IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE CHOCOLATE CONFECTIONARY ANTITRUST LITIGATION	**MDL Docket No. 1935 (Civil Action No. 1:08-MDL-1935) (Judge Conner)**
THIS DOCUMENT APPLIES TO: **ALL INDIRECT PURCHASERS' COMPLAINTS**	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS INDIRECT END USERS' CONSOLIDATED AMENDED COMPLAINT AND INDIRECT PURCHASER FOR RESALE'S CONSOLIDATED AMENDED COMPLAINT

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Indirect End User Plaintiffs ("IEU Plaintiffs"), by the undersigned counsel, submit this memorandum of law in opposition to Defendants' Motion to Dismiss Indirect End Users' Consolidated Amended Complaint And Indirect Purchaser For Resale's Consolidated Amended Complaint, and Memorandum in Support ("IEU Mot.") (Dkts. 469 and 470).[1]

STATEMENT OF QUESTIONS PRESENTED

1. Have the IEU Plaintiffs pled facts sufficient to state a plausible claim under any state antitrust law for conspiracy to fix prices for chocolate products? Suggested Answer: **Yes**.

2. Have the IEU Plaintiffs pled facts sufficient to state a claim for injunctive relief under federal antitrust law for conspiracy to fix prices for chocolate products? Suggested Answer: **Yes**.

3. Have the IEU Plaintiffs pled facts sufficient to state a claim under any state consumer protection statute? Suggested Answer: **Yes**.

4. Have the IEU Plaintiffs pled facts sufficient to state a claim for unjust enrichment? Suggested Answer: **Yes**.

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[1] Defendants' Memorandum in Support of Concurrent Motion To Dismiss Direct Purchaser Plaintiffs' Consolidated Class Action Complaint is referred to as "Def. Br." and Defendants' Memorandum in Support of Motion To Dismiss Indirect End Users' Consolidated Amended Complaint is referred to as "Def. IEU Br."

(COUNTER) STATEMENT OF FACTS

IEU Plaintiffs bring this action on behalf of themselves and all persons (the "Class") residing in the United States who indirectly purchased Chocolate Products, at any time during the period from December 9, 2002 to the present (the "Class Period"), for their own use. IEU Plaintiffs also bring this action on behalf of themselves and as a class action pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure and/or respective state statute(s), on behalf of all members of several state classes or subclasses.[2]

IEU Plaintiffs seek treble damages and injunctive relief arising from Defendants' agreement to fix prices of Chocolate Products sold during the Class Period.[3] This multi-district litigation began after an announcement by the United States Department of Justice ("DOJ") regarding an investigation into the pricing of Chocolate candy products in the United States. On December 20, 2007, Defendant Mars confirmed it had been contacted by the DOJ "regarding their inquiry concerning pricing practices in the U.S. chocolate confectionery industry." IEU

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[2] The state classes and subclasses include: Arizona, Arkansas, California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin.

[3] Plaintiffs' *Twombly* arguments for denying Defendants' motion to dismiss for damages apply with equal force for injunctive relief under the Sherman Act.

Compl. ¶ 111. (Dkt. 420). Nestlé confirmed the same.[4] *Id.* The first complaint filed on behalf of indirect plaintiffs was filed on December 22, 2007. Since then, numerous complaints have been filed in numerous district courts throughout the United States on behalf of both direct and indirect purchasers and consolidated in this District.

The Complaint alleges specific facts to support its claim that Defendants engaged in unlawful concerted conduct under Section 1 of the Sherman Act.[5]

A. The Chocolate Industry

Chocolate candy is a $15.6 billion retail and $10.2 billion wholesale industry in the United States. *Id*. ¶ 77. Chocolate is a commodity-like product wherein any Defendant can and does produce and sell certain types of chocolate candy bars and other chocolate candy that is similar to chocolate candy bars and chocolate candy offered by another Defendant. *Id*. ¶ 79. Defendants collectively possess approximately 80% of the United States chocolate market and collectively control more than 40% of the global market. *Id*. ¶ 80. Defendants collectively possess about 64% of the Canadian chocolate market. *Id.*

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[4] The next day, the *Wall Street Journal* also reported that the DOJ had begun an inquiry into Defendants' pricing practices for chocolate confectionery products in the United States. IEU Compl. ¶ 111.

[5] "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007).

That concentration is exacerbated by licensing agreements between some Defendants with exclusive rights to manufacture and/or sell products in the United States.[6] *Id.* ¶ 82. For Herfindahl-Hirschman Index ("HHI") purposes, a concentration in the market greater than 1,800 is indicative of oligopolistic market power. The chocolate industry based on the three firms (Hershey, Mars, and Nestlé) has an HHI rating of 2,835. *Id*. ¶ 83.

The chocolate market also has high barriers to entry. Technical know-how, advertising, and access to distribution channels allow an exercise of market power in the chocolate candy market, including the ability to raise prices and erect barriers to entry. *Id*. ¶ 89.

The United States is the leading exporter of Chocolate Products to Canada and the leading importer of Chocolate Products from Canada. *Id*. ¶ 90. In 2003, 46% of United States confectionery exports were to Canada. *Id.* Similarly, Canada was the largest exporter of chocolate food products to the United States in 2004 through 2006. *Id.* 45% of Canadian chocolate imports come from the United States, with over $600 million worth of chocolate manufactured in Canada imported for sale in the United States. *Id*. ¶ 113. Chocolate Products bearing

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[6] For example, through licensing, Hershey and Cadbury control 45% of the market. IEU Compl. ¶ 83. With licensing also come audit rights which allow Cadbury and Nestlé to obtain key sales information (pricing and cost data) from Hershey. *Id*. ¶¶ 85-87.

markings indicating that they were "Made in Canada" have been sold in the United States by Defendants. *Id.* Multiple industry-wide price increases for Chocolate Products occurred near in time in the United States and Canada during the Class Period. *Id.* ¶ 89.

B. Origins of the Conspiracy and Fixing Prices

Defendants' United States and Canadian operations are tightly integrated between the two countries which strongly suggest that any pricing decisions for Canada also affected chocolate prices in the United States. *Id*. ¶ 92. Though prices for chocolate in both countries had been stable from 1996-2002, Defendants uniformly raised prices in spite of recent declining demand for their products. *Id*. ¶ 93. Two or more Defendants simultaneously raised prices in the United States for chocolate in December 2002, December 2004, and March through April 2007. *Id.* ¶ 94. In Canada, Defendants simultaneously raised prices for chocolate in October 2005. *Id*. ¶ 95.

An increase in commodity and fuel prices cannot justify the price increases in Chocolate Products. *Id*. ¶¶ 96-100. Defendants' reasons for price increases were pre-textual in order to hide the existence of a price fixing conspiracy among Defendants in both Canada and the United States. *Id.* Defendants' maintenance of profit margins in the face of increased costs and waning demand further demonstrates the existence of a price fixing conspiracy. *Id*. ¶¶ 101-105.

Defendants' departure from past pricing patterns of chocolate in both the United States and Canada was carried out with the knowledge of a U.S. executive from Defendant Hershey who was involved with the import-export trade between Canada and the U.S. and the coordination of U.S. and Canadian operations. *Id*. ¶ 112. A comparison of Canadian and U.S. chocolate product prices during the Class Period also suggests that the Defendants' price fixing conspiracy existed in both the U.S. and Canada as shown by the similarity in prices for chocolate in both countries. *Id*. ¶ 114. Defendants had multiple opportunities for collusion since they were members in no less than two trade associations in Canada and three in the United States. *Id*. ¶ 120.

In approximately March and April 2007, Defendants Hershey, Cadbury, and Mars raised prices on certain chocolate prices in the United States. Shortly before those price increase announcements, Defendants' Canadian subsidiaries met to discuss prices. *Id*. ¶¶ 115-116. The resulting price increases strongly suggest that Defendants' United States entities were also involved in these agreements among Defendants. *Id.* Without a parallel and interlocking scheme involving all of Defendants' North American operations, the conspiracy would be undercut by arbitrage of the Defendants' United States and Canadian products. *Id*. ¶ 113.

C. The Canadian Investigation

The Canadian Competition Bureau ("Bureau") pursuant to a pending investigation of Defendants for price fixing of Chocolate Products in Canada executed two search warrants issued on November 21, 2007. *Id*. ¶ 107. The search warrants were based upon information from a "Cooperating Party," which is believed to be a Cadbury employee. *Id*. ¶ 108. The cooperating witness has stated to Canadian authorities that from at least February 2004 employees of the defendants communicated and met in Canada to fix prices. *Id*. ¶ 109. The Bureau noted, and Plaintiffs allege that several specific meetings and communications occurred between several of the Defendants.[7] Since then, numerous letters and emails in the possession of the Canadian authorities indicate that Defendants coordinated their chocolate price increases from 2005 through 2007 in Canada. *Id*. ¶ 109(f)-(w). As another example of the close ties between Defendants' operations in the United States and Canada, in a January 3, 2007 email from a senior

[7] For example, on February 23, 2004 the witness met with the Nestlé Canada CEO to discuss prices of products. IEU Compl. ¶ 109(a). Internal email exchanges exist between the Cadbury employee and a distributor in June 2005 where producer pricing was discussed. *Id*. ¶ 109(b). On June 2 to 5, 2005 the Cadbury employee met in person with the Nestlé Canada CEO who gave an envelope containing Nestlé's planned 2005 chocolate price increases to the Cadbury employee and said that "[w]e are going to take a price increase and I want you to hear it from the top." *Id*. ¶ 109(c). In July 2005, Cadbury emails and letters indicate that Cadbury was aware of Nestlé's planned chocolate price increase which prompted Cadbury to do the same. *Id*. ¶ 109(e).

executive at Hershey **in the United States** (formerly EVP Finance, CFO of Cadbury) wrote to his colleague Hershey executive (who had moved from Hershey in the United States to Hershey Canada and was directly involved in pricing discussions with competitors according to Canadian officials) and a competitor to "keep close" to one another. *Id*. ¶ 109(t). These two individuals of two Defendant competitors arranged to speak the very next day. *Id.*

On Nov. 28, 2007 the Canadian government alleged that Hershey Canada, Mars Canada, Nestlé Canada, the relevant trade association and other persons as early as February 2002, and continuing until the present conspired, combined, agreed or arranged with each other to enhance unreasonably the price and to unduly prevent or lessen competition in the supply of chocolate confectionery products in Canada, committing an indictable offense in Canada. *Id*. ¶ 110.

These and other facts alleged in Plaintiffs' complaint show that Defendants conspired to raise, fixe, maintain, and stabilize prices of their chocolate products at artificially high and noncompetitive levels throughout the United States throughout the Class Period causing IEU Plaintiffs to be deprived of the benefit of free and open competition. *Id*. ¶¶ 122-123. As a direct and proximate result of Defendants' actions throughout the Class Period, the Class has been injured by paying more for Chocolate Products than they otherwise would have paid in the absence of Defendants' conduct. *Id.*

ARGUMENT

I. PLAINTIFFS' PLEADINGS EXCEED *TWOMBLY*

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiffs are required only to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (internal quotation marks omitted). Contrary to Defendants' mischaracterizations, the Supreme Court in *Twombly* clearly stated "**[w]e do not require heightened fact pleading of specifics**." *Id.* at 1974 (emphasis added). Rather, to satisfy *Twombly*, a plaintiff need allege only "enough facts to state a claim to relief that is plausible on its face." *Id.*[8] But this plausibility standard does not mean that Plaintiffs must make a *probable* showing. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable and 'that recovery is very remote and unlikely.'" *Id.* at 1965 (quoting *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974)).[9]

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[8] *See also City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 7 (D.D.C. 2008) ("Because the complaint alleged some circumstantial facts that support an inference of an agreement, the plaintiffs' claim is plausible.").

[9] *See also In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1096 (N.D. Cal. 2007) ("*GPU II*"), ("[D]irect allegations of conspiracy are not always possible given the secret nature of conspiracies. Nor are direct allegations necessary.").

A. Plaintiffs' Pleadings Include Specific Allegations of Price-Fixing

Here, Plaintiffs plead specific facts that far exceed *Twombly*'s plausibility requirement. Plaintiffs have provided far more information than the "labels and conclusions" or the "formulaic recitation of the elements of a cause of action" criticized in *Twombly*. *Twombly*, 127 S. Ct. 1955. Indeed, when accepting as true all of the factual allegations contained in the complaint, Plaintiffs' pleadings present a case that is plausible *and* probable, going far beyond the facts of *Twombly*, and demonstrating that Defendants conspired to fix prices of their chocolate products in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and the state antitrust, consumer protection, and unfair competition statutes identified in Plaintiffs' complaint.

As several courts have held since *Twombly*, Plaintiffs' pleadings are sufficient where plaintiffs provide factual allegations to provide Defendants fair notice of the claims and state a plausible claim.[10] This does not impose a *probability* requirement at the pleading stage, but "simply calls for enough facts to

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[10] *See*, *e.g.*, *Weber v. Department of Veterans Affairs*, 512 F.3d 1178, 1181 (9th Cir.), *pet. for cert. pending*, No. 08-281 (U.S. filed July 3, 2008). *See also EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007); *In re Southeastern Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 941-44 (E.D. Tenn. 2008); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL No. 1869, 2008 WL 4831214, at *4 (D.D.C. Nov. 7, 2008) ("Accepting as true the factual allegations in the complaint, this Court concludes that the plaintiffs have moved their claims 'across the line from conceivable to plausible.'" (quoting *Twombly*, 127 S. Ct. at 1974)).

raise a reasonable expectation that discovery will reveal evidence." *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (internal quotation marks omitted). Moreover, *Twombly* does not require (as Defendants argue) pleadings of specific meetings or discussions among specific actors for particular decisions. *See In Re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1028 (N.D. Cal. 2007) ("*GPU I*"). Yet even without this requirement, IEU Plaintiffs have made allegations of numerous meetings among Defendants in this case.[11] IEU Compl. ¶ 109. The Court's concern in *Twombly* was that the plaintiffs did not make *any* independent allegations of factual agreement among the defendants, but instead relied solely on a lack of competition, which the plaintiffs claimed was consistent with a conspiracy. *See* 127 S. Ct. at 1970.

Here, Plaintiffs set forth additional specific facts regarding meetings and communications among Defendants, as well as independent Government investigations, all relating to a conspiracy to raise prices of Defendants' chocolate products. Specifically, Plaintiffs allege:

- The many meetings between executives from Mars, Hershey, Nestlé, and a "Cooperating Party" believed to be the Cadbury Defendants regarding price increases of Defendants' chocolate products, including products made for and sold in the United States, *see*, *e.g.*, IEU Compl. ¶¶ 104-109;
- Correspondence between the same parties regarding increasing the prices of

[11] Meeting dates include Feb. 23, 2004; June 2-5 and July 6 and 29, 2005; Feb. 15, 2006; and July 4 and Sept. 19, 2007. IEU Compl. ¶ 109.

Defendants' chocolate products, *see*, *e.g.*, *id.* ¶ 110;

- Defendants' parallel price increases of their chocolate products, including products made and packaged by the Defendants' Canadian divisions for sale in the United States, *see*, *e.g.*, *id.* ¶¶ 93-99;
- The Defendants' pre-textual reasons for the price increases, *see*, *e.g.*, *id.* ¶¶ 100-103;
- The investigation and findings of the Bureau into Defendants' conspiracy to fix prices of their chocolate products, *see*, *e.g.*, *id.* ¶¶ 107-110;
- A DOJ investigation into Defendants' conspiracy to raise prices of their chocolate products, *see*, *e.g.*, *id.* ¶ 111;
- Defendants' integration of their Canadian and Unite States operations into consolidated operating groups or units, *see*, *e.g.*, *id.* ¶ 92;
- Defendants' cross-licensing and other cooperative agreements amongst *competitors*, *see*, *e.g.*, *id.* ¶¶ 82-88; and
- The characteristics of the chocolate products market, including the opportunities for collusion and the market's highly concentrated structure, with Defendants controlling approximately 80% of the United States chocolate market and 64% of the Canadian market, *see*, *e.g.*, *id.* ¶¶ 93-102.

Far from relying solely on parallel price increases, Plaintiffs' complaint provides specific allegations of meetings at which, for example, Defendants' Canadian executives conspired to raise prices of products, including products made and packaged in Canada especially for sale to customers in the United States. *See id.* ¶¶ 93-110. Taken as true, these allegations, along with allegations regarding the parallel price increases in the United States and the Defendants' overlapping North American operations, present a plausible case of a conspiracy to fix prices of chocolate products in the United States.

Defendants suggest these allegations cannot show a conspiracy to fix prices of products in the United States because (1) the allegations are of meetings of Canadian divisions of Defendants and did not affect products sold in the United States and (2) the Bureau did not present findings of price-fixing for products sold in the United States. Def. Br. at 11-13. Both arguments are misleading.

In support of the former position, Defendants cite *In re Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir. 2007), in which the Second Circuit held that the plaintiffs could not rely solely on foreign price-fixing allegations to imply price-fixing in the United States. The plaintiffs argued that the price-fixing that occurred in a foreign country was evidence of a world-wide conspiracy, thereby affecting customers in the United States. *See id.* at 51-52. Plaintiffs here, however, do not rely on the Canadian meetings as evidence of a world-wide conspiracy or to *imply* that price-fixing occurred in the United States. Rather, Plaintiffs allege that the meetings and communications of the Defendants' Canadian executives involved products actually sold in the United States. IEU Compl. ¶ 90.[12] Thus, Plaintiffs allege that Defendants' Canadian executives at these meetings raised prices of

[12] In addition, *In re Elevator*'s foreign actions took place in Korea and Italy – much more remote locations and distinct markets, as opposed to the contiguous borders of Canada and the United States, through which goods flow easily.

products actually sold in the United States.[13]

These specific allegations of a conspiracy affecting the prices of chocolate products sold in the United States are a far cry from the *implied* conspiracy rejected by the Second Circuit in *In re Elevator*. Rather these are exactly the sort of allegations the Second Circuit suggested were missing in that case. *See id.* at 52 ("Allegations of anticompetitive wrongdoing in Europe – *absent any evidence of linkage between such foreign conduct and conduct here* – is merely to suggest (in defendants' words) that 'if it happened there, it could happen here.'" (emphasis added)). Plaintiffs here have provided this "evidence of linkage."[14]

Moreover, ample evidence demonstrates that the Canadian divisions of the

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[13] For example, Mars Canada was a party to several of the communications identified in the complaint. Mars Canada makes and packages 3 Musketeers bars for sale in the United States. Executives of Mars Canada conspired with other Defendants to raise prices of the Canadian divisions' products sold in the United States. *See* Plfs.' Opp'n to Def. Mars Canada's Mot. To Dismiss for Personal Jurisdiction, Decl. of Kfir B. Levy ¶¶ 1-2, 4-5 (Nov. 13, 2008) (showing Mars Canada chocolate sold in the United States). Therefore, the executives of Mars Canada and other Defendants conspired to raise prices of products sold to Plaintiffs in the United States. Plaintiffs also allege that the Canadian and United States markets are an integrated whole. This, along with the arbitrage prevent a price fixing conspiracy limited only to Canada. IEU Compl. ¶¶ 90, 92, 112, 113.

[14] Defendants' reliance on other cases in support of their *Twombly* argument is misplaced as well. *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 961 (N.D. Cal. 2007) ("plaintiffs d[id] not identify any actual agreement among the defendants"); *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 541 F. Supp. 2d 487, 491-92 (D. Conn. 2008) (the complaint alleged only a time frame with respect to alleged meetings among some of the defendants, and the criminal conspiracy charges involved a conspiracy to unlawfully **raise** prices, while the plaintiffs' case involved conspiracy claims of predatory pricing to **lower** prices).

Defendants are not the separately-acting, independent entities that Defendants claim they are. Rather, they are de facto divisions of their parent corporations, each defendant group operating as a single company.[15] Given this interrelatedness, Defendants cannot escape liability for their own actions, conducted through Canadian subsidiaries. As the allegations in Plaintiffs' complaints explain, for example, Mars, Inc., through Mars Canada and otherwise, conspired with the other Defendants to raise prices of chocolate products sold in the United States.[16]

B. Plaintiffs' Allegations Of Price-Increases Also Support A Plausible Claim Under *Twombly*

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[15] In the case of Mars Canada and Mars, Inc., for example: Mars, Inc. owns 100% of the stock of Mars Canada; Mars presents one worldwide image to the public, describing itself as a company that "operates in more than 65 countries and employs more than 40,000 associates worldwide"; all of Mars's divisions are guided by the same "Five Principles of Mars," stressing that the various "units and divisions are interdependent"; and Mars posts job listings for all of its divisions on Mars, Inc.'s website, identifying the positions by region and not by entity. *See* Mem. in Opp'n to Def. Mars Canada Motion To Dismiss for Lack of Personal Jurisdiction at 17-19 (filed Nov. 13, 2008).

[16] Defendants also incorrectly argue that because the Canadian Bureau did not present findings of price-fixing for products sold in the United States there was no such price-fixing. The Bureau was conducting an investigation regarding price-fixing of chocolate products in Canada, for products sold to Canadians. That is precisely what the Bureau found. IEU Compl. ¶ 110. Had the Bureau investigated price-fixing of products sold in the United States by the Defendants' Canadian divisions, it is likely – for the reasons set forth herein – the Bureau would have discovered this, as well. The fact that the Bureau did not make findings regarding an investigation it did not conduct is not dispositive of anything other than perhaps the interest or jurisdiction of the Canadian Competition Bureau. It is also possible that the Bureau has found evidence of price-fixing for products sold in the United States but has had no reason to disclose those findings.

In applying *Twombly*, courts have concluded that it is sufficient to show that unprecedented changes in pricing by multiple competitors occurred during the Class Period. *See GPU II,* 540 F. Supp. 2d at 1092 ("'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernable reason would support a plausible inference of conspiracy'") (quoting *Twombly*, 127 S. Ct. at 1965 n.4). Here the same fact situation exists. Prior to the Class Period, the price of chocolate was stable. IEU Compl. ¶ 92. During the Class Period, however, multiple Defendants raised prices nearly simultaneously at multiple times. *Id*. ¶ 94.

Additionally, the more incidents of parallel conduct alleged the more likely that an inference of plausibility exists. *See In re Southeastern Milk Antitrust Litigation*, 555 F. Supp. 2d 934, 944 (E.D. Tenn. 2008) ("the more individual instances of parallel conduct alleged by the plaintiffs, the stronger the inference can be drawn from those acts of parallel conduct to support an illegal conspiracy and the less likely it is that these parallel acts occurred unilaterally without any conspiracy or agreement.").[17] Here, Plaintiffs allege four separate instances of

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[17] *See also In re OSB Antitrust Litig*., No. 06-826m, 2007 WL 2253419 (E.D. Pa. Aug. 3, 2007) (parallel conduct allegations in context are sufficient to deny motion to dismiss); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363 (M.D. Pa. 2008) (same); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. M07-1819 CW, 2008 WL 426522 (N.D. Cal. Feb. 14, 2008) (same); *Babyage.com, Inc. v. Toys "R" Us*, 558 F. Supp. 2d 575, 583 (E.D. Pa.

nearly simultaneous price increases by multiple Defendants during the Class Period. IEU Compl. ¶ 94. These price increases are the result of a conspiracy or agreement between the Defendants rather than unilateral actions taken by each Defendant. *Id.* ¶¶ 104-105.

Circumstantial facts such as economic interests and motivations also can be sufficient to establish a plausible conspiracy. *See City of Moundridge*, 250 F.R.D. at 5. In that case, the plaintiffs alleged that defendants' reasons for withholding supply were pre-textual while defendants withheld supply of their product to further a price fixing conspiracy. *See id.* at 4. The court found that plaintiffs had alleged a plausible conspiracy through economic supply and profit levels even though plaintiffs had not excluded the defendants' business reason for the price increase.[18] *See id.* at 5. Here, Plaintiffs have similarly alleged that Defendants' price increase reasons were pre-textual to cover up evidence of a price fixing

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2008) (motion to dismiss denied where facts alleged tended "to negate the potential of unilateral conduct.").

[18] "[A] complaint need not be dismissed where it does not "exclude the possibility of independent business action. . . . The plaintiffs provided some circumstantial facts, including historical supply and consumption levels, market prices, profit levels, and the use the industry reports, to support an inference that the defendants engaged in not merely parallel conduct, but rather agreed to contribute false information regarding gas supply levels to industry reports, withhold supply, and engage in price-fixing." *City of Moundridge*, 250 F.R.D. at 5.

conspiracy. IEU Compl. ¶¶ 96-100.[19] Plaintiffs have not only met, but far exceeded the pleading requirements of Rule 8(a)(2) as explained in *Twombly*. The factual allegations in Plaintiffs' complaint set forth plausible grounds to infer a conspiracy to fix prices of chocolate products sold in the United States. Because Plaintiffs' complaint satisfies *Twombly*, it similarly satisfies the pleading requirements for the state antitrust claims identified in the complaint, as well as various other state laws. This Court should therefore deny Defendants' motion.

II. DEFENDANTS' ARTICLE III STANDING ARGUMENT IS PREMATURE

Defendants argue that the IEU Plaintiffs lack Article III standing to assert claims based on state laws if they are not residents of those states, and that those state claims should therefore be dismissed. *See* Def. IEU Br. at 12-15. Defendants' argument pertains to the IEU Plaintiffs' North Dakota antitrust claim, and the nationwide unjust enrichment claim to the extent there is no named plaintiff for a particular state.[20]

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[19] Plaintiffs also allege that during the Class Period, demand for Defendants' products was decreasing. IEU Compl. ¶ 103. Despite the waning demand for its products and Defendants' purported increase in costs, Defendants were still able to maintain profit margins. *Id.* ¶¶ 101-103. These highly suspicious actions render Plaintiffs' allegations plausible. Defendants would not have been able to maintain their profit margins in the face of declining demand and increased costs in the absence of a price fixing conspiracy. *Id.* ¶¶ 101-103.

[20] Notably, Defendants do not challenge the personal Article III standing of the named Plaintiffs. The issue therefore is whether the named Plaintiffs who do not

Defendants confuse the issue of "standing" with issues that are more properly addressed in connection with the class certification analysis, including whether the named Plaintiffs are "adequate" to represent the class, or have claims "typical" of absent class members.[21] Defendants' arguments are therefore premature and are more properly considered at class certification.

The Supreme Court's holding in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), provides further support to Plaintiffs. *Ortiz* holds that in cases where class certification issues are "logically antecedent to Article III concerns . . . and themselves pertain to statutory standing," then the issue of Rule 23 certification should be treated before standing. *Id.* at 831 (internal quotation marks omitted). Class certification issues are "logically antecedent" to Article III concerns in those cases where it is the possibility of class certification that gives rise to the

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reside in the challenged states, but who nonetheless were injured by Defendants' conduct, may bring claims on behalf of residents of those states. Put differently, the question is whether the named Plaintiffs may properly represent the purported class, not whether they have standing to bring their claims in the first instance.

[21] *See* Fed. R. Civ. P. 23(a)(3), (4); *In re Buspirone Patent & Antitrust Litig.*, 185 F. Supp. 2d 363, 377 (S.D.N.Y. 2002) ("[T]he only relevant question about the named plaintiffs' standing to represent [a nationwide class] will be whether the named plaintiffs meet the ordinary criteria for class standing, including whether their claims are typical of those of the class [and] whether they will adequately represent the interests of the class."); *see also* 1 Alba Conte *et al.*, *Newberg on Class Actions* § 2:7, at 88-89 (4th ed. 2008) ("Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions.").

jurisdictional issue as to standing. *See Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 333 n.2 (5th Cir. 2002).

Many courts have applied *Ortiz* to reject the very argument made by Defendants here. In *In re Buspirone*, the defendant argued that the putative class representatives, who had purchased defendants' product in only 15 states, lacked standing to assert antitrust and unfair competition claims on behalf of purchasers in the remaining 35 states. Applying *Ortiz*, the court found that class certification issues were logically antecedent to defendant's Article III standing challenge because the named plaintiffs had personal Article III standing and so the real issue was whether they could represent the class. *See* 185 F. Supp. 2d at 377. The *Busiprone* court further noted that "when a class action raises common issues of conduct that would establish liability under a number of different States' laws, it is possible for common issues to predominate and for class certification to be an appropriate mechanism for handling the dispute." *Id.*[22]

This is a case, like *Ortiz*, in which class certification issues are "logically antecedent" to those of Article III standing. The named IEU Plaintiffs have

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[22] *See also In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 269-70 (D. Mass. 2004) (class certification was logically antecedent to defendant's argument that the named plaintiffs lacked standing); *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 204-05 (D.N.J. 2003) (same); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 544 (D.N.J. 2004) ("This Court will not address this Article III standing issue prior to determining class certification.").

established personal Article III standing. Thus, Defendants' standing challenge is an issue that would not arise but for the named Plaintiffs' assertion of claims on behalf of a putative class. Accordingly, the *Ortiz* exception applies and this Court should defer consideration of Defendants' challenge until after class certification.

The cases cited by Defendants do not command a different result. In Defendants' cases, the named plaintiff(s) lacked personal Article III standing as to a particular claim. In other words, the standing issue was independent of the class claims, and the *Ortiz* exception did not apply. For example, in *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), the named plaintiffs alleged that defendant had engaged in discriminatory hiring, testing, promotion, and assignment in violation of Title VII of the Civil Rights Act of 1964. One of the named plaintiffs was a current employee who had been dismissed twice and re-hired and who claimed his dismissals were racially discriminatory. *See id.* at 1479. This named plaintiff also claimed that defendant's written entry exam discriminated against black applicants and sought to represent a class of potential employees who had failed the exam and been denied a job. Because this named plaintiff had taken the written exam and passed it, and therefore he suffered no injury as a result of the exam, the court found that he lacked standing to assert a claim that the test was discriminatory. *See id.* at 1484. The court's findings on the named plaintiff's standing were completely independent of his status as a putative class representative. Thus, it

was appropriate for the court to address standing before class certification.

Courts regularly address the propriety of multi-state class actions, and certify class actions, without requiring a class representative be named for each state whose law is at issue.[23] Finally, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court of the United States countenanced a multi-state class action represented by individuals from only two of the fifty states at issue, which also involved the application of several states' laws. *See Shutts v. Phillips Petroleum Co.*, 732 P.2d 1286, 1290-91 (Kan. 1987) (recounting procedural posture leading up to *Phillips Petroleum Co. v. Shutts*).

III. PLAINTIFFS' CLAIMS UNDER NEW YORK, DISTRICT OF COLUMBIA, MICHIGAN, AND MINNESOTA[24]

A. The Complaint States A Claim Pursuant to New York Law (Counts III and V)

Defendants have moved to dismiss the New York state law claims on the

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[23] *See*, *e.g.*, *Mowbray v. Waste Mgmt. Holdings, Inc.*, 189 F.R.D. 194, 195, 199, 202 (D. Mass. 1999) (holding that a single named plaintiff with a contract claim arising under Illinois law could adequately represent class members with similar claims arising under the laws of several different states); *In re Abbott Labs. Norvir Anti-Trust Litig.*, Nos. C 04-1511 *et al.*, 2007 WL 1689899, at *9 (N.D. Cal. June 11, 2007) (certifying a nationwide unjust enrichment class where the two named plaintiffs were California residents); *In re Crazy Eddie Sec. Litig.*, 135 F.R.D. 39, 41 (E.D.N.Y. 1991) (certifying multistate class on state law claims with only a representative from one state).

[24] Plaintiffs withdraw their antitrust claims under New Jersey Statutes Annotated § 56:9-1 *et seq.*, Hawaii Revised Statutes § 480-1 *et seq.*, and New York Gen. Bus. Law § 340 *et seq.*

sole basis that the Donnelly Act does not allow class actions. The problem with Defendants' argument is that Count III (IEU Compl. ¶ 172) and Count V (IEU Compl. ¶¶ 186-192) are not brought under the Donnelly Act (New York General Business Law ("GBL") § 340). Count III is brought under New York General Business Law § 349, which prohibits unfair and deceptive trade practices,[25] and Count V is brought pursuant to the Common Law Restraint of Trade. An action under the Donnelly Act cannot be brought as a class action because, under the Donnelly Act, N.Y. GBL § 340, treble damages are mandatory and considered a penalty. Under New York's Civil Practice Law and Rules ("CPLR"), actions for penalties cannot be brought as class actions unless the statute under which the claim is brought specifically authorizes class actions. *See* N.Y. CPLR § 901(b). Unlike the Donnelly Act, New York GBL § 349 provides for actual damages, for

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[25] It is well-recognized that an indirect purchaser may seek recovery in a class action for antitrust violations under New York GBL § 349. *See In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 2d 1129, 1143-44 (2008) ("*DRAM*") (denying motion to dismiss and holding that the indirect purchaser plaintiffs' allegations regarding the defendants' price-fixing conspiracy sufficiently stated a cause of action under New York GBL § 349), *mot. to cert. appeal granted*, No. M 02-1486, 2008 WL 863994 (N.D. Cal. Mar. 28, 2008); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2008 WL 3916309, at *15 (N.D. Cal. Aug. 25, 2008) ("*TFT-LCD*") (same); *GPU I*, 527 F. Supp. 2d at 1030; Order at 2, *In re OSB Antitrust Litig.*, Master File No. 06-826 (PSD) (E.D. Pa. Sept. 25, 2006) (Diamond, J.) (denying motion to dismiss because the indirect purchaser plaintiffs brought their antitrust claims under New York GBL § 349, not the Donnelly Act, and therefore the defendants' arguments and citations to case law addressing the Donnelly Act were inapposite).

alternative statutory damages of $50 and, at a court's discretion, up to treble damages. *See* N.Y. GBL § 349. Also, unlike cases under the Donnelly Act, cases interpreting New York GBL § 349 consistently hold that parties may waive the potential for multiple damages and seek only actual damages and thus pursue class actions asserting claims under New York GBL § 349. *See Leider v. Ralfe*, No. 01-3137, 2004 WL 1773330 (S.D.N.Y. July 30, 2004).[26]

Plaintiffs also adequately state a claim for damages pursuant to common law restraint of trade (Count V). *See* Compl. ¶¶ 186-192. Defendants incorrectly assert that Plaintiffs cannot bring a class action under common law restraint of trade because the Donnelly Act (N.Y. GBL § 340) bars antitrust class actions. *See* Def. IEU Br. at 19. This argument ignores the damages sought by Plaintiffs in Count V, in which Plaintiffs seek *actual* damages, not treble damages. *See* IEU Compl. ¶ 192. Unlike treble damages, actual damages are compensatory and, therefore, do not constitute a "penalty" under CPLR § 901(b). *See Sperry v.*

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[26] *See also Cox v. Microsoft Corp.*, 778 N.Y.S.2d 147, 148 (App. Div. 1st Dep't 2004); *Ridge Meadows Homeowners' Ass'n, Inc. v. Tara Dev. Co.*, 665 N.Y.S.2d 361 (App. Div. 4th Dep't 1997); *Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330, 341 (S.D.N.Y. 2004); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 95 (S.D.N.Y. 2001). The court in *Super Glue Corp. v. Avis Rent A Car System, Inc.*, 517 N.Y.S.2d 764, 767 (2d Dep't 1987), explained: "Although CPLR 901 (b) bars a class action to recover a penalty or minimum damages imposed by statute, where, as here, the statute does not explicitly authorize a class recovery thereof, the named plaintiff in a class action may waive that relief and bring an action for actual damages only."

Crompton Corp., 863 N.E.2d 1012, 1017 (N.Y. 2007) ("Although one third of the [treble damages] award unquestionably compensates a plaintiff for actual damages, the remainder necessarily punishes antitrust violations."). Because actual damages do not constitute a penalty, the class action restrictions under CPLR § 901(b) are inapplicable.[27] Accordingly, Plaintiffs may bring a class action for actual damages under New York's common law restraint of trade cause of action. Thus, Counts III and V should not be dismissed.

B. District of Columbia, Michigan, and Minnesota

Although Plaintiffs allege price-fixing claims under the antitrust laws of the District of Columbia, Michigan, and Minnesota, the complaint inadvertently cites to the monopoly statutes of these states. *See* IEU Compl. ¶ 138 (D.C. Code Ann. § 28-4503); *id*. ¶ 143 (Mich. Comp. Laws Ann. § 445.773); *id*. ¶ 144 (Minn. Stat. § 325D.52). Each of these states permit indirect purchaser claims for price-fixing (and Defendants do not argue to the contrary).[28] Accordingly, Plaintiffs request leave of Court to amend their complaint to substitute the appropriate state antitrust

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[27] Defendants cite a 1927 case, *Barns v. Dairymen's League Co-op. Ass'n*, 222 N.Y.S. 294 (1927), for the proposition that the Donnelly Act precludes Plaintiffs' common law claim. *Barns* was decided well before the New York Legislature enacted CPLR § 901(b) in 1975 (*see Sperry*, 863 N.E.2d at 1014) and does not address the issue of whether a plaintiff can bring an antitrust class action for actual damages under common law restraint of trade.

[28] *See* D.C. Code Ann. § 28-4501 *et seq.*; Mich. Comp. Laws Ann. § 445.771 *et seq.*; Minn. Stat. § 325D.50 *et seq.*

statutes as follows.

Count II, Violation of State Antitrust Statutes: Paragraph 138, replace District of Columbia Official Code § 28-4503 with § 28-4501 *et seq.*; Paragraph 143, replace Michigan Compiled Laws Annotated § 445.773 with § 445.771 *et seq.*; and Paragraph 144, replace Minnesota Statutes § 325D.52 with § 325D.50 *et seq.*

IV. THE COURT SHOULD DENY DEFENDANTS' REQUEST TO DISMISS CLAIMS UNDER NEVADA, SOUTH DAKOTA, TENNESSEE, WEST VIRGINIA, AND WISCONSIN ANTITRUST STATUTES

Defendants argue that IEU Plaintiffs' claims under the antitrust laws of Nevada, South Dakota, Tennessee, West Virginia, and Wisconsin are barred because these state statutes apply only to intrastate conduct. Defendants advocate an unduly narrowing of these statutes that is inconsistent with current case law.

A. Nevada

The Nevada Unfair Trade Practices Act ("NUTPA") lists various types of anticompetitive conduct and declares it "unlawful to conduct any part of such activity in this state." Nev. Rev. Stat. § 598A.60. In *In re New Motor Vehicles Canadian Export Antitrust Litigation*, ("*NMV*"), the plaintiffs alleged a nationwide conspiracy by U.S. and Canadian automobile manufacturers and dealers to fix the prices of automobiles sold throughout the United States. 350 F. Supp. 2d 160 (2004). The *NMV* court refused to dismiss a claim based on Nevada's antitrust

statute, saying the complaint alleged a conspiracy among manufacturers and dealers operating in Nevada that contemplated sales of vehicles in Nevada at higher prices. *See id.* at 171-72.[29] Based on these authorities, and the fact that Plaintiffs' allegations of anticompetitive conduct ("transactions between Defendants and their customers through the United States," IEU Compl. ¶ 76) include the sale of chocolate in Nevada markets, Plaintiffs' claim is sufficient.

B. South Dakota

The current version of South Dakota Codified Laws § 37-1-3.1 says that "[a] contract, combination, or conspiracy between two or more persons in restraint of trade or commerce *any part of which is within this state* is unlawful." (Emphasis added.) The *NMV* court assumed the South Dakota state legislature "intended its antitrust coverage to be as broad as possible" and concluded that "plaintiffs need only allege that a part of the trade or commerce occurred within South Dakota." *NMV*, 350 F. Supp. 2d at 172. The court found that the sales of motor vehicles in

[29] *See also, Pooler v. R.J. Reynolds Tobacco Co.*, No. CV00-02674, 2001 WL 403167, at *2 (D. Nev. Apr. 4, 2001) (alleged conspiracy to maintain high cigarette prices in domestic and foreign markets encompassed marketing and sales of tobacco products in Nevada); *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 414 (D. Del. 2007) ("*Intel*") (refusing to dismiss Nevada antitrust claims on intrastate issue because the "allegations of anticompetitive conduct by Intel include the sale of the x86 microprocessor in Nevada markets.").

the state satisfied that requirement. *See id*.[30] Likewise here, allegations of "transactions between Defendants and their customers throughout the United States," include sales of chocolate in South Dakota, and satisfy the statute's requirements. Accordingly, the South Dakota claim should not be dismissed.

C. Tennessee

The Tennessee antitrust statute prohibits anti-competitive arrangements which tend to lessen "full and free competition in the importation or sale of articles imported into this state . . . or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product." Tenn. Code Ann. § 47-25-101. The *NMV* court construed the statute as sufficiently broad to deny a motion to dismiss the Tennessee antitrust claims. The *NMV* court relied on a recent Tennessee Court of Appeals case that extensively analyzed the Tennessee antitrust statute. *See Sherwood v. Microsoft Corp.*, No. M2000-01850-COA-R9-CV, 2003 WL 21780975, at *17 (Tenn. Ct. App. July 31, 2003) ("We conclude that Tennessee's antitrust statute is not limited to anticompetitive conduct occurring within the boundaries of the state. We also conclude that it is not limited to transactions between the parties that are predominantly intrastate in character.")

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[30] *See also Intel*, 496 F. Supp. 2d at 414 (agreeing with *NMV*'s interpretation of the South Dakota statute); *SRAM Antitrust Litig.*, 2008 WL 426522, at *9 (finding allegation that defendants "produced, promoted, sold, marketed, and/or distributed SRAM in each of the states identified herein" were sufficient to support a claim under the South Dakota antitrust statute) (internal quotation marks omitted).

The *Sherwood* court used a "substantial effects" standard, and definitively establishes that "the [Tennessee] legislature clearly intended that the Act apply to anticompetitive conduct that decreases competition in or increases the price of goods paid by consumers in Tennessee even though those goods may have arrived in Tennessee through interstate commerce." *Id.* at *16.[31]

Plaintiffs' allegation of a conspiracy by chocolate manufacturers to increase chocolate prices (IEU Compl. ¶¶ 1-4, 91-123) necessarily involves anticompetitive conduct that increased the price paid by Tennessee consumers and has decreased competition within Tennessee. These are "substantial effects" on competition in Tennessee, and therefore satisfy the requirements of Tennessee's antitrust statute.

D. West Virginia

The West Virginia antitrust statute provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this State shall be unlawful." W. Va. Code § 47-18-3(a). The *Intel* court interpreted this statute to apply to claims involving a nationwide conspiracy with sales in West Virginia: "[b]ecause Class Plaintiffs have, at least by reasonable inference, alleged the sale of computers containing Intel x86

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[31] *See also D.R. Ward Constr. Co. v. Rohm & Haas Co.*, 470 F. Supp. 2d 485, 505-06 (E.D. Pa. 2006) (following the *NMV* interpretation of Tennessee's antitrust statute, applying a "substantial effects" standard, and denying defendants' motion to dismiss indirect purchaser claim under Tennessee antitrust statute).

microprocessors in West Virginia, the Court concludes at this juncture, that Class Plaintiffs' claims under West Virginia law withstand dismissal." *Intel*, 496 F. Supp. 2d at 414. *See also NMV*, 350 F. Supp. 2d at 175. Moreover, an unpublished West Virginia state court decision holds that West Virginia's statute "prohibits a conspiracy that restrains West Virginia trade or commerce, regardless of the locus of the conspiracy." *Buscher v. Abbott Labs.*, No. 94-C-755, at 2 (W.Va. Cir. Ct. Jan. 24, 1994) (attached as Exh. A). Based on these factors, the claims alleged in Plaintiffs' complaint are sufficient to satisfy West Virginia law.

E. Wisconsin

The Wisconsin antitrust statute prohibits "unfair and discriminatory business practices which destroy or hamper competition." Wis. Stat. § 133.01. The statute further states, "[i]t is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition." *Id.* Recent Wisconsin Supreme Court decisions have held that plaintiffs may sue for price-fixing conduct in violation of Wisconsin's antitrust law if that conduct had substantial effects in the state, even if it occurred "predominantly or exclusively outside this state." *Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 141 (Wis. 2005). *Meyers v. Bayer AG*, 735 N.W.2d 448 (Wis. 2007) affirmed *Olstad*, and held that "plaintiffs need not allege that the challenged conduct disproportionately affected Wisconsin, only that the challenged conduct

substantially affected the people of Wisconsin and had impacts in this state." *Id.* at 463. Here, Plaintiffs allege that "Defendants' unlawful conduct . . . affected customers located throughout the United States." IEU Compl. ¶ 76. This clearly includes the people of Wisconsin. Under the Wisconsin Supreme Court's "substantial effects" standard, Plaintiffs' allegations are sufficient to state a claim under the Wisconsin antitrust statute.[32]

V. PLAINTIFFS ADEQUATELY ALLEGE CONSUMER PROTECTION CLAIMS IN THE CONTESTED STATES

Defendants contend that the IEU Plaintiffs do not allege the requisite deceptive or unconscionable conduct required under the consumer protection or deceptive trade practice statutes of selected states. *See* Def. IEU Br. at 26-33. Defendants ignore the particularized conspiracy allegations set forth in Plaintiffs' complaint (IEU Compl. ¶¶ 91-121) demonstrating the manner and means whereby Defendants' acts and conduct forced Plaintiffs to pay artificially inflated prices for chocolate products during the Class Period. These allegations include at least 14

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[32] If the Court does grant Defendants' motion for any state with respect to a technical pleading deficiency that might be cured by amendment, Plaintiffs respectfully request leave to amend their complaint in order to cure the pleading deficiency. Whether to permit parties to amend a complaint is a matter entrusted to the court's "sound discretion." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 299 (2d Cir. 2007). Federal Rule of Civil Procedure 15(a) provides that leave to amend a complaint "shall be freely given when justice so requires. Furthermore, "[i]t is the usual practice upon granting a motion to dismiss to allow leave to replead." *Cortec Indus., Inc. v. Sum Holdings L.P.*, 949 F.2d 42, 48 (2d Cir. 1991).

specific overt acts executed by Defendants' Canadian counterparts with the knowledge and active participation of Defendants' United States executives. Those acts evidence specific meetings between specific actors at which specific pricing and related decisions were made.[33] *See* IEU Compl. ¶ 110.

Plaintiffs adequately plead their claims under state consumer protection laws, as well as state antitrust laws. Defendants incorrectly assert that certain of Plaintiffs' consumer protection claims fail because either (a) they do not allege that Defendants committed any deceptive acts, or (b) they do not allege unconscionable conduct. In fact, Plaintiffs plead facts supporting their consumer protection claims under either the unfair, unconscionable, or deceptive standards.

A. Arkansas

To invalidate Plaintiffs' Arkansas claim, Defendants rely solely on *State ex rel. Bryant v. R & A Investment Co.*, 985 S.W.2d 299, 302 (Ark. 1999). This case, in fact, supports Plaintiffs' Arkansas claim. At issue there were alleged violations

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[33] Specifically, Plaintiffs allege that Defendants and their co-conspirators (a) participated in meetings and conversations during which they agreed to charge prices at certain levels, and otherwise to fix, increase, maintain, or stabilize prices of chocolate products in the United States; (b) issued price announcements for the sale of chocolate products at prices that, in the aggregate, suggest unusual, lockstep behavior indicative of a non-competitive market; and (c) participated in meetings and conversations to implement, adhere, and police their conspiratorial agreement. *See* IEU Compl. ¶ 106. Further, the complaint alleges that Defendants "have engaged in unfair competition or unfair, unconscionable, deceptive, or fraudulent practices" in violation of the consumer protection or unfair competition statutes of sixteen states. *Id*. ¶ 160.

of Arkansas' Deceptive Trade Practices Act ("DTPA"), Ark. Code Ann. § 4-88-107(a)(10), which prohibits "[e]ngaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade."[34] The court held that the Attorney General had standing to enforce the provisions of the DTPA for unconscionable business practices involving usurious contracts: the practice of charging usurious interest rates was unconscionable and deceptive. The Arkansas Supreme Court emphasized that the DTPA was enacted to protect consumers, not to immunize commercial predators, and that Arkansas courts give the DTPA a "liberal construction." *Bryant*, 985 S.W.2d at 302. Under any construction of the Arkansas DTPA, Arkansas law makes clear that Defendants' price-fixing conspiracy constitutes an unconscionable deceptive trade practice.[35]

For example, in assessing whether a particular act or contractual provision is unconscionable, the Arkansas courts review the totality of the surrounding circumstances. The two dispositive considerations are whether: (a) there is a gross inequality of bargaining power between the parties and (b) the aggrieved party was made aware of and comprehended the provision or conduct in question. *See*

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[34] This was a suit brought by the Arkansas Attorney General against a title pawn broker for violations of the usury provisions of the Arkansas Constitution, which the Attorney General successfully claimed also violated Arkansas's DTPA.

[35] The infirmity of Defendants' assertion that the DTPA does not "reach price fixing" (IEU Mot. at 31-32) is confirmed by their failure to cite authority from an Arkansas court so holding.

Jordan v. Diamond Equip. & Supply Co., 207 S.W.3d 525, 535 (Ark. 2005).

Defendants do not suggest that Plaintiffs' transactions involved equality of bargaining power or that Defendants disclosed their conspiratorial acts and conduct when Plaintiffs made their purchases. On the other hand, the complaint alleges with particularity that Defendants used their dominant collective market share in the United States and Canada to raise prices and erect barriers to entry in the United States. The complaint also alleges that Defendants imposed industry-wide price increases in the same or similar amounts for chocolate products that became effective at or near the same time. *See* IEU Compl. ¶ 89. These allegations demonstrate the hallmark characteristics of unconscionable trade practices and negate any inference that Plaintiffs had even a scintilla of choice.

Execution of a price-fixing conspiracy is no different than a scheme to charge usurious interest rates: each indisputably constitutes an unconscionable, false, and deceptive trade practice, and whether such conduct is "unconscionable" under Arkansas law is a question of fact for the jury to decide. Additionally, Plaintiffs specifically allege that Defendants' conspiracy had the effect of depriving Arkansas consumers of the benefit of free and open competition. *See id.* ¶ 122(c). This allegation further supports the unconscionable element of Arkansas'

DTPA. Accordingly, the Arkansas claim survives.[36]

B. District of Columbia

Defendants rely on *Riggs National Bank v. District of Columbia*, 581 A.2d 1229, 1250-51 (D.C. 1990), to nullify Plaintiffs' claims under the District of Columbia Consumer Protection Procedures Act ("DCCPPA"), D.C. Code Ann. § 28-3904. That case, however, arose under the District of Columbia's Uniform Disposition of Unclaimed Property Act, D.C. Code Ann. § 41-101 *et seq*., and considered specifically whether defendant bank's signature card constituted a contract of adhesion. Hence, the case is irrelevant here. The DCCPPA was intended to protect consumers from a broad array of deceptive trade practices, and so must be construed broadly. "The [DCCPPA] is a comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers." *Atwater v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 566 A.2d 462, 465 (D.C. 1989). Even though the DCCPPA specifies a number of specific unlawful trade practices, "the enumeration is not exclusive." *District Cablevision Ltd. P'ship v. Bassin*, 828 A.2d 714, 723 (D.C. 2003) (citing *Atwater*, 566 A.2d at 465). "A main purpose of the [DCCPPA] is to

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[36] Defendants rely on the decision in *GPU I,* 527 F. Supp. 2d at 1029-30, (*see* IEU Mot. at 28), for the notion that the Arkansas DTPA does not prohibit price fixing. That holding is flawed because no Arkansas court to our knowledge has held that an antitrust claim is not "the kind of conduct" prohibited by the DTPA, and neither Defendants nor the *GPU I* court cites such a case.

'assure that a just mechanism exists to remedy *all* improper trade practices.'" *Id*. (quoting D.C. Code § 28-3901(b)(1)) (emphasis added). "Trade practices that violate other laws, including the common law, also fall within the purview of the [DCCPPA]." *Id*.[37] These cases construe the DCCPPA as a "comprehensive" statute designed to remedy "all improper trade practices," validating Plaintiffs' price fixing claim under the statute. *TFT-LCD*, 2008 WL 3916309, at *13 (internal quotation marks omitted). Furthermore, price fixing is actionable in the District of Columbia under both the Antitrust Act of 1980, D.C. Code Ann. § 28-4501 *et seq.*,[38] and the Consumer Protection Procedures Act. *See Boyle v. Giral*, 820 A.2d 561, 563 (D.C. 2003). The District of Columbia claim is thus actionable.

C. Kansas

Plaintiffs' Kansas antitrust claims are based on Kansas Statutes Annotated § 50-101 *et seq*. (IEU Compl. ¶ 141), and their Consumer Protection Act claims are rooted in Kansas Statute Annotated § 50-623 *et seq*. Concerning the antitrust claim, Kansas has adopted an *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), repealer that allows an action "regardless of whether such injured person dealt

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[37] *See also Osbourne v. Capital City Mortgage Corp.*, 727 A.2d 322, 325-26 (D.C. 1999) ("[T]he [DCCPPA's] extensive enforcement mechanisms apply not only to the unlawful trade practices proscribed by § 28-3904, but to all other statutory and common law prohibitions.").

[38] The Complaint contains an inadvertent typographical error. Plaintiffs' citation to District of Columbia Code Annotated § 28-4503 should be § 28-4502.

directly or indirectly with the defendant," Kan. Stat. Ann. § 50-161(b). *See*, *e.g.*, *Bellinder v. Microsoft Corp.*, Nos. 00-C-0855 *et al.*, 2001 WL 1397995, at *8-*9 (D. Kan. Sept. 7, 2001) (certifying indirect purchaser class). The Kansas antitrust claim thus stands. Concerning the Kansas Consumer Protection Act claim, Defendants do not and cannot cite a single Kansas case demonstrating that the allegations of the complaint are outside the scope of Kansas Statute Annotated § 50-627, which provides multiple non-exclusive examples of "deceptive acts and practices." *See generally* Def. IEU Br.[39] Kansas law, furthermore, holds that the determination of unconscionability is a fact-based question that cannot be resolved on a motion to dismiss. *See State ex rel. Stovall v. Confimed.Com, L.L.C.*, 38 P.3d 707, 713 (Kan. 2002) ("the determination of unconscionability involves not only a review of the written documents but also consideration of the witness testimony as to actions surrounding the transaction"). The Kansas Consumer Protection Act requirements accordingly are met here.

D. New Mexico

Plaintiffs sue under New Mexico's Antitrust Act, N.M. Stat. Ann. § 57-1-1 *et seq*. and its Unfair Practices Act" ("UPA"), N.M. Stat. Ann. § 57-12-1 *et seq*. Concerning the antitrust claim, New Mexico adopted an *Illinois Brick* repealer that

[39] In particular, Defendants do not and cannot cite a single Kansas decision supporting their premise that the Kansas Consumer Protection Act "provides no relief for alleged price fixing." Def. IEU Br. at 32.

confers a cause of action on persons "threatened with injury or injured . . . directly or indirectly." N.M. Stat. Ann. § 57-1-3(A)(2). Further, New Mexico prohibits conspiracy "in restraint of trade or commerce, any part of which trade or commerce is within this state." *Id*. § 57-1-1. New Mexico chocolate sales are trade or commerce within New Mexico. Plaintiffs' antitrust claim clearly meets the applicable pleading standard. The New Mexico UPA prohibits "[u]nfair or deceptive trade practices ***and*** unconscionable trade practices in the conduct of any trade or commerce." *Id*. § 57-12-3 (emphasis added).[40] New Mexico courts hold that the UPA is remedial legislation, and thus must be interpreted liberally to facilitate and accomplish its purposes and intent. *See Salmeron v. Highlands Ford Sales, Inc.*, 271 F. Supp. 2d 1314, 1318 (D.N.M. 2003) (citing *State ex rel. Stratton v. Gurley Motor Co.*, 737 P.2d 1180, 1185 (N.M. Ct. App. 1987)). In New Mexico, an "unconscionable trade practice" is "an act or practice . . . which to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid." N.M. Stat. Ann. § 57-12-2-E. The claim that Defendants' conspiratorial acts of collusion to set prices caused the New Mexico Plaintiffs to pay supra-competitive prices for

[40] Defendants overlook the plain language of the UPA wherein the New Mexico legislature defined and treated separately violations based on "unfair or deceptive trade practices" and those based on "unconscionable trade practices."

chocolate products, *see* IEU Compl. ¶ 134, adequately alleges a gross disparity between the value received and the price paid for the chocolate products they purchased. *See*, *e.g.*, *NMV*, 350 F. Supp. 2d at 196 (New Mexico indirect purchasers adequately stated UPA claims against automobile companies and national dealer associations for alleged conspiracy among themselves to prevent less expensive Canadian vehicles from entering the American market). To put a point on it, Plaintiffs allege that Defendants' conspiracy resulted in material artificial increases in the price of chocolate products, which resulted in a "gross disparity" between the value received and the prices they paid for those products. *Accord TFT-LCD*, 2008 WL 3916309, at *14. Controlling as well is New Mexico Statutes Annotated § 57-12-4, which requires the New Mexico courts, in construing the UPA, to "be guided by the interpretations given by the federal trade commission and the federal courts." In this context, Defendants' acts and conduct also constituted "'unfair or deceptive trade practice[s]'" within the meaning of New Mexico Statutes Annotated § 57-12-2-D, as construed by the Federal Trade Commission and the Supreme Court. As just one example, the Supreme Court has defined unfair acts within Section 5 of the FTC Act as conduct that is "immoral, unethical, oppressive, . . . unscrupulous . . . [or] causes substantial injury to consumers." *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972) (internal quotation marks omitted). Defendants' price fixing

scheme plainly falls within the "immoral, unethical, oppressive, or unscrupulous" standard. Plaintiffs' New Mexico claims accordingly may not be dismissed.

E. Maine

Plaintiffs sue under Maine's Unfair Trade Practices Act ("UTPA"), Me. Rev. Stat. Ann. tit. 5, §§ 205-A to 214, and Maine's antitrust statute, Me. Rev. Stat. Ann. tit. 10, § 1101 *et seq*. UTPA was originally enacted in 1999 as a "little FTC Act," and Maine Revised Statutes Annotated Title 5, § 207(1) specifically directs that Maine courts in interpreting the UTPA are to "be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to Section 45(a)(1) of the Federal Trade Commission Act (15 U.S.C. [§] 45(a)(1)), as from time to time amended." Accordingly, since a violation of the Sherman or Clayton Acts can also constitute a violation of section 5, *see Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 689-92 (1948), so too, can Defendants' price fixing conspiracy constitute a violation of the UTPA. The UTPA provides broad protection to Maine consumers by declaring that any "[u]nfair method[] of competition" and any "unfair or deceptive acts or practices in the conduct of any trade or commerce" are "unlawful." Me. Rev. Stat. Ann. tit. 5, § 207. Maine courts thus examine federal precedent in interpreting the UTPA. *See Tungate v. MacLean-Stevens Studios,*

Inc., 714 A.2d 792, 797 (Me. 1998).[41] Maine courts also hold that such consumer protection statutes as the UTPA "will be interpreted liberally to carry out the beneficent purpose of protecting" consumers. *Tanguay v. Seacoast Tractor Sales, Inc.*, 494 A.2d 1364, 1367 (Me. 1985) (Used Car Information Act). Combination of these principles leads to the conclusion that Plaintiffs have stated an actionable UPTA claim that satisfies the *Federal Trade Commission v. Sperry* "immoral, unethical, oppressive, or unscrupulous" standard. Concerning the antitrust claim, Maine has adopted an *Illinois Brick* repealer that grants standing to any person "injured directly or indirectly" by an antitrust violation. Me. Rev. Stat. Ann. tit. 10, § 1104(1). The Maine claims should be sustained as pleaded.

F. Rhode Island

Rhode Island's Unfair Trade Practices and Consumer Protection Act ("UTCPA"), R.I. Gen. Laws § 6-1.1-1 *et seq.*, specifies that "[u]nfair methods of competition and unfair or deceptive acts or practices means any one or more of the following" 20 prohibited practices. Pursuant to Rhode Island General Laws § 6-13-1-5.2(a), "any person who purchases or leases goods primarily for personal,

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[41] Defendants misread *Tungate*. *See* IEU Mot. at 30. The issue there was whether an undisclosed commission was an unfair or defective act. *See Tungate*, 714 A.2d at 797. The relevant provision in this case is not the prohibition on "unfair or deceptive acts," but instead the ban on "unfair methods of competition," which was not at issue in *Tungate*. Hence, *Tungate*'s standards for establishing deception are not relevant here.

family or household purposes" has standing to sue under the UTCPA. Rhode Island has adopted the *Federal Trade Commission v. Sperry* "immoral, unethical, oppressive, or unscrupulous" standard for determining whether a trade practice is unfair or deceptive. *Ames v. Oceanside Welding & Towing Co.*, 767 A.2d 677, 681 (R.I. 2001) (internal quotation marks omitted).[42]

Ignoring those controlling decisions, Defendants contend that the UTCPA claim should be dismissed because permitting a "cause of action for antitrust violations . . . would effectively permit an end-run around Rhode Island's Antitrust Act, which precludes claims by indirect purchasers." Def. IEU Br. at 32-33. Defendants also move to dismiss on the ground that the UTCPA "does not provide a cause of action for antitrust violations." *Id*. at 32. But Plaintiffs allege that Defendants failed to disclose their intentional and purposeful anti-competitive acts, including acts and conduct of collusion to set prices and their acts of price fixing, caused Plaintiffs to pay supra-competitive prices for chocolate products. *See* IEU Compl. ¶ 134. These allegations are sufficient to state a UTCPA claim under Rhode Island law. *See Ames*, 767 A.2d at 681. *Accord In re TFT-LCD*, 2008 WL 3916069, at *13; *SRAM Antitrust Litig.*, No. 07-cv-01819, 2008 WL 2610549, at *4 (N.D. Cal. June 27, 2008); *DRAM*, 536 F. Supp. 2d at 1144-45. These cases

[42] *See also Park v. Ford Motor Co.*, 844 A.2d 687, 692 (R.I. 2004) (recognizing that, in enacting the UTCPA, the Rhode Island legislature "intended to declare unlawful a broad variety of activities that are unfair or deceptive").

make clear that price fixing meets the test for "unscrupulous" conduct, which injures unwitting consumers in Rhode Island and elsewhere. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 233 F.R.D. 229, 230-31 (D. Mass. 2006) (certifying consumer co-payor class for claims under Rhode Island General Laws § 6-13.1-1).[43]

Relatedly, in addition to the twenty specifically enumerated practices that are prohibited by the UTCPA, prohibited acts further are defined broadly to include "[e]ngaging in any other conduct that similarly creates a likelihood of confusion or of misunderstanding," and "[e]ngaging in any act or practice that is unfair or deceptive to the consumer." R.I. Gen. Laws § 6-13.1-1(xii), (xiii). That broad language plainly includes the unfair and deceptive conduct at issue here.

VI. PLAINTIFFS STATE A NATIONWIDE CLAIM FOR UNJUST ENRICHMENT

Plaintiffs' fourth claim for relief alleges that (a) Defendants have been unjustly enriched through overpayments by Plaintiffs and the Class and the

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[43] Defendants also assert the UTCPA "does not provide a cause of action for antitrust violations." Def. IEU Br. at 32. The single case they rely upon, *ERI Max Entertainment, Inc. v. Streisand*, 690 A.2d 1351 (R.I. 1997), does not support that broad interpretation. It held that a complaint challenging Blockbuster Video's exclusive distribution rights to a special videotape concert was not an act of "unfair competition" because plaintiff was a business, not a consumer, and hence did not have standing to sue under the UTCPA. *See id.* at 1353-54. Furthermore, Defendants do not invoke a single Rhode Island case holding that indirect purchasers do not have standing to sue under the UTCPA.

resulting profits Defendants reaped as the direct result of such overpayments; (b) it would be inequitable for Defendants to retain the benefit of the overpayments; (c) Plaintiffs and the Class accordingly are entitled to the return of the overpayments either as damages or restitution; and, therefore, (d) Plaintiffs and the Class seek disgorgement of all profits resulting from such overpayments and the establishment of a constructive trust from which Plaintiffs and Class members may seek restitution. *See* IEU Compl. ¶¶ 180-185. Plaintiffs thus allege the essential elements of an unjust enrichment claim: (1) the unjust; (2) retention of; (3) a benefit received; (4) at the expense of another. *See In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 697 (S.D. Fla. 2004).

Plaintiffs assert this claim on behalf of a nationwide class under the unjust enrichment laws of 50 states, the District of Columbia, and Puerto Rico. Because common proof will be used to measure the restitution to which the class is entitled, common questions of law and fact predominate over questions affecting class members individually.

Defendants move to dismiss this count on the principal ground that they do not have adequate notice of the unjust enrichment claims against them and no way to evaluate their adequacy (or defend against them) without an indication of which state unjust enrichment laws plaintiffs intend to invoke. Defendants also argue that Plaintiffs' unjust enrichment claim fails as an "attempt to circumvent" the holding

in *Illinois Brick*.[44] *See* Def. IEU Br. at 33-35. Tellingly, Defendants did not cite a single case from any state, the District of Columbia, or Puerto Rico holding that Plaintiffs' Count IV claims are barred on any theory. *See generally* Def. IEU Br.

A. The Complaint Satisfies Federal Rules 8 and 12

Count IV meets Rule 8(a)'s requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief." "Each allegation must be simple, concise, and direct. No technical form is required." Fed. R. Civ. P. 8(d) (2007). In short, Plaintiffs need only "give the defendant fair notice of what [their] claim is [unjust enrichment] and the grounds upon which it rests" (the overpayments). *Erickson*, 127 S. Ct. at 2200 (internal quotation marks omitted).[45] Defendants' motion should accordingly fail.

B. *Illinois Brick* Is Not Violated

Defendants' invocation of *Illinois Brick* is also flawed. Defendants fail to view Plaintiffs' unjust enrichment allegations in the light most favorable to Plaintiffs. *See Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). Defendants also confuse the "right to recover an equitable

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[44] Defendants concede by omission that Plaintiffs properly plead unjust enrichment as an alternative theory of recovery. *See* Fed. R. Civ. P. 8(e)(2) (2007) ("A party may . . . state as many separate claims or defenses as the party has, regardless of consistency.").

[45] Defendants concede by omission that the "*Twombly* pleading standard" does not apply to Plaintiffs' unjust enrichment claims. *See* Def. IEU Br. at 7-9, 11, 29.

remedy under a claim based upon principles of unjust enrichment with [the] right to recover a remedy at law for an alleged violation of a state's antitrust laws." *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 669 (E.D. Mich. 2000).

Again ignoring their burden of Rule 12(b)(6) proof, Defendants imply that Plaintiffs' unjust enrichment claim depends upon their state antitrust claims. But courts "often award equitable remedies under common law claims for unjust enrichment in circumstances where claims based upon contract or other state law violations prove unsuccessful." *Id*. The reason for this is that unjust enrichment claims are "grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust." *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987).[46]

Plaintiffs' unjust enrichment claims do ***not*** depend on the allegations and proof of the elements necessary for their antitrust claims, but rather upon allegations and proof that Defendants "unjustly retained a benefit to the plaintiff's detriment, and that [their] retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *In re Cardizem*, 105 F. Supp. 2d at 669 (internal quotation marks omitted).[47] *See* Def. IEU Br. at 33-35.[48] These

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[46] *Accord Acton Constr. Co. v. State*, 383 N.W.2d 416, 417 (Minn. App. 1986); *Paschall's Inc. v. Dozier*, 407 S.W.2d 150, 155-56 (Tenn. 1966).

[47] *See*, *e.g.*, *D.R. Ward Constr. Co.*, 470 F. Supp. 2d at 506 ("plaintiffs may bring independent unjust enrichment claims under Arizona, Tennessee, and Vermont law

cases flatly repudiate the decision in *NMV*, which held that plaintiffs' antitrust and

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and . . . the viability of these claims does not hinge upon the success of the state statutory antitrust claims"); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d at 543-46 (court held that indirect purchaser plaintiffs adequately stated claims of 50 states, the District of Columbia, and Puerto Rico); *Federal Trade Comm'n v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 46, 49, 56 (D.D.C. 1999) (unjust enrichment/restitution claims ripe for adjudication even though State antitrust claim was dismissed); *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.2d 512, 524-26 (Tenn. 2005) (unjust enrichment claim was found to be ripe for adjudication even though Tennessee Trade Practices Act was dismissed); *Hollowell v. Career Decisions, Inc.*, 298 N.W.2d 915, 920 (Mich. App. 1980) ("The essential elements of such a claim are (1) receipt of a benefit by the defendant from the plaintiff and (2) which benefit it is inequitable that the defendant retain."); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Chipetine*, 634 N.Y.S.2d 469, 471 (1st Dep't 1995) (proof of unjust enrichment claim "requires the court to determine whether it is against equity and good conscience to permit defendant to retain what is sought to be recovered") (internal quotation marks omitted); *Booher v. Frue*, 358 S.E.2d 127, 129 (N.C. App. 1987) (North Carolina law distinguishes between damages recovery and restitution recovery; the damage award is designed to compensate a plaintiff for his loss, whereas "[t]he principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep . . . even though plaintiff may have suffered no demonstrable losses") (internal quotation marks omitted); *Emerine v. Yancey*, 680 A.2d 1380, 1383 (D.C. 1996) ("to recover on a theory of unjust enrichment, . . . the plaintiff must show that [the defendant] was unjustly enriched at his expense and that the circumstances were such that that in good conscience [defendant] should make restitution") (internal quotation marks omitted); *Schumacher v. Tyson Fresh Meats, Inc.*, 221 F.R.D. 605, 612 (D.S.D. 2004) ("[T]he very nature of such claims requires a focus on the gains of the defendants, not the losses of the plaintiffs. That is a universal thread throughout all common law causes of action for unjust enrichment.").

[48] Defendants overlook this point in their citation of the *SRAM* and *TFT-LCD* cases. *See* Def. IEU Br. at 34-35. Those courts did not consider this precise argument. Furthermore, the *SRAM* plaintiffs voluntarily re-plead, and filed an amended complaint alleging unjust enrichment claims under the laws of the various states. *See* Third Amended Compl., *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. M:07-CV-01819, at 20-30 (N.D. Cal. filed Aug. 1, 2008) (Dkt. 507).

unjust enrichment claims were so intertwined that they could "not use state common law restitution to recover money from the defendants for violation of the federal antitrust laws" because of *Illinois Brick*. 350 F. Supp. 2d at 211. Even that court acknowledged, however, that claims for "restitutionary relief" may not be dismissed if based on state antitrust laws that do not preclude restitutionary remedies. Plaintiffs in that case, unlike here, did not argue their unjust enrichment claims were not precluded in states following *Illinois Brick*.

Accordingly, Plaintiffs' nationwide unjust enrichment claim should not be dismissed because of *Illinois Brick*.

C. Plaintiffs Need Not Plead Specific State Unjust Enrichment Laws At This Stage

As shown above, Plaintiffs need not plead specific state unjust enrichment laws at this stage because (1) the laws of each state do not materially differ and (2) Plaintiffs' unjust enrichment claims are ***independent of*** and ***not dependent upon*** their state antitrust claims. Thus, Defendants' claim that Plaintiffs are required to plead the specific state laws is wrong.

The laws of the 50 states informing unjust enrichment claims do not differ in any material respect, and so are susceptible to nationwide treatment. *See In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. at 697 n.40 (the standards for evaluating unjust enrichment under the laws of the multiple states at issue – Alabama, California, Florida, Illinois, Kansas, Maine, Michigan, Minnesota,

Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, West Virginia, and Wisconsin – were "virtually identical").[49] Defendants ignore their heavy burden on this dispositive point as well.

For these reasons, courts routinely refuse to dismiss nationwide class claims for unjust enrichment, and the same result is required here. *See*, *e.g.*, *GPU I*, 527 F. Supp. 2d at 1029 (refusing to dismiss nationwide class claim for unjust enrichment on the ground that such claims "should be dismissed as an attempt to circumvent the holding of *Illinois Brick*," and rejecting defendants' argument that state unjust enrichment laws materially differed).[50] As noted by the *GPU I* court, Defendants' will bear the burden at the class certification phase of the case to demonstrate any (perceived) "vagaries" in state unjust enrichment laws that **may**

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[49] *Singer v. AT&T Corp.*, 185 F.R.D. 681, 692 (S.D. Fla. 1998) (unjust enrichment is one of those "universally recognized causes of action that are materially the same throughout the United States"); *In re Abbott Labs.*, 2007 WL 1689899, at *9 ("the variations among some States' unjust enrichment laws do not significantly alter the central issue or the manner of proof. Common to all class members and provable on a class-wide basis is whether Defendant unjustly acquired additional revenues or profits by virtue of an anti-competitive premium on the price of Norvir."); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022-23 (9th Cir. 1998) (the "idiosyncratic differences" between state unjust enrichment laws "are not sufficiently substantive to predominate over the shared claims").

[50] *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 240 (C.D. Cal. 2003) (certifying nationwide class of unjust enrichment claimants); *Schumacher*, 221 F.R.D. at 613 (same); *Hanlon*, 150 F.3d at 1022-23 (same); *In re Abbott Labs.*, 2007 WL 1689899, at *9-*10 (same, with the exception of Indiana and Ohio;); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 241, 248 (D. Del. 2002) (court certified settlement class on claims for unjust enrichment based on the laws of 50 states and the District of Columbia).

bear on the commonality and manageability issues. For now, however, all such issues are unripe. *Id.*[51]

Defendants fail to discharge their heavy burden of demonstrating under Rules 8 and 12 that Plaintiffs have not pled facts entitling them to relief. Defendants do not anchor their motion on specific cases demonstrating that Plaintiffs' unjust enrichment claims are deficient under specific state precedent.

CONCLUSION

For the reasons set forth above, the Indirect End User Plaintiffs respectfully request the Court to deny Defendants' motion to dismiss Plaintiffs' Consolidated Amended Complaint.

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[51] *Accord In re Hypodermic Prods. Antitrust Litig.*, MDL No. 1730, 2007 WL 1959225, at *16 (D.N.J. June 29, 2007) ("To the extent that Defendant moves to dismiss Plaintiffs' claims of unjust enrichment on the basis that certain individual states impose additional requirements . . . the Court likewise determines that it is premature to consider these requirements on a state by state basis, at this time.); *Rios v. State Farm Fire & Cas. Co.*, 469 F. Supp. 2d 727, 740-42 (S.D. Iowa 2007) (denying as premature motion to strike and dismiss nationwide class allegations on breach of contract and unjust enrichment claims).

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Respectfully submitted,

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