in the PSA and denied the motion for summary judgment. Pursuant to 28 U.S.C. § 1292(b), the district court then entered an order certifying the following issue for appeal: whether a plaintiff must prove an adverse effect on competition in order to prevail under 7 U.S.C. § 192(a) and (b).
>
> A panel of this court affirmed the district court's order. ***Wheeler v. Pilgrim's Pride Corp.,*** 536 F.3d 455 (5th Cir. 2008). The panel held that "the language of sections 192(a)-(b) is plain, clear, and unambiguous, and

… it does not require the Growers to prove an adverse effect on competition." ***Id.*** at 460. It also addressed the PSA's legislative history, not because it was necessary or proper in order to construe the statute, but because it was the panel's "point of departure" from other circuit courts that have held an adverse effect on competition is required. ***Id.*** at 458, 461–62. The panel concluded that the legislative history does "not paint a clear picture of Congress's intent," ***id.*** at 462, and that it may be read to support the proposition that § 192(a) and (b) do not require a plaintiff to prove an adverse effect on competition. ***Id.*** at 461. Judge Reavley dissented stating:

> Sections 192(a) and (b) of the Packers and Stockyards Act may be read differently, and this panel majority reading is certainly reasonable. However, I incline to the meaning given "unfair" by the Tenth Circuit in ***Been v. O.K. Indus. Inc.***, 495 F.3d 1217 (10th Cir. 2007) and, in any event, would not create a circuit split after so many contrary circuit decisions over many years.

Id. at 462–63 (Reavley, J., dissenting).

Other words used in subsections (a) and (b) further rebut a construction requiring competitive injury. For example, subsection (a) makes it unlawful to engage in or use any "deceptive practice." It defies common sense that Congress meant to allow some deceptive practices, so long as

they did not adversely affect competition, while prohibiting others that did impact competition. If the majority is correct to construe subsection (a) to require competitive injury, then deceptive practices that do not adversely affect competition are permissible under the PSA. In light of the plain language of subsections (a) and (b), this makes no sense: the prohibitions listed in subsections (a) and (b) are stated as absolute bans, unlike the prohibitions listed in subsections (c) through (e), which bar conduct only if it adversely affects competition. Indeed, subsection (b) prohibits unreasonable preferences or advantages, and undue or unreasonable prejudice or disadvantage, "in any respect." This language, creating an unqualified prohibition of listed practices is inconsistent with, and would be rendered superfluous by, a qualification that only those listed practices that adversely affect competition are prohibited. It is a basic precept of statutory construction that we should give effect to every clause and word of a statute where possible and should not construe statutes in a way that renders words or clauses superfluous. ***TRW Inc. v. Andrews***, 534 U.S. 19, 31, 122 S. Ct. 441, 151 (2001).

Under the majority's reading, Congress did not need to include specific anticompetitive injury through a series of committee discussions and house reports. This of course begs the question why Congress chose to include any anticompetitive language at all if it was so clear that competitive harm permeated the entire statute. By holding that the subsections with no mention of competitive harm nonetheless require a showing of competitive

> injury, the majority renders superfluous the express anticompetitive language in subsections (c)-(e). Courts should, however, attempt to give effect to every clause and word of a statute. ***TRW Inc.***, 534 U.S. at 31.
>
> The violence wrought on the statute by the majority's interpretation is even more clear when one considers subsection (e), which broadly prohibits persons from engaging "in any course of business or . . . any act" that has as its purpose or effect "manipulating or controlling prices, or of creating a monopoly . . . or of restraining commerce." 7 U.S.C. § 192(e) (emphasis added). If, as the majority holds, subsections (a) and (b) also require the specific prohibited conduct to affect competition, then those subsections are rendered superfluous in their entirety because they would be completely subsumed by subsection (e). Subsection (e) prohibits *any* act for the purpose or with the effect of manipulating or controlling prices or restraining commerce, which would cover all of the acts specified in subsections (a) and (b) if they also required an anticompetitive effect.

Wheeler, 591 F.3d at 371 (Garza, J., dissenting).

Even if this Court were inclined to glean meaning from the Act's legislative history, it would still find support for this conclusion. As noted again by Judge Garza in his dissent, "the 'primary purpose of this Act is to assure fair competition **and** fair trade practices.' H.R. 85-1048 at 1 (1957). In the very sentence upon which other circuits place so much emphasis is evidence of a second purpose that does not involve competitive harm. Even if it were true that fair competition was the PSA's 'primary purpose,' the House described

other purposes as well:

> The primary purpose of this Act is to assure fair competition **and** fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and **to protect consumers against unfair business practices** in the marketing of meats, poultry, etc. **Protection is also provided** to members of the livestock marketing and meat industries **from unfair, deceptive, unjustly discriminatory**, and monopolistic practices of competitors, large or small.
>
> H.R. 85-1048 at 1 (1957).

Wheeler, 591 F.3d at 378 (Garza, J., dissenting)(emphasis in original).

With this having been said, this Court finds anticompetitive effect is not an essential element that need be alleged to state a claim for violation of § 192(a)-(b). Accordingly, this Court need not delve into which alleged practices actually harmed competition versus those which are likely to harm competition. Finally, viewing the allegations in a light most favorable to the plaintiff, this Court finds it has alleged "'enough facts to state a claim to relief that is plausible on its face.' ***Bell Atl. Corp. v. Twombly***, 127 S. Ct. 1955, 1974 (2007) (emphasis added)." ***Giarrantano v. Johnson***, 521 F.3d 298, 302 (4th Cir. 2008).

B. Breach of Contract

M&M asserts breach of contract for Pride's failure to give 90-days' notice as required by Section D of the BPA. In West Virginia, the elements of breach of contract are that (1) a contract exists between the parties; (2) a defendant failed to comply with a term in the

contract; and (3) damage arose from the breach. *See* ***Wince v. Easterbrooke Cellular, Corp.***, 681 F.Supp.2d 688, 693 (N.D. W.Va. 2010). When determining whether a defendant failed to comply with a term in the contract, a court is required to construe the contract in question according to the plain and unambiguous language used. *See* ***Fifth Third Bank v. McClure Properties, Inc.***, 724 F.Supp.2d 598, 605 (S.D. W.Va. 2010). In making this determination, a court should find language ambiguous only when "it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after apply the established rules of construction." ***FOP, Lodge No. 69 v. City of Fairmont***, 196 W.Va. 97, 468 S.E.2d 712, 716 (1996).

The Amended Complaint specifically refers to the BPA, the contract which governs the parties' relationship. Therein, plaintiff alleges the defendant violated the terms of the BPA by failing to give 90 days' notice of termination as required by Section D of the Agreement. (Am. Compl. ¶ 29). Plaintiff asserts further breaches of the BPA including breaching its obligation to exert its best efforts in the process of growing chickens pursuant to H.1; breaching its obligation to provide plaintiff with chicks "without bias" pursuant to paragraph F.1; and breaching its obligation to be responsible for damage caused to plaintiff's property pursuant to paragraph F.5. (Am. Compl. at ¶¶ 21, 37). This Court finds support for each of these claims as pleaded in the Complaint; accordingly, this claim survives.

C. Good Faith and Fair Dealing

Pride asserts M&M's claim for the "violation of the duty of good faith and fair dealing" should be dismissed because it is not a stand-alone claim. Pride notes that under West

Virginia law, "an implied covenant of good faith and fair dealing does not provide a cause of action apart from a breach of contract claim." ***Highmark W. Va., Inc. v. Jamie***, 221 W. Va. 487, 655 S.E.2d 509, 514 (2007). Thus, defendant argues, the claim must be predicated on breach of contract in order to remain legally tenable. *See e.g.,* ***Clendenin v. Wells Fargo Bank, N.A.***, 2009 WL 4263506, *5 (S.D. W.Va. Nov. 24, 2009) (holding that the bad faith claim "will live or die by the [express] breach-of-contract claim . . .."). Defendant further asserts that, even if this Court construes the good faith and fair dealing claim as one based on breach of the BPA, the claim must be dismissed because M&M fails to cite any provision of the BPA that was breached. This Court disagrees.

As noted above in Section C, the plaintiff cites to several provisions of the BPA it alleges the defendant has breached. Plaintiff further alleges that defendant affirmatively sought to ruin plaintiff as an example to any other growers in the Moorefield region who also have reason to complain about the defendant's bad faith practices. Accordingly, this Court finds the plaintiff has sufficiently stated a claim for violation of the duty of good faith and fair dealing.

D. Tortious Interference With a Contract

"To establish *prima facie* proof of tortious interference, a plaintiff must show: (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages." Syl. Pt. 2, ***Torbett v. Wheeling Dollar Sav. & Trust Co.***, 173 W. Va. 210, 314 S.E.2d 166 (1983).

In support of its motion to dismiss plaintiff's tortious interference claim, Pride asserts

M&M cannot satisfy elements 2 and 3 above. M&M alleges in the Amended Complaint that Pride interfered with M&M's loan with Grant County Bank.

Pride contends that M&M's tortious interference claim is based on Pride's termination of its own BPA with M&M. Plaintiff alleges it had a loan contract with Grant County Bank to which defendant Pride was not a party. (Am. Comp. at ¶ 52). Plaintiff alleges the defendant intentionally interfered with that contract by "forcing plaintiff to allow unfettered communication and access with the bank and forcing M&M to obtain advances from the bank for the purpose of paying utilities." Id. Plaintiff asserts the defendant took these actions to diminish the plaintiff's status with the bank, intentionally creating an impression that plaintiff was delinquent in paying his utilities, which defendant knew was false. Id. Plaintiff thus alleges that these actions caused Grant County Bank to make unnecessary advances, purportedly to pay for utilities, added expense to the loan contract, and led to the default of the loan contract between plaintiff and Grant County Bank. Id. Plaintiff alleges defendant's unjustified acts were for the sole purpose of exerting additional financial pressure on the plaintiff to its end game purpose of terminating the plaintiff's BPA. This Court finds the above states a claim.

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss **[Doc. 15]** is **DENIED**.

As a final matter, this Court notes that in reading the Amended Complaint and the BPA, the plaintiff has demanded a trial by jury, while BPA H.17 ("Choice of Law and Venue") specifically provides that "SUCH TRIALS WILL BE DECIDED BY A JUDGE. THE

PARTIES WAIVE TRIAL BY JURY IN ANY SUCH ACTION AND CONFIRM THAT THIS WAIVER IS A MATERIAL INDUCEMENT TO THEIR BUSINESS TRANSACTIONS."

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to any counsel of record herein.

DATED: October 26, 2015.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE