IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE CLASS 8 TRANSMISSION INDIRECT PURCHASER ANTITRUST LITIGATION	)	**Civil Action No. 11-cv-00009 (SLR)** **CLASS ACTION**

REPLY BRIEF IN FURTHER SUPPORT OF INDIRECT PURCHASER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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Defendants' Brief in Opposition to the Indirect Purchaser Plaintiffs' Motion for Class Certification ("Opposition" or "Def. Br.") raises no arguments which could defeat class certification. Accordingly, as further demonstrated below the Indirect Purchaser Plaintiffs ("Plaintiffs" or "IPPs")[1] have met their burden under Rule 23 of the Federal Rules of Civil Procedure, and the states classes should be certified.

PRELIMINARY STATEMENT

The facts and data demonstrate that common issues predominate – this is all the IPPs must show at this stage. The IPPs have demonstrated that all class members were impacted as a result of an overcharge, and the overcharge was passed through at a common rate.

To counter this, Defendants and their expert Dr. John H. Johnson claim various supposed differences, often based on speculation rather than empirical evidence, which are mere distractions meant to make the classwide impact and damages analysis seem considerably more complicated than it is.

One way that Defendants and Dr. Johnson do this is by taking the data provided and breaking it down into such small chunks that the chunks misrepresent what the data reveals. It is much like snowfall – all snowflakes look different when you look at them closely, but such differences are meaningless when measuring the effects of a blizzard.

Because Dr. Johnson runs numerous "mini-regressions" on small subsets the data, at face value his "tests" show differing and varying results. But because the data are sliced-and-diced in this manner, without a foundation in economic theory in doing so, his results are not meaningful, but are instead improper and economically insignificant. Furthermore, even Dr. Johnson's own

[1] Unless otherwise indicated, the IPPs incorporate the same definitions from their Opening Brief in Support of the Motion for Class Certification, filed on November 3, 2014 [Dkt. No. 185].

slicing-and-dicing analysis confirms a significant positive pass-through of overcharge to indirect purchasers, meaning all class members were impacted by the conspiracy.

Defendants also propose supposed differences concerning the truck purchase negotiation process. While trucks are priced according to a standardized discount process that takes into account different variables, such as a customer's bargaining power, all those variables are unrelated to the transmission choice and would be identical in both (1) the actual world and (2) the world that would have existed "but-for" for alleged conspiracy. The only difference between the actual world and the but for world is that, as a result of the conspiracy, each truck purchaser paid a common overcharge.

Defendants also try to manufacture other supposed differences in an attempt to complicate the Rule 23 analysis, including arguments concerning: (1) the distribution chain for Class 8 trucks; (2) differences in performance versus linehaul transmissions; and (3) statute of limitations and state law issues. However, these are either red-herrings supported only by speculation or are issues that need not be addresses at the class certification stage.

Exclusion Of Daimler Trucks From Damages Calculation

For the reasons put forth in the Reply Declaration of Russell Lamb ("Lamb Rebuttal Report" submitted herewith) at ¶¶ 7, 11, both the Direct Purchaser Plaintiffs ("DPPs") and the IPPs have chosen to exclude purchasers of Daimler trucks (including the Freightliner, Sterling, and Western Star brands) from the respective classes.[2] The exclusion of Daimler purchasers

[2] As a result of this modification, as well as a modification excluding indirect purchasers who purchased for the purpose of resale, the IPPs wish to modify the prososed class definition for each state to the following:

> all persons or entities, in the state of [STATE] that, beginning October 1, 2002 and continuing until the present ("Class Period"), indirectly purchased new Class 8 Heavy Duty trucks containing Eaton transmissions from the following companies: Navistar International Corporation ("Navistar"); Kenworth Truck Company ("Kenworth"); Peterbilt Motors Company ("Peterbilt"); Volvo Trucks North America ("Volvo"); and Mack Trucks, Inc. ("Mack"). Excluded from this class are: (i) Defendants and their parent companies, subsidiaries, affiliates, officers, directors,

eliminates the current class representatives from the states of Tennessee, Iowa, Nebraska, and Minnesota, as those representatives purchased only Daimler trucks. We anticipate seeking to substitute adequate class representatives for those states.[3] This substitution would be necessary to preserve the rights of putative class members of those states who believed their rights were protected in this instant lawsuit.

ARGUMENT

I. COMMON ISSUES PREDOMINATE

A. Common Injury To Indirect Purchasers Exists

As Defendants concede, to demonstrate that common issues predominate, Plaintiffs must show that "all or nearly all of the proposed class members paid a higher price than they would have absent the alleged conspiracy." Def. Br. at 13.[4] This is exactly what Plaintiffs have demonstrated through the evidence in Plaintiffs' Motion and through the Dr. Lamb's Expert Report and Rebuttal Reports. [redacted]

employees, legal representatives, heirs, assigns, and co-conspirators; (ii) any judges presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action; and (iii) any person or entity who purchased a new Class 8 Heavy Duty truck for the purpose of reselling that truck as new.

[3] Pursuant to Fed. R. Civ. P. 21, "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." "Courts may allow class counsel to identify new class representatives who meet Rule 23(a) requirements. See Manual for Complex Litigation (Fourth)) § 21.26 ('[C]ourts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements. The Court may permit intervention by a new representative or may simply designate that person as a class representative in the order granting class certification.'"). *In re Welbutrin XL Antitrust Litig*., 282 F.R.D. 126, 139 (E.D. Pa. 2011); *see also In re Telectronics Pacing Systems, Inc*., 172 F.R.D. 271, 283 (S.D. Ohio 1997).

[4] *Citing In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008), *as amended* (Jan. 16, 2009); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013); *In re New Motor Vehicles Canadian Exp. Antitrust Litig*., 522 F.3d 562, 571 (1st Cir. 2008); *Blades v. Monsanto Co.*, 400 F.3d 562, 571 (8th Cir. 2005); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003).

[redacted]

B. Individualized Analysis Of Pass-Through Is Not Required

Unable to show the absence of a common injury, Defendants attempt to manufacture supposedly individualized issues to defeat predominance. Defendants claim the market for Class 8 trucks is a highly-competitive market, and that individual negotiations, monetary rebates (called "SPIFFs"), and even things like extended warranties, product support, and fuel prices[7] must therefore be considered in analyzing the overcharge pass-through. Def. Br. at 15. [redacted]

[redacted]

[5] [redacted]

[6] Defendants also note that they contest the fact of overcharge to direct purchasers, but give no further analysis in their Opposition other than referencing their Brief in Opposition to the Direct Purchasers' Motion for Class Certification. Def. Br. at 14. Given that Defendants did not set forth their arguments in this regard in their Opposition to Indirect Purchasers' Motion, Plaintiffs do not respond further herein, other than similarly referencing the briefing submitted by Direct Purchaser Plaintiffs.

[7] [redacted]

[8] [redacted]

[redacted] Dr. Johnson also provides no indication that such discounts or negotiations would have been any different if the anticompetitive conduct had not occurred. The way pricing operates here does not support the claim that pricing negotiations with customers creates individualized pass-through issues. [redacted] Further, as explained more fully in Section

[9] Notably, Dr. Johnson unsuccessfully raised similar arguments in *In re Chocolate Confectionary Antitrust Litig.*. "The second important point is by ignoring trade spend [a type of discount], what Dr. McClave has done is he has missed the enormous variation in the customers' prices, and that variation is critical to the question of common proof…The pricing process of the chocolate business is for the majority of customers a function of complex negotiation…" *In re Chocolate Confectionary Antitrust Litig.*, 1:08-MDL-1935, November 16, 2011, testimony (doc no. 1087) (5:18-6:11) (attached as Exhibit 2 to the Linkh Declaration). Similarly, Dr. Johnson argued that differences in customer size and type created individual issues. *Id* at 8-9. Notwithstanding these arguments, the court certified the class. *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 226 (M.D. Pa. 2012).

[10] [redacted]

II.A.2, infra, and the Expert Report of Russell Lamb, dated November 3, 2014, filed in *Wallach v. Eaton, et al*., 10-cv-260 ("Lamb Direct Report") at ¶ 160, all of the discounts and SPIFFs contemplated by Dr. Johnson would have been the same or greater in the but-for world, absent the conspiracy.

In summary, where negotiations for a truck are always based off a list price generated by the OEMs from the total cost of components, where the evidence shows customers do not negotiate the prices of individual components when pricing a truck with a dealer, and where all of these discounts and negotiations would have been the same absent the conspiracy, all of the evidence suggests negotiations and discounts need not be considered on an individualized basis in determining pass-through. Defendants and Dr. Johnson provide no evidence to the contrary, only speculation.

C. The Distribution Chain For Class 8 Trucks Is Not Complex Such That A Reseller-by-Reseller Analysis Of Pass-Through Is Required

In another attempt to create individualized issues when there are none, Defendants characterize the Class 8 truck distribution chain as so complex that individualized inquiries would be required.[11]

[11] Not supporting their argument, the cases cited by Defendants all contemplate markets where the complexity of distribution is magnitudes greater than how truck transmissions are sold. As an example, in *In re Flash Memory Antitrust Litig*., No. C 07-0086 SBA, 2010 WL 2332081, at *2 (N.D. Cal. June 9, 2010), the court identified five separate levels in the distribution chain, and stated that at each level a distributor "may add 'value'—and ultimately, cost, to the consumer—by incorporating the NAND flash chip with other components to make an intermediate product or finished good or providing transportation or product display services." There were "thousands of differentiated products with diverse price points" incorporating the chip and actual evidence "that different retailers respond to cost changes in different ways based on their individual competitive situations and strategies." *Id*. at *2, *11-12. Due to this actual evidence of the complexity of the market and thousands of very different products at issue, the court found certification improper.

In *In re Graphics Processing Units Antitrust Litig*. ("GPU"), 253 F.R.D. 478, 506-07 (N.D. Cal. 2008), the court found that the methodology for proving class wide impact was flawed where plaintiffs' expert, on her own initiative, used different variables in various reseller-specific regressions. This raised a concern about the "individualized nature of [the expert's] methodology" and "significant concerns about the manageability of this potential class action." *Id*. at 504. In that case, where indirect purchasers could have purchased either a graphics card containing the computer chip, or an entire computer containing such a graphics card, from "potentially thousands of different

In fact, the distribution chain in this case is remarkably simple. Eaton transmissions were sold to the four OEM manufacturers. Those manufacturers sold or delivered trucks containing the transmissions to their owned or authorized dealers, who sold the trucks to customers. [redacted]

However, Defendants raise the specter of three additional potential links in the chain: indirect purchases by independent resellers, body-building companies, and leasing or rental entities. Each of these entities constitutes a relatively small number of indirect purchasers, and each will be discussed in turn.

1. Independent Resellers And Body-Builders

The Indirect Purchaser Plaintiffs do not intend to seek duplicative recovery, and seek only to represent end purchasers. The IPPs have modified class definition to any indirect purchaser, such as independent resellers or body-builders, who bought Class 8 trucks for purposes of resale.[12]

[redacted]

retailers and manufacturers," the expert's own decision to utilize an inherently individualized methodology highlighted the complex nature of the market and led to denial of certification. *Id*. at 499, 504.[11] Dr. Lamb proposes no such individualized methodology here.

[12] Aside from any concern regarding duplicative recovery, there is no explanation why an independent reseller would, as Defendants say, "render[] tracing an overcharge on a common basis impossible." Def. Br. at 18. The presence of resellers in other indirect purchaser cases has not impeded certification. *See, e.g., In re OSB Antitrust Litig,* Civ. No. 06-826,2007 WL 2253425, at *12 (E.D. Pa. Aug. 3, 2007) (certifying a class of indirect purchasers who bought from "manufacturers, distributors, and resellers"); *see also In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 603 (N.D. Cal. 2010); *amended in part,* 2011 WL 3268649 (N.D. Cal. July 28, 2011) ("Numerous courts have held that variations in products and complexities in a distribution chain do not preclude an estimation of whether an overcharge impacted end purchasers.")

[redacted] Accordingly, Dr. Johnson's speculation regarding the impact of these companies should not defeat certification.

[redacted] Because such a small number of indirect purchasers purchased from either body-builders or independent resellers, if the Court deems necessary, such end-user purchasers could be excluded from the class without substantially reducing the size of the class. [14]

2. Leasing Companies

The inclusion of leasing companies in Defendants' argument is more perplexing.

[13] [redacted]

[14] Nonetheless the *GPU* court noted, certification should not be denied even where "plaintiffs are 'unable to establish injury as to a few class members.' That alone would not be enough to defeat certification." *GPU*, 253 F.R.D. at 506-07 (internal citation omitted); *see also In re Nexium Antitrust Litig.*, 777 F.3d 9, 36 (1st Cir. 2015) ("a certified class may include a de minimis number of potentially uninjured parties"); *In re Flonase Antitrust Litig*., 284 F.R.D. 207, 227 (E.D. Pa. 2012) (Noting that courts "have routinely observed that the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class.") (*citing In re Cardizem CD Antitrust Litig*., 200 F.R.D. 297, 320–21 (E.D. Mich. 2001); *In re NASDAQ Market–Makers Antitrust Litig*., 169 F.R.D. 493, 523 (S.D.N.Y. 1996); *Meijer, Inc. v. Warner Chilcott Holdings, Co. III, Ltd.*, 246 F.R.D. 293, 309–310 (D.D.C. 2007); *In re K–Dur Antitrust Litig.*, No. 01–1652, 2008 WL 2699390, at *18 (D.N.J. April 14, 2008)).

Consumers who lease trucks were never included in Plaintiffs' proposed class definition, which captures only indirect purchasers of new trucks. [redacted]

Plaintiffs believe there is no legitimate basis to exclude sales to leasing companies. However, if this Court finds that sales to leasing companies do in some way make class certification unmanageable or inappropriate, given that such a small number of indirect purchasers purchased solely for the purpose of leasing out the trucks to others, such end-user purchasers could be excluded from the class.

D. Dr. Lamb's Methodology Is Reliable

Defendants criticize Dr. Lamb's Report primarily for utilizing totality of the data available, which at the time came from two dealers. Def. Br. at 21-22. [redacted]

[15] Defendants' argument appears to be that some form of pass-on defense would be available regarding leasing companies. Defendants provide no case law on this point, and Plaintiffs are aware of no precedent providing for a pass-on defense where an overcharged product is subsequently leased or rented to a customer. [redacted] This lease is clearly a different type of transaction, and a different market, from the resale of a new truck. A finding that a pass-on defense exists for leasing companies, and that it would require individual determinations, would lead to the conclusion that the ability to rent out a product which a consumer was overcharged for, or use that product as part of any other profitable service, would also lead to a potential pass-on defense.

Similarly, Defendants' arguments concerning potential intra-class conflicts is also unavailing. Defendants argue that leasing companies or others might have conflicts with other class members because they arguably "passed-on" a price increase. (Def. Br. at 31-32). This is irrelevant here, because any possible application of a pass-through defense should not be considered at the class certification stage. *In re Cardizem CD Antitrust Litig*., 200 F.R.D. 326, 347 (E.D. Mich. 2001) (any application of the pass-on defense "presents a merit-based question . . [which] would be premature" to address at the class certification stage.) Nonetheless, it should be noted that many state laws disfavor the pass-through defense. *See Clayworth v. Pfizer*, 233 P.2d 1066, 1070 (Cal. 2010) (pass on defense not permitted); *K-S Pharmacies Inc. v. Abbott Labs*., No. 94CV002384, 1996 WL 33323859, *12 (Wis. Cir. Ct. May 17, 1996) (same); *Minnesota ex rel. Humphrey v. Philip Morris, Inc*., 551 N.W.2d 490, 496 (Minn. 1996) (same); *Jabo's Pharmacy, Inc. v. King Pharmaceuticals, Inc*., No. 31,973 (Cocke Co. Tennessee Cir. Ct.) (same).

[redacted]

[redacted]

[redacted]

Defendants also state that Dr. Lamb has erred by calculating a pass-through rate on truck prices rather than transmission prices. Def. Br. at 23. [redacted] By this logic no indirect purchaser class could ever be certified.

Defendants also contend that Dr. Lamb has erred in not determining whether the pass-through rate "declined during the Class Period compared to the pre-Class Period for some or all subclass members which could entirely offset the alleged 'overcharge.'" Def. Br. at 23. Such an analysis is irrelevant. *See Nexium*,777 F.3d at 27 (noting "antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset."). [redacted]

[redacted]

[redacted]

Finally, Defendants state that Dr. Lamb "assumes that . . . competition translates into uniform pass-through without testing this assumption." Def. Br. at 23. This is untrue. [redacted] Defendants' provision of a handful of anecdotal affidavits stating that cost increases are sometimes not passed on is not sufficient evidence to disprove these economic findings. *See, e.g., OSB,* 2007 WL 2253425, at *12 (rejecting the contention that testimony from a few individuals that price increases were not always passed-through should defeat certification).

Defendants have provided no evidence to show that Dr. Lamb's methodology is unsound. When properly specified, even the analysis by Defendants' expert shows a positive and consistent measure of pass-through damages. The addition of more data to Dr. Lamb's calculations has only further validated his methodology. Accordingly, certification is proper.

E. Individualized Issues Do Not Defeat Certification

Defendants raise various additional supposedly-individualized issues in order to challenge certification. None of these arguments defeats Plaintiffs' showing that common issues predominate here.

1. Whether ZF Meritor Would Have Entered The Performance Market

The question of whether there was an overcharge on performance transmissions is a factual merits question potentially relating to all purchasers of those transmissions. The legal theory here is the same for both performance and linehaul transmissions – that Defendants'

conduct caused Eaton to have an illegal monopoly on both, and this illegal monopoly caused an overcharge for both types of transmissions.

[redacted] If the trier of fact were to later find that no overcharge existed as to performance transmissions, it would create an adjustment to damages that could be resolved on a common basis for all purchasers of performance transmissions. No individualized inquiry would be required.[18]

2. Statute Of Limitations Defenses

Defendants' argument that statute of limitations issues raise individual issues ignores the law of this Circuit. Plaintiffs allege that the statute of limitations was tolled during the period that Defendants fraudulently concealed their conduct from Plaintiffs and the public. In *In re Linerboard Antitrust Litigation*, 305 F.3d 145, 163 (3d. Cir. 2002), the Third Circuit held that because the issue of fraudulent concealment relates to "what defendants did rather than what plaintiffs did" (citing *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 488 (W.D. Pa. 1999)), such issues should not defeat class certification because "common issues of fraudulent concealment predominate."[19]Over two years after Plaintiffs' second amended complaint was

[18] Similarly, any difference in proof for linehaul or performance truck purchasers does not raise any unique defense that could defeat typicality. "Factual differences will not defeat typicality if the named plaintiffs' claims arise from the same event or course of conduct that gives rise to the claims of the class members and are based on the same legal theory." *Danvers v. Ford Motor Co*., 543 F.3d 141, 150 (3d Cir. 2008) (*citing Beck v. Maximus, Inc*., 457 F.3d 291, 296 (3d Cir. 2006)) (emphasis omitted). "A finding of typicality will generally not be precluded even if there are 'pronounced factual differences' where there is a strong similarity of legal theories." *In re Linerboard Antitrust Litig*., 203 F.R.D. 197, 207 (E.D. Pa. 2001) (citations omitted); see also *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79, 84 (E.D. Pa. 2003) (*citing Hoxworth v. Blinder*, 980 F.2d 912, 923 (3d Cir. 1992)).

[19] Defendants raise the mere possibility that they may argue a statute of limitations defense in the future, stating the vague contention that some subclass members "likely were aware" of the unlawful conduct before the statute of limitations was tolled. [redacted]

filed, Defendants now apparently question that amendment, claiming that Plaintiffs "arbitrarily and self-servingly" amended the date before which Plaintiffs and class members could not have reasonably discovered Defendants' conspiracy to October 30, 2009. Def. Br. at 24. Defendants previously made no challenge to that amendment before suddenly including it in their Opposition brief. Plaintiffs have based the date of fraudulent concealment on the date when the trial transcripts in the ZF Meritor action were released, since before that the evidence in that action was subject to a Protective Order. [Dkt. No. 68.] Again, merely raising the potential that Plaintiffs' fraudulent concealment allegations may one day be challenged does not defeat certification.

F. The Supposed State Law Variation Does Not Raise Individual Issues Nor Render The Proposed Subclasses Unmanageable

Defendants argue that variations in state laws will raise individualized issues and render the proposed subclasses unmanageable. In so doing, Defendants misstate the relevant law. Every citation made by Defendants on this point is to a case where the court declined to certify a *nationwide* class that clumped together various state law claims.[20] Plaintiffs do not propose a nationwide class here; they propose a subclass for each of the states at issue. The proposed subclasses mean that each state law can be considered on its own, and if this Court determines that significant state law differences exist, each states' cases can be tried separately. This specific subclassing proposal weighs in favor of certification. *See, e.g. Chin v. Chrysler Corp.*, 182 F.R.D. 448, 463 (D.N.J. 1998) (rejecting nationwide certification and stating that the concept that

[redacted]

[20] *See Grandalski v. Quest Diagnostics Inc*., 767 F.3d 175, 183 (3d Cir. 2014); *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 181 (3d Cir. 2006); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 463 (D.N.J. 1998); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 193 (3d Cir. 2001), *as amended* (Oct. 16, 2001).

subclasses could be implemented "would have been aided by a realistic, specific proposal by Plaintiffs concerning how subclasses could be constructed and implemented in this case.")[21]

If Defendants were correct that the state antitrust laws at issue are inherently unmanageable together, then indirect purchaser actions alleging violations of the law of more than one state would never be certified. Obviously, this is not the case. *See, e.g.*, *In re Terazosin Hydrochloride Antitrust Litigation*, 220 F.R.D. 672, 687 (S.D. Fl. 2004) ("[T]he Court acknowledges that management of the several state classes will raise numerous challenges. However, these challenges are ones that routinely arise in complex litigation, and they are insufficient to overcome the innumerable advantages that class treatment will afford.").[22]

II. The Proposed Class Plaintiffs Are Both Typical And Adequate

A. Large Fleet Customers Are Not Atypical Of The Named Plaintiffs

Defendants' argument that large fleets and other large purchaser companies are somehow atypical of named plaintiffs is without merit. Typicality is satisfied in an antitrust class action even if "the plaintiff followed different purchasing procedures, purchased in different quantities or at different prices, or purchased a different mix of products than did the members of the class." *In re TCT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 300 (N.D. Cal. 2010) (quoting *In re Dynamic Random Access Memory (DRAM) Antitrust Litig*., No. M. 02-1486 PJH, 2006 WL 1530166, at *4 (N.D. Cal. Jun. 5, 2006)).

[21] Even if the state laws were considered as one grouping, Plaintiffs have provided this court with a detailed chart demonstrating the significant and pervasive similarities in them. *See* Plaintiffs' Motion, Exhibit 1. This comparison may further assist the Court in determining that these claims are manageable and strongly related. *See, e.g., Grandalski*, 767 F.3d at 184 (stating that Plaintiffs must provide more than a "generic assessment of . . . state statutes" but citing with approval a prior case in which Plaintiffs provided a "series of charts setting forth comprehensive analyses of the various states' laws potentially applicable to their common law claims.").

[22] *See also In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583 (N.D. Cal. 2010) *amended in part*, No. M 07-1827 SI, 2011 WL 3268649 (N.D. Cal. July 28, 2011); *In re Flonase Antitrust Litig*., 284 F.R.D. 207 (E.D. Pa. 2012).

Defendants' citation to *In re Intel Corp. Microprocessor Antitrust Litigation*, MDL No. 05-1717-LPS, 2014 WL 6601941 (D. Del. Aug. 6, 2014), is unavailing. In *Intel*, the court found that larger "enterprise customers" and smaller "individual customers" were not typical of each other because enterprise customers were often able to "purchase computers as part of a package, and the prices they pay result from individual negotiations," whereas the individual customers did not do so. *Id.* at *11.[23] Accordingly, in *Intel*, enterprise and individual customers' purchasers had completely different buying experiences. Here, by contrast, there is no such similar distinction in buying process between large and small purchasers. Any variations in purchase price (excluding trade-ins) of the trucks at issue are due to three factors: (1) OEM discounts; (2) SPIFFs paid by Eaton; and (3) differences in profit margin by the dealer. Each variable would have been identical in the but-for world, and each will be discussed in turn.

1. OEM Discounts

While each purchaser, whether large or small, enters into negotiations concerning the purchase of each truck, the OEM discounts are done through a standardized discount process coordinated by the OEM. [redacted]

[23] Similar differences in purchasing between small purchasers and larger "enterprise customers" were also at issue in *Deiter v. Microsoft Corp*., 436 F.3d 461, 468 (4th Cir. 2006) (differences between named plaintiffs who purchased product at retail price and enterprise customers who received negotiated discounts unique to each transaction); *In re Optical Disk Drive Antitrust Litig*., 303 F.R.D. 311, 317 (N.D. Cal. 2014) (named plaintiffs were individual purchasers who paid list prices, but large companies major distributors, which accounted for the bulk of purchases, negotiated prices); and *In re Graphics Processing Units Antitrust Litig*., 253 F.R.D. 478, 490 (N.D. Cal. 2008) (named plaintiffs were individual purchasers, but 99.5% of revenue came from wholesale purchasers hat engaged in "customized negotiations"). Like *Intel*, these cases are inapposite for the same reasons discussed herein.

[redacted] Accordingly, because the OEM discounts to customers would not have been different in the but-for world, variations in OEM discounts between class members will not affect typicality.

2. SPIFFs

While Defendants argue that Eaton's SPIFFs to certain class members raise individual issues (Def. Br. at 28-29), such SPIFFs would not have had an actual impact on the alleged overcharge. [redacted] Accordingly, the use of SPIFFs in certain transactions is irrelevant to the calculation of an overcharge, and thus does not render class members atypical of each other.

3. Dealer Margins

Any differences in dealer profit between purchasers would also have no impact on overcharge. Negotiations might indicate that while dealers try to get a standard margin in their own profit from a sale, on occasion the margin is negotiated downward. However, this factor would also exist in the but-for world. [redacted]

[redacted]

B. No Class Representative Has Demonstrated Inadequacy Due To Lack Of Knowledge

Despite Defendants' attempts to cherry-pick various lapses in plaintiffs' knowledge about the case (Def. Br. at 32-34), the class representative plaintiffs have each demonstrated their adequacy. "Antitrust plaintiffs must show an interest in the litigation but need not have extensive personal knowledge of the facts tending to prove a conspiracy in order to be adequate representatives." *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 213 (E.D. Pa. 2001). "[I]t is unrealistic to require a class action representative to have an in-depth grasp of the legal theories of recovery behind his or her claim. It is more important that the representative actively seeks vindication of his or her rights and engages competent counsel to prosecute the claims." *In re Cephalon Sec. Litig.*, No. Civ. A. 96-0633, 1998 WL 470160, at *3 (E.D. Pa. Aug. 12, 1998) (*citing Barnes v. American Tobacco Co., Inc.*, 176 F.R.D. 479, 486 (1997)). All that is required is that a plaintiff has "a basic understanding of the allegations made in the case, and what law is alleged to have been violated, and that he would be willing to contest an action by his attorneys with which he did not agree." *In re Resource America Sec. Litig.*, 202 F.R.D. 177, 186–87 (E.D. Pa. 2001).

The class representatives have demonstrated nothing other than a complete willingness to actively seek vindication of the rights of themselves and of the class.[25] That is all that is required of them here.

[25] Defendants' attempts to cherry-pick various plaintiffs' testimony is contradicted by additional clarifying testimony demonstrating plaintiffs' knowledge about the both the case and duties as a class representative:

[redacted]

C. Plaintiffs Cordes And Prosper Have Standing

Defendants put forth the specious argument that class representatives Cordes and Prosper lack standing, on the technicality that the trucks at issue were not purchased in their name, but were purchased by entities wholly owned by them. (Def. Br. at 34-36.) This is irrelevant, as both Cordes and Prosper suffered the harm from overcharge, by way of their complete ownership of the respective ownership of the companies, and each made the purchasing decisions for the trucks. However, to the extent that the court requires that the formal entities be intervened or substituted, plaintiffs will do so. [redacted]

D. Class Members Are Ascertainable Through VIN Numbers

Defendants' arguments that class members are unascertainable (Def. Br. at 38-40) are based neither in law nor fact. It is not disputed by Defendants that, through Defendants' own records, each transmission subject to an alleged overcharge can be connected to a truck through

[redacted]

that truck's VIN number. A class member can supply proof of ownership through their own invoices, registration records, or other documents evidencing ownership. Given that these truck often require financing and are used for business, class members are likely to have retained these records.[26] Government records or Defendants' own records can be used as a further tool to identify potential class members.

CONCLUSION

For the foregoing reasons, as well as the reasons put forth in the IPPs opening brief and Dr. Lamb's opening and rebuttal reports, the IPP classes should be certified.

Dated: March 6, 2015

Respectfully Submitted,

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[26] The cases cited by Defendants are distinguishable because for each product at issue, there was no way to know which specific units were affected, and thus which customers were affected. In *Marcus v. BMW*, 687 F.3d 583, 592 (3d Cir. 2012), plaintiffs sought to certify a class of BMW purchasers with a type of tire that had "gone flat and been replaced." The class was found to be unascertainable because neither BMW nor any other party had documentation concerning (1) the vehicles on which the affected tires were installed, or (2) the vehicles that suffered flat tires. *Id*. at 593-94. Here, the OEMs have provided data to determine the transmission type for every truck sold during the Class Period. Also, unlike Marcus, where the injury occurred after the sale and only occurred if and when the tire went flat, the injury in the instant case happened at the time of sale, so mere sales records will be sufficient to prove class membership. Similarly, in *Carrera v. Bayer Corp*., 727 F.3d 300, 309-10 (3d Cir. 2013), the class was found to be unascertainable because there was no feasible way to identify purchasers of a weight loss supplement, given that customer membership cards or records of online sales did not suffice. Here, unlike with an inexpensive weight loss pill (for which all parties conceded class members would not have documentary proof of purchase), there are ample sales and registration records for the trucks, so class member purchasers can be readily determined. Defendants' other cases are inapposite as well because they presented difficulties, not present here, in determining the identities of class members. *See also Byrd v. Aaron's Inc.,* Civil Action No. 11–101E, 2014 WL 1316055, at *5 (W.D. Pa. Mar. 31, 2014) (class was not ascertainable because parties were unable to determine which purchasers actually activated computer software at issue); *Haskins v. First Am. Title Ins. Co.*, Civil No. 10–5044 (RMB/JS), 2014 WL 294654, at *13 (D.N.J. Jan. 27, 2014) (defendants' records did not have loan files at issue; even plaintiffs conceded that it was economically impossible to locate necessary files to determine how many persons were overcharged for title insurance).

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