David W. Parham (15459500)
Clayton E. Bailey (00796151)
BAKER & McKENZIE LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
Telephone: (214) 978-3000
Facsimile: (214) 978-3099

Attorneys for Reorganized Debtors

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	**Chapter 11**
	§	
PILGRIM'S PRIDE CORPORATION,	§	**Case No. 08-45664 (DML)**
	§	
Debtor.	§	**Jointly Administered**

REORGANIZED DEBTORS' BRIEF IN SUPPORT OF THEIR
MOTION TO EXCLUDE THE TESTIMONY OF DR. C. ROBERT TAYLOR
[Relates to Docket No. 6201]

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Pilgrim's Pride Corporation ("Pilgrim's Pride") and its affiliated reorganized debtors in the above-referenced chapter 11 cases (collectively, as reorganized, the "Debtors")[1] file this Brief in Support of their Motion to Exclude the Testimony of Dr. C. Robert Taylor ("Motion") and state as follows:

I. PRELIMINARY STATEMENT

The Grower Claimants ("Growers") in this matter rely on the opinions contained in the report of their expert, Dr. C. Robert Taylor, in an effort to avoid summary judgment being entered against them on their claims under the Packers & Stockyards Act, 1921 ("PSA"). However, Dr. Taylor's opinions fail to meet the requirements of Federal Rule of Evidence 702 ("Rule 702") and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[2] ("*Daubert*"), and should therefore be excluded by the Court. Specifically, (a) Dr. Taylor's opinions are not based upon sufficient facts or data, (b) Dr. Taylor's opinions are not the product of reliable principles and methods, and (c) Dr. Taylor fails to apply principles and methods reliably to the facts of this case. Indeed, Dr. Taylor has not examined the facts and data necessary to support his opinions and he performed no analysis to reliably arrive at his opinions. In sum, Dr. Taylor's opinions are based on speculation, guesswork and conjecture. Therefore, the Court should exclude Dr. Taylor's opinions and testimony from consideration and enter summary judgment in Debtors' favor on the Growers' PSA claims.[3]

[1] The Reorganized Debtors in these cases are Pilgrim's Pride; PFS Distribution Company; PPC Transportation Company; To-Ricos, Ltd.; To-Ricos Distribution, Ltd.; Pilgrim's Pride Corporation of West Virginia, Inc.; and PPC Marketing, Ltd.

[2] 509 U.S. 579 (1993).

[3] By their Motion and this Brief, Debtors are in no way waiving their objection and motion to strike Dr. Taylor's reports as unsworn and incompetent summary judgment evidence.

II. RESPONSIVE EVIDENCE

In support of its Motion, Debtors submit the following evidence for the Court's consideration:

Exhibit "A" Excerpts from the deposition transcript of Dr. C. Robert Taylor taken on December 14, 2010 ("Taylor Dep.") and relevant exhibits thereto (App. 1-249).

Additionally, Debtors request the Court to consider all evidence and testimony proffered by Debtors during any hearing on the Motion.

III. ARGUMENT AND AUTHORITIES

The Growers rely on Dr. Taylor's opinions to assert that competition has been injured, and therefore, their PSA claim can survive summary judgment. Dkt. Entry No. 6169 (Certain Alabama, Arkansas, Florida, Georgia and North Carolina Growers' Brief in Support of Response to Reorganized Debtors' Motion for Partial Summary Judgment on Alleged Violations of the Packers and Stockyards Act, 1921 - Filed Under Seal) at pp. 23, 25, 27 (citing Dr. Taylor's expert report at ¶¶ 22, 25 and asserting that Pilgrim's Pride's alleged price manipulation practices "undoubtedly" injured competition by negatively impacting consumers through increased consumer prices). However, Dr. Taylor's opinions do not meet the requirements of Rule 702 and *Daubert*, and should therefore be excluded from consideration by the Court both at the summary judgment stage and at trial. *First United Fin. Corp. v. United States Fid. & Guar. Co.*, 96 F.3d 135, 136-37 (5th Cir. 1996) ("[T]he admissibility of expert testimony is governed by the same rules, whether at trial or on summary judgment."); *Munoz v. Orr*, 200 F.3d 291, 301 (5th Cir. 2000) ("[I]f the basis for an expert's opinion is clearly unreliable, the district court may disregard that opinion in deciding whether a party has created a genuine issue of material fact.") (citing *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 824 (5th Cir. 1993)). Accordingly, Debtors should be granted summary judgment on the Growers' PSA claims.

A. The Requirements Necessary To Satisfy Rule 702 And The *Daubert* Factors

In the Fifth Circuit, the admissibility of expert testimony is governed by Rule 702 and the reliability and relevance analysis set forth in *Daubert*. *See Watkins v. Telesmith, Inc*., 121 F.3d 984, 988-89 (5th Cir. 1997) (citing *Daubert,* 509 U.S. at 589). Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

The Supreme Court in *Daubert* provided a list of factors that are designed to assist trial court judges in evaluating whether proffered expert testimony satisfies Rule 702. The illustrative list of factors that may aid a court in evaluating reliability include, but are not limited to, the following:

> (1) whether the expert's theory can be or had been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error of a technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community.

Moore v. Ashland Chem. Inc., 151 F.3d 269, 275 (5th Cir. 1998) (*en banc*) (citing *Daubert*, 509 U.S. at 593-95). And "the district court's responsibility 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Burleson v. Tex. Dep't of Crim. Justice*, 393 F.3d 577, 584 (5th Cir. 2004) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

B. Dr. Taylor's Opinions And Testimony Do Not Meet The Requirements Of Rule 702 And The *Daubert* Factors; Therefore, The Opinions And Testimony Should Be Excluded From Consideration By The Court

Dr. Taylor issued an expert report containing his opinions regarding whether Pilgrim's Pride's actions impacted competition. *See* Ex. A, Taylor Dep. at Ex. 4 (App. 233-241). However, Dr. Taylor's expert report is unusual because it begins by stating that Dr. Taylor has been asked by the Growers to address three distinct issues, but he does not reach a conclusion or offer an opinion regarding two of the three issues. Specifically, Dr. Taylor states that he has been asked to address: (1) The economic performance of contract growers in complexes that Pilgrim's Pride closed or reduced production; (2) Whether Pilgrim's Pride's plant idling and reduction in capacity was an effort to manipulate prices; and (3) Whether Pilgrim's Pride's actions injured competition and affected the competitive dynamics in commodity chicken. *Id.* at ¶ 7. But Dr. Taylor fails to reach a conclusion or offer an opinion regarding issues (2) or (3). *See generally id.*

This strikes the reader as very odd until he reads Dr. Taylor's deposition testimony. It then becomes clear that Dr. Taylor does not answer questions (2) and (3) because he has not performed the requisite analysis to do so. Ex. A, Taylor Dep. at 67:10-19 (App. 67). For instance, when asked if he determined whether Pilgrim's Pride's plant idling and reduction in capacity was an effort to manipulate prices, Dr. Taylor admits he performed no quantitative analysis in order to make such a determination. *Id.* at 58:10-17, 60:25-62:11 (App. 58, 60-62). Likewise, when asked if he determined whether Pilgrim's Pride's actions injured competition, Dr. Taylor testified that he does not have a concrete definition of the word "competition" to work with, so he can't determine whether competition has been injured and he has not performed a

definitive evaluation to determine whether competition was in fact injured. *Id.* at 64:1-7, 64:23-65:10 (App. 64-65).

Regarding issue (1), Dr. Taylor testified he performed the analysis to determine the economic performance of growers in complexes that Pilgrim's Pride closed or reduced production, but admits that, in determining which plants to idle, costs other than live production costs (such as plant costs, labor costs, etc.) would be important for Pilgrim's Pride to consider as well. *Id.* at 67:24-68:23 (App. 67-68).

What the reader of Dr. Taylor's expert report is left with are various other opinions offered by Dr. Taylor, none of which meet the requirements of Rule 702 that (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

These opinions consist of the following:[4]

(1) Due to Pilgrim's Pride's large market share and dominant market position, changes in its production of chicken clearly have an effect on price in the commodity market. For a firm with a large market share, production cutbacks undoubtedly cause commodity chicken prices to increase.[5]

(2) Pilgrim's Pride's production decreased by 25% from 2006 to 2009. If other companies did not change production, this would result in a national reduction of 6.2% causing a 7.4% national price increase based on the elasticity in Table 3. Thus, Pilgrim's Pride's reduction in total production can be seen to negatively impact consumers.[6]

(3) Other integrators were generally cutting back on production or at least not increasing production during the period when Pilgrim's Pride was idling plants. Consequently, other integrators were and are generally not taking on additional growers and few growers idled by Pilgrim's Pride have

[4] Dr. Taylor testified at his deposition that he is not offering any opinions outside of his expert report and rebuttal expert report. Ex. A, Taylor Dep. at 142:21-143:6 (App. 142-43)

[5] *Id.* at Ex. 4 at ¶ 21 (App. 237); *id.* at Ex. 6 at ¶ 3 (App. 243).

[6] *Id.* at Ex. 4 at ¶ 25 (App. 237).

economically viable options regarding their poultry operations. Therefore, growers terminated by Pilgrim's Pride were harmed by its actions.[7]

(4) The type of retail contracts prevalent in the poultry industry raise issues of competitive harm.[8]

(5) Pilgrim's Pride's attempts to prevent the sale of idled plants is a possible competitive injury under USDA/GIPSA's definition.[9]

C. None Of The Opinions Offered By Dr. Taylor Are Based Upon Sufficient Facts Or Data

None of the opinions offered by Dr. Taylor meet any of the three requirements of Rule 702. However, their most fundamental flaw is that the opinions are not based on sufficient facts or data. Indeed, "a conclusion without any support is not one based on expert knowledge and entitled to the dignity of evidence." *Watkins*, 121 F.3d at 991 (quoting *Navarro v. Fugi Heavy Indus*., 117 F.3d 1027, 1031 (7th Cir. 1997)). And the United States Supreme Court mandates that when expert testimony is offered under Rule 702, the trial judge perform a screening function to ensure that the expert's opinion is reliable and relevant to the facts at issue in the case. *Id.* at 988-89 (citing *Daubert*, 509 U.S. at 589); *see also Michaels v. Avitech, Inc.*, 202 F.3d 746, 754 (5th Cir. 2000) (citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("Nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert")).

[7] *Id.* at Ex. 4 at ¶ 30 (App. 238-39); *id.* at Ex. 6 at ¶¶ 13, 16 (App. 247-48).
[8] *Id.* at Ex. 4 at ¶ 33 (App. 239).
[9] *Id.* at ¶ 37 (App. 240).

1. **Dr. Taylor's opinion that due to Pilgrim's Pride's large market share and dominant market position, changes in its production of chicken clearly have an effect on price in the commodity market. For a firm with a large market share, production cutbacks undoubtedly cause commodity chicken prices to increase.**

Dr. Taylor did not perform any independent analysis or investigation to determine the relevant "market" upon which he based his opinion that due to Pilgrim's Pride's large market share and dominant market position, changes in its production of chicken clearly have an effect on the price of chicken in the commodity market. Ex. A, Taylor Dep. at 106:8-20 (App. 106). Dr. Taylor also did not determine the market share Pilgrim's Pride held in any particular market. *Id.* at 106:21-107:18, 108:5-11 (App. 106-08).

2. **Dr. Taylor's opinion that Pilgrim's Pride's production decreased by 25% from 2006 to 2009. If other companies did not change production, this would result in a national reduction of 6.2% causing a 7.4% national price increase based on the elasticity in Table 3. Thus, Pilgrim's Pride's reduction in total production can be seen to negatively impact consumers.**

Dr. Taylor acknowledges that instead of other poultry companies not changing production from 2006 to 2009, they actually increased production as Pilgrim's Pride was decreasing production. *Id.* at 108:20-109:6 (App. 108-09). Dr. Taylor also admits that if Pilgrim's Pride reduces production and other integrators increase production, a price increase will not necessarily occur. *Id.* at 119:19-25 (App. 119). In fact, Dr. Taylor testified that many different factors impact whether a price increase occurs. *Id.* ***Dr. Taylor also acknowledges that there was a reduction in the demand for chicken between 2006 and 2009, and that Pilgrim's Pride's reduction in production was an appropriate response to the reduction in demand.*** *Id.* at 110:5-111:14 (App. 110-11).

3. Dr. Taylor's opinion that other integrators were generally cutting back on production or at least not increasing production during the period when Pilgrim's Pride was idling plants. Consequently, other integrators were and are generally not taking on additional growers and few growers idled by Pilgrim's Pride have economically viable options regarding their poultry operations. Therefore, growers terminated by Pilgrim's Pride were harmed by its actions

Dr. Taylor also offers this opinion after his own analysis demonstrates that other integrators were actually increasing production during the time Pilgrim's Pride was idling plants and decreasing production. *Id.* at 51:12-52:25, 81:23-83:10 (App. 51-52, 81-83). Dr. Taylor further admits that he does not know whether other integrators in the areas where Pilgrim's Pride idled plants were adding growers during this time. *Id.* at 114:13-18 (App. 114). Dr. Taylor also acknowledges that he offers this opinion despite the fact that he has not analyzed any data or done any independent analysis to determine whether only a few growers have economically viable options regarding their poultry operations.[10] *Id.* at 51:12-52:25, 136:20-137:2 (App. 51-52, 136-37). In fact, Dr. Taylor has not reviewed any of the Growers' deposition testimony in this case or interviewed any of the Growers. *Id.* at 51:12-52:25 (App. 51-52). ***Dr. Taylor also admits that he is not offering the expert opinion that Pilgrim's Pride selected certain complexes to idle because the Growers would not be able to contract with other integrators.*** *Id.* at 137:7-11 (App. 137). ***Finally, Dr. Taylor performed no analysis regarding the competitive effects of Pilgrim's Pride's actions on any of the Growers in this case.*** *Id.* at 158:11-160:24 (App. 158-60).

[10] Indeed, the evidence produced by the parties demonstrates that many Growers in this case were in fact picked up by other integrators. *See* Dkt. Entry No. 6097 (Pilgrim's Pride's Brief in Support of its Motion for Partial Summary on Alleged Violations of the Packers & Stockyards Act, 1921 – filed under seal) at § J.2., pp. 73-74.

4. Dr. Taylor's opinion that the type of retail contracts prevalent in the poultry industry raise issues of competitive harm.

Dr. Taylor has not reviewed any of the contracts entered into between poultry integrators and their retail customers. *Id.* at 48:11-15 (App. 48). Dr. Taylor has also not analyzed whether the contracts entered into between integrators and retailers raise competitive issues. *Id.* at 23:5-14 (App. 23). Therefore, Dr. Taylor cannot state whether the contracts are competitive or anti-competitive in nature. *Id.* at 47:24-48:10 (App. 47-48). Likewise, Dr. Taylor cannot state whether the contracts entered into between Pilgrim's Pride and its retail customers are competitive or anti-competitive in nature. *Id.* at 49:5-10 (App. 49).

5. Dr. Taylor's opinion that Pilgrim's Pride's attempts to prevent the sale of idled plants is a possible competitive injury under USDA/GIPSA's definition.

Dr. Taylor admits that he has not "looked into" whether Pilgrim's Pride has refused to sell any of its plants at appraised value. *Id.* at 87:15-18 (App. 87). Likewise, Dr. Taylor acknowledges that he has not seen any evidence indicating that Pilgrim's Pride refused to sell any of its plants at appraised value. *Id.* at 88:5-9 (App. 88).

Collectively, and individually, these opinions offered by Dr. Taylor are prime examples of opinions that do not meet the requirements of Rule 702 because they are not based upon sufficient facts or data. *IQ Prods. Co. v. Pennzoil Prods. Co.*, 305 F.3d 368, 376 (5th Cir. 2002) (excluding expert testimony based on insufficient data when the experts based their opinions on the combined effect of the defendants' failure to label their product as flammable and the defendants' representation that the product was non-explosive when flammability was no longer a relevant issue); *Watkins*, 121 F.3d at 988-89, 992-93 (holding that the *Daubert* analysis *does* apply to the type of testimony that the plaintiff's expert presented—that is, non-scientific opinion testimony based on knowledge and experience, and affirming exclusion of the expert's opinion

based on his failure to conduct an investigation into the conveyor designs and/or conduct a comparative analysis between the subject conveyor and other conveyors, and his failure to perform calculations that would have enabled the trier of fact to infer that the expert's theory was supported by valid engineering principles). Therefore, because Dr. Taylor's opinions are not based on sufficient facts or data, the Court should exclude the opinions from consideration under Rule 702.

D. None Of The Opinions Offered By Dr. Taylor Are The Product Of Reliable Principals and Methods

The party seeking admission of expert testimony must demonstrate that the expert's findings and conclusions are based on reliable principles and methods, a standard Dr. Taylor's opinions do not meet. *Moore*, 151 F.3d at 276. "This requires some objective, independent validation of the expert's methodology." *Id*. And an expert's assurances that he has utilized reliable principles and methods are insufficient to satisfy Rule 702. *Id*.

As discussed above, the nonexclusive list of *Daubert* factors that trial courts consider in evaluating the admissibility of expert testimony includes: (a) whether a theory or technique can, and has, been tested; (b) whether the testimony has been subjected to peer review and publication; (c) the known or potential error rate; (d) the existence and maintenance of standards controlling the technique's operation; and (e) general acceptance. *Watkins*, 121 F.3d at 988-89. The Supreme Court recognizes that the inquiry envisioned by Rule 702 is flexible, however "[i]ts overarching subject is the scientific validity and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions they generate." *Id*. (quoting *Daubert*, 509 U.S. at 594-95). The Supreme Court and the Fifth Circuit also recognize that "a district court, while acting as a gatekeeper for expert evidence, must evaluate whether there is an adequate 'fit'

between the data and the opinion proffered." *Moore*, 151 F.3d at 276 (citing *Joiner*, 522 U.S. at 145-46).

In the present case, Dr. Taylor's opinions are not the product of reliable principles and methods. For example, one of Pilgrim's Pride Corporation's experts, Dr. Steve Wiggins, performed a regression analysis and determined that commodity chicken prices did not increase as a result of Pilgrim's Pride idling plants or reducing production. Ex. A, Taylor Dep. at Ex. 2 at ¶ 81 (App. 197). In contrast, Dr. Taylor, despite having performed "a few zillion" regression analyses in the past, did not perform a regression analysis in this case to determine whether prices rose as a result of Pilgrim's Pride's decrease in production. Ex. A, Taylor Dep. at 125:13-126:15 (App. 125-26). Therefore, Dr. Taylor admits he does not know if any regression analysis he performed would demonstrate results different from Pilgrim's Pride's Corporation's expert's regression analysis concluding that Pilgrim's Pride's production cuts did not impact price. *Id.* at 125:13-126:15 (App. 125-26).

Not surprisingly then, Dr. Taylor acknowledges that he has not determined whether other factors affected the price of commodity chicken meat as opposed to Pilgrim's Pride's production cuts. *Id.* at 61:23-62:11 (App. 61-62) (stating that "[j]ust based on common sense economics, I expect [the commodity chicken price] to be higher than it otherwise would have been, but I have not numerically evaluated that because I don't have the data." and "[I haven't been able to verify that the price actually rose] after accounting for other factors."). Therefore, Dr. Taylor admits that he cannot offer an expert opinion that market prices rose as a result of Pilgrim's Pride reducing production. *Id.* at 100:7-25 (App. 100).

Given Dr. Taylor's failure to utilize reliable principles and methods, his opinions and testimony should be excluded under Rule 702. *IQ Prods. Co.*, 305 F.3d at 376 (excluding expert

testimony based on unreliable methodology because the experts did not conduct any market or survey research that could be subject to testing and verification, and one expert instead based his opinion on "common sense."); *El Aguila Food Prods., Inc. v. Gruma Corp.,* 131 Fed. Appx. 450, 453, 2005 U.S. App. LEXIS 8944, at **8-9 (5th Cir., May 17, 2005) (excluding expert's testimony based on unreliable methodology because, by characterizing all variances between the trade association earnings data and plaintiffs' respective earnings as "lost profits," no allowance was made for losses caused by any other factor—including, for example, reductions in shelf space attributable to other dominant firms or new entrants into the relevant markets, the plaintiffs' own failure to compete for shelf space on the terms sought by retailers, and their lack of capacity or efficiency relative to other firms); *Burleson,* 393 F.3d at 587 (exclusion of expert opinions because the opinions were based on speculation, guesswork and conjecture, including the fact that, although the plaintiff's exposure level to a potential cancer causing agent could be calculated, the expert failed to perform such a calculation because he "satisfied himself that [the dose was] sufficient").

E. Dr. Taylor Failed To Apply Reliable Principals And Methods To The Facts Of This Case

"Under Daubert, '*any* step that renders the analysis unreliable . . . *renders the expert's testimony inadmissible*. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology*.'" *Moore*, 151 F.3d at 279, n.11 (quoting *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3rd Cir. 1994) (emphasis in original)). In the present case, it is clear that Dr. Taylor's opinions are not based on the facts and data of this case. It is also clear that Dr. Taylor's opinions are not the product of reliable principles and methods. Therefore, Dr. Taylor's testimony should be excluded under the first two requirements of Rule

702. However, Dr. Taylor's opinions also fail to satisfy the third prong of Rule 702 because Dr. Taylor did not apply principles and methods reliably to the facts of the case.

Dr. Taylor's opinions are offered without Dr. Taylor performing any of the requisite analysis necessary to arrive at the opinions. For example, Dr. Taylor offers opinions without examining the underlying data or facts (opinions relating to Pilgrim's Pride's market share, whether other integrators were contracting with growers in the idled complexes, whether retail contracts are anti-competitive, and whether Pilgrim's Pride refused to sell any of its plants at appraised value). Dr. Taylor also offers opinions that are contradicted by his own research (Dr. Taylor's opinion regarding whether other integrators were decreasing or maintaining production levels as Pilgrim's Pride was decreasing production).

This failure to apply reliable principals and methods to the facts of the case precludes admission of Dr. Taylor's opinions under Rule 702. *El Aguila Food Prods., Inc.*, 131 Fed. Appx. at 454 (excluding expert's opinions as they "amounted to abstract conclusions not adequately grounded in the facts of the case" because the expert did not examine sales data from retailers in the relevant markets, did not attempt to tie space allocation to retailers with which the defendant had marketing agreements or paid slotting fees, did not quantify either the extent of exclusivity the defendant allegedly obtained or the extent of market foreclosure allegedly caused by the defendant's challenged conduct, and failed to adequately account for alternative causes of plaintiffs' reduction in shelf space); *Pipitone v. Biomatrix*, 288 F.3d 239, 245 (5th Cir. 2002) (excluding one expert's testimony that it was "as likely as not" that a particular syringe contained salmonella bacteria, but admitting a different expert's testimony that eliminated alternative sources of the infection and permitted the expert to conclude with 99.9% positivity that the source of the salmonella was the syringe).

In a comparable case, *Moore v. Ashland Chemical Inc.*, the plaintiff brought a toxic-tort action for injuries allegedly sustained as a result of the containment and clean-up of a chemical spill. 151 F.3d at 271-73. The district court excluded the testimony of one the plaintiff's causation experts and entered a take-nothing judgment against the plaintiff. *Id*. The Fifth Circuit initially concluded that the district court erred in refusing to allow the plaintiff's causation expert to testify, and reversed the district court's judgment and remanded the case for new trial. *Id*. However, the Fifth Circuit granted a rehearing to consider the case *en banc* and to clarify the standards that district courts should apply in determining whether to admit expert testimony. *Id*.

The Fifth Circuit noted that the plaintiff's expert reached conclusions regarding causation, but provided no explanation regarding how, specifically, he arrived at the conclusions. *Id*. at 278-79 Further, the expert offered no scientific support for his general causation theory that exposure to the chemical at issue at any level would cause the asthmatic-type condition allegedly sustained by the plaintiff. *Id*. Additionally, the expert possessed no information on the level of exposure necessary for a person to sustain injuries. *Id*. The expert also provided no comparative study between the chemical solution and other similar hazardous chemicals to which the syndrome had been scientifically linked. *Id*.

The Fifth Circuit noted that none of the *Daubert* factors to assess whether the opinion was based on sound principles were met, specifically, (a) the expert's theory had not been tested; (b) the theory had not been subject to peer review or publication; (c) the potential rate of error had not been determined or applied; and (d) the theory had not been generally accepted in the scientific community. *Id*. The expert also could not provide any scientific support for his causation theory that exposure to any irritant at unknown levels triggers the asthmatic-type condition. *Id*. Simply put, the expert failed to apply principles and methods reliably to the facts

of the case. Therefore, the Fifth Circuit found that it was within the district court judge's discretion to conclude that the expert's testimony was not sufficiently reliable for the jury to consider. *Id*. The Fifth Circuit went on to instruct district courts that "[u]nder the Daubert regime*, trial courts are encouraged to exclude such speculative testimony.*" *Id*. (emphasis added).

Like the expert in *Moore*, Dr. Taylor failed to apply principles and methods reliably to the facts of this case. Because Dr. Taylor failed to perform a regression analysis or any other detailed analysis of the facts or data, (a) Dr. Taylor's opinions have not been, and cannot be, tested; (b) Dr. Taylor's opinions have not been subject to peer review and publication; (c) it is impossible for Dr. Taylor (or anyone else) to have a known or potential rate of error regarding his techniques or theories as applied; (d) standards and controls for his expert opinions do not exist and, therefore, cannot be maintained; and (e) there is absolutely no testimony or evidence to support that Dr. Taylor's nonexistent techniques or unsubstantiated theories have been generally accepted in the scientific community. Thus, while the *Daubert* five-factor test remains flexible for district courts to consider, the complete failure to satisfy any of the *Daubert* reliability factors requires the exclusion of Dr. Taylor's speculative opinions.

Therefore, in addition to the first and second requirements of Rule 702, Dr. Taylor's opinions also fail to satisfy the third requirement of Rule 702 and his opinions and testimony must be excluded in order for the Court to appropriately exercise its duty as a gatekeeper in this case and to ensure that expert opinions and testimony are not only relevant by reliable. *See Daubert*, 509 U.S. at 590-93.

IV. CONCLUSION

The undisputed facts conclusively establish that Dr. Taylor's opinions and testimony satisfy neither Rule 702 nor the requirements of *Daubert*. Therefore, the Court should grant Debtors' Motion, exclude Dr. Taylor's opinions and testimony from consideration at the summary judgment stage and at trial, and grant Debtors' Motion for Partial Summary Judgment on Alleged Violations of the Packers and Stockyards Act, 1921. Debtors also request the Court to grant them all such other and further relief to which they may be entitled both at law and in equity.

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Dallas, Texas

/s/ Clayton E. Bailey

David W. Parham (15459500)
Clayton E. Bailey (00796151)
BAKER & McKENZIE LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
Telephone: (214) 978-3000
Facsimile: (214) 978-3099

Attorneys for Reorganized Debtors