IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE LOESTRIN 24 FE ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO:** **ALL END-PAYOR CLASS ACTIONS**	**MDL NO. 2472** **Master File No. 1:13-md-2472-S-PAS**

END-PAYOR PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE INDIRECT PURCHASER PLAINTIFFS' CONSOLIDATED CLASS ACTION COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Court should deny every aspect of Defendants' motion to dismiss the End-Payor Plaintiffs' Consolidated Class Action Complaint ("Complaint" or "Comp.").

End-Payor Plaintiffs are nine union health and welfare funds and three consumers who assert claims for injunctive and declaratory relief under Sherman Act, 15 U.S.C. § 1, and claims for damages under state-law antitrust and consumer protection statutes and common law. When brand drug manufacturers and generic manufacturers collude to delay the advent of price competition, individual consumers and end payors such as Plaintiffs, who purchase prescription drugs or who pay or reimburse the great majority of the costs of their members' prescription drug purchases, bear the brunt of the anticompetitive scheme.[1] The law has always recognized this fundamental reality. Indeed, before 1977 "indirect purchasers" could recover damages under federal antitrust law. *Perkins v. Standard Oil Co. of California*, 395 U.S. 642, 648 (1969). In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court changed that rule, limiting federal damages recovery to "direct" purchasers, over a strenuous dissent, which explicitly acknowledged that "the brunt of antitrust injuries is borne by indirect purchasers." *Id.* at 749.

Following *Illinois Brick*, state legislatures reacted swiftly, and through the years a majority of them, including Rhode Island, enacted "repealer" legislation for the explicit purpose

[1] Collectively, the End-Payor Plaintiffs purchase or reimburse their members' purchases in 14 of the 27 so-called *Illinois Brick*-repealer jurisdictions. *See* Comp. at ¶¶ 13-24. Plaintiffs assert their own claims under the Sherman Act and the laws of those 14 states, and assert claims on behalf of a putative class of consumers and other End-Payors under the Sherman Act and the law of all 27 repealer states.

of assuring that *Illinois Brick*'s damage limitations are not applied under their state laws, thereby ensuring that the ultimate consumers could be compensated for their antitrust injuries.[2]

In *California v. ARC America Corp.*, 490 U.S. 93 (1989), the Court held that courts must apply repealer state laws consistently with the intentions of the state legislatures and courts, and must not apply *Illinois Brick* principles to curtail the repealer states' law and policy.[3]

Since *ARC America*, defendants have devised several creative strategies to read *Illinois Brick*'s limitations back into repealer state antitrust law. Defendants here rest their pending motion to dismiss on at least one page from that playbook, arguing that Plaintiffs lack standing to pursue their claims. Those ploys cannot succeed – Plaintiffs' standing under state law is rock solid.

Regarding the merits of the antitrust claims, Defendants are correct that state law generally follows federal antitrust principles.[4] But Defendants' arguments on the merits fail.[5]

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[2] *See, e.g.*, R.I. Gen. Laws § 6-36-7(d) (2013). Other states also have reached the same conclusion by judicial interpretation. Collectively both groups, which together comprise a majority of the states, are referred to as "repealer states."

[3] Although state repealer laws are often referred to as protecting "indirect" purchasers, the laws are not secondary or derivative to federal law, or to rights of "direct" purchasers, in the way that some mistakenly suppose based on "direct/indirect" terminology. As *ARC America* makes clear, the repealer state laws are distinctly defined and separately enforceable independent laws that diverge from federal law mainly by seeking to protect the End Payors who often bear the brunt of antitrust overcharges. Accordingly, although Defendants refer to Plaintiffs alternatively as indirect purchasers, Plaintiffs believe the more accurate appellation to be "End-Payor Plaintiffs" and refer to themselves as such herein.

[4] Asserting that state antitrust law generally adopts the corresponding federal antitrust principles, Defendants have incorporated by reference against the End-Payor Plaintiffs the arguments that Defendants make against the Direct Purchaser Plaintiffs. *See* Defendants' Memorandum in Support of Motion to Dismiss Indirect Purchaser Plaintiffs' Consolidated Class Action Complaint ("Def. Mem.") at 1; Defendants' Memorandum in Support of Motion to Dismiss Direct Purchaser Class Plaintiffs' Consolidated Amended Class Action Complaint ("Def. DP Mem.") at 1. The End-Payor Plaintiffs hereby incorporate by reference all of the Direct Purchaser Plaintiffs' responsive arguments on issues applicable to the End Payors.

Plaintiffs have alleged sufficient facts for this court to find unlawful reverse payments to Lupin and Watson plausible, and have pled facts sufficient to support an overarching conspiracy claim. Other courts, as well as scholarly opinion, have rejected the very arguments that Defendants try to resurrect here. Defendants' litany of other state-law-specific arguments similarly lack merit. Defendants' motion should therefore be denied.

ARGUMENT

I. THE WARNER CHILCOTT/LUPIN AGREEMENT IS UNLAWFUL UNDER *ACTAVIS*

A. The Side Deals that Warner Chilcott Provided to Lupin Are Payments Under *Actavis*.

Warner Chilcott ("WC") and Lupin entered into a Reverse Payment Agreement under which Lupin agreed to delay generic entry until July 22, 2014 in exchange for "side deals" involving two other drugs, Femcon and Asacol. Comp. at ¶¶ 105-08. This consideration is plainly a "payment" under *Actavis* because: (1) it was valuable to Lupin and could, therefore, entice Lupin to delay generic entry; and (2) Lupin could not obtain the rights to these drugs even if it had won the Loesterin 24 Fe patent litigation. *FTC v. Actavis*, 133 S. Ct. 2223, 2235-36 (2013).[6]

[5] The End-Payor Plaintiffs filed the first cases challenging Defendants' anticompetitive scheme, and subsequently worked collaboratively with the Direct Purchase Plaintiffs to draft the amended complaints; consequently, the two sets of plaintiffs' complaints make essentially the same substantive antitrust allegations. Accordingly, End Payor Plaintiffs do not repeat here the essential facts of this case because they are set forth in the Direct Purchaser Plaintiffs' brief ("DP Br."). The facts unique to the End Payor Plaintiffs' claims arising from the agreement between Warner Chilcott ("WC") and Lupin, and the overall conspiracy among WC, Watson, and Lupin (claims not pursued by the Direct Purchasers) are set forth in the Argument sections below.

[6] These criteria are addressed in detail in the Direct Purchasers' brief.

B. Plaintiffs Pled that the Payments Were Large and Unjustified.

Defendants argue that Plaintiffs failed to allege that these payments were "large" and "unjustified." Def. Mem. at 16. Not so. *Actavis* defines a "large" payment as one that is greater than WC's saved future litigation costs. 133 S. Ct. at 2236.[7] The Complaint alleges that the side deals had "substantial value" to Lupin (Comp. at ¶ 109) and that absent the terms of those deals, Lupin would not have agreed to delay generic entry (*id*. at ¶ 192). The Complaint alleges that absent Lupin's delayed entry, WC would *not* have done the deals at all or would *not* have paid as much as it did. *See* Comp. at ¶ 109. Plaintiffs have plausibly alleged that the side deals were not at market rates – Lupin would not have delayed entry without getting the above-market terms, and WC would not have given the above-market terms unless Lupin delayed entry.[8] *See id.* at ¶¶ 109, 192.

Defendants argue that the payments were "justified" as a matter of law because *Actavis* teaches that early-entry licenses are procompetitive, and WC's payments to Lupin took the form of early-entry licenses for Femcon and Asacol. Def. Mem. at 14-15, 17. But *Actavis*'s discussion of a procompetitive early-entry license was limited to early entry for the *drug at issue in the patent case*. 133 S. Ct. at 2237 (referring to consumer benefit of "allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point").

As noted above, *Actavis* holds that a suspect payment is something of value that the generic manufacturer could not have obtained by winning the patent case. WC paid Lupin by

[7] *See* DP Brief.

[8] Moreover, if the payments were only for the costs saved, WC would have done the deals on those terms regardless of whether Lupin agreed to delayed entry. *See, e.g.*, 1 Herbert Hovenkamp et al., *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* § 15.3, at 15-52 (2d ed. Supp. 2013).

granting early entry licenses for *other drugs*, which Lupin plainly could not have obtained by winning the Loestrin 24 Fe patent case. To settle the Loestrin 24 Fe patent case, WC was entitled under *Actavis* to grant an early-entry license to Lupin to sell *generic Loestrin 24 Fe*. Settling the Loestrin case by granting licenses to sell *other products* is exactly the sort of suspect payment that *Actavis* condemns. Accordingly, reverse payments that are "sufficiently ***unrelated*** to the settlement of a particular patent dispute will be censured by the courts." *In re Nexium (Esomeprazole) Antitrust Litig.*, No. 12–md–02409–WGY, 2013 WL 4832176, at *15 (D. Mass. Sept. 11, 2013) (emphasis added). In *Nexium* the brand manufacturer gave the generic a side deal (partial forgiveness of patent damages) with respect to a different drug. Applying the *Actavis* criteria for suspect payments, the Court held that "AstraZeneca's forgiveness of Teva's . . . contingent liabilities related to the infringement of *non-Nexium-related* patents sufficiently implicate[d] adverse anticompetitive consequences" to require antitrust scrutiny. *Nexium*, 2013 WL 4832176, at *15 (emphasis added).

Lastly, Defendants argue that the side deals cannot be "reverse payments" because the deals required Lupin to pay money to WC. Def. Mem. at 17, 19-20. This is rank formalism. The suspect payment in *Actavis* was a side deal in which the brand manufacturer overpaid the generic for services that it provided. 133 S. Ct. at 2229. Defendants' side deals here cannot escape antitrust scrutiny merely because they took a slightly different form, *i.e.*, the generic under-paid the brand manufacturer for services that it provided. *See, e.g.*, *Am. Needle, Inc.* v. *Nat'l Football League,* 560 U.S. 183, 191 (2010) ("we have eschewed . . . formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."); *id.* at 196 ("the inquiry is one of competitive reality"); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992)

("formalistic distinctions" are "generally disfavored in antitrust law"); *United States v. Delta Dental of R.I.*, 943 F. Supp. 172, 190 (D.R.I. 1996) (courts cannot ignore "Supreme Court's admonition that . . . actual market realities" must govern the antitrust analysis) (citing *Eastman Kodak*, 504 U.S. at 466-67)). Accordingly, Defendants here cannot distinguish the brand manufacturer's overpayment for services in *Actavis* from the generic's underpayment for services here. Suspect "payments" under *Actavis* clearly include "a 'sweetheart' deal on goods purchased from the patentee." Aaron Edlin, et al., *Activating Actavis*, 28 Antitrust 16, 18 (2013). Defendants' arguments should be rejected.

C. *Actavis* Holds that "Fair Value" and "Litigation Costs" Are Potential Procompetitive Justifications.

Although Plaintiffs have alleged that the payments were large and unjustified, Plaintiffs need not have done so. *Actavis* holds that these are potential procompetitive justifications on which Defendants, not Plaintiffs, have the burden of proof. 133 S. Ct. at 2236. The Court addresses the "fair value" and "litigation costs" issue in the section of the opinion dedicated to whether the anticompetitive consequences of payments are "unjustified," i.e., whether "offsetting or redeeming virtues are . . . present." *Id*. The Court noted that the "payment may reflect compensation for other services"[9] or may be no more than saved litigation costs, and "[t]here may be *other justifications*." *Id*. (emphasis added).[10] The issue being one of procompetitive

[9] Notably, the Court concluded that the "payment" may reflect fair value for services, *not* that there *is no payment* because it was fair value for services. Similarly, the Court noted that where the payment was fair value in exchange for services, "the parties may have *provided for a reverse payment* without having sought or brought about the anticompetitive consequences we mentioned above." *Actavis*, 133 S. Ct. at 2236. The Court did *not* conclude that in such circumstances there was no reverse payment; there was a payment, but it was justified.

[10] *See also Actavis*, 133 S. Ct. at 2237 (likelihood of reverse payment causing harm depends on, among other things, "its independence from other services for which it might represent payment, and the lack of any other convincing justification").

justification, the possibility that the payments reflected saved costs or fair value for services "does not justify dismissing the FTC's complaint":

> An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason." *Id*. In its overall conclusion regarding the Rule of Reason, the Court reiterated that "one who makes such a payment may be unable to explain and to justify it.

Id. at 2237. *Actavis* thus leaves no doubt that Plaintiffs satisfy their initial burden by proving that the brand agreed to make the payments. Then the Defendants must show that the payments represented "fair value" for services or were not larger than saved litigation costs. This clear conclusion has several important procedural and substantive consequences for the proper antitrust analysis.

First, as *Actavis* held, Defendants, not Plaintiffs, have the burden on this issue. And the burden is one of *proof*, not merely of production. 133 S. Ct. at 2236 (Defendants must "show[] the lawfulness of that term under the rule of reason"); *id*. at 2237 (Defendants must "explain and. . . justify it"). This is well-established law. *See, e.g*., *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984) (Defendants bear "a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market"); *see also Steward Health Care System, LLC v. Blue Cross & Blue Shield of R.I.*, No. 13–405 S., 2014 WL 630678, at *4 (D.R.I. Feb. 19, 2014) ("the existence of a business justification is not properly determined on a motion to dismiss"). At the pleading stage, it is not Plaintiffs' burden to demonstrate that Defendants' affirmative defenses do not apply. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (burden of pleading affirmative defenses rests with the defendant).

Second, it is not sufficient for Defendants to establish that the payments were fair value for *some* services. They must establish that the payments were fair value for services *in the market that the restraint affects*. Defendants here cannot justify paying to delay competition for Loestrin 24 Fe by pointing to allegedly procompetitive deals for Femcon and Asacol. Competition "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). Accordingly, "procompetitive justifications for price-fixing must apply *to the same market in which the restraint is found*, not to some other market." *Law v. NCAA*, 902 F. Supp. 1394, 1406 (D. Kan. 1995) (emphasis added), *aff'd*, 134 F.3d 1010 (10th Cir. 1998); *see also Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1157 n.11 (9th Cir. 2003) (based on *Topco*, procompetitive effects in one market cannot justify anticompetitive effects in a separate market); *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1392 (9th Cir. 1984) ("[T]he relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue.").

Actavis resolved any remaining doubt on this issue. The Court noted that payments might be justified when they "reflect compensation for other services that the generic has promised to perform – such as distributing *the patented item* or helping to develop a *market for that item*." 133 S. Ct. at 2236 (emphasis added). The reasoning is straightforward. When the generic agrees to delay entry in exchange for a payment from the brand, consumers *of the product at issue* receive no offsetting benefit if the generic agrees to distribute *some other product*. For that payment to benefit the *relevant* consumers, it must reflect fair value for

"distributing the patented item, or helping to develop a market for that item." *Actavis*, 133 S. Ct. at 2236.

The Court of Appeals in *Sullivan v. National Football League*, 34 F.3d 1091 (1st Cir. 1994), refused to definitively decide this issue, but offered very clear guidance. *Sullivan* held that "it seems improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market." *Id*. at 1112. At the very least, the defendant must prove that "benefits flowing indirectly from" the term that defendant seeks to justify "ultimately have a beneficial impact on competition in the relevant market itself." *Id*. at 1113.

That rationale has particular traction regarding these "side deals" in the pharmaceutical industry.[11] If side deals unrelated to the product at issue were truly arms-length transactions with no purpose to induce the generic to delay entry, the parties would have no need to tie them to the settlement. They would and could be executed as stand-alone deals, which is all the more reason to apply the antitrust rule that justifications must relate to the market affected by the restraint. That rule reduces the manufacturers' ability to hide or obscure compensation whose true point is to induce the manufacturer to give up the patent fight.

Third, even where defendants prove that they exchanged fair value for services in the relevant market, that is not the end of the inquiry under the Rule of Reason. Instead, the burden

[11] Brand manufacturers and generic manufacturers rarely enter into such side deals outside the reverse-payment context; the manufacturers make the deals intentionally complex; and the manufacturers have control of all the relevant information. In all cases this supports a conclusive presumption that the side deal was not for fair value. *See* Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Date and Rulemaking to Preserve Drug Competition*, 109 Colum. L. Rev. 629, 666-69 (2009). It certainly supports permitting defendants to argue "fair value" only if the side deal at least potentially benefits purchasers of the drug at issue.

then shifts back to the plaintiff to establish that, despite the procompetitive justification, the restraint is anticompetitive on balance. Under *Actavis*, the ultimate inquiry under the Rule of Reason is whether "the true point of the payments was to compensate the generics for agreeing not to compete." 133 S. Ct. at 2229; *see also id*. at 2234 (question is whether there was "payment in return for staying out of the market"). Even where a side deal is for services in the relevant market and reflects "fair value," the jury may conclude that, on balance, the deal's "true point" was to induce the generic to give up its patent challenge.

For example, a particular side deal, even at "fair value," might still be profitable for the generic manufacturer. In balancing the payment's anticompetitive vices against its procompetitive virtues, the jury may conclude that the brand manufacturer would not otherwise have done the deal with the generic, and that the fair but profitable deal did in fact induce the generic to give up the fight. Similarly, the jury could find for plaintiffs where, as here, the brand manufacturer bestowed more than one such profitable side-deal on the generic. The possible permutations and circumstances are endless. The point is this: the conclusion that the defendants exchanged fair value for services in the relevant market would not mean that defendants would win; it would simply mean that there is something on their side of the scale for the jury to weigh.

As noted at the outset, Plaintiffs here have in fact pled that the payments were large and unjustified. It may become important later in the case that these are properly issues of procompetitive justification; for now, that fact emphasizes that Defendants' motion on these issues is fantastical.

II. THE WARNER CHILCOTT/WATSON AGREEMENT IS UNLAWFUL UNDER *ACTAVIS*

Plaintiffs allege that the Watson agreement contains an anticompetitive "acceleration

clause." Comp. at ¶ 95.[12] That clause provides that if any other generic manufacturer enters the market before Watson's scheduled entry date of January 22, 2014, then Watson's entry date is accelerated accordingly. *Id*. As Watson had forfeited its right to 180 days of exclusivity, this acceleration clause was extremely valuable to Watson.

Absent the clause, other generic manufacturers, including Defendant Lupin, would have had an opportunity and incentive to enter the market before Watson's scheduled entry date of January 22, 2014. Lupin could have entered earlier by: (1) litigating and winning the patent case; or (2) waiting out the 30-month stay and then entering the market "at risk" while the patent case was pending.[13] Achieving this period of *de facto* exclusivity as the only generic product on the market would have been of enormous value to Lupin and provided a tremendous incentive to entering before Watson's scheduled date. *See Actavis*, 133 S. Ct. at 2228-29.

A. Plaintiffs Pled that the Acceleration Clause Is a Payment and Is Anticompetitive.

Plaintiffs have alleged that the acceleration clause is a suspect payment and is anticompetitive. *First*, the acceleration clause deterred Lupin from trying to enter before January 22, 2014. *See* Comp. at ¶ 95.[14] After incurring the substantial costs of continued litigation, or

[12] Regarding the other aspects of WC's payments to Watson, End Payors incorporate by reference the DP Brief.

[13] Lupin had a third means of entering before January 22, 2014—using the leverage of its patent challenge to negotiate an earlier licensed entry date. But the unlawful no-license clause eliminated that possibility. *See* Comp. at ¶ 94. Together, the no-license clause and the acceleration clause eliminated or substantially reduced the viability of every means of Lupin's earlier entry. The anticompetitive effects of these clauses must, of course, be considered together. *See, e.g*., *Contl. Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.")(citation omitted).

[14] Paragraph 95 of the Complaint contains a typographical error: its last three lines state that the acceleration clause "also deterred those other manufacturers from attempting to enter before January 22, 2014 because they knew that they could [not] obtain a period of time in which they were the sole generic or one of only two generics on the market." Comp. at ¶ 95. The bracketed

facing the potential damages from entering at-risk, Lupin would have encountered Watson's simultaneous entry. In short, the acceleration clause acted as a penalty or deterrent – it eliminated the possibility of Lupin's enjoying any period of *de facto* exclusivity and thus very substantially diminished, if not altogether eliminated, its incentive to enter before Watson's scheduled date.[15] *Id.* And the acceleration clause, in fact, had the intended effect—Lupin agreed not to enter earlier. *See id.* at ¶ 105.

Second, by eliminating or substantially reducing the possibility that another generic manufacturer would enter before Watson's scheduled date, the acceleration clause resulted in Watson agreeing to a later entry date than it otherwise would have. *Id.* at ¶ 95. Instead of insisting on an entry date of, say, January *2012*, Watson instead accepted an entry date of January *2014,* with an acceleration clause.

The acceleration clause was a suspect payment under *Actavis* because the clause had value to Watson enticed it to delay entry, and Watson could not have obtained the clause or its economic equivalent by winning the patent case.[16]

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word – a small but important one – is erroneously absent from the sentence in the Complaint. Plaintiffs intend to seek leave to amend to correct this typographical error.

[15] The Watson Agreement provides other indications that Watson and WC intended the acceleration clause as a penalty meant to deter Lupin and others from entering before Watson's scheduled date. These other indicators include the no-license clause (Agreement ¶5), which confirms the parties' intent to prevent anyone else from entering before Watson; the confidentiality provisions (Agreement ¶18), which prohibit WC from revealing to other generic manufacturers the agreement's terms *except* for the acceleration clause; and the stipulation (Agreement ¶7) that if the acceleration clause is triggered by an at-risk launch, Watson's entry license terminates if the other manufacturer subsequently exits the market (confirming that the acceleration clause's only intended function is deterring other manufacturers' entry). *See* Def. Mem. at Exhibit B.

[16] For example, even if Watson had won the patent case, Lupin could have entered the market before Watson because it had forfeited the statutory 180-day exclusivity.

B. Plaintiffs' Allegations Are Clearly Plausible.

Plaintiffs' specific allegations of anticompetitive intent and effect are clearly plausible. In testimony to Congress, the Chairman and CEO of Apotex, Inc., the nation's fifth largest generic manufacturer, decried the anticompetitive effects of "an acceleration clause, or 'poison pill'":

> "[N]o subsequent filer is going to take up the patent fight knowing it will get nothing if it wins. ***Consumers are the biggest losers under this system.*** If subsequent filers do not have the incentive to take on the cost of multimillion patent challenges these challenges will not occur. Weak patents that should be knocked out will remain in place, unduly blocking consumer access to generics. The challenges to brand patents by generic companies that Hatch-Waxman was designed to generate will decrease. And settlements that delay consumer access to the generic will, in turn, increase."

Protecting Consumer Access to Generic Drugs Act of 2009: Hearing on H.R. 1706 Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy & Commerce, 111th Cong. (2009), http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Sherman-CTCP-Generic-Drugs-Act-2009-3-31.pdf (statement of Bernard Sherman, CEO, Apotex, Inc.) (emphasis in original) (hereafter "Apotex Statement").[17]

Acceleration clauses may appear "at first blush" to benefit consumers by accelerating entry, but this is a mirage. *Id*. Basic economics reached that conclusion long ago in a variety of analogous contexts, such as Most Favored Nations clauses, Best-Price provisions, and the like – all of which appear to benefit consumers by requiring lower prices but in fact can actually raise prices. *See, e.g.*, *United States v. Delta Dental of R.I.*, 943 F. Supp. 172, 176 (D.R.I. 1976) (MFNs violate the rule of reason if they "produce substantial anticompetitive effects in particular

[17] Apotex addressed acceleration clauses in the context in which the first-filing generic retained the 180-day exclusivity. But the clauses have the same—or worse—anticompetitive effect where, as here, Watson forfeited its exclusivity. In both instances, the acceleration clause all but eliminates the later generic manufacturer's incentive to try to enter before the scheduled date.

circumstances"); *Reazin v. Blue Cross & Blue Shield of Kan.*, 663 F. Supp. 1360, 1418 (D. Kan. 1987) (MFNs "[can] effectively prevent[] competing insurance companies from offering more favorable insurance rates to consumers"), *aff'd*, 899 F.2d 951 (10th Cir. 1990).[18] MFNs concern prices, while acceleration clauses concern entry dates, but in pharmaceutical marketplaces early generic entry produces lower prices for consumers. Acceleration clauses can push back entry and raise prices because they "further reduc[e] the incentive" of other generic manufacturers to continue challenging the patent. C. Scott Hemphill & Mark A. Lemley, *Earning Exclusivity*, 77 Antitrust L.J. 947, 964 (2011).

Although there are subtle differences between MFNs, Best-Price provisions, and the acceleration clause at issue here—subtleties that will be fleshed out in the expert economic reports in this case—these clauses share the attribute of potentially deterring competitors' entry or dampening their willingness to strive for a more competitive outcome. *See, e.g.*, *Delta Dental*, 943 F. Supp. at 183 (MFN had purpose and effect of raising barriers to entry); *U.S. v.*

[18] *See also United States. v. Apple Inc.*, 952 F. Supp. 2d 638, 694 (S.D.N.Y. 2013) (MFN "did not promote competition, but destroyed it"); *See also Blue Cross & Blue Shield of Ohio v. Bingaman*, No. 1:94 CV 2297, 1996 WL 677094, at *4 (N.D. Ohio June 24, 1996) (noting "the anticompetitive effects that MFN clauses may have" and finding that "MFN clauses could violate the Sherman Act by restraining competition"), *aff'd sub nom. Blue Cross & Blue Shield of Ohio v. Klein*, 117 F.3d 1420 (6th Cir. July 11, 1997); *United States v. Medical Mutual of Ohio*, 1999 WL 670717, at *12 n.6 (N.D. Ohio Jan. 29, 1999) (court had previously "soundly rejected" the proposition that MFNs are procompetitive as a matter of law); *Blue Cross & Blue Shield of Mich. v. Mich. Association of Psychotherapy Clinics*, No. 9-71014, 1980 WL 1848, at *3 (E.D. Mich. Mar. 14, 1980) (MFNs are evaluated under the rule of reason)). Courts have upheld certain MFNs when a full factual record revealed that they resulted, on balance, in lower prices. *See, e.g.*, *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1111 (1st Cir. 1989). But those cases obviously do not mean that MFNs or analogous clauses are per se lawful – a full factual record may instead show that they are on balance anticompetitive. *See United States v. Delta Dental of R.I.*, 943 F. Supp. 172, 178-79 (D.R.I. 1976) (distinguishing *Ocean State* on that basis).

Blue Cross Blue Shield of Michigan, 809 F. Supp. 2d 665, 675 (E.D. Mich. 2011) (MFN "prevent[ed] other insurers from entering the market"); Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 Antitrust ABA 20, 22, 24 (Spring 2013) ("MFNs may. . .harm competition by assisting an incumbent in foreclosing the entry or expansion of rivals" or "it may simply dampen competition among non-coordinating rivals"); Anthony J. Dennis, *Potential Anticompetitive Effects of Most Favored Nation Contract Clauses in Managed Care and Health Insurance Contracts*, 4 Ann. Health L. 71, 75 (1995) (MFNs have tendency "to both force competitors from the health care market and set an artificial price floor in the health care marketplace"); Thomas E. Cooper, *Most-Favored-Customer Pricing and Tacit Collusion*, 17 Rand J. Econ 377, 387 (1986) (MFNs can lead firms to compete less aggressively).

The second anticompetitive effect—causing Watson to accept a later entry date than it otherwise would have—is likewise undeniably plausible. Watson made more profits by obtaining a period of exclusivity for its generic Loestrin 24 Fe than by entering the market earlier. Indeed, the exclusivity period generates the "vast majority" of the first-filer's profits. *Actavis*, 133 S. Ct. at 2229. The first-filer "is therefore much more willing to accept a later entry date than it would be if settlement did not preserve exclusivity." C. Scott Hemphill & Mark A. Lemley, *Earning Exclusivity* at 965; *see also* Apotex Statement (prohibiting acceleration clauses "will shorten the period of delay first filers are willing to accept in settlements"); C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement As A Regulatory Design Problem*, 81 N.Y.U. L. Rev. 1553, 1593 (2006) ("[e]njoying the exclusivity period with certainty is more important to a generic firm than its timing"). This conforms to standard economic analyses. *See, e.g.*, *Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d at 669 (defendant is willing

to pay higher prices to hospitals in exchange for MFN because of its tendency to preserve defendant's market share); Steven C. Salop & Fiona Scott Morton, *Developing an Administrable MFN Enforcement Policy*, 27 Antitrust ABA 15, 16 (Spring 2013) (buyer is willing to pay higher price when MFN dampens competition from rivals); Steven C. Salop, *Practices that (Credibly) Facilitate Oligopoly Co-ordination*, New Developments in the Analysis of Market Structure 265 (Joseph E. Stiglitz & G. Frank Mathewson eds., 1986) (party will accept less competitive terms when MFN injures rivals because party will "count that injury as a benefit").

Defendants argue that the acceleration clause cannot be a "payment" under *Actavis* because its only function, and its only value to Watson, is that it "facilitates earlier entry of Watson's generic." Def. Mem. at 14-16. But that simply contradicts Plaintiffs' clearly plausible allegation that the clause created value for Watson not by allowing it to enter earlier, but by deterring other generics from entering earlier. *See* Comp. at ¶ 95. Although an acceleration clause could conceivably be procompetitive under some circumstances, determining the effect of the clause here requires a factual inquiry and a balancing of anticompetitive and procompetitive effects. *See Delta Dental*, 943 F. Supp. at 176. The analysis "turns precisely on the severity of the alleged anticompetitive effects flowing from the application of [the defendant's] MFN clause juxtaposed against any competitive benefits." *Id.* at 180. This balancing is not appropriate at the pleading stage where, as here, Plaintiffs have plausibly alleged anticompetitive harm. *See, e.g., Steward Health Care System, LLC v. Blue Cross & Blue Shield of R.I.*, No. 13–405 S, 2014 WL 630678, at *6 (Smith, C.J.) (citing *Creative Copier v. Xerox,* 344 F. Supp. 2d 858, 867 (D. Conn. 2004) ("[T]he presence of a business justification. . .is not appropriately raised at [the motion to dismiss] stage. . . .[The plaintiff] is not required to allege the negative of every possible justification [the defendant] may offer for its conduct.")).

Defendants also contend that Plaintiffs fail to allege that the payment was "large." Def. Mem. at 15. But the Complaint alleges that the acceleration clause preserved Watson's period of *de facto* exclusivity (Comp. at ¶ 95), which "may be worth hundreds of millions of dollars." *Id*. at ¶ 58. In any event, as demonstrated in detail above, *Actavis* makes clear that the *burden is on defendants* to prove that a payment is *not large*.

Plaintiffs note, finally, that the acceleration clause is anticompetitive, and actionable, regardless of whether it is a "payment."[19] All reverse payments are subject to analysis under *Actavis*, but not all anticompetitive clauses are reverse payments. *Actavis* itself reviewed a line of cases—not involving reverse payments—finding unlawful a variety of clauses in patent licenses, including those intended to deter competitors' entry. *Id*. at 2232-33.

The Court reiterated the long-standing antitrust framework for analyzing *any* clause in a patent license: courts should "answer[] the antitrust question by considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents." *Id*. at 2231. This analysis "seek[s] to accommodate patent and antitrust policies, finding challenged terms and conditions *unlawful unless patent law policy offsets the antitrust law policy strongly favoring competition.*" *Id*. at 2233 (emphasis added). Patent principles overcome the strong policy favoring competition where "'the patent statute specifically gives a right' to restrain competition in the manner challenged." *Id*. at 2231 (quoting *United States v. Line Materials Co.*, 333 U.S. 287, 311 (1948)). Defendants here identify no such specific statutory authorization. Thus, their arguments fail and this Court should not dismiss Plaintiffs'

[19] Plaintiffs allege that the acceleration clause is an unlawful payment and that it is unlawful regardless of whether it is a payment. *See* Comp., Second Claim for Relief and Fifth Claim for Relief.

acceleration clause allegations.

III. PLAINTIFFS' PRODUCT-SWITCHING ALLEGATIONS APPROPRIATELY ADDRESS MOTIVE AND DAMAGES

Defendants argue that Plaintiffs fail to state a claim for unlawfully switching the market from Loestrin 24 Fe to Lo Loestrin 24 and Minastrin 24, and that the product-switching allegations should, therefore, be "disregarded and ignored, if not stricken entirely from the Complaint." Def. Mem. at 22. But these allegations go to WC's *motive* for making the unlawful reverse payments and to the *damages* resulting from them. Allegations regarding a conspiracy's motive and effect are standard and appropriate in antitrust conspiracy complaints. *See, e.g.*, *Manego v. Orleans Bd. of Trade*, 773 F.2d 1, 7 (1st Cir. 1985) (plaintiff appropriately alleged "all possible motives for such a conspiracy and all facts necessary to support these allegations"); *Serv. Merch. Co., Inc. v. Boyd Corp.,* 722 F.2d 945, 951 (1st Cir. 1983) ("[I]n order to prove a conspiracy, there must be evidence of motive and intent. The anticompetitive effect of the market allocation was such evidence."). And Plaintiffs are entitled to have their claims considered in the commercial and economic context in which the challenged conduct occurred. *See, e.g.*, *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 393 n.19 (1981) (courts must "give attention to the particular economic context in which the alleged conspiracy and 'refusal to deal' took place"); *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 932 F. Supp. 2d 240, 248 (D. Mass. 2013) ("The rule of reason. . .looks to the entire economic context in which the allegedly exclusionary conduct took place, asking whether the restraint of trade at issue was unreasonable under the circumstances.").[20]

[20] Defendants note the controversy over whether product-switching alone–independent of reverse payments–constitutes unlawful monopolization. Def. Mem. at 20-22. *See, e.g.*, *Abbott*

Motive: WC's unlawful reverse payments gave it the time required to switch the prescription base from Loestrin 24 Fe to WC's follow-on products which are (temporarily) shielded from generic competition. *See* Comp. at ¶¶ 8, 112. And the scheme succeeded – absent the payments, Watson and Lupin's generic Loestrin 24 Fe would have entered the market before WC launched the follow-on products. As a result, WC would not have even marketed those products or, if it did, they would have made few, if any, sales. *See id*. at ¶ 116.

Damages: WC made the payments and used the time that it bought to convert the prescription base to the follow-on products. Consequently, when generic Loestrin 24 Fe finally did launch in January 2014, there were far fewer prescriptions available for generic substitution, thus significantly increasing Plaintiffs' damages (and WC's ill-gotten gains). *Id*. at ¶¶ 7, 9, 117, 121. These allegations regarding WC's motive to make the payments, and their devastating effect on consumers, are more than plausible. *See, e.g.*, Michael A. Carrier, *A Real-World Analysis of Pharmaceutical Settlements: The Missing Dimension of Product Hopping*, 62 Fla. L. Rev. 1009, 1021 (2010) ("Brand firms have a considerable interest in forestalling generic entry [through reverse payments] until after they can switch the market to the new product. Such a delay protects them from selling and marketing their branded drugs against cheaper generics.").

Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 420–23 (D. Del. 2006) (denying motion to dismiss monopolization claim); Herbert Hovenkamp, et al., *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* § 15.3, 2012 WL 5831540 (2012) ("product hopping to ward off generic competition is precisely the sort of behavior the Sherman Act condemns"). But Plaintiffs here have not asserted a monopolization claim, and those issues have nothing to do with whether Plaintiffs have properly pled WC's motive for the reverse payments and the damage they caused.

IV. PLAINTIFFS HAVE STANDING TO PURSUE THEIR STATE LAW CLAIMS

Defendants argue that Plaintiffs have standing to represent purchasers in only the states in which they made purchases, and not purchasers in other states.[21] Incredibly, Defendants fail to cite the three most recent district court opinions from the First Circuit that address this very issue, all of which squarely reject Defendants' argument. *See Nexium*, 2013 WL 4832176, at * 24; *Glass Dimensions, Inc. v. State Street Bank & Trust Co.*, 285 F.R.D. 169, 175 (D. Mass. 2012); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 269 (D. Mass. 2004). Defendants' argument defies a body of law in this Circuit and elsewhere, and confuses two separate legal concepts—Article III standing and Rule 23's class certification requirements.

A. Plaintiffs Have Article III Standing.

Defendants repeatedly stress that Article III standing is a "threshold" inquiry and that each "class representative must meet this standing requirement."[22] Here, each named Plaintiff, in fact, satisfies this threshold inquiry. To demonstrate Article III standing, a plaintiff need only show that "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). Plaintiffs' Complaint alleges that, as a result of Defendants' unlawful conduct, each of them paid more than they otherwise would have in the form of overcharges.[23] This is all that is required to establish the named Plaintiffs' Article III standing to pursue their own claims. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102–03 (1998); *see also*

[21] Def. Mem. at 49. Specifically, Defendants assert that Plaintiffs lack standing under the laws of Alabama, Alaska, Arkansas, Colorado, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Montana, Oklahoma, Washington, and Wyoming.

[22] *See e.g.*, Def. Mem. at 50 (citing *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, MDL 1532, 2006 WL 623591, at *3 (D. Me. Mar. 10, 2006), and *In re Bank of Boston Corp. Securities Litig.*, 762 F. Supp. 1525, 1531 (D. Mass. 1991)).

[23] *See e.g.*, Comp. at ¶¶118–123.

Nexium, 2013 WL 4832176, at *25 ("each of the named end-payor plaintiffs has claims against each of the defendants based on their alleged overpayments . . . [and] have therefore made out their Article III requisite") (citations omitted).

B. Because Plaintiffs Have Article III Standing, Rule 23 Determines Whether They May Pursue Claims of Absent Class Members in Other States.

Once a class representative establishes Article III standing to assert his own claim, whether he also may advance claims of absent class members is determined solely under Rule 23's requirements.[24] The governing principle is straightforward: "[W]hen a class plaintiff shows individual standing, the court should proceed to Rule 23 criteria to determine whether, and to what extent, the plaintiff may serve in a representative capacity on behalf of the class." 1 William B. Rubinstein et al., Newburg on Class Actions §2:6 (5th ed. 2011); *see also* 7AA Alan Wright et al., Federal Practice and Procedure §1785.1 (3d ed. 2010) (once named plaintiff establishes his own standing, "whether he will be able to represent the putative class . . . depends solely on whether he is able to meet the additional criteria encompassed in Rule 23"). Thus, named Plaintiffs need only establish standing to assert their own claims—which they have done. As Plaintiffs have established Article III standing, no separate standing inquiry exists outside of Rule 23's requirements.[25]

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[24] *See Sosna v. Iowa*, 419 U.S. 393, 403 (1975) (once the named plaintiff establishes that he has suffered an injury that is "real and immediate," not "conjectural" or "hypothetical," it "shift[s] the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class'"); *In re Nexium*, 2013 WL 4832176, at *24 ("once an individual has alleged a distinct and palpable injury to himself he has standing to challenge a practice even if the injury is of a sort shared by a large class of possible litigants") (citing *Senter v. Gen. Motors Corp.,* 532 F.2d 511, 517 (6th Cir. 1976)).

[25] *See Glass Dimensions, Inc. v. State St. Bank & Trust Co.*, 285 F.R.D. 169, 175. (D. Mass. 2012). Numerous Courts of Appeal have held likewise. *See, e.g.*, *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 158–62 (2d Cir. 2012) (whether named plaintiff has "class standing" does not turn on whether she would have "statutory or Article III standing"); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 307

Defendants assert that the Court should decide the issue of whether Plaintiffs may pursue claims of absent class members from other states on a motion to dismiss, rather than awaiting class certification. The overwhelming weight of authority is to the contrary.[26] For example, the

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(3d Cir. 1998) ("[O]nce the named parties have demonstrated they are properly before the court, 'the issue [becomes] one of compliance with the provisions of Rule 23, not one of Article III standing.'") (citation omitted); *Arreola v. Godinez*, 546 F.3d 788, 795 (7th Cir. 2008) (once plaintiff establishes standing to pursue his own claims "[w]hether he is entitled to relief on any or all of those claims and whether he may serve as an adequate class representative for others asserting such claims are separate questions"); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 592 (8th Cir. 2009) (plaintiff with Article III standing is not limited to asserting "his own rights or redress his own injuries. To the contrary . . . a plaintiff may be able to assert causes of action which are based on conduct that harmed him, but which sweep more broadly than the injury he personally suffered"); *Piazza v. Ebsco Indus.*, 273 F.3d 1341, 1351 (11th Cir. 2001) (where named plaintiff has standing to assert his own claim, whether he can adequately represent the class is determined solely by Rule 23); *accord Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. 393, 398 (2010) (once Rule 23 is satisfied, the court must certify the class).

[26] *See, e.g., In re Nexium*, 2013 WL 4832176, at *2727 ("This Court therefore postpones its determination as to whether the named representatives may pursue claims on behalf of its absent class members under Rule 23 until the time it entertains the certification of the putative class."); *In re Auto. Parts Antitrust Litig.*, No. 12-MD-02311, 2013 WL 2456612, at *9-12; (E.D. Mich. June 6, 2013); *In re DDAVP Indirect Purchaser Antitrust Litig.*, 903 F. Supp. 2d 198, 214 (S.D.N.Y. 2012); *In re Hydroxycut Mktg. & Sales Practices Litig.*, 801 F. Supp. 2d 993, 1005 (S.D. Cal. 2011); *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 406 (S.D.N.Y. 2011); *Blessing v. Sirius XM Radio Inc.*, 756 F. Supp. 2d 445, 452 (S.D.N.Y. 2010); *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F. Supp. 2d 356, 376-77 (E.D.N.Y. 2010); *Owens v. Apple, Inc.*, No. 09-CV-0479-MJR, 2009 WL 5126940, at *4 (S.D. Ill. Dec. 21, 2009); *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 579-80 (M.D. Pa. 2009); *Ramirez v. STI Prepaid LLC*, 644 F. Supp. 2d 496, 505 (D.N.J. Mar. 18, 2009); *Young v. Wells Fargo & Co.*, 671 F. Supp. 2d 1006, 1023-24 (S.D. Iowa 2009); *Sheet Metal Workers National Health Fund v. Amgen, Inc.*, No. 07-5295 (SRC), 2008 WL 3833577, at *8–9 (D.N.J. Aug. 13, 2008); *Hoving v. Transnation Title Ins. Co.*, 545 F. Supp. 2d 662, 668 (E.D. Mich. 2008); *Kuhl v. Guitar Ctr. Stores, Inc.*, No. 07 C 214, 2008 WL 656049, at *2 (N.D. Ill. Mar. 5, 2008); *Lantz v. Am. Honda Motor Co., Inc.*, No. 06 C 5932, 2008 WL 162759, at *4 (N.D. Ill. Jan. 17, 2008); *Woodard v. Fid. Nat. Title Ins. Co.*, No. CIV 06-1170 RB/WDS, 2007 WL 5173415 (D.N.M. Dec. 4, 2007); *In re Hypodermic Products Antitrust Litigation*, No. 06–cv–0174, 2007 WL 1959225 (D.N.J. June 29, 2007); *Jepson v. Ticor Title Ins. Co.*, No. C06-1723 JCC, 2007 WL 2060856 (W.D. Wash. May 1, 2007); *Potts v. United Parcel Serv., Inc.*, No. 06 C 4766, 2007 WL 551555, at *3 (N.D. Ill. Feb. 15, 2007); *In re Grand Theft Auto Video Game Consumer Litig.*, No. 06–1739, 2006 WL 3039993, at *3 (S.D.N.Y. Oct. 25, 2006); *In re*

District of Massachusetts has held that class certification is "logically antecedent" to a ruling on whether the named plaintiff can pursue the claims of absent class members whose claims arise under the laws of other states. *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 269 (D. Mass. 2004). The court in *Relafen* rejected the defendant's argument that the named plaintiffs from a limited number of states lack standing to represent a class from a broader range of states. *See id.* There, as here, end-payor plaintiffs asserted that defendant unlawfully delayed the onset of generic competition. *Id.* at 263-64. Plaintiffs, who resided in California and Massachusetts, sued under the statutes of their home states and multiple others. *Id.* at 264. Plaintiffs moved for class certification and, in opposition, defendant argued that plaintiffs "lacked standing to assert the claims of, or to serve as adequate representatives for, class members who made their purchases in the remaining states [other than California and Massachusetts]." *Id.* at 267.

The court endorsed "the long-standing rule that, once a class is properly certified, statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs." *Id.* at 269 (quoting *Payton v. County of Kane*, 308 F.3d 673, 680 (7th Cir. 2002)). The court's practical, functional approach emphasized that:

> [t]he assurance of vigorous advocacy may be provided instead by the collective interest of the class, advanced by the named representative serving as a sort of 'private attorney general.' The focus of the standing inquiry is therefore appropriately directed toward the class rather than its representative.

Relafen, 221 F.R.D. at 269 (citation omitted).

K–Dur Antitrust Litigation, 338 F. Supp. 2d 517, 544 (D.N.J. 2004); *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363, 377 (S.D.N.Y. 2002).

This approach "also proves consistent with the policies served by class action procedure." *Id.* Specifically, defendant's approach in *Relafen*, resurrected by Defendants here, "would require class counsel to identify representatives from each state involved in a multistate class action, would render class actions considerably more cumbersome to initiate, and in turn, less effective in overcoming a lack of incentives to prosecute individual rights and in 'achiev[ing] economies of time, effort, and expense.'" *Id.* The *Relafen* court rejected Defendants' standing arguments on a Rule 23 motion to certify the class. Defendants' arguments here are even less persuasive in a Rule 12(b)(6) motion to dismiss Plaintiffs' claims at the outset.

Similarly, in *Glass Dimensions, Inc. v. State St. Bank & Trust Co.*, plaintiffs sued for breach of fiduciary duty, alleging injury arising out of defendants' conduct in managing 260 lending funds, 285 F.R.D. 169, 172-75 (D. Mass. 2012). Plaintiff had invested in only three of the funds and defendants argued that plaintiff did not have standing to sue on behalf of the funds in which it did not purchase. *Id*. at 174. In holding that the plaintiff had established constitutional standing as to the 257 funds in which it did not purchase, the court stated:

> Plaintiff sues for breach of fiduciary duty, and alleges an injury rooted in Defendants' conduct in managing all 260 lending funds as a group. The named Plaintiff, therefore, *has an identity of interest with the proposed class in seeking redress from an injury perpetrated by all named Defendants*. . . . Relevant First Circuit precedent . . . indicates that a potential class representative is only required to establish constitutional standing with respect to each defendant, which Plaintiff does here. Once a plaintiff establishes his own standing, the question of whether a plaintiff will be able to represent the putative class, depends solely on whether he is able to meet the additional criteria encompassed in Rule 23 of the Federal Rules of Civil Procedure. Here, Defendants have conflated standing requirements with class certification analysis.

Id. at 175 (quoting *Fallick v. Nationwide Mut. Ins. Co.,* 162 F.3d 410, 423 (6th Cir.1998)) (internal quotation marks omitted).

More recently, in *Nexium*, the District of Massachusetts rejected Defendants' exact argument—that a "majority of the twenty-six state claims ought be dismissed" since "the End–Payors only have Article III standing to assert antitrust or consumer protection claims in the states in which they suffered an injury." 2013 WL 4832176, at *23. The Court held that Defendants' argument "erroneously conflate[s] the requirements of Article III, for the purposes of assessing constitutional standing of the named plaintiffs, with the procedural requirements of Rule 23, which are designed to determine whether a putative class representative for whom Article III standing has already been established may also raise the claims of the class which it purports to represent." *Id.* at *24. The court thus refused to dismiss claims asserted under the laws of states where the named plaintiffs did not reside. *Id*. at *27. The court recognized that, "[a]ll members of the putative class *have a common interest in litigating claims arising from the Defendants' allegedly anticompetitive collusion* designed to cause the End-Payors to pay supracompetitive prices across the several states." *Id*. (emphasis added).[27]

Defendants argue that, under Article III or Rule 23, a named plaintiff must have the *exact same claim* – arising under the same state law – as absent class members. An identical-claims rule would defy the very language of Rule 23(a)(3), which provides that a named plaintiff may

[27] The only two opinions from the First Circuit cited by Defendants' are inapposite. *New Motor Vehicles*, an opinion certifying an injunctive class pursuant to Rule 23(b)(2), stands only for the undisputed proposition that standing is a threshold inquiry and that every class representative must have standing. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, MDL 1532, 2006 WL 623591, at *3 (D. Me. Mar. 10, 2006). Similarly, *Bank of Boston* deals only with the class representative's standing to pursue his own claim, not whether he could pursue the claims of absent class members. *In re Bank of Boston Corp. Securities Litig.*, 762 F. Supp. 1525 (D. Mass. 1991). In *Bank of Boston*, the class representative lacked standing to pursue *his own claims* because he did not "purchase or sell" stock as required by the statute, but merely "retained" it. *Id*. at 1531-32. As discussed above, the class representatives in this case clearly have standing to pursue their own claims, and the only issue – not appropriately raised on a motion to dismiss the complaint – is whether these Plaintiffs satisfy the criteria of Rule 23.

represent the class if her claims "are typical of the claims . . . of the class." The First Circuit has held that claims can be "typical" without being identical.[28] Other courts conclude the same.[29] The "identical claim" requirement that Defendants try to engraft onto Article III jurisprudence simply is not the law. As in *Relafen*, *Glass Dimensions*, and *Nexium* (none of which is cited in Defendants' brief), all class members in this case have a *common interest* in litigating their claims against the Defendants—they all allege injuries in the form of overcharges—and there is no risk that the named Plaintiffs are attempting to "piggy-back" on the injuries of the unnamed class members. Consumers throughout the United States have been injured by Defendants' anticompetitive conduct, and, as numerous courts agree, whether the named Plaintiffs may assert claims on behalf of absent class members must await this Court's analysis under Rule 23.

V. PLAINTIFFS' CLAIMS ARE NOT TIME-BARRED

The Court may dismiss a claim based on the affirmative defense of statute of limitations only if "the facts establishing the defense [are] clear on the face of the plaintiff's pleadings." *Klunder v. Trustees & Fellows of Coll. or Univ. in English Colony of Rhode Island & Providence Plantations*, No. 10-410 ML, 2012 WL 5936565, at *1 (D.R.I. Nov. 27, 2012) (citing *Santana–Castro v. Toledo–Davila,* 579 F.3d 109, 113–14 (1st Cir. 2009)). Dismissal based on

[28] *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012) ("perfect symmetry of interest is not required and not every discrepancy among the interests of class members renders a putative class action untenable"); *see also George v. Nat'l Water Main Cleaning Co.*, 286 F.R.D. 168, 176 (D. Mass. 2012) (typicality requires only that "named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence") (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 n. 5 (2011)); *Swack v. Credit Suisse First Boston*, 230 F.R.D. 250, 264 (D. Mass. 2005) (Rule 23(a)(3), however, "does not mandate that the claims of the class representative be identical to those of the absent class members.").

[29] *See, e.g.*, *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183 (3d Cir. 2001) (claims arising out of the same course of conduct satisfy typicality); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 27 (D.D.C. 2001) ("[T]here is nothing in Rule 23(a)(3) which requires named plaintiffs to be clones of each other or clones of other class members." (citation omitted)).

the affirmative defense is permissible only if the complaint "leave[s] no doubt that an asserted claim is time-barred." *Lucas v. D'Angelo*, 37 F. Supp. 2d 45, 46 (D. Me. 1999) (citing *LaChapelle v. Berkshire Life Insurance Co.,* 142 F.3d 507, 509 (1st Cir. 1998)); *see also Garcia v. Bernabe*, 289 F.2d 690, 693 (1st Cir. 1961) ("[T]he complaint cannot be said to affirmatively show that it is barred by the statute of limitations. Judgment will be entered vacating the order of the district court and remanding the case for further proceedings not inconsistent with this opinion."); *Dessler v. Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local Union No. 251*, 686 F. Supp. 977, 980 (D.R.I. 1988) ("In reality, defendants must plead the statute of limitations as an affirmative defense and prove its applicability. Since the complaint on its face does not indicate that it is time-barred, defendants' motion to dismiss the complaint because plaintiff allegedly has failed to meet the applicable limitations period must be denied.").

Defendants here come nowhere near meeting this standard. Instead, the Plaintiffs' Complaint makes clear that the claims are *not* barred by the statutes of limitations, because: (1) the claims did not first accrue until Plaintiffs were injured – until generic entry would have occurred if Defendants had not unlawfully delayed it – and the Complaint specifically alleges that *the date of first injury was September 2009 at the earliest*; (2) even if they had accrued before September 2009, Plaintiffs' claims within four years[30] of filing the Complaint (i.e., all claims from April 5, 2009 to the present) are timely under the "continuing violation" rule because (a) each of WC's millions of over-priced sales of Loestrin 24 Fe to Plaintiffs is an "overt

[30] For ease of reference, Plaintiffs will generally refer to a four-year statute. We note, however, that Florida provides for claims to be brought within four years or "2 years after the last payment in a transaction involved in a violation of this part, whichever is later." Fla. Stat. § 501.207 (5). WC has made many payments to Watson within two years before the filing of the first End-Payor Complaint in April 2013 (*see* Comp. at ¶ 92-93), so Plaintiffs' Florida claims, like the Maine, Vermont, and Wisconsin claims (which have six-year statutes) are timely even under Defendants' (wrong) view of the law.

act" that starts the statute of limitations anew, and (b) WC, Watson[31] and Lupin committed a plethora of additional overt acts, including Watson and Lupin's refusal to enter the market; concerted conduct to keep any generic manufacturer from entering before January 2014; and WC's refusal to enter the market with an authorized generic Loestrin 24 Fe until after Watson enjoys 180 days of exclusivity; and (3) Plaintiffs' claims are also timely under the "speculative damages" rule because Plaintiffs could not have known whether, how much, and at what price they would make additional purchases of Loestrin 24 Fe in the future.

A. Plaintiffs' Claims Are Timely Under The Basic Accrual Rule.

The "basic accrual" rule for antitrust claims is that they accrue when the plaintiff is *first injured* by the defendant's unlawful conduct. The Complaint alleges that Plaintiffs were injured by the absence of generic competition. *See* Comp. at ¶¶ 13-24. The Complaint further alleges that, absent the unlawful conduct, generic competition would have first occurred in September 2009 at the earliest. *See id.* at ¶ 9. That is when the Food and Drug Administration ("FDA") approved Watson's generic product for sale – the Complaint pleads no facts that would have allowed Watson to enter the market before the FDA gave its approval in September 2009. The Complaint does *not* allege that generic competition would have occurred any sooner than September 2009. The first End-Payor complaint was filed on April 5, 2013, well within four years of September 2009 – the earliest date on which the Complaint alleges that Plaintiffs were injured.[32] *See United Food and Commercial Workers Local 1776 & Participating Employers*

[31] WC, Watson, and Lupin move to dismiss the claims against them in Count Five; WC and Watson move to dismiss the claims against them in Count 2; and Lupin moves to dismiss the claims under Alabama, Idaho, and Tennessee law in Count 6.

[32] In alleging that generic entry would have occurred "as early as" September 2009, the Complaint does not rule out the possibility that a jury may conclude that generic entry would have occurred later than that. For example, the jury may conclude that, absent the unlawful payments, WC would have granted Watson a license to enter the market in, say, May 2011 or

Health and Welfare Fund v. Warner Chilcott (US), LLC, 2:13-cv-01807-CMR (E.D. Pa.)(ECF No. 1).

Defendants assert that Plaintiffs' claims accrued not when Plaintiffs were first injured, but when Defendants entered into the Agreement. But it is literally hornbook law that "[t]he limitations period begins to run when the cause of action accrues—ordinarily, when the plaintiff suffers injury resulting from the antitrust violation." ABA Section of Antitrust Law, *Antitrust Law Developments*, at 807 (7th ed. 2012). Simply put, "two events must occur in order to begin the running of the limitations period: the act and the injury." *Marcus Corp. v. Am. Express Co*., No. 04-cv-5432, 2005 WL 1560484, at *2 (S.D.N.Y. July 5, 2005).

This conclusion is backed by decades of unanimous authority. *See, e.g.*, *Zenith Radio v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *Morton's Mkt. Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 828 (11th Cir. 1999); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 295 (2d Cir. 1979); *In re Nexium (Esomeprazole) Antitrust Litig.*, No. 12–md–02409–WGY, 2013 WL 4832176, at *21 (D. Mass. Sept. 11, 2013); *KFC Corp. v. Marion- Kay Co., Inc*., 620 F. Supp. 1160, 1167 (S.D. Ind. 1985). And it is just plain common sense. The courts do not want to encourage plaintiffs to sue with respect to unlawful agreements that *might* injure them but have *not yet* done so (to provide just one of innumerable examples, what if the FDA had never approved Watson's generic?).

Defendants' limitations argument never gets out of the starting gate. Plaintiffs' claims did not first accrue until September 2009 at the earliest.

May 2012. The but-for entry date will be the subject of expert testimony and ultimately will have to be resolved by the jury. The determinative point for the current motion is that nothing in the Complaint precludes that possibility that the jury will find a but-for entry date as late as May 2012. So Defendants' arguments about the few claims with one or two-year statutes of limitations (the Alabama, Idaho, and Tennessee claims in Count 6) also fail.

B. Plaintiffs' Claims Are Timely Under the "Continuing Violation" Rule.

Even if Defendants could somehow overcome the accrual hurdle, Plaintiffs' claims are timely under the "continuing violation" rule. An antitrust defendant that has committed overt acts in furtherance of a conspiracy during the statutory period has no claim to the repose of the statute of limitations. *See, e.g., Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa.*, 815 F.2d 270, 278 (3d Cir. 1987) (claim is timely to the extent "there is evidence of overt acts in furtherance of the conspiracy occurring within the limitations period."); *Nexium*, 2013 WL 4832176, at *21-22 (same). Defendants argue that the continuing violation rule is inapplicable because all of Plaintiffs' injuries flow from an antitrust violation that was complete the day they entered into the unlawful agreement. Def. Mem. at 26. Defendants are wrong on both the law and facts.

1. *Defendants Committed Overt Acts by Charging Supracompetitive Prices to Plaintiffs.*

WC and Watson entered an unlawful, ongoing horizontal market allocation agreement. In relevant economic substance, the Agreement is no different than those reached by price-fixing cartels. *See California Dental Ass'n* v. FTC, 526 U.S. 756, 777 (1999) (in general, "raising price, reducing output, and dividing markets have the same anticompetitive effects") (citation omitted); Julian O. von Kalinowski, *Antitrust Laws and Trade Regulation* § 162.02[2][d] (2d ed. 2003) (same statute-of-limitations rules apply to claims "involv[ing] price fixing, or some other form of cartel behavior that raises prices, such as dividing markets or customers"). Their Agreement has brought about a series of unlawful overcharges that Defendants extracted from Plaintiffs and then shared between themselves by means of WC's payments to Watson.

The Supreme Court has held that a separate cause of action accrues to purchasers each time defendants charge them an unlawfully high price—a high price that defendants' ongoing conspiracy makes possible. *See, e.g.*, *Zenith Radio Corp.*, 401 U.S. at 338; *Hanover Shoe, Inc. v.*

United Shoe Mach. Corp., 392 U.S. 481, 489 (1968). The Court summarized its cases on this issue:

> Antitrust law provides that, in the case of a "continuing violation," say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "*each overt act that is part of the violation and that injures the plaintiff," e.g., each sale to the plaintiff, "starts the statutory period running again*, regardless of the plaintiff's knowledge of the alleged illegality of much earlier times.

Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997) (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶338b (3d ed. 2007), at 145 (footnote omitted)) (emphasis added). The three Courts of Appeals that have addressed the issue have reached the same conclusion.[33] So have at least 13 district court decisions.[34]

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[33] *See, e.g., Morton's Mkt., Inc.*, 198 F.3d 823, 828 (11th Cir. 1999) ("when sellers conspire to fix the price of a product, each time a customer purchases that product at the artificially inflated price, an antitrust violation occurs and a cause of action accrues");") (citation omitted); *Imperial Point Colonnades Condo. Inc., v. Mangurian*, 549 F.2d 1029, 1043-44 (5th Cir. 1977) (reversing grant of summary judgment where plaintiffs paid inflated rents during the four years prior to filing where plaintiffs bought their condominium units and became parties to the recreational lease more than four years before commencing suit); *Berkey Photo*, 603 F.2d at 295 ("although the business of the monopolist's rival may be injured at the time the anticompetitive conduct occurs, a purchaser, by contrast, is not harmed until the monopolist actually exercises its illicit power to extract an excessive price").

[34] *See, e.g.*, *In re Pool Products Distribution Mkt. Antitrust Litig*., 940 F. Supp. 2d 367, 400, at *27 (E.D. La. 2013) ("[P]laintiffs have alleged overt anticompetitive acts and resulting injury to plaintiffs in the form of overcharges for Pool Products within the limitations period....Plaintiffs may therefore recover for overcharges paid in the four-year period before filing suit."); *Precision Associates, Inc. v. Panalpina World Transp. (Holding) Ltd*., No. 08-CV-42, (JG)(VVP), 2011 WL 7053807, at *48 (E.D.N.Y. Jan. 4, 2011), report and recommendation adopted, *Precision Associates, Inc. v. Panalpina World Transp. (Holding) Ltd*., No. 08-CV-00042, 2012 WL 3307486 (E.D.N.Y. Aug. 13, 2012) ("The statute of limitations for antitrust litigation runs from the most recent injury caused by the defendants' activities rather than from the violation's inception. Therefore, as the defendants continued to cause injury (through sales) into the limitations period, these claims would be timely.") (citations omitted); *Allen v. Dairy Farmers of Am., Inc*., 748 F. Supp. 2d 323, 349 (D. Vt. 2010) ("the every-purchase-equals-a-new-violation-theory is applicable to Plaintiffs' price-fixing claims"); *Rite Aid Corp. v. Am. Express Travel Related Servs. Co.*, 708 F. Supp. 2d 257, 263-64 (E.D.N.Y. 2010) ("A purchaser plaintiff's cause of action accrues when he or she actually pays an overcharge. By contrast, a

Defendants try to respond to this massive line of authority by citing a single antitrust case, *Berkson v. Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984). But *Berkson* involved a one-time

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competitor plaintiff's cause of action accrues at the time of the defendant's anticompetitive conduct.") (citation omitted); *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732, 2007 WL 5215231, at *3 (E.D. Pa. Jan. 18, 2007) (claims accrue "when the plaintiff purchases the product at a price inflated due to anti-competitive conduct. Harm resulting from each purchase is viewed individually to determine its timeliness") (citation omitted); *Molecular Diagnostics Labs. v. Hoffmann-LaRoche, Inc.*, 402 F. Supp. 2d 276, 286 (D.D.C. 2005) ("That [plaintiff] is litigating this action as a purchaser, not a competitor, is a critical distinction .... Because [plaintiff] is a purchaser, not a competitor, each time [plaintiff] was allegedly forced to pay a supra-competitive price as a result of [defendants'] anticompetitive conduct, a separate injury accrued.") (citation omitted); *Meijer, Inc. v. 3M*, No. 04-5871, 2005 WL 1660188, at *4 (E.D. Pa. July 13, 2005) ("[C]ourts have held that . . . the requisite injurious act within the limitations period can include being overcharged as the result of an unlawful act which took place outside the limitations period but continued to allow the defendant to maintain market control."); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 551 (D.N.J. 2004) ("Here, plaintiffs have alleged that they were overcharged and paid supra-competitive prices for K-Dur as a result of Defendants' settlement agreements. As such it appears that plaintiffs' claims are not barred by the statute of limitations to the extent that they bought and overpaid for K-Dur within the applicable time limitations."); *Exhaust Unlimited, Inc. v. Cintas Corp.*, 326 F. Supp. 2d 928, 931 (S.D. Ill. 2004) ("The statute of limitations for antitrust litigation runs from the most recent injury caused by the defendants' activities rather than from the violation's inception. [Plaintiff]'s complaint alleges that [defendant] imposed an environmental charge as late as February 2001, which is within the four-year period preceding the complaint, and that each imposition of an environmental charge caused additional antitrust injury. Under established principles, this suffices so as to bring a timely antitrust claim under the Sherman Act.") (internal quotation marks and citations omitted); *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363, 380 (S.D.N.Y. 2002) (purchaser plaintiffs' claims are timely "to the extent that the claims are based on allegations of injury arising from purchases of Buspar® at allegedly inflated prices beginning four years prior to the filings of their respective [c]omplaints"); *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2000 WL 1475559, at *6 (E.D. Pa. Oct. 4, 2000) ("[Plaintiffs] allege a price fixing conspiracy that brought about a series of unlawfully high priced sales over a period of years. Under those circumstances, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale of linerboard or linerboard-based products to the plaintiffs, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.") (internal quotation marks and citations omitted); *Thomas v. Petro-Wash, Inc.*, 429 F. Supp. 808, 812 (M.D.N.C. 1977) ("The plaintiff contends that the sale of gas under the lease agreement constitutes an overt act committed pursuant to the conspiracy of the defendants to violate the antitrust law. The Court agrees with this proposition. Therefore, when a private cause of action is based upon a continuous invasion of one's rights; i.e., the sale of gas, the plaintiffs' cause of action accrues from day to day as his rights are invaded to his damage.").

anticompetitive act—excluding plaintiff from a competitive bidding process—rather than an ongoing conspiracy. Moreover, plaintiff did not dispute when the claim accrued, relying solely on a theory of fraudulent concealment, and in any event "no subsequent overt act in furtherance of the alleged conspiracy is described or even hinted at." 743 F.2d at 55. More fundamentally, the antitrust claim in *Berkson* was brought by a competitor rather than by consumers. But *Klehr* makes clear that there is a different rule for consumer claims: "each sale to the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality of much earlier times." *Klehr*, 521 U.S. at 189.

The competitor/consumer distinction for statute-of-limitations purposes is hardly surprising —in enacting the damages provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15, "Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets." *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 530 (1983). Accordingly, Courts have consistently followed the Supreme Court's guidance regarding the competitor/consumer dichotomy. For example, the court in another exclusion-payment case, *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 1:12-MD-2343, 2013 WL 2181185 (E.D. Tenn. May 20, 2013), exhaustively reviewed the precedent and held that purchaser plaintiffs "should be allowed to proceed with their claims because—even if most or all of the overt acts alleged as part of the continuing conspiracy occurred outside the limitations period—[p]laintiffs have sufficiently alleged those acts resulted in [p]laintiffs being overcharged for metaxalone well into the limitations period." *Id*. at *29.

Defendants purport to rely on *In re Relafen Antitrust Litig.*, 286 F. Supp. 2d 56 (D. Mass. 2003). Def. DP Mem. at 45. But there the court endorsed the overwhelming weight of authority:

in conspiracy cases, "the continuing act of charging higher prices is the continuing violation and a plaintiff is not limited by the initial acts of predatory pricing by the defendant." *Id*. at 62.[35]

2. *Defendants Committed Numerous Other Continuing Overt Acts.*

If required, Plaintiffs could readily show many other overt acts in addition to Defendants' ongoing extraction of overcharges.

a. *Refusing to Enter the Market*

Defendants' most obvious additional overt acts in furtherance of the conspiracy were Watson's and Lupin's continuous refusals to enter the market. As Watson and Lupin's co-conspirator, WC shares responsibility for this ongoing refusal to enter. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940); *Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1562 (1st Cir. 1994).

Defendants insist that Watson and Lupin's ongoing refusal to enter the market was somehow simply the inevitable outcome of the January 2009 agreement. Def. DP Mem. at 45. But that is patently and obviously wrong. This is not a case where a monopolist unilaterally obtains exclusion of a rival through some one-time, once-and-for-all anticompetitive act (e.g., acquiring the rival or driving him out of business). Watson and Lupin did not enter the market because they continuously adhered to an agreement not to enter—an agreement that they could have renounced and quit adhering to at any time.

Watson and Lupin's continuous refusal to enter the market pursuant to the Agreement constituted an ongoing series of overt acts that continually re-set the statute of limitations. It has long been the rule that "[a] conspiracy thus continued is in effect renewed during each day of its

[35] The court found that the *Relafen* case was "very different" because it was a monopoly case involving unilateral conduct, and the conduct was a one-time act (the filing of a sham litigation) that "does not constitute a 'continuing violation' of the antitrust laws." *Relafen*, 286 F. Supp. 2d at 62.

continuance." *United States v. Borden Co*., 308 U.S. 188, 202 (1939) (citation omitted); *see also United States Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 628 (7th Cir. 2003) ("The parties' decision to keep a joint venture in operation or manage the operations in ways that may violate antitrust rules is one that may be challenged when adverse effects are felt."); *Pa. Dental Ass'n*, 815 F.2d at 278 ("The summary judgment record as it now stands would permit a fact finder to conclude that the conspiracy charged by Blue Shield is a continuing one and that its effects continued well into the four-year period . . . . Most of the offending [agreements] have never been rescinded."); *Nat'l Souvenir Ctr., Inc. v. Historic Figures, Inc*., 728 F.2d 503, 510 (D.C. Cir. 1984) ("the 'overt act' requirement may be satisfied merely by the parties continuing to maintain contractual relationships that directly affect competition"); *Maricopa Cnty. v. Am. Pipe & Const. Co*., 303 F. Supp. 77, 82 (D. Ariz. 1969), *aff'd*, 431 F.2d 1145 (9th Cir. 1970) ("A conspiracy of the nature here alleged is a continuing one and is in effect renewed during each day of its continuance."); *In re SE Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 947 (E.D. Tenn. 2008) ("A conspiracy is presumed continuing where there is an agreement to eliminate competition with no 'affirmative showing of the termination of that agreement.'").

Defendants cannot escape this authority by asserting that Watson and Lupin's failure to enter the market constituted inaction rather than overt action. The Court rejected exactly that argument in *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3d Cir. 1993), where defendants asserted that their concerted refusal to deal with rivals was mere inaction resulting from an agreement reached beyond the statute of limitations. Defendants' argument "has no merit because it fails to recognize, in circumstances such as here, that continuing and accumulating damage may result from intentional, concerted inaction. The purposeful nature of the inaction—here an ongoing refusal to sell or lease—obviously constitutes an injurious act,

although perhaps not an overt one in the commonly-understood sense." *Id*. at 1172.

Here Defendants have caused, and continue to cause, anticompetitive harm not by a one-time act but by continual adherence to an ongoing agreement. Hence, "the defendant could quit causing the injury of which the plaintiff complains at any time, simply by not enforcing or collecting benefits under the contract in question." *Imperial Point Colonnades Condo., Inc. v. Mangurian*, 549 F.2d 1029, 1037 (5th Cir. 1977) ("[I]t does not lie well in the mouth of a defendant to argue that he is immunized . . . because a pre-limitations contract, alleged to be unlawful in itself or the product of an unlawful conspiracy, purports to authorize the commission of such acts."). Plaintiffs' claims are timely because "the violation is not 'final at its impact . . . or . . . by its nature permanent at initiation without further acts.'" *Id*.; *see also United States v. Kissel*, 218 U.S. 601, 608 (1910) ("If [defendants] do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success.").

b. *Maintaining the Bottleneck*

Defendants' Agreement provided that Watson would stay out of the market until January 22, 2014, but that it could enter earlier if another generic manufacturer managed to enter before then. *See* Comp. at ¶ 88. To help ensure that no other generic manufacturer triggered that earlier date, the Defendants did three things: (1) they agreed that WC would refuse to grant a license to any other manufacturer to enter before January 22, 2014 (*id*. ¶ 94); (2) they included the acceleration clause in the WC/Watson agreement in order to deter other manufacturers from trying to enter earlier (*id*. ¶ 95); and (3) WC paid Lupin a bribe, which Lupin accepted (*id*. ¶¶ 107-08). These are clearly overt acts in furtherance of the conspiracy, and under the co-conspirator rule they are chargeable to all three of the conspirators.

c. *Refraining from Launching an Authorized Generic*

Defendants are *today* (March 24, 2014) still in the midst of performing one of the

principal aspects of their market- allocation agreement. In substantial part, Defendants' unlawful Agreement is in the nature of a reciprocal market-allocation agreement: Watson delayed competing with a generic against WC's brand drug until January 22, 2014; and now – today – WC is reciprocally refraining from competing with a generic for Loestrin 24 Fe during the 180-day exclusivity period. Comp. at ¶ 90. WC's entry with an authorized generic today would substantially reduce the prices that Plaintiffs are paying for generic Loestrin 24 Fe. WC's refusal to enter with that generic is causing Plaintiffs to incur additional and cumulative overcharges.

Defendants argue that WC is merely implementing the agreement that it made in January 2009. Def. DP Mem. at 45. But that is plainly inadequate, for the reasons stated above. It also defies common sense. Watson agreed to stay out of WC's market effective September 2009. Pursuant to the no-authorized-generic clause, WC agreed to stay out of the generic sector of the market beginning in January 2014. Defendants cannot immunize the additional, different, and accumulating injury that WC's refusal to launch an authorized generic began having on Plaintiffs in January 2014 by having agreed to cause that harm in January 2009.

If Joe agrees to break Tom's arm in 2009 in exchange for Bob's agreement to break Tom's leg in 2014, Bob's actual breaking of Tom's leg in 2014 is an act in furtherance of the conspiracy. They do not shield the actual leg-breaking from a four-year statute of limitations by having agreed to it earlier. The actual causing of harm to the plaintiff within the statute of limitations is an overt act in furtherance of a conspiracy, even if the conspiracy was first formed outside the statutory period. *United States v. Stewart*, 12-2395, 2014 WL 715800, at *4 (1st Cir. Feb. 26, 2014) (conspiracy remains in effect until "the conspiratorial object was achieved"); *United States v. Ramallo-Diaz*, 455 F. Supp. 2d 22, 28 (D.P.R. 2006) (complaint timely when conspiracy is ongoing and "'at least one overt act in furtherance of the conspiratorial agreement

was performed within that period'" (quoting *Grunewald v. United States*, 353 U.S. 391, 396-7, (1957)).

C. Plaintiffs' Claims Are Also Timely Under the Speculative Damages Rule.

Plaintiffs' claims are also timely under the "speculative damages" rule, which is straightforward: a consumer who was first injured outside the statute of limitations may nevertheless recover for additional injuries incurred inside the statute of limitations if the existence or magnitude of those additional injuries were not known at the time of the first injury. Assume, for example, that a consumer bought a pack of Loestrin 24 Fe in January 2009 and bought a second pack in January 2014. Even though this consumer was first injured outside a four-year statute of limitations, her claim for recovery with respect to the second pack is not time-barred because when she was first injured in January 2009 it was speculative whether and to what extent she would incur any injuries on subsequent Loestrin 24 Fe purchases. It was speculative, for example, whether she would make any additional purchases and, if she did, how many, when, and at what price.

Under the speculative damages doctrine, "where damages flowing from conduct violating the antitrust laws are uncertain at the time the defendant engages in the conduct, the cause of action for future damages accrues on the date they are suffered." *Relafen*, 286 F. Supp. 2d at 63 (citing *Zenith Radio*, 401 U.S. at 339). The Court in *Zenith Radio* explicitly recognized circumstances where an "injury and a cause of action have accrued as of a certain date," but where "future damages that might arise from the conduct sued on are unrecoverable [because] the fact of their accrual is speculative or their amount and nature unprovable." 401 U.S. at 339. The Court thus permitted injured plaintiffs "an opportunity to recover their damages in a later period if, at an earlier date prior to the statutory period, such damages would have proven speculative." Robert Brina, *Complexities of Accrual: The Antitrust Statute of Limitations in a*

Contractual Context, 31 UCLA L. Rev. 1061, 1066 (1984). To hold that the rule applies—that is, to hold that determining future damages would be "too speculative" at the occurrence of an original antitrust violation—is the "equivalent [of] holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted." *Zenith Radio*, 401 U.S. at 339.

Courts have consistently held that purchasers have only speculative claims for damages for future purchases of defendant's product, and therefore the statute of limitations accrues anew for each such purchase. For example the Second Circuit held in *Berkey Photo*:

> Plainly, at the time a monopolist commits anticompetitive conduct[,] it is entirely speculative how much damage that action will cause its purchasers in the future. . . . Not until the monopolist actually sets an inflated price and its customers determine the amount of their purchases can a reasonable estimate be made. The purchaser's cause of action, therefore, accrues only on the date damages are 'suffered'. . .

603 F.2d at 295 (citing *Zenith Radio*, 401 U.S. at 340). Likewise, in *Meijer, Inc. v. 3M*, No. 04-5871, 2005 WL 1660188, at *5 (E.D. Pa. July 13, 2005), the court held that, "[i]n purchaser antitrust actions, damages from future overcharges necessarily fall into the speculative damages exception to the four year statute of limitations." The court explained:

> To hold otherwise would require a purchaser to predict and prove, within four years of the time it was first injured by anticompetitive conduct, the amount of future overcharges, the quantity of future product purchases, the level of future competition in the relevant market, and the availability of substitutes and new suppliers over time. Resolution of these issues depends on overall changes in consumer demand . . . developments in the purchaser's overall business, variations in the cost of producing the product over time, and the future prices which the supplier ultimately decides to charge. These considerations are too speculative and remote to properly predict a purchaser's future damages. The Court, therefore, finds that [plaintiff purchaser]'s antitrust claim . . . could not accrue until it actually paid the overcharge.

Id.[36]

This line of cases confirms, in effect, that each purchase by a plaintiff begins the statute of limitations anew. Defendants impose overcharges, and plaintiffs pay them. Whether considered as defendants' overt acts in an ongoing conspiracy, or as plaintiffs' injuries that are speculative until incurred, ongoing overcharges imposed and paid within the statute of limitations are recoverable. Thus, Plaintiff's claims are timely and this Court should deny Defendants' erroneous statute of limitations argument.

VI. DEFENDANTS ARE WRONG ON THE FACTS AND LAW REGARDING PLAINTIFFS' OVERARCHING CONSPIRACY CLAIM

Defendants argue that "Plaintiffs have not pled . . . that Defendants entered into the challenged agreements with a common purpose to foreclose competition or that there was any overarching agreement among Defendants to restrain trade." Def. Mem. at 33. Defendants are wrong on both the facts and law and dismissal of Plaintiffs' overarching conspiracy claim is unwarranted.[37]

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[36] *See also Citibank, N.A. v. Allied Management Group, Inc*., No. 06-1193 (GAG), 2006 WL 3386900, at *1 (D.P.R. Nov. 21, 2006) ("At the time the contracts were signed, the defendants had suffered no injury and any possible claims for damages would have been speculative. At the time that Citibank collected partial post-closing fees in rental income . . . defendants' damages from plaintiff's [later] demand of post-closing fees and from plaintiff's allegedly unlawful attachment during the pendency of this suit would have been speculative. Accordingly, the defendants' other claims are likewise not time-barred."); *Rite Aid Corp. v. Am. Exp. Travel Related Servs. Co., Inc*., 708 F. Supp. 2d 257, 266-67 (E.D.N.Y. 2010) ("damages caused by Amex's overcharges were speculative when [plaintiffs] executed Amex's merchant agreements" because "[a]t that time, the amount of Plaintiffs' damages arising from Amex's supracompetitive discount fees could not have been reasonably estimated. The merchant agreements did not specify the payment schedule or the quantity of Plaintiffs' purchases of Amex payment services: when, how large, and how many Amex retail transactions Plaintiffs would process").

[37] As Defendants concede, the state law based claims "should be interpreted harmoniously with federal law." Because Plaintiffs have pled facts sufficient to establish an overarching conspiracy against all Defendants under federal law, their various state law based claims should likewise withstand scrutiny.

A. Plaintiffs Have Pled Sufficient Facts to Establish an Overarching Conspiracy Involving All Defendants.

Defendants' contention that Plaintiffs "present no evidence that the Defendants entered into an agreement with the shared motivation of delaying generic entry of Loestrin" is belied by the substantial and well-pled allegations that the agreements contain explicit[38] *interdependent* terms that: (1) link each settling Generic Defendant's entry date to the entry of its competitor; and (2) provide each Generic Defendant with the assurance that its agreement to stay off market is contingent upon the other doing the same. Def. Mem. at 32. The complaint contains the following key allegations:

- By entering the Exclusion Payment Agreements, WC engineered an agreement with, between and among itself and the Generic Defendants not to compete with each other and to delay generic entry.

- Pursuant to the terms of their Exclusion Payment Agreement, WC and Watson agreed, among other things that: (1) WC would not license any other generic manufacturer to enter the market until 180 days after Watson entered; and (2) if any other generic manufacturer entered the market before January 22, 2014 Watson's entry date would be accelerated accordingly.

[38] This Court should deny Defendants' motion even if the allegations concerning the overall agreement are viewed as *tacit* rather than express. As even Defendants concede, "[i]n evaluating whether a restraint is effected by such a combination or conspiracy in violation of § 1, "'[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from [an] independent decision or from an agreement, *tacit* or express.'" *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 43 (1st Cir. 2013) (citation omitted) (emphasis added) (alterations in original); Def. Mem at 31. Tacit agreement is inferred from the conspirators' actions and standardized conduct, not express communications. *Cf. Brown v. Pro Football*, 518 U.S. 231, 241 (1996) ("Antitrust law also sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision") (citations omitted). Courts recognize that when competitors "devise some subtle, unique form of conspiracy tailored to best serve their own purposes which purposely leaves few tracks or fingerprints, it may violate the law even though it cannot be easily accommodated in the familiar mold of a simple and limited conspiracy." *United States v. Consol. Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978).

- During the negotiation of its Exclusion Payment Agreement with WC, Lupin was aware of these two terms of the WC/Watson conspiracy. Lupin joined that ongoing conspiracy by, among other things, agreeing not to enter before January 22, 2014, which would have triggered earlier entry by Watson, and by accepting an entry date, pursuant to the terms of the conspiracy initiated by WC and Watson, that was 180 days beyond the specified date of entry for Watson.

Comp. at ¶ 212-214. These allegations reflect the reality that WC faced challenges to its patent from Watson and Lupin. To eliminate those challenges it needed resolution with both of them. The terms reflect the economic reality that it was contrary to each generic's economic self-interest to agree to stay off market if the other generic did not agree to key its entry date off the first and could come to the market earlier. Without these clauses, each Generic Defendant, operating pursuant to its independent economic self-interest, would have sought the earliest possible entry date without regard to what its fellow generic (its competitor) had agreed to, either by litigating the patent suit to conclusion, or otherwise.[39]

While defendants argue that there could be no collusion because there are no facts to suggest that "Watson or Lupin made any agreement with each other," the fact of the matter is that the Generic Defendants did not need to meet or directly talk to collude – Lupin was aware of the key terms of the WC/Watson agreement, as described herein, during its negotiations with WC. *See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 447 (9th Cir. 1990) (communication of information necessary for the conspiracy can

[39] In *Nexium*, 12-md-02409 (D. Mass) (ECF No. 857), Judge Young, based on similar Exclusion Payment agreement terms, denied certain defendants' motion for partial summary judgment as to overarching conspiracy, finding that there was "sufficient circumstantial evidence, primarily due to the 'contingent launch' provisions of the respective agreements, for the jury reasonably to infer a conspiracy among the Defendants in violation of Sections 1 and 2 of the Sherman Act and analogous state laws." The contingent launch provisions in *Nexium* provided that a settling generic's entry date would be advanced if another generic came to market before the agreed-upon May 2014 entry date. That provision is akin to the acceleration clause in the instant case.

come through press releases or other publicly available information and "the *form* of the exchange . . . should not be determinative of its legality." (citing Richard A. Posner, *Antitrust Law: An Economic Perspective* 146 (1976)). Moreover, Lupin knew the WC/Watson agreement intended to delay competition and joined the conspiracy by agreeing to drop its patent challenges and stay off market until July 22, 2014 – exactly 180 days after Watson's agreed-upon entry date.[40] "[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948). Both Watson and Lupin were knowing and willful participants in the conspiracy and responsible for perpetuating its success. *Duplan Corp. v. Deering Milliken, Inc.*, 594 F.2d 979, 982 (4th Cir. 1979) (per curiam) ("Where, as here, the [defendants] were knowing participants in a scheme whose effect was to restrain trade, the fact that their motives were different from or even in conflict with those of the other conspirators is immaterial."); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 541 (4th Cir. 1998) ("it is sufficient that [defendant], regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects").

Defendants' contention that the Watson and Lupin settlements with WC were "separate bilateral settlement[s]" is likewise unavailing. Def. Mem. at 33. In *United States v. Masonite Corp.*, 316 U.S. 265 (1942), the United States alleged that a series of agreements between Masonite and other hardboard manufacturers that followed the settlement of patent litigation constituted an unlawful horizontal combination in violation of Section One of the Sherman Act.

[40] Indeed, as Judge Young recognized in *Nexium*, "the later agreements" with subsequently settling Generic Defendants constitute "overt acts" in furtherance of the conspiracy. *Nexium*, 12-md-02409 (ECF No. 668, Hrg. Trans. 12/11/13, at 6).

The Supreme Court reversed the district court's dismissal[41] after a full trial finding insufficient evidence of concerted action:

> It is not clear at what precise point of time each appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement. But it is clear that, as the arrangement continued, each became familiar with its purpose and scope. Here as in *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226, "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." The circumstances surrounding the making of the 1936 agreements and the joinder in 1937 of the two other companies leave no room for doubt that all had an awareness of the general scope and purpose of the undertaking. As this Court stated in the *Interstate Circuit* case (p.227): "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement of an invitation to participate in a plan, the necessary consequences of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Id. at 275. So too here, the Generic Defendants knew that concerted action was contemplated and invited and they gave their adherence to the scheme and joined the conspiracy when they signed the settlement agreements.[42]

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[41] The district court found that "in negotiating and entering into the first agreements, each appellee, other than Masonite, acted independently of the others, negotiated only with Masonite, desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others." *Masonite*, 316 U.S at 275.

[42] The fact that the Generic Defendants joined the conspiracy at different times is immaterial. *See, e.g., United States v. Cont'l Group, Inc*., 603 F.2d 444, 452, 453 (3d Cir. 1979) (defendants joined the conspiracy ten and nineteen years after inception; court found no need "to prove that [defendant] participated in the conspiracy from its inception, but only that he knowingly became a member of the ongoing conspiracy") (citation omitted); *United States v. Nat'l Lead Co.*, 332 U.S. 319, 325-27 (1947) (defendant joined the conspiracy thirteen years after inception); *Indus. Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1343 (9th Cir. 1970) (defendant joined the conspiracy two years after inception). And as co-conspirators, defendants are jointly and severally liable for their acts. *Dextone Co. v. Bldg. Trades Council*, 60 F.2d 47, 48 (2d Cir. 1932) ("[E]very person who participates in a conspiracy is liable for everything done during the period of its existence regardless of the exact time at which he becomes a member or the extent of his participation."); *Aetna Cas. Sur. Co. v. P&B Autobody*, 43 F.3d 1546, 1562 (1st Cir. 1994) ("A defendant who does not know the 'entire conspiratorial

B. Plaintiffs' Complaint is Legally Sufficient As to the Overarching Conspiracy Claim.

Defendants' motion ignores Plaintiffs' allegation that WC, in addition to entering into separate, unlawful reverse payment agreements with Watson and Lupin, orchestrated a horizontal agreement between and among WC and Watson and Lupin, not to compete in the market for Loestrin until January 22, 2014 and July 22, 2014, respectively. Under these conspiracy claims, Defendants' joint conduct constitutes a *per se* unlawful market allocation agreement even if the individual agreements are not independently illegal. *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990).

The evidence presented here is analytically identical to the evidence at issue in *Toys "R" Us* that led the Seventh Circuit to affirm the finding by the Federal Trade Commission that:

> TRU had acted as the coordinator of a horizontal agreement among a number of toy manufacturers. The agreements took the form of a network of vertical agreements between TRU and the individual manufacturers, in each of which the manufacturer promised to restrict the distribution of its products to low priced warehouse club stores, on the condition that other manufacturers would do the same.

Toys 'R' Us v. FTC, 221 F.3d 928, 930 (7th Cir. 2000).

In *Toys 'R' Us*, TRU, a "giant" in the toy retailing industry, was concerned about the emerging competitive threat from warehouse clubs which carried many of the same toys sold by TRU but were priced 25-30% less. To meet this competitive threat, TRU announced a new policy that required toy manufacturers to restrict the products and terms under which they could sell to the clubs. TRU was very careful to meet individually with each of its suppliers to explain

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sweep' is nevertheless jointly and severally liable, in the civil context, for all acts in furtherance of the conspiracy."); *Myzel v. Fields*, 386 F.2d 718, 738 n.12 (8th Cir. 1967) ("it is well settled even under civil or criminal conspiracy that one who knowingly joins a conspiracy even at a later date takes the conspiracy as he finds it, with or without knowledge of what has gone on before.").

its new policy and separately negotiate the agreements. *Toys 'R' Us*, 221 F.3d at 931-32. During, the negotiations, the "biggest hindrance TRU had to overcome was the major toy companies' reluctance to give up a new, fast-growing, and profitable channel of distribution" and their concern "that any of their rivals who broke ranks and sold to the clubs might gain sales at their expense, given the widespread and increasing popularity of the club format." *Id.* at 932. To address this problem, "TRU orchestrated a horizontal agreement among its key suppliers to boycott the clubs" and the toy manufacturers agreed to join the boycott "*on the condition that their competitors would do the same*." *Id.* (emphasis added).

The Seventh Circuit affirmed the Commission's findings that there was sufficient evidence to conclude that "the only condition on which each toy manufacturer would agree to TRU's demands was if it could be sure its competitors were doing the same thing." *Id.* at 936. And as the Seventh Circuit held: "***That is a horizontal agreement.*"** *Id.* (emphasis added).

Here, the Generic Defendants faced the same competitive dilemma that confronted the toy manufacturers in *Toys 'R' Us*: each would agree to delay generic entry only on the condition that their competitor would do the same thing. The entry-date and acceleration provisions provided the protection each of the generics needed to assure them that their competitor could not come to market earlier.[43] And while TRU was "careful to meet individually with each of its

[43] A variation of this ringmaster conspiracy claim was also the basis for Judge Denise Cote's recent finding in *Apple*, following a two-week trial, that Apple, Inc. had orchestrated a *per se* unlawful horizontal conspiracy among book publishers to fix and raise the prices of e-books. *United States v. Apple*, 952 F. Supp. 2d 638, 694 (S.D.N.Y. 2013). *See also, In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 685 (S.D.N.Y. 2012).

suppliers to explain its new policy" and separately negotiate the agreements,[44] such formalistic solicitude does not immunize the collusive conduct that was actually at work.[45]

VII. PLAINTIFFS HAVE ADEQUATELY PLED THEIR STATE ANTITRUST LAW CLAIMS

A. Plaintiffs Have Standing Under Puerto Rico Law.[46]

Defendants' allege that Plaintiffs do not have standing to pursue their Puerto Rico antitrust claim. Defendants are wrong.

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[44] *Toys "R" Us v. FTC*, 221 F.3d at 932; *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 689.

[45] Contrary to Defendants' suggestion, Def. Mem. at 32, Plaintiffs do not rely on a "hub-and-spoke" analysis to prove the existence of the conspiracy, nor did the Seventh Circuit in *Toys "R" Us*. But, were the Court to apply the "hub-and-spoke" analysis, the evidence of an overall conspiracy would be just as plausible and compelling. To determine if the evidence supports finding a single conspiracy, "courts have looked for (1) a common goal, (2) interdependence among the participants, and (3) overlap among the participants." *United States v. Portela*, 167 F.3d 687, 695 (1st Cir. 1999). Interdependence requires determining "whether the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme." *Id.* (internal quotations omitted) Here, Defendants shared a common goal to delay generic competition and "the pervasive involvement of a single 'core conspirator'" [WC] satisfies the "overlap" requirement. *Id.* at 695-96 (internal citations omitted). The entry date provisions in each agreement that were necessary (or advantageous) to the success of the scheme as described above establishes the interdependence among the participants and provides the "rim" that connects the "spokes."

[46] Plaintiffs withdraw their Massachusetts antitrust claim but this claim may still be pursued under the consumer protection statute of Massachusetts. The Plaintiffs have alleged a violation of the antitrust statute as a predicate act in violation of the consumer protection statute. While Plaintiffs may not be able to pursue claims under the Massachusetts antitrust statute, it is well settled they can bring such claims under the Massachusetts consumer protection statute. *See Ciardi v. Hoffman-La Roche*, 762 N.E.2d 303, 312 & n.18. (Mass. 2002). Moreover, here, although Plaintiffs inadvertently omitted a claim under the Utah Consumer Protection Act, Plaintiffs intend to move to amend their Complaint to include the same. In Utah, as in Massachusetts, the states consumer protection statute allows Plaintiffs to pursue an antitrust claim. *In re Intel Corp., Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404 (D. Del. 2007). On May 1, 2006, Utah amended its antitrust law, Utah Code Ann. 76-10-3109(1)(a) (formerly cited as Utah Code Ann. 76-10-919(1)) to specifically create an "*Illinois Brick*" repealer provision which authorizes indirect purchasers to commence suit in Utah. *See In re Processed Egg Prods. Antitrust Litig.*, 851 F. Supp. 2d 867, 892 (E.D. Pa. 2012). Plaintiffs' claims arise *after* enactment of the Utah *Illinois Brick* repealer statute. Accordingly, Plaintiffs are not barred from commencing competition-based claims under the Utah antitrust or consumer protection statutes.

The Puerto Rico Antitrust Act ("PRAA") does not distinguish between direct and indirect purchasers but provides that "*[a]ny person*" injured by acts prohibited by the statute may sue. PRAA, P.R. Laws Ann. tit. 10, § 268 (emphasis added). The PRAA is liberally construed and has been held to permit indirect purchasers to bring antitrust claims for damages:

> PRAA is modeled after federal antitrust statutes. Although federal jurisprudence has implied special standing requirements into private antitrust actions . . . Puerto Rico explicitly rejects any such limitations . . . . Because Puerto Rico liberally construes its standing requirements in private antitrust cases, it is immaterial whether Plaintiffs are direct or indirect purchasers of cabotage services.

Rivera-Muñiz v. Horizon Lines Inc., 737 F. Supp. 2d 57, 61 (D.P.R. 2010) (internal citations omitted).

Ten days after issuing its decision in *Rivera-Muñiz*, the District of Puerto Rico refused to certify for appeal the question of whether indirect purchasers have standing under the PRAA, determining certification "is not a vehicle to force the high court to revisit settled matters of Puerto Rico law." *Rivera-Muñiz v. Horizon Lines Inc.*, No. 09-2081 (GAG), 2010 WL 3703737, at *1 (D.P.R. Sept. 13, 2010). The District of Puerto Rico reasoned:

> The Puerto Rico legislature enacted PRAA in 1964. Since then, federal precedents have limited standing in private antitrust actions under federal law to direct purchasers. Without citing *Illinois Brick* explicitly, the Puerto Rico Supreme Court rejected such limitations on standing for the purpose of private antitrust actions under PRAA.

Id. (internal citations omitted); *see also Pressure Vessels of P.R., Inc. v. Empire Gas de P.R.*, 137 P.R. Dec. 497, 519-520 (P.R. 1994) (noting that at the time of the PRAA's enactment in 1964 the Supreme Court "had expressed itself on behalf of a liberal standing theory under Clayton Act sec. 4" and the law should be applied "'in accordance with its plain language and its broad remedial and deterrent objectives'" (citing *Blue Shield of Va. v. McCready*, 457 U.S. 465, 473 (1982)).

The cases Defendants cite are distinguishable. In *In re Static Random Access Memory*

(SRAM) Antitrust Litigation, No. 07-md-01819 CW, 2010 WL 5094289, at *4 (N.D. Cal. Dec. 8, 2010), the Court noted that "Plaintiffs point to no authority that suggests that *Illinois Brick's* interpretation of federal antitrust law would not be applied to Puerto Rico law." Similarly, in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 599 F. Supp. 2d 1179, 1185-86, 1188 (N.D. Cal. 2009), the court pointed to defendants' argument that "there are no antitrust cases in . . . Puerto Rico permitting indirect purchasers to bring suit" and concluded that it was "reluctant to find standing in the absence of an explicit *Illinois Brick* repealer, either by statute *or case law*." (emphasis added).[47] None of these cases cites either the opinion in *Rivera-Muñiz* or *Pressure Vessels*, which both interpret the PRAA to allow for indirect purchaser claims.

This split of authority[48] provides a reminder that the judicial role is not one of bean counting, but of pursuing justice. The two decisions in *Rivera-Muñiz* and the *Pressure Vessels* opinion present *the only* in-depth substantive analyses. By following those decisions, this Court will give effect to the explicit language of the PRAA, the required liberal construction of the statute, and the intent of the legislature. By contrast, adopting Defendants' position will deprive all end-payors in Puerto Rico of the antitrust remedies provided by the Puerto Rico legislature for the benefit of "all persons" injured by prohibited anticompetitive conduct. Plaintiffs respectfully urge the Court to follow the well-reasoned analyses set forth in the *Rivera-Muñiz* and *Pressure Vessels* decisions.

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[47] Likewise, in *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 413 (S.D.N.Y. 2011), the court concluded that "any state that has not expressly passed *Illinois Brick* repealer legislation *or interpreted its law in such a way as to override the rule of Illinois Brick* is presumed to have decided to follow federal law."

[48] Although not cited by Defendants, Plaintiffs note that Judge Young dismissed plaintiffs' Puerto Rico antitrust claim. *In re Nexium (Esomeprazole) Antitrust Litig.,* No. 12-md-02409-WGY, 2013 WL 4832176, at *29 (D. Mass. Sept. 11, 2013). However, on this issue, Judge Young did not engage in any extensive analysis and relied upon the distinguishable cases Defendants cite here.

B. Plaintiffs' Allege a Sufficient Nexus to Intrastate Commerce.

Plaintiffs allege a sufficient nexus to intrastate commerce in their Massachusetts, Mississippi, New York, Tennessee and District of Columbia antitrust claims. It is well settled that a complaint alleging a nationwide antitrust violation satisfies "intrastate" pleading requirements. *See In re Digital Music Antitrust Litig*ation, 812 F. Supp. 2d 390, 408 (S.D.N.Y. 2011) (collecting cases). A nationwide antitrust violation decreases competition in each state, thereby increasing the price of goods paid by consumers in each state. *See In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 665-70 (E.D. Mich. 2000); *In re Brand Name Prescription Drug Antitrust Litig.*, 123 F.3d 599, 613 (7th Cir. 1997).

Interstate anticompetitive injury is not mutually exclusive of its taking place and causing competitive injury *intrastate*.[49] The operative focus is on Defendants' conduct and its effect. *See Tanol Distribs., Inc. v. Panasonic Co., Div. of Matsushita Elec. Corp. of Am.*, No. 86-3355-S, 1987 WL 13319, at *4 (D. Mass. July 2, 1987) upon which Defendants rely (Def. Mem at n. 40)("that [defendant] is a large foreign corporation engaged primarily in interstate commerce is of no consequence under the terms of the Act. Section 3 of the Act speaks in terms of a course of conduct, pattern of activity and activities. Its focus is on the location and effect of a Defendant's anticompetitive activities rather than on the overall nature of a defendant's business. . . Thus . . . [the Act] suggests that businesses engaged in interstate commerce enjoy no blanket exemption from the Act."). *Tanol Distribs, Inc.*, 1987 WL 13319, at *4.

Under New York law, Plaintiffs' New York claim requires allegations sufficient to demonstrate only harm to the public interest. The statute prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce. . . ." § 349(a). "[T]he gravamen of the

[49] Defendants list Plaintiffs' residence in n.42, but Plaintiff's residence is immaterial to the issue of *intrastate* conduct.

complaint must be . . . *harm to the public interest*." *Azby Brokerage Inc. v. Allstate Ins. Co.,* 681 F. Supp. 1084, 1089 n.6 (S.D.N.Y. 1988) (emphasis added). "The critical question, then, is whether the matter affects the public interest in New York. . . ." *Securitron Magnalock Corp. v. Schnabolk,* 65 F.3d 256, 257, 264 (2nd Cir. 1995); *see also Cox v. Microsoft Corp.*, 778 N.Y.S.2d 147, 148 (App. Div. 2004). The Complaint here alleges conduct that affects the public interest of New York. Defendants' reliance on *H-Quotient, Inc. v. Knight Trading Grp., Inc.*, No. 03 Civ. 5889(DAB), 2005 WL 323750, at *5 (S.D.N.Y Feb. 9, 2005), is misplaced.[50] That was a ruling on a motion to remand in which the plaintiffs failed to "put forth any specific allegations . . . of impact on intrastate commerce." *Id.* at *5. Contrast that with the citizens of New York being denied access to lower priced pharmaceutical products.

By alleging that Defendants' nationwide anticompetitive scheme directly impacted commerce within each state, Plaintiffs have demonstrated a sufficient nexus to intrastate commerce. *See, e.g.*, *In re Auto. Parts Antitrust Litig.*, No. 12-md-02311, 2013 WL 2456612, at *20-21 (E.D. Mich. June 6, 2013) (similar allegations sufficient to satisfy the intrastate requirements of the antitrust laws of the District of Columbia, Mississippi, South Dakota, Nevada, New York, North Carolina and West Virginia). Accordingly, Plaintiffs also satisfy "intrastate" pleading requirements for the District of Columbia,[51] Mississippi,[52] and New York.[53]

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[50] Defendants' reliance on *In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042, 2013 WL 1431756 (E.D. Mich. April 9, 2013), is also misplaced as those plaintiffs failed to allege Tennessee-specific antitrust activities or effects. Here, plaintiffs allege that they paid substantially higher prices for Loestrin – a direct effect on Tennessee citizens. Comp. at ¶¶ 159, 188(t).

[51] *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 411–14 (D. Del. 2007); *Processed Egg Prods.*, 851 F. Supp. 2d 867, 887-891 (E.D. Pa. 2012).

[52] *In re DDAVP Indirect Purchaser Antitrust Litig.*, No. 05-cv-2237 (CS), 2012 WL 4932158, at *24–25 (S.D.N.Y. Oct. 17, 2012); *Processed Egg Prods.*, 851 F. Supp. 2d at 887-891.

Id. [54]; *see also Processed Egg Prods*., 851 F. Supp. 2d 867 (E.D. Pa. 2012) (D.C. claim sustained).

C. Plaintiffs Have Standing to Assert Their Rhode Island State Law Claims.

Defendants contend that Plaintiffs lack standing to pursue claims before the July 15, 2013 enactment of R.I. Gen. Laws § 6-36-7(d). Def. Mem at 30-31. The statute expressly grants indirect purchasers antitrust standing to sue and is entirely consistent with existing judicial determinations.[55] Defendants cite *no authority* to support their assertion that this remedial statute can be applied prospectively only. *See id.* Remedial statutes may be retroactively applied. *See Winfree v. N. Pac. Ry. Co*., 227 U.S. 296, 301 (1913); *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 273 (1994) (noting that "application of new statutes passed after the events in suit is unquestionably proper in many situations"). In *Nexium*, Judge Young recently considered the same argument against retroactivity and allowed claims not barred by the statute of limitations to proceed, reasoning that "the addition of claims under Rhode Island law is permitted due to the similarity of those provisions to federal antitrust law." Slip Op. at 3-4, *Nexium*, No. 12-md-02409, (D. Mass. Oct. 23, 2013), ECF No. 448, attached to the Declaration of Lisa J. Rodriguez dated Jan. 17, 2014. Indeed, Rhode Island's antitrust law provides for claims for both restraint of trade (R.I. Gen. Laws § 6-36-4) and monopolization (R.I. Gen. Laws § 6-36-5), and it is intended to "complement the laws of the United States governing monopolistic and restrictive trade practices." (R.I. Gen. Laws § 6-36-2(a)(1)). Justice requires that Plaintiffs be afforded the

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[53] *Sheet Metal Workers Local 441 Health & Welfare Plan v. Glaxosmithkline, PLC*, 737 F. Supp. 2d 380, 399 n.7 (E.D. Pa 2010); *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 664 (E.D. Mich. 2011).

[54] *Sheet Metal Workers*, 737 F. Supp. 2d at 399 n.7; *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 664 (E.D. Mich. 2011).

[55] *See In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 2d 1129, 1145 (N.D. Cal. 2008); *see also Auto. Parts*, 2013 WL 2456612, at *27.

benefit of the Rhode Island statutory amendment allowing indirect purchasers a remedy. *See Darney v. Dragon Prods. Co. LLC*, 266 F.R.D. 23, 26-27 (D. Me. 2010) (it "seems fundamentally just that Plaintiffs should have recourse to a . . . theory recently adopted"). Accordingly, the Rhode Island claims accruing before July 15, 2013 should be upheld. At any rate, Plaintiffs' post-July 15, 2013 damages claims clearly should be sustained.

VIII. PLAINTIFFS HAVE ADEQUATELY PLED UNJUST ENRICHMENT

A. Plaintiffs' Unjust Enrichment Claims Are Not Barred by *Illinois Brick*.

Defendants incorrectly assert that certain of Plaintiffs' unjust enrichment claims constitute impermissible attempts to circumvent *Illinois Brick*. Def. Mem. at 24-25.[56]

Plaintiffs are permitted to plead alternative causes of action. *See In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 544 (D.N.J. 2004) (refusing to dismiss unjust enrichment claims because indirect purchasers are "clearly permitted to plead alternative theories of recovery"). Courts routinely reject the argument that unjust enrichment claims constitute impermissible circumventions of *Illinois Brick*. In *In re Cardizem CD Antitrust Litigation*, the court denied defendants' motion to dismiss unjust enrichment claims and held that defendant "confuses Plaintiffs' right to recover an equitable remedy under a common law claim based upon principles of unjust enrichment with its right to recover a remedy at law for an alleged violation of a state's antitrust laws."[57] 105 F. Supp. 2d at 669.

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[56] Although Defendants challenge claims brought under the laws of eighteen states, they only specifically address Pennsylvania law. *See* Def. Mem. at 25 n.36. Plaintiffs withdraw their unjust enrichment claim under the laws of Pennsylvania.

[57] *See also In re Processed Egg Prods.*, 851 F. Supp. 2d at 914-36; *In re Chocolate Confectionary Antitrust Litig.*, 749 F. Supp. 2d 224, 235-243 (M.D. Pa. 2010) (examining the laws of several states, including Massachusetts, and rejecting defendants' argument that unjust enrichment is an end-run around *Illinois Brick*); *In re G-Fees Antitrust Litig.*, 584 F. Supp. 2d 26, 46 (D.D.C. 2008) ("No reason or logic supports a conclusion that a state's adherence to the rule of *Illinois Brick* dispossesses a person not only of a statutory legal remedy for an antitrust

B. Plaintiffs' Unjust Enrichment Claims Are Properly Pled.

Defendants grumble about Plaintiffs' unjust enrichment claims with cursory statements but ignore case law which has upheld identical unjust enrichment claims. State law claims of unjust enrichment are "universally recognized causes of action that are materially the same throughout the United States." *Singer v. AT&T Corp.,* 185 F.R.D. 681, 692 (S.D. Fla. 1998); *see also In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 58-59 (D.N.J. 2009). As one court summarized:

> Although there are numerous permutations of the elements of the [unjust enrichment] cause of action in the various states, there are few real differences. In all states, the focus of an unjust enrichment claim is whether the defendant was *unjustly* enriched. At the core of each state's law are two fundamental elements—the defendant received a benefit from the plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the plaintiff. The focus of the inquiry is the same in each state. Application of another variation of the cause of action than that subscribed to by a state will not frustrate or infringe upon that state's interests. In other words, regardless of which state's unjust enrichment elements are applied, the result is the same. Thus, there is no real conflict surrounding the elements of the cause of action.

Powers v. Lycoming Engines, 245 F.R.D. 226, 231 (E.D. Pa. 2007) (emphasis in original), *rev'd on other grounds,* 2009 WL 826842, 328 Fed. Appx. 121 (3d Cir. March 31, 2009); *see also In re Terazosin Hydochloride Antitrust Litig.*, 220 F.R.D. 672, 697 n.40 (S.D. Fla. 2004) ("The standards for evaluating each of the various states classes' unjust enrichment claims are virtually identical. Courts have recognized that state claims of unjust enrichment are universally recognized causes of action that are materially the same throughout the United States.") (citation and quotation marks omitted); *In re Ford Motor Co. E-350 Van Prods. Liability Litig.*, (No. II), No. 03-4558 (HAA), 2008 WL 4126264, at *21 (D.N.J. Sept. 2, 2008).

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violation, but also dispossesses the same person of his right to pursue a common law equitable remedy.").

Generally speaking, in order to state a claim for unjust enrichment, a plaintiff must allege: (1) at plaintiff's expense; (2) defendant received benefit; and (3) under circumstances that would make it unjust for defendant to retain benefit without paying for it. *See Restatement of Restitution* § 1, Comment (1937); *see also K-Dur*, 338 F. Supp. 2d at 544; *In re Lorazepam & Clorazepate Antitrust Litig.*, 295 F. Supp. 2d 30, 50 (D.D.C. 2003). End Payors have sufficiently pled each of these elements: Defendants received a benefit in the "nature of profits resulting from unlawful overcharges and monopoly profits" (Comp. ¶ 226); the financial benefits received by Defendants rightfully belong to Plaintiffs and the Class (Comp. ¶ 230); and it would be inequitable to allow Defendants to retain their ill-gotten gains (Comp. ¶ 231).

One of Defendants' cursory alternative arguments,[58] no lack of legal remedy, also fails because unjust enrichment is a separate cause of action which plaintiffs are allowed to plead in the alternative under Federal Rule of Civil Procedure Rule 8 – regardless of consistency and whether based on legal or equitable grounds. *See, e.g., Processed Eggs Prods.*, 851 F. Supp.2d at 917-18; *see also Restatement (Third) of Restitution* § 1(a), Comment (2011). Accordingly, even if a legal remedy would bar End Payors' unjust enrichment claims, it is premature to dismiss such claims before Plaintiffs' remedies are determined. *See, e.g.*, *K-Dur*, 338 F. Supp. 2d at 541, 544.

Another of Defendants' phrasal arguments (Def. Mem at 48) regarding "direct benefit" also fails. Unjust enrichment "does not require any promise or privity between the parties." *Salzman v. Bachrach*, 996 P.2d 1263, 1265 (Colo. 2000); *see also* 66 Am. Jur. 2d *Restitution* § 9

[58] Defendants' other phrases purporting to be arguments on standing, absence of adequate legal remedy, failure to plead relationship and failure to allege mistake or fraud (Def. Mem. at 48) are inadequately asserted and are without support sufficient to require that Plaintiffs' unjust enrichment claims be dismissed. Indeed, Defendants reserve those arguments for some time in the future. *Id.*

(2001). "[R]ecovery based on unjust enrichment depends [only] upon showing that the parties have money, or its equivalent, in their hands that, in equity and good conscience, they ought not be allowed to retain, and which *ex aequo et bono* belongs to another." *Id.* § 12. *See In re Process Egg Prods.*, 851 F. Supp. 2d at 916-19 (court upheld unjust enrichment claims under the laws of the District of Columbia, Florida, Kansas, Minnesota, Mississippi, New York, North Carolina, Utah and West Virginia, among others after conducting a detailed analysis of the supposed "direct benefit" requirement and concluded there was none).

Moreover, California, Illinois, and Mississippi have independent causes of action for unjust enrichment. *See Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d at 670 (citing *Lectrodryer v. SeoulBank,* 91 Cal. Rptr. 2d 881, 883 (Cal. Ct. App. 2000) (court identified the elements of unjust enrichment claim as "receipt of a benefit and unjust retention of the benefit at the expense of another"); *see also In re Processed Egg*, 851 F. Supp. 2d at 913 (recognizing independent unjust enrichment claim under California and Mississippi law); *Raintree Homes, Inc. v. Vill. of Long Grove*, 807 N.E.2d 439, 445 (Ill. 2004) (Illinois recognizes unjust enrichment claim). Moreover, the Illinois Supreme Court has articulated the elements of unjust enrichment without reference to a separate underlying claim in tort, contract, or statute. *See HPI Health Care Svcs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989); *see also Cleary v. Philip Morris Inc.,* 656 F.3d 511, 517 (7th Cir. 2011) ("Unjust enrichment is a common-law theory of recovery or restitution that arises when the defendant is retaining a benefit to the plaintiff's detriment, and this retention is unjust."). Improper conduct by the defendant is what often makes the retention of the benefit unjust. *Id.*

Likewise, with respect to Mississippi, there is considerable authority that supports the existence of an independent state law claim for unjust enrichment. *In re Processed Egg Prods.*,

851 F. Supp. 2d at 913. (Citing *Owens Corning v. R.J. Reynolds Tobacco Co.,* 868 So.2d 331, 342–43 (Miss. 2004) (evaluating whether a Mississippi unjust enrichment claim survives summary judgment)); *Omnibank of Mantee v. United S. Bank,* 607 So.2d 76, 92–93 (Miss. 1992); *Dorsey Miss. Sales, Inc. v. Newell,* 251 Miss. 77, 168 So.2d 645, 651 (Miss. 1964); and *In re Light Cigarettes Mktg. Sales Practices Litig.,* 751 F. Supp. 2d 183, 194–95 (D. Me. 2010) (court examined the precise issue *sub judice* with a thoughtful survey of Mississippi law, as applied by Mississippi courts and federal courts sitting in diversity, and concluded that "there is a substantial body of Mississippi case law that treats unjust enrichment as a separate cause of action.")

In Georgia, "[u]njust enrichment is an equitable concept and applies when as a matter of fact there is no legal contract." *St. Paul Mercury Ins. Co. v. Meeks,* 508 S.E.2d 646, 648 (Ga. 1998) (citation and internal quotations omitted).

IX. PLAINTIFFS HAVE ADEQUATELY PLED THEIR STATE LAW CONSUMER PROTECTION CLAIMS

A. Plaintiffs Need Not Allege, or Otherwise Have Alleged, Deception or Reliance Under The Consumer Protection Laws of California, the District of Columbia, Illinois, Maine, Nevada, Tennessee, Vermont, West Virginia and Wisconsin.

Defendants' argument that Plaintiffs fail to allege deception and reliance by consumers under California, the District of Columbia, Maine, Nevada, Tennessee, Vermont, West Virginia and Wisconsin consumer statutes, Def. Mem. at 35-37, is unavailing. No such allegations are required.

California: "[A] person who has suffered injury in fact and has lost money or property as a result of . . . *unfair competition*" may sue under California's Unfair Competition Law (UCL) (emphasis added). Cal. Bus. & Prof. Code § 17204 (2009). The UCL broadly defines "unfair competition" as any "unlawful, unfair or fraudulent business act or practice." *Id.* § 17200. As

the statute is written in the disjunctive, a plaintiff need only allege that the defendant's conduct is unlawful, unfair *or* fraudulent under the UCL. *Boschma v. Home Loan Ctr., Inc.*, 129 Cal. Rptr. 3d 874, 893 (Cal. Ct. App. 2011).[59] If a plaintiff alleges facts sufficient to state a claim under one prong, the court need not determine whether plaintiff has alleged facts sufficient to state a claim under another prong. *See In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1106 (N.D. Cal. 2007).

Plaintiffs allege violations of state antitrust statutes sufficient to maintain a claim under both the "unlawful" *and* "unfair" prongs of the UCL. Courts have recognized claims under the UCL by indirect purchasers based on anticompetitive conduct.[60] None of the cases Defendants cite states that reliance is necessary under the UCL, only that it *may* be an element under the particular facts of those cases, which did not involve antitrust violations.[61]

District of Columbia: Defendants incorrectly argue that the D.C. Consumer Protection Practices Act (DCCPPA) requires pleading unconscionable conduct towards consumers. In *In re Automotive Parts Antitrust Litigation*, the court explained that "[a] main purpose of the [DCCPPA] is to assure that a just mechanism exists to remedy all improper trade practices."

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[59] *Paulus v. Bob Lynch Ford, Inc.*, 43 Cal. Rptr. 3d 148, 161-62 (Cal. Ct. App. 2006) (noting that "the scope of the UCL is broad . . . [and] covers a wide range of conduct") (internal quotes and citations omitted).

[60] *See, e.g.*, *In re Processed Egg*, 851 F. Supp. 2d at 894 (stating that "antitrust violations can constitute 'unfair competition' under the UCL") (internal citations omitted); *Sheet Metal Workers Local 441 Health & Welfare Plan v. Glaxosmithkline*, *PLC*, 737 F. Supp. 2d 380, 406 (E.D. Pa. 2010) ("*Wellbutrin SR*") (holding allegations of anticompetitive conduct to prevent entry of generic competition states a valid claim under the UCL and noting courts have allowed monopolization claims to proceed under the UCL); *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D 143, 160 (E.D. Pa. 2009) (allegations that would constitute violations of California antitrust law may provide a basis of a claim under the unlawful or unfair prongs of the UCL).

[61] Plaintiffs need not allege reliance on any misrepresentations in order to state a claim under the UCL. *See Ditropan XL*, 529 F. Supp. 2d at 1105 ("[Defendant] has not proffered any authority that demonstrates reliance on misrepresentations . . . is required for UCL claims which fall under the unfair or unlawful prongs.").

2013 WL 2456612, at *25 (internal quotes and citations omitted). The court held that this broad statutory mandate allows "plaintiffs [end-payors] to [be able to] proceed with a claim of price-fixing under the statute [DCCPPA] *without additional unconscionable allegations*." *Id.* (citing *TFT-LCD*, 586 F. Supp. 2d 1109, 1125-26 (N.D. Cal. 2009)). The court added that any "[t]rade practices that violate other laws, including the common law, also fall within the purview of the [DCCPPA]." *Id*. (citation omitted). Thus, it is sufficient to plead that Defendants' illegal anticompetitive conspiracy caused higher prices to occur, without alleging unconscionable conduct, to satisfy the DCCPPA. *Id.*

Nonetheless, Plaintiffs adequately pled a claim under the DCCPPA's separate unconscionability provision. "[I]n order to show that a price was unconscionably high, the buyer must establish that the price was 'unreasonably favorable' to the seller (and also, almost always, that the buyer did not have a meaningful choice of alternatives under the circumstances)." *Ford v. Chartone, Inc.*, 908 A.2d 72, 90 (D.C. 2006) (citing *Urban Invs., Inc. v. Branham*, 464 A.2d 93, 99 (D.C. 1983)). A price is "unreasonably favorable" when there is a "gross disparity between the price of the property . . . sold . . . and the value of the property . . . measured by the price at which similar property . . . [is] readily obtainable." D.C. Code § 28-3904(r)(3). Plaintiffs have alleged that Defendants' misconduct enabled them to charge prices that were unreasonably favorable to them and that consumers had no meaningful choice of alternatives because of WC's market power. Plaintiffs also specifically allege gross disparity in price.

Illinois: Defendants simply state that Plaintiffs' claim under the Illinois' consumer protection law must be dismissed for not alleging deception or reliance,[62] without making any argument whatsoever or citing any cases. Nevertheless, Plaintiffs plainly pled the elements of

[62] Def. Mem. at 37.

the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA"), which does not require proof of an intentional misrepresentation. *Fireman's Annuity and Benefit Fund of City of Chi. v. Municipal Empls.', Officers', and Officials' Annuity and Benefit Fund of Chi.*, 579 N.E.2d 1003, 1007 (Ill. Ct. App. 1991). Further, the ICFA does not require a showing of individual reliance. *Cozzi Iron & Metal, Inc. v. U.S. Office Equip, Inc.*, 250 F.3d 570, 576 (7th Cir. 2001). Indeed, a claim under ICFA on behalf of end-payor pharmaceutical purchasers was certified in *In re Pharm. Indus. Average Wholesale Price Litigation ("AWP")*, 252 F.R.D. 83, 98 (D. Mass. 2008).

Maine: Maine's Unfair Trade Practices Act ("MUTPA") prohibits both "[u]nfair[63] methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Me. Rev. Stat. Ann. tit. 5, § 207. Courts must, therefore, grant a remedy for injuries flowing from *either* unfair competition *or* deceptive practices. Defendants conflate the two and advocate that Plaintiffs must allege that the price for Loestrin 24 and its generic equivalents was deceptive.

In *In re New Motor Vehicles Canadian Exp. Antitrust Litigation ("NMV")*, 350 F. Supp. 2d 160, 187 n.40 (D. Me. 2004), the District of Maine rejected Defendants' argument that *Tungate v. MacLean-Stevens Studios, Inc.*, 714 A.2d 792 (Me. 1998), requires plaintiffs to prove that a deceptive price term induced their purchase. *NMV* properly held *Tungate* was limited to "whether an undisclosed commission was an unfair or deceptive act," and the decision was not pertinent to "[t]he relevant provision in th[at] case [which was] . . . the ban on 'unfair methods of

[63] An "unfair" act or practice "(1) must cause, or be likely to cause, substantial injury to consumers; (2) that is not reasonably avoidable by consumers; and (3) that is not outweighed by any countervailing benefits to consumers or competition." *Maine v. Weinschenk*, 868 A.2d 200, 206 (Me. 2005). Plaintiffs satisfy each element.

competition.'" *NMV*, 350 F. Supp. 2d at 187 n.40. The *NMV* court concluded that allegations of price-fixing "constitute a violation of Maine's Unfair Trade Practices Act." *Id*. at 187. Thus, it is sufficient to plead that Defendants' conspiracy caused higher prices to occur, without alleging deception toward consumers.[64]

Nevada: The Nevada Unfair and Deceptive Trade Practices Act ("NUDTPA") applies to any corporation that "[v]iolates a state or federal statute or regulation relating to the sale or lease of goods or services." Nev. Rev. Stat. § 598.0923. The complaint states a claim under this provision. *FTC v. IFC Credit Corp.*, 543 F. Supp.2d 925, 941 (N.D. Ill. 2008) (FTC Act relates to the sale or lease of goods and service). Actual reliance on the unfair or deceptive act is not required. *See AWP*, 252 F.R.D. at 98 (certifying class under Nevada consumer statute based on allegations of illegal pricing of prescription drugs).[65]

Tennessee: The Tennessee Consumer Protection Act ("TCPA") prohibits all "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce," Tenn. Code Ann. § 47-18-104(a), and is to be liberally construed. *Morris v. Mack's Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992). The TCPA includes an exemplary (non-exhaustive) list of unfair or deceptive acts

[64] Indeed, courts construing § 207 must adhere to interpretations of § 5 of the Federal Trade Commission Act ("FTC Act"). *See* Me. Rev. Stat. Ann. tit. 5, § 207(1); *Tungate*, 714 A.2d at 797. Courts have unwaveringly held that any violation of the Sherman and Clayton Acts constitutes a violation of § 5 of the FTC Act. *See, e.g., Luria Bros. & Co., Inc. v. FTC*, 389 F.2d 847, 859 (3d Cir. 1968). Defendants' reliance on *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011 (N.D. Cal. 2007) ("*GPU*"), is unavailing because it ignores the MUTPA's mandate that courts interpreting the statute adhere to federal courts' interpretations of § 5 of the FTC Act, implicitly ignores *NMV's* limitation of *Tungate*, and ignores the MUTPA's "unfair methods of competition" clause.

[65] *Sheet Metal Workers*, 737 F. Supp. 2d at 417, is inapplicable because the plaintiff there did not make sufficient allegations with respect to a particular section of the NUDTPA that is not at issue here. *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657-58 (D. Nev. 2009) is also inapplicable because the court in *Picus* found only that reliance was required in *that case* – not that reliance is required in every NUDTPA case.

- specifically stating that the list does not limit the scope of subsection (a). Tenn. Code Ann. § 47-18-104(b)*; Harmon v. Meek,* No. E2007-01168-COA-R3-CV, 2008 WL 918513, at *4 (Tenn. Ct. App. April 4, 2008); *Gaston v. Tenn. Farmers Mut. Ins. Co.,* No. E2006-01103-COA-R3-CV, 2007 WL 1775967, at *11 (Tenn. Ct. App. June 21, 2007). Further, the TCPA includes a "catch-all" section that prohibits "[e]ngaging in ***any other act or practice which is deceptive to the consumer or to any other person***." Tenn. Code Ann. § 47-18-104(b)(27) (emphasis added). Consistent with the broad scope of application of the TCPA, where here the Class paid prices for Loestrin, not the result of market forces, but the result of Defendants' illegal conduct to keep generic Loestrin off the market - the TCPA clearly applies. *See Blake v. Abbott Labs., Inc.*, No. 03A01-9509-CV-00307, 1996 WL 134947, at *5 – 7 (Tenn. Ct. App. Mar. 27, 1996) ("While price fixing is not among the unfair or deceptive acts or practices specifically enumerated in T.C.A. § 47-18-104, it is clear that the enumeration of unfair or deceptive acts or practices is not exclusive nor limited only to those acts enumerated. Paragraph (b)(27) specifically states that 'engaging in any other act or practice which is deceptive to the consumer or to any other person' falls within the scope of the statute. . . . The Tennessee Consumer Protection Act of 1977 [and the Tennessee Trade Practices Act], are cumulative remedies in all respects and their application under the circumstances of this case [price fixing], at least for the purposes of a Rule 12 motion, are not inconsistent with the application of The Tennessee Trade Practices Act.").

Vermont: The Vermont Consumer Fraud Act ("VCFA") prohibits "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." Vt. Stat. Ann. tit. 9, § 2453(a). It is a remedial statute and must be construed liberally to accomplish its purpose of encouraging fair and honest competition. *Elkins v. Microsoft Corp.*, 817 A.2d 9, 13 (Vt. 2002).

The Supreme Court of Vermont has permitted antitrust claims brought pursuant to § 2453 that do not allege deception toward consumers. *See id.* at 20 (permitting indirect purchaser to allege violation of the VCFA based on injury from monopoly power) (citing Vt. Stat. Ann. tit 9, § 2461(b)); *Russell v. Atkins*, 679 A.2d 333, 336-37 (Vt. 1996) (denying summary judgment on anticompetitive tying claim not involving fraud allegations). Accordingly, the court in *In re New Motor Vehicle Canadian Export Antitrust Litigation* held that the VCFA "permits private plaintiffs to seek relief . . . for 'practices prohibited by section 2453' without requiring allegations of 'false or fraudulent representations.'" 350 F. Supp. 2d at 206.[66] (internal citations omitted).

West Virginia: Consumers received a prescription from their doctors and purchased Loestrin 24 and/or its generic equivalents for personal use. All damages to End Payors flow from these purchases. The West Virginia Consumer Credit and Protection Act[67] does not require Plaintiffs establish reliance. The statute authorizes a cause of action for:

> Any person[68] who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article may bring an action in the circuit

[66] Defendants' cited cases, *Moffitt v. Icynene, Inc.*, 407 F. Supp. 2d 591 (D. Vt. 2005), *Ianelli v. U.S. Bank*, 996 A.2d 722 (Vt. 2010), and *Bergman v. Spruce Peak Realty LLC*, 847 F. Supp. 2d 653, 671 (D. Vt. 2012), are inapposite. These cases do not involve antitrust claims and do not address the requirements of establishing a violation based on the separate provision of the VCFA prohibiting "unfair methods of competition." Vt. Stat. Ann. tit. 9, § 2453(a).

[67] The West Virginia Consumer Credit and Protection Act ("WVCCPA") prohibits "[u]nfair methods of competition," provides that the statute is to be "liberally construed," and declares that its application should "be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters." W. Va. Code §§ 46A-6-101, 46A-6-104.

[68] Under the WVCCPA, "person" is defined to include "a natural person or an individual, and an organization"; "organization" is defined to include "a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative or association." W. Va. Code Ann. § 46A-1-102(299)(31). This definition encompasses third-party payors.

> court of the county in which the seller or lessor resides or has his principal place of business or is doing business, or as provided for in sections one and two, article one, chapter fifty-six of this code, to recover actual damages or two hundred dollars, whichever is greater. The court may, in its discretion, provide such equitable relief as it deems necessary or proper.

W. Va. Code § 46A-6-106(a). The word reliance does not appear anywhere in this section, and courts have repeatedly sustained indirect purchasers' antitrust actions under the statute. *See AWP*, 252 F.R.D. at 98 (certifying consumer subclass under WVCCPA based on allegations of illegal pricing of prescription drugs); *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 350 F. Supp. 2d 160, 173-74.[69]

Wisconsin: Wisconsin's "antitrust statute provides a cause of action to 'any person injured, directly or indirectly, by reason of anything prohibited by this chapter,' Wis. Stat. Ann. § 133.18(1)(a) (West Supp. 2000), while the unfair trade practice statute [i.e., the WDTPA] provides a cause of action to '[a]ny person suffering pecuniary loss because of a violation of this section,' *id.* § 100.18(11)(b)(2)." *Meyers v. Bayer AG*, 143 F. Supp. 2d 1044, 1052 n.5 (E.D. Wis. 2001). Defendants' settlement agreements were illegal contracts, combinations or conspiracies in restraint of trade under § 133.03(1) of the antitrust statute. Defendants deceived the public, in violation of the WDTPA, § 100.18(1), that Loestrin prices were the result of market competition rather than illegal payoffs to keep generics off the market. *See Meyers*, 143 F. Supp. 2d at 1052 n.6.

[69] The only case cited by Defendants, *White v. Wyeth*, 705 S.E.2d 828, 837-38, is inapplicable because in that case reliance was required only because "the deceptive conduct or practice alleged involves affirmative misrepresentations." Here, by contrast, Plaintiffs allege that Defendants concealed their anticompetitive scheme to suppress generic competition and maintain inflated prices for Loestrin 24, for the purpose of reaping illegal profits from consumers, which is more akin to an omission by the time the product reached the hands of consumers.

B. The Alleged Conduct Has a Sufficient Consumer Nexus or Is Consumer Oriented Under the Consumer Protection Statutes of the District of Columbia, Idaho, Illinois, Nebraska, New Mexico, New York, West Virginia, and Wisconsin.

Plaintiffs' allegations are directly connected to a consumer transaction, are consumer-oriented, or have a consumer nexus that falls within the scope of the consumer protection statutes of the District of Columbia, Idaho, Illinois,[70] Nebraska, New Mexico,[71] New York,[72] West Virginia, [73] and Wisconsin.[74] Plaintiffs' allegations amply demonstrate that consumers, as the end payors for Loestrin 24 and its AB-rated generic equivalents, are in need of protection from Defendants' illegal anticompetitive conduct.

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[70] *See, e.g., Birnberg v. Milk St. Residential Assocs. Ltd. P'Ship*, Nos. 02 C 0978, 02 C 3436, 2003 WL 151929, at *17 (N.D. Ill. Jan. 21, 2003) (Under the Illinois Consumer Fraud Act [ICFA] "[w]hen the plaintiff itself is a consumer, the plaintiff does not need to show the transaction implicates consumer protection concerns; this factor only comes into play when the purchaser is a business.") (citations omitted).

[71] *See, e.g.*, *State ex. rel. Stratton v. Gurley Motor Co.*, 105 N.M. 803, 737 P.2d 1180, 1185 (N.M. Ct. App. 1987). ("[The New Mexico] Unfair Practices Act constitutes remedial legislation, we interpret the provisions of this Act liberally to facilitate and accomplish its purpose and intent.").

[72] *See, e.g.*, *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 331, 343 (N.Y. Ct. App. 1999) (An "extensive marketing scheme that had a broader impact on consumers at large" satisfies "consumer oriented" deceptive act or practice a New York General Business § 349 must be predicated upon. (citations and internal quotes omitted).

[73] *Powell v. Bank of Am., N.A.*, 842 F. Supp. 2d 966, 982-983 (S.D. W. Va. 2012) ("The West Virginia Supreme Court of Appeals has indicated that the WVCCPA [West Virginia Consumer Credit and Protection Act] is to be construed broadly: The purpose of the [WVCCPA] is to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action. . . . Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended." c*iting State Ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.,* 194 W. Va. 770, 461 S.E.2d 516, 523 (1995) (internal citations omitted)).

[74] Plaintiffs have also sufficiently alleged a sufficient consumer connection under Wisconsin law. *See* Section VIII.A.

Defendants' argument that Plaintiffs' allegations are not sufficiently related to a specific consumer transaction, were not consumer-oriented, or did not have a consumer nexus (*see* Def. Mem. at 37-39) ignores several important factors:

- Defendants' actions inflated the price of Loestrin 24 and its generic equivalents each and every time a consumer made a purchase.

- Anticompetitive agreements like these have been found to be sufficiently connected to consumers under the consumer protection statutes of the challenged states.[75]

- The intended and actual result of Defendants' conduct was to overcharge consumers, the very parties whom these state statutes are intended to protect. As such, the conduct has a sufficient consumer nexus. Defendants have cited no authority for the proposition that a misrepresentation must be made directly to the consumers and there is no such law in the subject states.

District of Columbia: The DCCPPA is a comprehensive statute intended to remedy "all improper trade practices," including antitrust conduct, and Plaintiffs adequately pled a claim under the statute. Relying upon snippets of authority from distinguishable cases,[76] Defendants incorrectly argue that Plaintiffs' claims are insufficiently consumer-oriented to fall within the purview of the DCCPPA. Def. Mem. at 38. Plaintiffs' overcharge injuries, however, resulted directly from consumer transactions, *i.e.*, the purchase of Loestrin 24 and/or its generic equivalents. Plaintiffs, therefore, adequately pled a claim under the DCCPPA.

Idaho: The Iowa Consumer Protection Act ("ICPA") "protect[s] both consumers and

[75] *See Siegel v. Shell Oil Co.*, 480 F. Supp. 2d 1034 (N.D. Ill. 2007) (allegations that defendant oil companies conspired to increase the price of gasoline stated a claim under the Illinois Consumer Fraud Act), *New York v. Feldman*, 210 F. Supp. 2d 294, 302 (S.D.N.Y. 2002) (price fixing allegations "constitute the kind of deceptive acts and practices contemplated by [New York General Business Law] section 349"); *Processed Egg Prods.*, 851 F. Supp. 2d at, 904-905 (indirect purchaser plaintiffs' price-fixing allegations stated a claim under the New Mexico Unfair Practices Act).

[76] *In Antoine v. U.S. Bank N.A.,* 821 F. Supp. 2d 1, 7 (D.D.C. 2010), plaintiffs did not argue that the subject loan was a consumer transaction.

businesses against unfair methods of competition and unfair or deceptive acts and practices in the conduct of trade or commerce." Idaho Code Ann. § 48-601. The Idaho Supreme Court requires broad construction of the ICPA. *W. Acceptance Corp., Inc. v. Jones*, 788 P.2d 214, 216 (Idaho 1990). The statute's prohibition against unfair methods of competition and unfair or deceptive acts or practices covers Defendants' alleged conduct, including under the statutory prohibitions against: "(2) [c]ausing likelihood of . . . misunderstanding as to the . . . sponsorship [or] approval. . . of goods" and "(17) [e]ngaging in any act or practice which is otherwise misleading, false, or deceptive to the consumer." Idaho Code Ann. § 48-603(2), (17). *See also In re DDAVP Indirect Purchaser Antitrust Litig. v. Ferring Pharms. Inc*., No. 05-CV-2237 (CS), 2012 U.S. Dist. LEXIS 149588, at *50, *53-54, *63-65 (S.D.N.Y. Oct. 16, 2012) (finding allegations that defendant engaged in "anticompetitive conduct designed to maintain a fraudulent monopoly through a knowingly invalid patent," including the filing of a baseless citizen petition, stated a claim under subsections (2) or (17), and noting "Plaintiffs have plausibly pleaded misrepresentations that, although they may not have been made directly to consumers, had the kind of effect on end-payors that [consumer protection laws] seek to remedy").

Nebraska: Defendants are also mistaken in their arguments on Plaintiffs' claims under the Nebraska Consumer Protection Act ("NCPA"). That statute provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful." Neb. Rev. Stat. § 59-1602. It also expressly prohibits anticompetitive conduct. Neb. Rev. Stat. § 59-1604.[50] The NCPA is Nebraska's state law equivalent of the Sherman Act, *State ex rel. Douglas v. Associated Grocers of Neb. Co-op., Inc.*, 332 N.W.2d 690, 691 (Neb. 1983), and numerous courts have acknowledged its application to antitrust conduct and allowed antitrust allegations like Plaintiffs' to proceed. *See*, e.g., *TFT-LCD*, 586 F. Supp. 2d

at 1126-1127 (noting that the NCPA "includes both antitrust and consumer protection aspects"); *Relafen*, 225 F.R.D. at 27.

C. The Consumer Fraud Statutes of Alabama, the District of Columbia, Idaho, Illinois, Tennessee, West Virginia, and Wisconsin Include and/or Apply to Antitrust Conduct.

Defendants' assertion that the state consumer protection laws of Alabama,[77] Idaho,[78] Illinois,[79] West Virginia,[80] and Wisconsin[81] do not include or apply to antitrust conduct ignores

[77] Alabama Deceptive Trade Practices Act, Section 8-19-5 (27) states that, "[t]he following deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful . . .[e]ngaging in any other unconscionable, false, misleading or deceptive act or practice in the conduct of trade or commerce." Ala. Code 1975 § 8-19-5(1) & (27) Although, there is no authority addressing either all the elements of Section 8-19-5 Subsection 27, or how a Section 1 finding would affect Alabama's state law claims, Section 8-19-6 states that, "due consideration and great weight shall be given where applicable to interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act." Ala. Code 1975 § 8-19-6.

[78] *FTC v. Mylan Labs.*, *Inc.*, 62 F. Supp. 2d 25, 46 (D.D.C. 1999) (allowing indirect purchaser claims under Idaho's consumer protection act, and holding that "great weight is given to the FTC's interpretation of the FTC Act in the construction of [Idaho's consumer protection act]").

[79] 815 Ill. Comp. Stat. § 505/2 (Section 2 of the Illinois Consumer Fraud and Deceptive Practices Act specifically provides that "consideration ***shall*** be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act" in interpreting what constitutes unlawful conduct under the act) (emphasis added).

[80] Application of West Virginia's Consumer Credit and Protection Act is guided by the FTC Act. W. Va. Code § 46A-6-103. Given the clear statutory language and purpose of the FTC Act, courts have allowed antitrust claims to go forward under the WVCCPA. *See, e.g., AWP*, 233 F.R.D. 229, 231 (D. Mass. 2006).

[81] Wisconsin Consumer Protection Laws - Unfair Business Practices, Wis. Stat. § 100.20 broadly prohibits unfair business practices and methods of competition is modeled after the Federal Trade Commission Act - commonly referred to as "Wisconsin's Little FTC Act." *See* James D. Jeffries, *Protection for Consumers Against Unfair and Deceptive Business,* 57 Marq. L. Rev. 559, 560 (1974); James K. Matson, *Unfair and Deceptive Business Practices: Private Remedies for Consumers and Competitors,* 53 Wis. B. Bull. 14, 15 (January 1980). Further, the purposes and policies behind Wisconsin's consumer protection statute are much the same as the purposes and policies behind Wisconsin's antitrust laws. *Benkoski* v. *Flood*, 242 Wis. 2d 652, 665, 626 N.W.2d 851, 857 (Wis. Ct. App. 2001). The statute similarly provides for multiple damages to encourage actions by private litigants, and it provides for an award of attorney's fees

the key role that the Federal Trade Commission Act ("FTCA"), which prohibits unfair methods of competition including monopolistic conduct, plays in the application of consumer protection laws in those states. The Federal Trade Commission has interpreted the FTC Act to encompass violations of the Sherman Act. *See FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948) ("all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act").

District of Columbia: The District of Columbia Consumer Protection Procedures Act ("DCCPA") is a comprehensive statute intended to remedy "all improper trade practices," including price-fixing and illegal conspiracies resulting in higher prices. D.C. Code § 28-3901(b)(1). *See TFT-LCD*, 586 F. Supp. 2d at 1125-26 (consumer injuries for price-fixing); *NMV*, 350 F. Supp. 2d at 183 (antitrust conspiracy); *Marbry v. EMI Music Distrib.*, 129 Daily Wash. L. Rptr. 2065, 2067 (D.C. Sup. Ct. 2001) (price-fixing). "[T]he statute obviously contemplates that procedures and sanctions provided by the Act [DCCPA] will be used to enforce trade practices made unlawful by other statutes." *Atwater v. D.C. Dept. of Consumer & Regulatory Affairs*, 566 A.2d 462, 466 (D.C. Ct. App. 1989).

Tennessee: Regarding Tennessee, End Payors'antitrust claims are redressable under the Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. §§ 47-18-101, *et seq*. *See supra*, Section IX.A., "Tennessee" discussion.

D. Individuals and Third Party Payors Have Standing to Bring Claims Under the Consumer Protection Statutes of Maine, North Carolina, and Vermont.

Defendants' contend that the consumer laws of Maine, North Carolina, and Vermont "allow a plaintiff to sue only in its capacity as a consumer" and that "third-party payors ["TPPs"]

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and costs to encourage enforcement as a "private attorney general." *Id.* (citing *Shands v. Castrovinci,* 115 Wis. 2d 352, 358-359, 340 N.W.2d 506 (Wis. 1983)).

. . . have no right of action in these states." Def. Mem. at 41.[82] Defendants misconstrue the law – both individual consumers and TPPs can bring claims under the consumer laws of those states.

Maine: Under the Maine Unfair Trade Practices Act ("MUTPA"), Me. Rev. Stat. Ann., tit. 5, § 207, *et seq.*, "[a]ny person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss . . . may bring an action . . . " Me. Rev. Stat. Ann. tit. 5, §213. MUTPA defines "person" as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity." Me. Rev. Stat. Ann. tit. 5, § 206. Third-party payor Plaintiffs are "persons" under this definition.

North Carolina: Plaintiffs plainly fit within North Carolina's judicial interpretation of the term "consumer." *See Walker v. Fleetwood Homes of N.C., Inc.*, 176 N.C. App. 668, 673-74, 627 S.E.2d 629, 633 (N.C. Ct. App. 2006) ("to determine who may pursue a claim for unfair and deceptive trade practices, we . . . look to N.C. Gen. Stat. § 75-16[,] [which] provides, in pertinent part: '*If any person* shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action . . .'") (internal citations omitted). Indeed, end payors have specifically been found to have standing under North Carolina's Unfair and Deceptive Trade Practices Act. *See Sheet Metal Workers*, 737 F. Supp. 2d at 419.

Vermont: Defendants' argument that the VCFA does not allow TPPs to sue also fails. The explicit language of the VCFA allows TPP claims, as all end-payors meet the statute's

[82] Defendants have also raised the same arguments with respect to the consumer protection statute of Alabama. Plaintiffs however, hereby withdraw their Alabama consumer protection claim.

definition of "consumer." Before 1997, the VCFA defined "consumer" as any "person who purchases . . . or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for his or her use or benefit or the use or benefit of a member of his or her household." Vt. Stat. Ann. tit. 9, § 2451a(a) (2012). All End-Payor Plaintiffs purchased or paid for Defendants' product, and each purchase is undeniably for the use or benefit of the consumer.[83] Federal courts construing the similar provisions of Pennsylvania's consumer law have routinely held that TPPs have standing under the statute.[84] Additionally, in 1997, the Vermont legislature removed any doubt by amending the VCFA to expressly allow a private cause of action for businesses.[85] *See Rathe Salvage, Inc. v. R. Brown & Sons, Inc.*, 965 A.2d 460, 467 (Vt. 2008) ("[W]e hold unequivocally that business entities are entitled to the same rights under the Act as other consumers.").

E. Pre-Filing Notice Provisions Do Not Support Dismissal of Plaintiffs' Claims Under the Laws of California, Maine, Massachusetts or West Virginia.

Defendants argue that Plaintiffs' claims under California, Massachusetts, Maine, and West Virginia law should be dismissed for failure to meet requirements of pre-suit notice to either the defendant or the State Attorney General. Def. Mem. at 42-44. Defendants' arguments concerning pre-suit notice requirements are misplaced for two principal reasons: first, such pre-

[83] Defendants rely upon *Vermont v. Int'l Collection Serv. Inc.*, 594 A.2d 426 (Vt. 1991), to argue otherwise, but that case was superseded by a subsequent statutory amendment. *N. Hero Marina v. Melanson*, No. 607-02 CnC, 2004 Vt. Super. LEXIS 82, at *6-7 (Vt. Sup. Ct. July 30, 2004) (1997 amendment intended to expressly create a private cause of action for businesses).

[84] *See, e.g.*, *In re Actiq Sales and Mktg. Practices Litig.*, 790 F. Supp. 2d 313, 326-27 (E.D. Pa. 2011); *Am. Fed'n of State Cnty. Mun. Emp. v. Ortho-McNeill-Janssen Pharms., Inc.*, No. 08-cv-5904, 2010 WL 891150, at *3-4 (E.D. Pa. Mar. 11, 2010).

[85] The statute now defines "consumer" to include "a person who purchases . . . or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for the use or benefit of his or her business or in connection with the operation of his or her business." Vt. Stat. Ann. tit. 9, § 2451a(a) (2012).

suit notice requirements are procedural requirements that are superseded by federal law; and second, lack of a pre-suit notice does not mandate dismissal under the laws of any of the states referenced by Defendants.

As an initial matter, courts have found that pre-suit notice requirements in state statutes are procedural and are therefore not applicable to cases brought under those statutes in federal court. *See Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 393 (2010); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 346 (7th Cir. 1997) ("the notice provision of the WCA does not grant or deny a substantive right . . . . If the purpose of the WCA's notice requirement is, as argued by the defendants, to prevent a suit from ever being filed (by encouraging the parties to reach an agreement extra-judicially), such a notice requirement is not substantive.")[86]

Defendants' arguments fail for the further state-specific reasons detailed below.

California: Defendants quote part of California's UCL that requires parties to "serve, within three days of filing with the court, a copy of that brief or petition on the Attorney General," Def. Mem. at 42, but they omit language which makes clear that the notice requirement applies only to proceedings in California state courts. *See* Cal. Bus. & Prof. Code § 17209 (limiting the requirement to "any proceeding in the ***Supreme Court of California***, a ***state***

[86] Indeed, Defendants failed to engage in any of the relevant analysis under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) or *Shady Grove Orthopedic Associates v. Allstate Ins. Co.*, 559 U.S. 393 (2010), to determine whether a statute is procedural or substantive. The Court cannot agree with Defendants without engaging in that analysis for each relevant state. *See Shenandoah Chiropractic, P.A. v. Nat'l Specialty Ins. Co.*, 526 F. Supp. 2d 1283, 1288 (S.D. Fla. 2007) (distinguishing Florida PIP notice requirement from Wisconsin statute at issue in *Van Ru* in part because "according to the legislative history, the addition of a pre-suit notice requirement to the PIP statute was part of a larger effort to prevent fraud and 'trumped up lawsuits.' The purpose of this provision was not merely to encourage settlement, as in [*Van Ru*], it was to achieve a larger and more substantive legislative goal."). (internal citations omitted).

court of appeal, or the ***appellate division*** of a superior court") (emphasis added); *Californians for Population Stabilization v. Hewlett-Packard Co.*, 58 Cal. App. 4th 273, 285, 67 Cal. Rptr. 2d 621, 628 (Cal. Ct. App. 1997) *abrogated on other grounds by Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 999 P.2d 706 (Cal. 2000) ("the purpose of the statute is to inform the Attorney General and the local district attorney of issues to be raised on appeal"). Notably, Defendants cite no cases dismissing a claim pursuant to Section 17209.

Maine: The applicable Maine statute, Me. Rev. Stat. Ann. tit. 5, § 213(1-A), does *not* require the dismissal of Plaintiffs' claims as a consequence of non-compliance. *See Oceanside at Pine Point Condo. Owners Ass'n v. Peachtree Doors*, 659 A.2d 267, 273 (Me. 1995) (refusing to dismiss for failure to provide pre-suit notice and stating that "[i]n the absence of explicit terms regarding noncompliance, we conclude that the notice requirements of section 213 (I-A) are not jurisdictional and do not operate in this case to preclude the plaintiffs from maintaining their UPTA claim against [defendant]").

Massachusetts: The Massachusetts Consumer Protection Act generally requires that a demand letter be provided to the defendant thirty days before filing suit. Mass. Gen. Laws Ann. ch. 93A, § 9(3) (2004). This notice requirement does not support dismissal here for several reasons. First, Massachusetts' pre-filing requirement applies only if the defendant maintains a place of business and/or keep assets within the Commonwealth. *See* Mass. Gen. Laws. Ann. ch. 93A, § 9(3) (2004); *Burnham v. Mark IV Homes, Inc*., 441 N.E.2d 1027, 1032-1033, n.13 (Mass. 1982). Upon information and belief, none of WC, Lupin, or Watson maintains a place of business or keeps assets within Massachusetts and Defendants do not assert otherwise.

Second, there is no pre-suit demand requirement for claims brought by businesses under

Mass. Gen. Laws Ann. ch. 93A, § 11.[87] Thus, the notice provisions of § 9(3) do not warrant dismissal of claims brought by any of the Plaintiffs. Third, the Seventh Circuit has persuasively held that a state law pre-suit notice requirement is procedural and thus inapplicable to cases brought in federal court. *Van Ru*, 109 F.3d at 346. Defendants have not offered any analysis to show otherwise under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), or *Shady Grove*, 559 U.S. 393 (2010) (holding that in diversity actions, Rule 23 of the Federal Rules of Civil Procedure preempts state rules restricting class actions). Lastly, even if the demand requirement does apply, the filing of numerous complaints well over 30 days before the filing of the Consolidated Complaint on December 6, 2013, effectively acted as sufficient demand under Chapter 93A, §9(3). *See, e.g., Latino v. Ford Motor Co*., 526 N.E.2d 1282, 1284 (Mass. 1988) (no demand letter necessary where a prior action (*e.g.*, arbitration) had already been commenced describing the claims).

West Virginia: W. Va. Code § 46A-6-106(b) does not mandate dismissal if a plaintiff has not complied with pre-suit notice: "Notwithstanding the provisions of subsection (a) of this section, no action may be brought pursuant to the provisions of this section *until* the consumer has informed the seller or lessor in writing." Further, like in *Van Ru*, the statute clearly has the purpose of encouraging settlement, as the statute provides "the seller or lessor twenty days from receipt of the notice of violation to make a cure offer," the consumer then has "ten days from receipt of the cure offer to accept the cure offer or it is deemed refused and withdrawn." *Id.*[88]

[87] *See AWP*, 230 F.R.D. 61, 86 (D. Mass. 2005).

[88] The holding in *Motto v. CSX Transp., Inc.*, 647 S.E.2d 848 (W. Va. 2007), that notice before filing suit against a *governmental entity* is jurisdictional does not have any application here, since the language the court was interpreting in *Motto* differs significantly from the language in Section 46A-6-106(b). More importantly, the *Motto* court held that dismissal was mandatory in part because of the unique purpose behind governmental immunity statutes. *Motto*,

F. Plaintiffs Allege Intrastate Conduct Under Massachusetts and North Carolina's Consumer Protection Statutes.

Defendants incorrectly contend that Plaintiffs fail to satisfy the "intrastate" requirements under Massachusetts and North Carolina's consumer protection statutes. *See* Def. Mem. at 43-44. End Payors have explicitly alleged that: (a) Defendants' conduct "had substantial intrastate effects in that, *inter alia*, retailers within each state are foreclosed from offering less expensive generic Loestrin 24 to end-payors inside each respective state" (Comp. at ¶ 137); and (b) "the foreclosure of generic Loestrin 24 directly impacts and disrupts commerce for end-payors within each state" (*id*.). Nevertheless, Defendants contend that Plaintiffs fail to satisfy the intrastate pleading requirements of several states. Defendants are wrong.

It is well settled that a complaint alleging a nationwide antitrust or consumer law violation satisfies "intrastate" pleading requirements. *See Digital Music*, 812 F. Supp. 2d at 408 (collecting cases). The logic behind this is straightforward – a nationwide antitrust violation decreases competition in each state, thereby increasing or artificially stabilizing the price of goods paid by consumers in each state. *See Cardizem CD*, 105 F. Supp. 2d at 665-70; *Brand Name Prescription Drug*, 123 F.3d at 613. By alleging that WC's nationwide anticompetitive scheme directly impacted commerce within each state, Plaintiffs have demonstrated a sufficient

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647 S.E.2d at 855. The statute at issue here is far more like the statute analyzed in *Hinchman v. Gillette*, 618 S.E.2d 387 (W. Va. 2005), where the court refused to dismiss a medical malpractice action for failure to respond to defendant's pre-filing complaints about the purported insufficiency of the plaintiff's pre-filing notice. The *Hinchman* court reached this conclusion even though that statute provides that "no person may file a medical professional liability action against any health care provider without complying with the provisions of this section" (*see* W. Va. Code § 55-7B-6) because, "to the extent possible, under modern concepts of jurisprudence, legal contests should be devoid of those sporting characteristics which gave law the quality of a game of forfeits or trial by ambush." *Hinchman,* 618 S.E.2d at 394.

nexus to intrastate commerce. [89]

Massachusetts: In *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 139 F.3d 1396 (11th Cir. 1998), cited by Defendants, the plaintiff did not "fe[el] the 'sting' of any deception" in Massachusetts; here, Plaintiffs overpaid in Massachusetts (along with everywhere else Loestrin and/or its generic equivalents was sold). 139 F.3d at 1410. *See also*, *Ciardi v. F. Hoffmann-La Roche, Ltd.*, 762 N.E.2d 303, 313 (Mass. 2002) (affirming right to bring indirect purchaser claims under Mass. G.L. 93A where conduct largely occurred out of state because the foreign defendants "are manufacturing and distributing vitamin products that are intended for use by persons exactly like the plaintiff, the ultimate consumer.").

North Carolina: The North Carolina Unfair and Deceptive Trade Practices Act ("NCUDTPA"), N.C. Gen Stat. § 75–1 *et seq,* states: "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." The court in *Auto. Parts*, held that a nationwide conspiracy to rig bids, fix prices, and allocate the market for automotive wire harness systems and related products satisfied the intrastate requirements of North Carolina law, as the end-payors included a North Carolina resident who purchased wire harness system. 2013 WL 2456612, at *21. In *Lawrence v. UMLIC–Five Corp.,* No. 06 CVS 20643, 2007 WL 2570256, at *5–6 (N.C. Sup. Ct., June 18, 2007), the state court held that a foreign plaintiff may proceed under the NCUDTPA against a resident defendant even when the injury did not occur in North Carolina, provided the injuries have a "substantial in-state effect on North Carolina trade or commerce." [90]

[89] *See also Sheet Metal Workers*, 737 F. Supp.2d at 397-402 (intrastate effect alleged where interstate restraint of trade has effect within state).

[90] *Flonase*, 692 F. Supp.2d at 540–41 (considering whether allegations that large amounts of product sold in North Carolina at artificially inflated prices satisfied the substantial in-state effect

G. Class Action Bars are Inapplicable.

Defendants assert that class actions are barred under the consumer fraud laws of Alabama, Illinois and Tennessee. Anticipating Plaintiffs' response, Defendants argue that the Supreme Court's ruling in *Shady Grove*, 559 U.S. 393, that Rule 23 trumps state laws restricting class actions, is inapplicable. Defendants are wrong about the import of *Shady Grove*, and the cases they rely upon do not support their position.

The Supreme Court held that in diversity actions, Rule 23 pre-empts state rules restricting class actions and will control unless the federal rule interferes with substantive state law rights. *Shady Grove*, 559 U.S. at 393. The Court held:

> Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met. We cannot contort its text, even to avert a collision with state law that might render it invalid.

Id. at 406 (emphasis added).

For the Supreme Court, Rule 23 is a classic procedural rule that controls the business of the federal courts:

> Such rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed . . . . A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

Id. at 408. Thus, the class action restriction is not "intertwined with a state right or remedy" and is, therefore, a procedural rule which must yield to Rule 23. *Id.* at 395.

Alabama: The Alabama Deceptive Trade Practices Act ("ADTPA") does not preclude a federal court's jurisdiction over class members. Alabama's Supreme Court has interpreted

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required by the statute).

ADTPA's state court class action bar as a procedural bar and not a substantive bar. *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 286 (E.D. Pa. 2003); *see Ex Parte Exxon Corp.,* 725 So.2d 930 (Ala. 1998). "There is nothing in the [ADTPA] statute that would prevent a federal court from grouping the potentially thousands of Alabama plaintiffs into a class action in order to conserve federal court resources." *O'Keefe*, 214 F.R.D. at 286 *citing Erie*, 304 U.S. at 92 ("The line between procedural and substantive law is hazy, but no one doubts federal power over procedure.").

Illinois: As to Illinois, this Court is not bound by the opinions in *In re Wellbutrin XL Antitrust Litigation*, 260 F.R.D. 143 (E.D. Pa. 2009) and *In re Flonase Antitrust Litigation*, 692 F. Supp. 2d 524 (E.D. Pa. 2010), which, respectfully, are wrong in refusing to apply Rule 23. In both cases the Court decided that the state's restriction against class actions was somehow substantive, even though neither statute has an explicit bar on class actions, and both statutes give consumers individually the right to seek damages. As discussed above, the proper analysis under *Shady Grove* is whether the application of Rule 23 to state law claims abridges, enlarges or modifies a right given under state law. Since the state laws of Illinois already give residents the right to seek damages for the Defendants' conduct alleged, the use of a Rule 23 class action does not impact any state given right and, is therefore permissible.

Tennessee: Plaintiffs are permitted to bring their Tennessee Consumer Protection Act ("TCPA") claim as a class action in federal court. In *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 746 (7th Cir. 2008), the Seventh Circuit explained that a class action can be maintained under the TCPA in federal court ". . . *to advance a substantive policy concerning consumer protection*." (emphasis added). *Cf. Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301 (Tenn. 2008). "The *Thorogood* court . . . expressly stated that TCPA's class-action bar did not

preclude the maintenance of class action litigation in federal court." *In re FedEx Ground Package System, Inc. Employment Practices Litigation*, Nos. 3:05-MD-527 RM, 3-05-cv-600 RM (TN), 2010 WL 597997, at *3 (N.D. Ind. Feb. 17, 2010) (granting class certification to Tennessee plaintiffs under TCPA). Plaintiffs TCPA claim clearly furthers a substantive consumer protection policy—lower prices to consumers of a critical pharmaceutical product—and, therefore, should proceed.

H. Plaintiffs Have Stated a Claim Under the West Virginia Consumer Credit and Protection Act.

The West Virginia Consumer Credit and Protection Act ("WVCCPA") outlaws "***[u]nfair methods of competition*** and unfair or deceptive acts or practices in the conduct of any trade or commerce." W. Va. Code § 46A-6-104 (emphasis added). Unable to challenge the applicability of the statute to the anticompetitive conduct alleged by Plaintiffs, Defendants instead assert that there is a blanket prohibition against bringing any private claim involving prescription drugs under the WVCCPA. The only case cited by Defendants, *White v. Wyeth*, 705 S.E.2d 828, 837-38 (W. Va. 2010), is inapplicable because in that case reliance was required only because "the deceptive conduct or practice alleged [deceptive marketing and labeling of hormone replacement drugs] involves affirmative misrepresentations." It reasoned, "we are simply not convinced that a causal connection exists within the context of prescription drug purchases . . . . [T]he intervention by a physician in the decision-making process . . . protects consumers in ways respecting efficacy that are lacking in advertising campaigns for other products." *Id.* at 837-38 (internal quotation omitted). This reasoning and holding do not apply in this case where Plaintiffs allege that anticompetitive conduct adversely affected the price of Loestrin 24 - not that Defendants made any misrepresentations. Here, by contrast, Plaintiffs allege that Defendants concealed their anticompetitive scheme to suppress generic competition and maintain inflated

prices for Loestrin 24, for the purpose of reaping illegal profits from consumers, which is more akin to an omission by the time the product reached the hands of consumers.

In fact, courts have allowed WVCCPA claims alleging anticompetitive conduct in the sale of drugs. *FTC v. Mylan Labs,* 99 F. Supp. 2d 1 (D.D.C. 1999) (reinstating claims for restitution under the WVCCPA that related to illegal maintenance of a monopoly on the branded drugs lorazepam and chlorazepate); *see also AWP,* 233 F.R.D. 229, 231 (D. Mass. 2006) (indirect purchaser class certified under WVCCPA for antitrust violations relating to pricing of prescription drugs). Accordingly, Plaintiffs have stated a claim under the WVCCPA.

I. Plaintiffs Have Alleged Injury Under The Consumer Protection Laws of the District of Columbia, Florida, and Massachusetts.

Defendants ignore well-established law in Massachusetts, Florida, and D.C. that allows end payors who have paid supracompetitive prices for products as a result of anticompetitive conduct to recover under state consumer protection statutes. *See Ciardi*, 762 N.E.2d at 306 ("[I]ndirect purchasers can assert claims for price-fixing or other anticompetitive conduct under [Mass.] G.L. c. 93A."); *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 110 (Fla. Ct. App. 1996) (reversing dismissal of indirect purchaser claim under Florida Deceptive Practices Act against infant formula manufacturer alleging price-fixing); *Processed Egg Prods.*, 851 F. Supp. 2d at 898 (denying motion to dismiss indirect purchaser claims under DCCPPA and citing *Marbry*, 129 Daily Wash. L. Rptr. at 2067).

Indeed, Defendants fail to cite a single case involving anticompetitive conduct in support of their argument. Instead, they cite cases involving the deceptive marketing of prescription drugs. Def. Mem. at 46, nn.82-84. In each of those cases, plaintiffs sought only economic damages, claiming they had paid too much for drugs that did not work as advertised. *Williams v. The Purdue Pharma Co.*, 297 F. Supp. 2d 171, 177-78 (D.D.C. 2003) (dismissing claim that

defendant's deceptive advertising and over promotion of Oxycontin inflated the price of the drug where plaintiffs suffered only economic damages due to inflated prices and none of the ill side effects allegedly concealed); *Prohias v. Pfizer, Inc.*, 485 F. Supp. 2d 1329, 1337 (S.D. Fla. 2007) (dismissing claim that defendant's false advertising about Lipitor's coronary benefits inflated prices where plaintiffs had continued to take and pay for drug); *Rule v. Ft. Dodge Animal Health Inc.*, 607 F.3d 250, 255 (1st Cir. 2010) (dismissing claim that defendant's failure to disclose risks associated with heartworm drug inflated price of drug where plaintiff's dog had suffered none of the undisclosed side effects).

The First Circuit, in deciding a price-fixing case, succinctly distinguished *Rule* in reasoning applicable to each of the cases Defendants cite. "*Rule* . . . did not involve an attempt to conspire with a competitor to raise prices; it concerned undisclosed risks." *Liu v. Amerco,* 677 F.3d 489, 495 (1st Cir. 2012). It elaborated, "disclosure of the defect would not have lowered the price, but would instead have eliminated the product. Here, by contrast, plaintiff has alleged that the defendants' attempted price-fixing scheme directly raised the price . . . paid by plaintiff—economic damage by any test." *Id.* at 495 (distinguishing *Rule*). The reasoning in *Liu*, rather than *Rule*, applies here. Plaintiffs have stated claims under the consumer protection statutes of Massachusetts, Florida and the District of Columbia.

J. Plaintiffs Can Represent Nevada Residents Under the Nevada Deceptive Trade Practices Act.

Defendants maintain that the Nevada Deceptive Trade Practices Act allows private causes of action only by elderly or disabled persons. Defendants ignore Nevada's statutory scheme and the facts of this case. Nev. Rev. Stat. §41.600 states that "an action may be brought by any person who is a victim of consumer fraud." The Complaint adequately alleges that Defendants have engaged in unfair competition or unfair deceptive acts or practices in violation

of Nev. Rev. Stat. §598.0903, *et seq.*[91] Nevada courts have recognized that any person can bring a suit for harm from a deceptive practice. *S. Serv. Corp. v. Excel Building Servs., Inc.*, 617 F. Supp. 2d 1097 (D. Nev. 2007). Thus, Defendants' claim that private actions are limited to elderly or disabled persons is simply misplaced.

CONCLUSION

For all the foregoing reasons, Defendants' motion to dismiss should be denied.

Dated: March 24, 2014

Respectfully submitted,

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[91] This would include §598.0915, which prohibits deceptive trade practices, making false representations as to the approval or certification of goods, false or misleading statements of fact concerning the price of goods; and any other false representations. Nev. Rev. Stat. §598.0915(2), (13),(15). Also, Plaintiffs have claims under §598.0923(3), which defines a deceptive trade practice to include knowingly violating a state or federal statute or regulation relating to the sale or lease of goods or service.

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2014, a copy of the foregoing End-Payor Plaintiffs' Memorandum of Law In Opposition To Defendants' Motion To Dismiss The Indirect Purchaser Plaintiffs' Consolidated Class Action Complaint was served on counsel for the defendants via the Court's electronic filing system to those attorneys registered with the Court's ECF notification system.

Dated: March 24, 2014

Respectfully submitted,

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