UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

IN RE: CHOCOLATE CONFECTIONARY ANTITRUST LITIGATION	**MDL DOCKET NO. 1935**
	(Civil Action No. 1:08-MDL-1935)
	(Judge Conner)
THIS DOCUMENT RELATES TO: DIRECT PURCHASER CLASS ACTIONS	

REPLY MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

REDACTED VERSION FILED AS PUBLIC RECORD

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October 21, 2011

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INTRODUCTION

"At the class certification stage, a court need only be satisfied that issues … will be capable of proof through evidence common to the class." *Behrend v. Comcast Corp.*, 2011 WL 3678805, at *7 (3d Cir. Aug. 23, 2011) (citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008)).

The three elements of Plaintiffs' claim in this case are: (1) the existence of a conspiracy; (2) antitrust injury-in-fact (or impact) resulting from the conspiracy; and (3) measurable damages. All are readily capable of common proof. With respect to proof of the conspiracy, Defendants have conceded that it is common to the class. The dispute therefore focuses on impact and damages.

With respect to impact, the record evidence makes clear that

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Where list prices are collusively imposed and transaction prices are tied to those list prices, courts have overwhelmingly concluded that such evidence is common and sufficient to establish class-wide impact.

Plaintiffs also have offered the

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Plaintiffs also have offered the

These opinions constitute evidence that is common to the class.

Defendants have offered

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which further establish that classwide impact and damages can be proven on a common basis.

Defendants also challenge typicality and adequacy under Fed. R. Civ. P. 23(a)(3) and (4), which challenges are based upon the same factual assertions on which they rely to attack impact. As will be apparent, regardless of Defendants' assertions, the facts and issues raised all involve common proof.

ARGUMENT

I. Plaintiffs Have Established Typicality and Adequacy under Rule 23(a)

A. Typicality

There are a number of differences between class members and even between the named Plaintiffs themselves.[1] But it is the similarities between the named Plaintiffs and the class members that are the relevant inquiry at class certification – each: (1) alleges the identical conspiracy, (2) bought singles and/or Kings directly from Defendants, (3) at prices starting from Defendants' list prices, and (4) suffered antitrust injury and damages as a result. The incentives and burdens of proving their claims are the same for all.

Defendants argue the typicality requirement of Rule 23(a)(3) is not met

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But the great

[1] Jones Vend, for example, is headquartered in St. Louis, Missouri and is a relatively large distributor of singles and Kings (and other goods) to vending machine operators in eleven states. PITCO Foods is a warehouse distributor based in California that sells bulk food products (including singles and Kings) primarily to retailers. Card & Party Mart is a small retail establishment in Chicago that sells party supplies and seasonal goods, including singles and Kings. Lorain Novelty is a small wholesaler based in Lorain, Ohio (about 30 miles from Cleveland) that sells singles and Kings and other goods, primarily to concession operators.

weight of case law is at odds with this argument.[2] Because Defendants' conspiracy forms the basis for every class member's claim, the claims of the named Plaintiffs are typical of other class members' claims. *McDonough v. Toys "R" Us, Inc.*, 638 F. Supp. 2d 461, 475-76 (E.D. Pa. 2011).

The lone case Defendants cite supporting their typicality argument, *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-68 (4th Cir. 2006), is not on point. In *Deiter*, the plaintiffs alleged a monopoly under Section 2 of the Sherman Act. However, the *Dieter* named plaintiffs were from a different purchasing channel than the majority of absent class members, and a showing of monopoly power by them would not necessarily apply to the class. Thus, the named plaintiffs and the class

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[2] *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 300 (N.D. Cal. 2010) ("[T]he overarching scheme is the linchpin of plaintiffs' . . . complaint, regardless of the product purchased, the market involved or the price ultimately paid.") (citation and internal quotation marks omitted); *Meijer, Inc. v. Warner Chilcott Holdings Co.*, 246 F.R.D. 293, 301 (D.D.C. 2007) ("[t]ypicality refers to the nature of the claims of the representative, not the individual characteristics of the plaintiff") (internal quotation marks omitted); *In re Bulk (Extruded) Graphite Products Antitrust Litig.*, 2006 U.S. Dist. LEXIS 16619, at *18 (D.N.J. Apr. 4, 2006) ("That the proposed class representatives had different purchasing positions from end user and OEM class members," and may have paid different prices as a result, "does not mean that the class representatives' claims are atypical, considering that all members of the proposed plaintiffs' class have alleged that they purchased bulk extruded graphite from the defendants at a price that was inflated as a result of the horizontal price-fixing conspiracy."); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 480 (W.D. Pa. 1999).

members in *Dieter* required different, not common, evidence at trial.[3] That is not the case here.

B. Adequacy

Defendants' argument that Plaintiffs' emphasis on the experience and ability of their counsel "misses the primary focus of Rule 23(a)(4)" as amended in 2003, Def. Mem. at 29, is mistaken. The Third Circuit has made clear that the qualifications of class counsel remain central to the adequacy inquiry. *See In re Community Bank*, 622 F.3d 275, 292 (3d Cir. 2010).[4]

With respect to the named Plaintiffs themselves, Defendants do not dispute that they made qualifying purchases and that Plaintiffs and the class will attempt to prove the existence of the same conspiracy, which caused the same type of

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[3] *See TFT-LCD*, 267 F.R.D. at 304 (distinguishing *Dieter* and certifying class because "there is substantial legal authority holding in favor of a finding of typicality in price fixing conspiracy cases, even where differences exist between plaintiffs and absent class members with respect to pricing, products, and/or methods of purchasing products.") (citing cases); *see also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 1530166, at *5 (N.D. Cal. June 5, 2006).

[4] *See also Danvers Motor Co. v. Ford Motor Co.*, 543 F.3d 141, 150 (3d Cir. 2008) (decided five years after the 2003 amendment) ("[T]he adequacy inquiry assures that the named plaintiffs' claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class.") (internal quotation marks omitted); *McDonough*, 638 F. Supp. 2d at 477 ("I found that subclass members would complain of identical misconduct based on the same legal theory. For this reason, they do not have antagonistic interests.").

antitrust injuries. Moreover, the named Plaintiffs have demonstrated their commitment to litigating this case on behalf of the class by producing thousands of documents and sitting for multiple depositions.

II. Common Issues Predominate as Required by Rule 23(b)(3)

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As discussed below, the remaining two elements – antitrust injury and damages – will also be established with common proof.

A. Defendants' Conspiracy Injured Every Class Member

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With respect to Plaintiffs' burden, Defendants erroneously suggest that at class certification,

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REDACTED As the Third Circuit made clear only sentences after this misleading truncated quote:

> Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.[5]

Hydrogen Peroxide, 552 F.3d at 311-12.

Thus, it is not enough for Defendants to disagree with the evidence offered by Plaintiffs. Indeed, the Third Circuit recently rebuffed just such a request: "Many of [defendant]'s contentions ask us to reach into the record and determine whether Plaintiffs actually have proven antitrust impact. This we will not do." *Behrend*, 2011 WL 3678805, at *11.

1. Defendants' Use of Price Lists Is Common Evidence of Class-wide Impact

Plaintiffs allege a conspiracy to fix list prices for singles and Kings through parallel announcements of list price increases.

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[5] This premise is affirmed many times in *Behrend*, 2011 WL 3678805.

[6] "Pl. Op. Ex." refers to the exhibits to Plaintiffs' opening class certification brief filed May 27, 2011. "Pl. Rep. Ex." refers to exhibits appended to this brief. "Def. Ex." refers to exhibits attached to Defendants' opposition brief filed August 12, 2011.

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8 REDACTED

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[9] Judge Posner similarly has recognized, "sellers would not bother to fix list prices if they thought there would be no effect on transaction prices." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002). *See also id.* ("An agreement to fix list prices is . . . a *per se* violation of the Sherman Act even if most or for that matter all transactions occur at lower prices."). *See also In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 24 (N.D. Ga. 1997) ("[I]f list prices bore absolutely no relationship to transaction prices, Defendants logically would not have spent their time and effort preparing the price lists and publicizing them to their sales staff and customers. The Court cannot perceive why Defendants would send their customers a price list unless Defendants intended that the transaction price be related in at least some degree to the list price."); *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y. 1996) (argument that list prices have no relationship to transaction prices "is inherently implausible, because if ... correct, there would be no reason for defendants to raise list prices").

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But "[n]either a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that, as here, the price range was affected generally." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 523 (S.D.N.Y. 1996).

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Courts overwhelmingly hold that where transaction prices are tied to a collusively imposed list price, the element of class-wide impact is established. *See, e.g., In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 486 (W.D. Pa. 1999) ("even though some plaintiffs negotiated prices, if plaintiffs can establish that the base price from which these negotiations occurred was inflated, this would establish at least the fact of damage, even if the extent of the damage by each plaintiff varied").[10]

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[10] *See also In re Pressure Sensitive Labelstock Antitrust Litig.*, 2007 U.S. Dist. LEXIS 85466, at *60 (M.D. Pa. Nov. 19, 2007) ("The evidentiary record, however, reveals that Defendants issued pricing guidelines that established the baseline price for negotiations. Thus, if Plaintiffs' allegations of a conspiracy are true, and it can be shown that prices were higher than they should have been, then even customers who negotiated prices would have been harmed because the starting point for negotiations was inflated artificially."); *In re Aftermarket Auto. Lighting Products Antitrust Litig.*, 2011 WL 3204588, at *5 (C.D. Cal. July 25, 2011); *McDonough*, 638 F. Supp. 2d at 486 ("the presence of coupons or sales does not disprove impact because when list prices have been artificially inflated, fixed or proportional discounts from them are equally inflated"); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 89 (D. Conn. 2009) (finding that "across-the-board list price increases" establish "common proof of impact to the class"); *In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 171-72 (S.D. Ind. 2009) (certifying class where "it is clear that Plaintiffs intend to prove at trial that Defendants conspired to set artificially high list prices."); *In re Urethane Antitrust Litig. ("Urethane II")*, 251 F.R.D. 629, 637-38 (D. Kan. 2008) ("plaintiffs have directed this court's attention to product price lists maintained by the defendants during the class period as well as coordinated price increase announcements from the defendants . . . This evidence of a standardized pricing structure, which (in light of the alleged conspiracy) presumably establishes an artificially inflated baseline from which any individualized negotiations would proceed, provides generalized proof of class-wide impact"); *Meijer, Inc. v. Abbott Laboratories*, 2008 U.S. Dist. LEXIS 78219, at *26-*29 (N.D. Cal. Aug. 27, 2008)

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Two of the cases are not even class certification decisions.[11] In four more cases, there were no allegations that the

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(finding class-wide impact based on defendants' use of list prices and stating "Abbott contends, approximately twenty percent of all sales of these drugs involve discounts or chargebacks to the direct purchasers, lowering their net price. Abbott asserts that, because not all direct purchasers paid the same net price for the drugs, and because the net price paid by individual class members has varied over time, individualized evidence must be taken into account....Abbott's position has uniformly been rejected by the courts."); *accord, In re Polyester Staple Antitrust Litig.*, 2007 WL 2111380, at *23 (W.D. N.C. July 19, 2007); *In re Urethane Antitrust Litig. ("Urethane I")*, 237 F.R.D. 440, 450-51 (D. Kan. 2006); *In re Carbon Black Antitrust Litig.*, 2005 WL 102966, at *17 (D. Mass. Jan. 18, 2005); *Fears v. Wilhelmina Model Agency, Inc.*, 2003 WL 21659373, at *6 (S.D.N.Y. July 15, 2003); *In re Bromine Antitrust Litig.*, 203 F.R.D. 403, 415 (S.D. Ind. 2001); *In re Plastic Cutlery Antitrust Litig.*, 1998 WL 135703 (E.D. Pa. Mar. 20, 1998); *In re Commercial Tissue Prods.*, 183 F.R.D. 589, 595 (N.D. Fla. 1998); *Polypropylene Carpet*, 996 F. Supp. at 24-25; *In Re Med. X-ray Film Antitrust Litig.*, 1997 WL 33320580 (E.D.N.Y. Dec. 26, 1997); *In re Citric Acid Antitrust Litig.*, 1996 WL 655791, at *7 (N.D. Cal. Oct. 2, 1996); *Indus. Diamonds*, 167 F.R.D. at 383; *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 689 (N.D. Ga. 1991); *Hedges Enterprises, Inc. v. Cont'l Group, Inc.*, 81 F.R.D. 461, 475 (E.D. Pa. 1979).

[11] In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 235-37 (1993), the Supreme Court evaluated the sufficiency of conspiracy evidence in a Robinson-Patman action in which there were no class claims. *Williamson Oil Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1263 (N.D. Ga. 2002), is a summary judgment decision where the court ***had already certified the class***.

defendants had fixed list prices.[12] One of the cases is an indirect-purchaser action involving a "theory of impact [that] is both novel and complex," which has no application here.[13]

Thus, only two of the cases cited by Defendants are even relevant. Both of them decidedly support a finding of class-wide impact here. In *EPDM*, the court determined that evidence of collusive list price increases in an industry where transaction prices derived from those list prices was sufficient to establish class-wide impact and certified the class of direct purchasers. 256 F.R.D. at 89.

In *In re Plastics Additives*, 2010 WL 3431837, at *6 (E.D. Pa. Aug. 31, 2010), the plaintiffs alleged a series of collusive list price increases, but the court

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[12] In *Hydrogen Peroxide* there were no allegations of fixed list prices, *see* 552 F.3d at 308 (summarizing allegations), and in fact there was record evidence suggesting that list prices were not used to determine transaction prices. *Id.* at 315. In *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 513 (S.D. Ill. 2004), there was no allegation of fixed list prices, but instead plaintiffs alleged that there was a collusively imposed surcharge, which the record evidence demonstrated did not, in fact, apply to all customers or transactions. *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144, 145 (N.D. Cal. 1991), was a whistleblower case with very thin allegations, none of which related to fixed list prices. Although the plaintiffs alleged that some base prices were fixed for some products in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 312 (N.D. Cal. 2010), the plaintiffs did not establish class-wide impact by reference to price lists. In any event, the court certified the class, notwithstanding defendants' argument that individualized impact analysis was required. *Id. See* n. 3 above.

[13] *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 27 (1st Cir. 2008) (alleging that auto manufacturers colluded to limit arbitrage opportunities between the Canadian and U.S. markets, which the Court rejected as implausible).

declined to certify the class because "the prices actually paid by some customers... have ***no relationship*** with Defendants' [list] price increases." (emphasis added). That is not this case.[14]

2. Defendants' Other Documents Also Establish Class-wide Impact

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[14] In *Plastic Additives*, the plaintiffs' expert had "done no empirical analysis of the actual effect of the price increases upon which they rely," and, in fact, prices declined. 2010 WL 3431837, at *5.

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3. REDACTED

Another piece of Plaintiffs' common proof of impact is

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15 REDACTED

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The relevant inquiry here is whether the alleged conspiracy could have succeeded in raising prices for customers. The answer is yes,

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Manufacturers can and do fix the prices of highly branded and differentiated products.[17]

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[17] Cartels have manipulated the prices of a variety of highly branded products. *See, e.g.,* http://www.nytimes.com/1988/09/01/business/corporate-prison-term-for-allegheny-bottling.html (Coke & Pepsi); http://www.time.com/time/magazine/article/0,9171,825458,00.html (Chevrolet, Ford & Oldsmobile); http://www.msnbc.msn.com/id/18176660/ns/business-world_business/t/eu-fines-brewers-m-price-fixing-probe/# (Heineken & Stella Artois); http://www.law.com/jsp/article.jsp?id=900005560431&slreturn=1&hbxlogin=1 (Unilever, Procter & Gamble and Colgate-Palmolive on various branded consumer products). REDACTED

4. Impact and Damages Are Distinct Elements of Plaintiffs' Claims

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They have conflated impact and damages. Comparing actual prices to "but for" prices can establish both antitrust damages

[18] The three cases cited by Defendants do not remotely support their assertion. In *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005), the court did not hold (as suggested by Defendants) that antitrust impact can only be established with a "but for" model. Rather, the court rejected the modeling offered by the plaintiffs' expert because it "presumed" impact instead of demonstrating it. 400 F.3d at 570. In addition, the court concluded that the plaintiffs could not rely on price lists to establish impact because of "wide variation in list prices" across many different markets that resulted in "individualized market conditions" necessitating individual inquiry – characteristics that do not apply here, where the record is clear that all transactions for all customers in all channels of trade were tied to Defendants' nationwide list prices. *Id.* at 572. Defendants' citation to *Pittsburgh v. West Penn Power Co.*, 147 F.3d 256 (3d Cir. 1998), which is not a class case, is baffling. In *West Penn Power*, the Third Circuit determined that the city of Pittsburgh had not suffered an injury-in-fact under the antitrust laws and thus lacked standing to obtain injunctive relief, but there is no suggestion that the only way to establish antitrust impact is via an econometric "but for" model. Defendants' reliance on *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001), is similarly inapt; *Newton*, which was brought under the Securities Exchange Act of 1934 and Rule 10b-5, is not an antitrust case and cannot possibly speak to what is necessary to establish antitrust injury-in-fact.

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and antitrust injury. *See EPDM*, 256 F.R.D. at 88 ("Proving damages proves injury because damages necessarily indicate that the plaintiff has been impacted or injured by the antitrust violation."). But this is not the sole way to establish impact. Impact can be established class-wide through common proof of Defendants' use of nationwide list prices coupled with common evidence that the market structure was amenable to price-fixing. As held in *EPDM*:

> The plaintiffs have not merely alleged that these price lists existed and that they affected all EPDM purchasers – they have shown undisputed evidence of lock-step price increases and provided expert opinions that the structural characteristics of the EPDM market would support collusive increases of prices to artificially high levels. As discussed more fully below, the defendants do not dispute the price list increases, nor do their experts truly contest the nature of the EPDM market, but instead argue that the plaintiffs cannot prevail on the merits, because they cannot prove that every class member ultimately suffered damages. That argument is best reserved for their argument that common questions do not predominate on the issue of damages and for trial on the merits.

EPDM, 256 F.R.D. at 90.

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B.

The Third Circuit recently emphasized that "[a]t the class certification stage, a court need only be satisfied that issues – including the [expert testimony on merits issues] – will be capable of proof through evidence common to the class." *Behrend*, 2011 WL 3678805, at *7. Thus, the inquiry at class certification is not which parties' experts are correct on the merits, but rather, whether "the antitrust impact Plaintiffs allege is 'plausible in theory' and 'susceptible to proof at trial through available evidence common to the class.'" *Id.* at *11 (quoting *Hydrogen Peroxide*, 552 F.3d at 325). Here, the answer to both questions is yes.

1.

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a.

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[19] In *Hydrogen Peroxide*, the Third Circuit made clear that "to prevail ***on the merits*** in a class action, every class member must prove at least some antitrust impact[.]" 552 F.3d at 311 (emphasis added). The Third Circuit did not hold, however, that impact must be proven at class certification. Moreover, the class members who account for the 0.1% of non-impacted sales are readily identifiable. Thus, there is no risk of them making an improper recovery. *Cf. In re OSB Antitrust Litig.*, 2007 WL 2253418, at *9 (E.D. Pa. Aug. 3, 2007) ("Because the proposed class need only be ascertainable by some objective criteria, not actually ascertained, challenges to individual claims based on class membership may be resolved at the claims phase of the litigation.").

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Cf. In re Linerboard Antitrust Litig., 203 F.R.D. 197, 220-21 (E.D. Pa. 2001), *aff'd* 305 F.3d 145, 158 (3d Cir. 2002) (affirming class certification where most class members were injured, notwithstanding the existence of some uninjured class members "whose contracts were tied to a factor independent of the price of linerboard").

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REDACTED

REDACTED

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REDACTED

22 Moreover, the absence of monetary damages does not mean that a class member has not suffered antitrust injury-in-fact. *See, e.g., EPDM*, 256 F.R.D. at 88-89.

b.

REDACTED

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REDACTED

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REDACTED

REDACTED

REDACTED

2. Defendants' Trade Spend Arguments Are Flawed

REDACTED

REDACTED

a. Defendants' Trade Spend Arguments Are Not Supported by the Factual Record

REDACTED

REDACTED

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25 REDACTED

REDACTED

b. Defendants' Trade Spend Arguments Are Implausible and Legally Unsound

REDACTED

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REDACTED

REDACTED

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[27] *See, e.g., In re Wellbutrin SR Direct Purchaser Antitrust Litig.*, 2008 U.S. Dist. LEXIS 36719, at * 25 (E.D. Pa. May 2, 2008) ("Indeed, any economic benefits the wholesalers experienced in the past are legally irrelevant because the overcharge itself – not any economic effect of the overcharge – is the proper measure of recovery in this antitrust case. As the Supreme Court has explained, a party may recover for an antitrust overcharge whether or not the party experienced a net loss or a net gain (*i.e.*, by passing on the overcharge to other parties).") (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 724-25 (1971); *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968)). *See also McDonough*, 638 F. Supp. 2d at 489.

REDACTED

REDACTED

At a minimum, a jury could reasonably credit the common evidence offered by Plaintiffs over the incredible alternative offered by Defendants.

c.

REDACTED

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REDACTED

REDACTED

d. Defendants' Trade Spend Arguments Relate to Damages, Not Impact

As explained at length above, Plaintiffs can (and do) establish class-wide impact

REDACTED

REDACTED

The law does not require precision with respect to estimating damages.[29] Nor do individual issues with respect to damages defeat class certification.[30]

REDACTED

[29] *See, e.g., Behrend,* 2011 WL 3678805, at *18-*19 ("Given the inherent difficulty of identifying a 'but-for world,' we do not require that damages be measured with certainty, but rather that they be demonstrated as 'a matter of just and reasonable inference.'") (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)); *McDonough*, 638 F. Supp. 2d at 490 ("predominance requires only a viable method whereby damages can be reasonably estimated based on common evidence"). *See also In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008) ("Indeed, we have never required a precise mathematical calculation of damages before deeming a class worthy of certification."); *In re Linerboard Antitrust Litig.*, 497 F. Supp. 2d 666, 675 (E.D. Pa. 2007) ("Once causation is determined, the actual amount of damages may result from a reasonable estimate, as long as the jury verdict is not the product of speculation or guess work.") (internal citations, quotations, ellipses omitted).

[30] *In re Bulk (Extruded) Graphite Products Antitrust Litig.*, 2006 U.S. Dist. LEXIS 16619, at *45 ("the Third Circuit has opined that '[b]ecause separate proceedings can, if necessary, be held on individualized issues such as damages or reliance, such individual questions do not ordinarily preclude the use of the class action device'") (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 817 (3d Cir. 1995)).

3. Defendants' Failure to Maintain Adequate Records Should Not Deprive Plaintiffs of a Remedy for Injuries Sustained as a Result of Defendants' Conspiracy

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Were Defendants correct, all businesses would have a perverse incentive to set up a byzantine system of promotional payments and discounts, which would provide them with immunity from class litigation in a price-fixing case. But courts do not allow defendants to evade liability due to inadequacies in their own records.[31]

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[31] *See, e.g.*, *Shurland v. Bacci Café & Pizzeria on Ogden, Inc.*, 271 F.R.D. 139, 145-46 (N.D. Ill. 2010) (recognizing that "whether a class action is appropriate cannot be a function of [defendant's] record-keeping practices"); *Gutierrez v. Wells Fargo & Co.*, 2010 U.S. Dist. LEXIS 29117 at *39 (N.D. Cal. 2010) ("Olsen's [Plaintiffs' expert's] report is aimed at determining the amount of overdraft fees Wells Fargo allegedly unfairly assessed on individual customers. The calculations were based upon all the data, and where approximations were made, they were necessitated by insufficient detail in defendant's own record-

C. Common Questions Predominate with Respect to Fraudulent Concealment

The issue of fraudulent concealment relates only to a twelve month period (December 2002 to December 2003).

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the Third Circuit made clear in *Linerboard* that "most courts have refused to deny class certification simply because there will be some individual questions raised during the proceedings" with respect to fraudulent concealment. 305 F.3d at 162; *see also id.* at 163 ("'Challenges based on the statute of limitations [or] fraudulent concealment...have usually been rejected").

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keeping process. As such, this [court] declines to find that Olsen's report is inadmissible to prove restitution."); *Harris v. D. Scott Carruthers & Assoc.*, 270 F.R.D. 446, 451 (D. Neb. 2010) ("[D]efendants in this case attempt to defeat class certification through their failure to retain information regarding which Nebraskans were sent letters similar to the letters sent to the named plaintiffs.... [T]his Court will not allow defendants to prevail by virtue of their careless record retention."); *Drossin v. National Action Financial Services, Inc.*, 255 F.R.D. 608, 614 (S.D. Fla. 2009) ("Defendant's inadequate record keeping is not grounds to defeat the class certification or it would be fairly easy for defendant debt collectors to defeat such motions."); *Appleton Electronic Co. v. Advance-United Expressways*, 494 F.2d 126, 139 (7th Cir. 1974) ("Class actions cannot be defeated ... because the prospective refunder has taken so much from so many that complexities arise.").

In *Linerboard*, notwithstanding that one named plaintiff had suspected price-fixing, another had not[32] (305 F.3d at 161 n.13), and the court found that "common issues of concealment predominate":

> Key questions will not revolve around whether [plaintiffs] knew that the prices paid were higher than they should have been or whether [plaintiffs] knew of the alleged conspiracy ... Instead, the critical inquiry will be whether ***defendants*** successfully concealed the existence of the alleged conspiracy, which proof will be common among the class members in each class. It is the fact of concealment that is the polestar in an analysis of fraudulent concealment. It is the camouflage that demands attention, the cover up, the acts of obscuring or masking. ***These allegations of proof are all common to the defendants, not the plaintiffs.***

Id. at 163 (quotation marks and citations omitted) (emphasis added).[33]

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REDACTED

33 REDACTED

In *Klein v. O'Neal, Inc.*, 2008 U.S. Dist. LEXIS 41762 (N.D. Tex. May 22, 2008), the court never held that fraudulent concealment was a bar to class certification, but simply requested that the parties submit supplemental briefing on that issue. *Id.* at *29. In *Township of Susquehanna v. H&M, Inc.*, 98 F.R.D. 658 (M.D. Pa. 1983), the court held that the predominance requirement was not met where "the central *litigated* issue in this case will be whether or not members of the proposed Plaintiff class have live claims not barred by the statute of limitations." *Id.* at 668 (emphasis in original). Here, the statute of limitations will not be the central litigated issue. *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3rd Cir. 1993), is not even a class action. As for *Stand Energy Corp. v. Columbia Transmission Corp.*,

III. Plaintiffs Have Established Rule 23(b)(3) Superiority

In determining whether Plaintiffs have established that the class action device is the superior way to proceed with Plaintiffs' claims, "the Court must 'balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication.'" *Labelstock*, 2007 U.S. Dist. LEXIS 85466, at *70 (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)). Here,

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there is no question that a class action is the superior method of adjudication. "As other courts have noted, when a 'case appears at this stage to involve large numbers of defendants' customers who allegedly were overcharged pursuant to a common scheme,' a class action is the superior method of litigation." *Ready-Mixed Concrete*, 261 F.R.D. at 173 (quoting *Auction Houses*, 193 F.R.D. at 168). Moreover, when "common questions are found to predominate, then courts also generally have ruled that the second prerequisite of Rule 23(b)(3) – that the class suit be superior to any other available means of settling the controversy – is

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2008 U.S. Dist. LEXIS 63913 (S.D. W. Va. Aug. 19, 2008), it is an unpublished outlier decision at odds with Third Circuit law. *See, e.g.*, *Linerboard*, 305 F.3d at 163.

satisfied in the context of an antitrust action." *Carbon Black*, 2005 WL 102966, at *21.

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Indeed, there is no viable alternative; the class mechanism is clearly superior.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully submit that their motion for class certification should be granted.

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