Docket No. 15-2789

In the United States Court of Appeals
For the Eighth Circuit

MORGAN-LARSON, LLC; JOHNSON AUTO ELECTRIC, INC.; SPEED STOP 32, INC.; and YOCUM OIL COMPANY, INC.

Plaintiffs-Appellants,

v.

FERRELLGAS PARTNERS, L.P., A LIMITED PARTNERSHIP; FERRELLGAS, L.P., A LIMITED PARTNERSHIP, DOING BUSINESS AS BLUE RHINO; AMERIGAS PARTNERS, LP, A LIMITED PARTNERSHIP; UGI CORPORATION; AMERIGAS PROPANE, INC., DOING BUSINESS AS AMERIGAS CYLINDER EXCHANGE; and AMERIGAS PROPANE, L.P.

Defendants-Appellees.

Appeal from a Decision and Judgment of the United States District Court
for the Western District of Missouri, No. 4:14-MD-2567-GAF
Honorable Gary F. Fenner

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I. SUMMARY OF THE CASE

Plaintiffs allege that Defendants AmeriGas and Blue Rhino engaged in an ongoing conspiracy to fix the price of Filled Propane Exchange Tanks. The conspiracy began in or around 2008, centering on Defendants' agreement to reduce the fill level in their propane tanks without reducing their prices. Defendants continued to adhere to that agreement, and to coordinate pricing and allocate markets, until this case was filed in 2014.

The district court held Plaintiffs' claims were time-barred. Plaintiffs assert two grounds for error. First, the district court strayed from clear Supreme Court and Eighth Circuit law holding that each time Defendants charged a conspiratorially-set price, they committed an overt act that restarts the statute of limitations. Second, the district court ignored detailed allegations of Defendants' ongoing communications during the limitations period—including discussions of contract pricing and mutual assurances that each Defendant would uphold the fill-level agreement and avoid price competition—holding that these were "mere affirmations" of the fill-level agreement. These communications were not only independently unlawful, they were also crucial to the maintenance of Defendants' conspiracy; therefore, these activities establish a continuing violation that restarts the limitations period.

Plaintiffs respectfully request 30 minutes of oral argument.

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Morgan-Larson, LLC, Johnson Auto Electric, Inc., Speed Stop 32, Inc., and Yocum Oil Company, Inc. do not have any parent corporations, and no publicly-held corporation owns 10% or more of Plaintiffs-Appellants' stock.

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I. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 15 U.S.C. § 4, 28 U.S.C. §§ 1331 and 1337, and Section 4 of the Clayton Act (15 U.S.C. § 15(a)). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because this is an appeal from a Final Order and Judgment granting Defendants' motion to dismiss. Order Granting Mot. to Dismiss ("Order"), ECF No. 162 (JA0333). Plaintiff-Appellants filed their timely Notice of Appeal on July 30, 2015. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A).

II. STATEMENT OF ISSUES

A. Whether charging a supra-competitive price that was fixed by means of a *per se* illegal antitrust conspiracy, and thereby causing antitrust injury to direct purchasers, is an overt act sufficient to restart the limitations period under the continuing violation doctrine. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728 (8th Cir. 2014); *United States v. N. Improvement Co.*, 814 F.2d 540 (8th Cir. 1987).

B. Whether communications between horizontal competitors encouraging and confirming each other's compliance with the terms of a price fixing conspiracy, discussing contract pricing to customers, and agreeing not to undercut each other on price, are overt acts sufficient to restart the limitations

period under the continuing violation doctrine. *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265 (8th Cir. 2004); *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999), *amended in part by* 211 F.3d 1224 (11th Cir. 2000); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3d Cir. 1993).

III. STATEMENT OF THE CASE

Defendants-Appellees Blue Rhino[1] and AmeriGas[2] (collectively, "Defendants") are the two major nationwide distributors of Filled Propane Exchange Tanks ("propane tanks"), dominating approximately 80% of the U.S. market. Direct Purchaser Pls.' Consol. Am. Compl. ("CAC" or "Complaint") ¶ 42, ECF No. 102 (JA0140-41). Beginning no later than the spring of 2008, Defendants conspired to reduce the fill level of their propane tanks from 17 pounds to 15 pounds without lowering the price commensurately, and further conspired to allocate customers and fix prices. *Id.* ¶¶ 1, 6-15, 48-93 (JA0131-35, JA0142-51). They maintained the conspiracy through regular communications and market and customer-allocation agreements. *Id.* An earlier lawsuit that was settled solely on behalf of indirect purchasers did not motivate Defendants to abandon their price-

[1] Defendants-Appellees Ferrellgas Partners, L.P. and Ferrellgas, L.P. do business under the name Blue Rhino, and are collectively referred to as "Blue Rhino." Direct Purchaser Pls.' Consol. Am. Compl. ("CAC") ¶ 1, ECF No. 102 (JA0131).

[2] AmeriGas Partners, LP; AmeriGas Propane, Inc.; and AmeriGas Propane, LP are collectively referred to as "AmeriGas."

fixing agreement. Instead, Defendants continued to charge the collusively fixed price, and they continued to consciously avoid undercutting each other on price, police their agreement, and exchange mutual assurances of compliance in order to maintain their conspiracy. Even without the aid of formal discovery, Plaintiff-Appellants' investigation has revealed that this unlawful conduct continued into the limitations period.

A. The Fill Levels Conspiracy

Filled Propane Exchange Tanks are portable steel cylinders pre-filled with propane gas. CAC ¶¶ 2, 38-41 (JA0132, JA0139-40). Defendants sell these tanks to Plaintiffs, who are gas stations, convenience stores, hardware stores, grocery stores, and big box retailers. *Id.* ¶¶ 2, 44-45 (JA0132, JA0141). While propane tanks may hold a maximum of 25 pounds, safety regulations dictate that they cannot be filled to more than 17 or 17.5 pounds. *Id.* ¶¶ 3, 39 (JA0132, JA0139-40). Before the conspiracy, both Blue Rhino and AmeriGas filled their tanks with 17 pounds of propane. *Id.* ¶¶ 3, 48 (JA0132, JA0142).

In 2006 and 2007, in the wake of severe cost pressures, Blue Rhino and AmeriGas began discussing with each other the possibility of raising prices or decreasing fill levels. *Id.* ¶¶ 49-50 (JA0142-43). While both Blue Rhino and AmeriGas internally considered reducing their fill levels, both recognized that it would be impossible to make this move unilaterally. *Id.* ¶¶ 51-56 (JA0143-44).

Blue Rhino's initial attempts to go it alone underscored this fact. Blue Rhino proposed the fill level decrease to Wal-Mart, which at the time was the largest retailer of Filled Propane Exchange Tanks in the country, and which purchased from both Blue Rhino and AmeriGas. Wal-Mart rejected the proposed change and stated it would not carry filled propane tanks with different fill levels – implying that it might shift its business to AmeriGas if Blue Rhino followed through on the fill level reduction. CAC ¶¶ 54-56 (JA0143-44).

On May 29, 2008, Blue Rhino proposed the fill reduction to Lowe's, its largest retail customer. Lowe's accepted the proposal, but only on the condition that Blue Rhino convert all of its other customers, including Wal-Mart, to 15-pound tanks within 30 days of implementing the fill reduction at Lowe's. *Id.* ¶ 59 (JA0145).

Realizing that Wal-Mart was the lynchpin to implementing the fill reduction, Blue Rhino engaged in dozens of calls, emails, and in-person meetings with AmeriGas to coordinate a united front. *Id.* ¶¶ 8-9, 57-66 (JA0133, JA0144-46). The Complaint contains highly specific allegations of the substance of those contacts that leave no room for doubt that Defendants entered into a conspiracy. For instance, the Complaint alleges a meeting took place on or about May 23, 2008 between Blue Rhino's Vice President of Operations, Jay Werner, and an AmeriGas vice president responsible for the Filled Propane Exchange Tanks business. *Id.* ¶

58 (JA0144-45). AmeriGas's notes from the meeting reveal that the parties discussed sensitive commercial information, including Blue Rhino's plan (not yet discussed with any retailer) to reduce its fill levels to 15 pounds and its desire to exclude a small competitor from accessing refilling facilities that a third party was considering building. *Id.* In addition, the Complaint describes a series of phone calls on June 18 and 19, 2008 between Blue Rhino's President, Tod Brown, and AmeriGas's Director of National Accounts, Ken Janish. During those calls, AmeriGas agreed that if Blue Rhino reduced its fill levels to 15 pounds per tank, AmeriGas would follow suit. *Id.* ¶¶ 9, 60 (JA0133, JA0145). These and other communications cemented Defendants' agreement. *See id.* ¶¶ 64-65 (JA0146). By the last week of June 2008, Blue Rhino and AmeriGas had agreed on both the fill reduction and a rollout plan: Blue Rhino would begin selling 15-pound Filled Propane Exchange Tanks on July 21, 2008, and AmeriGas would follow on August 1, 2008. *Id.* ¶ 66 (JA0146).

Thereafter, Blue Rhino and AmeriGas acted in unison, presenting their revised fill level policy to Wal-Mart, Home Depot, and Lowe's, and secretly coordinating during their negotiations with their customers. *Id.* ¶¶ 69-88 (JA0147-50). Defendants achieved their aim: with the only two national suppliers holding firm on the 15-pound fill level, Wal-Mart and other large retailers were forced to accept Defendants' collusive price increase.

B. The 2009 Lawsuit and Settlement

Beginning in June 2009, purchasers of propane tanks filed lawsuits against Defendants alleging antitrust and state law claims on behalf of all purchasers of Filled Propane Exchange Tanks. CAC ¶¶ 100-01, 103 (JA0152-53). Those suits were consolidated in the Western District of Missouri. *Id.* ¶ 102 (JA0153). On December 9, 2009, the plaintiffs moved for preliminary approval of a settlement with AmeriGas and certification of a settlement class consisting of indirect purchasers only. *Id*. ¶ 104 (JA0153-54). On October 6, 2011, the plaintiffs moved for preliminary approval and class certification for a settlement with Blue Rhino, also on behalf of indirect purchasers only. *Id*. ¶¶ 105-06 (JA0154). The court certified a class on behalf of indirect purchasers and granted final settlement approval on May 31, 2012. *Id*. ¶ 107 (JA0154).

C. The FTC Complaint

On March 27, 2014, the Federal Trade Commission issued a complaint under 15 U.S.C. § 45 against Ferrellgas Partners, L.P., Ferrellgas, L.P., AmeriGas Partners, L.P., and UGI Corp., alleging substantially the same conspiracy as Plaintiffs allege here. CAC ¶¶ 94-95 (JA0151). On October 31, 2014, the defendants entered into consent agreements with the FTC, and on January 9, 2015, the Commission voted to accept those consent orders. *Id.* ¶¶ 96-98 (JA0151-52). Pursuant to the consent agreements, Defendants agreed to cease and desist from

entering into any anti-competitive agreements regarding pricing, fill levels, or coordinating communications to customers, and from disclosing competitively sensitive, non-public information to each other. *Id*. ¶¶ 96-97 (JA0151-52).

D. Plaintiffs' Lawsuit and New Allegations

Shortly after the FTC filed its complaint, a number of direct purchasers of Filled Propane Exchange Tanks filed lawsuits alleging antitrust claims. Those cases were consolidated in the Western District of Missouri. Transfer Order, ECF No. 1 (JA0082). On January 29, 2015, Plaintiffs filed a Consolidated Amended Complaint. ECF No. 102 (JA0131).

In the course of their case investigation, Plaintiffs uncovered evidence that AmeriGas and Blue Rhino did not cease their unlawful conduct as a result of the prior lawsuit, but instead engaged in conspiratorial communications through at least late 2010, which is within the limitations period.[3] As detailed in the Complaint:

- Through at least late 2010, AmeriGas's Director of National Accounts, Ken Janish, had conversations with Blue Rhino employees in which Mr. Janish sought, and received from Blue Rhino, assurances that Blue Rhino would adhere to the fill reduction agreement and not undercut AmeriGas on price. CAC ¶¶ 13, 60 (JA0134, JA0145).

[3] As discussed *infra* at note 4, the FTC's complaint against Defendants moved the statute of limitations period back to March 27, 2010, four years before the filing of the FTC's complaint. *See* Order Granting Mot. to Dismiss 7, ECF No. 162 (JA0339).

- Through at least 2010, AmeriGas and Blue Rhino continued to have discussions regarding pricing for contracts. *Id.* ¶ 13 (JA0134).

- Through at least the end of 2010, Defendants regularly communicated to assure compliance with the conspiracy. Defendants also monitored the market to ensure that neither cheated on their anticompetitive agreement by offering a price reduction or competing for one another's customers or geographic markets. Should cheating be suspected, Defendants communicated with each other to reassure each other of their compliance with the conspiracy. *Id.* ¶ 92 (JA0151).

- From in or about 2006 through at least the date the CAC was filed, Defendants carried out co-packing agreements, pursuant to which each Defendant agreed to refurbish and refill its competitor's propane tanks for the other company. These agreements provided an opportunity for Defendants to monitor each other's compliance with the fill-level agreement and to stay in regular contact with each other. *Id.* ¶¶ 46-47, 58 (JA0142, JA0144-45).

The CAC also alleges unlawful conduct that may have taken place during the limitations period, although the precise dates are currently unknown:

- Defendants allocated customers and markets to avoid competing with each other. For example, AmeriGas took Walmart's West Coast business and Blue Rhino took Walmart's East Coast business. Similarly, Blue Rhino was allocated all of Kroger's business and AmeriGas was allocated all of Albertson's business. CAC ¶¶ 90-91 (JA0150-51).

This ongoing coordination made it possible for Defendants to continue acting in concert to prevent free competition through at least the end of 2010, and likely through the present day. Each of the proposed class representatives purchased Filled Propane Exchange Tanks at supra-competitive prices during the

limitations period. CAC ¶¶ 18-21, 110-11, 121-23 (JA0135-36, JA0155, JA0157-58).

E. Procedural History

On January 5, 2015, Defendants moved to stay discovery. Defs' Joint Mot. to Stay Discovery, ECF No. 84 (JA0086). On February 24, 2015, the district court granted the motion to stay discovery. Order Granting Defs' Joint Mot. to Stay Discovery, ECF No. 119 (JA0186). On March 30, 2015, Defendants moved to dismiss the Complaint. Joint Motion to Dismiss the Direct Purchaser Pls.' Consol. Am. Compl., ECF No. 137 (JA0196). On July 2, 2015, the district court issued an order granting Defendants' motion to dismiss (JA0333), and on July 21, 2015, the district court entered a judgment dismissing the case. (JA0358). Plaintiffs filed their timely Notice of Appeal on July 30, 2015.

IV. SUMMARY OF THE ARGUMENT

From 2008 to the present, Defendants, the two largest distributors of Filled Propane Exchange Tanks in the United States, engaged in a continuing conspiracy to fix the price of propane tanks and allocate customers between them. The conspiracy centered on Defendants' agreement to increase the price of their Filled Propane Exchange Tanks by reducing the fill level without lowering the price commensurately. The conspiracy also involved customer and market allocation and mutual assurances that neither Defendant would undercut the other's prices. This

conduct is a *per se* violation of Section 1 of the Sherman Antitrust Act. As a result, Plaintiffs have suffered antitrust injury by being forced to pay artificially inflated prices for propane tanks.

The district court's opinion dismissing the Complaint does not question that Defendants conspired. Nor does it question that Defendants continued to cooperate rather than compete well into the limitations period. Instead, the district court ignored allegations of conspiracy other than the initial agreement to decrease fill levels, and, contrary to well-established law, refused to recognize Defendants' continuing conspiratorial behavior as overt acts that reset the statute of limitations. *See* Order at 6-7 (JA0338-39).

First, the district court's decision departs from decades of controlling precedent holding that each sale at a supra-competitive price pursuant to a horizontal price-fixing conspiracy is an overt act. *See, e.g.*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997); *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 736 (8th Cir. 2014). The opinion below is silent as to most of this precedent, and its bases for distinguishing *Wholesale Grocery* – in particular, that that case involved an increase in price as opposed to the maintenance of an artificially inflated price – are not supported by *Wholesale Grocery* nor any other precedent.

Second, the CAC contains detailed allegations regarding Defendants' conspiratorial communications during the limitations period regarding pricing, fill levels, and market allocation, each of which is an overt act in furtherance of Defendants' ongoing conspiracy. The district court held those discussions were "mere reaffirmations" of the fill-level agreement. Order at 12-13 (JA0344-45). This holding is erroneous because it ignores unlawful conduct alleged in the CAC that goes beyond the basic fill-level reduction. It also fails to understand that horizontal price-fixing conspiracies like the one alleged here depend upon continued reassurances and mechanisms for enforcement and that such communications therefore further the objectives of the conspiracy.

In fact, the rule announced by the district court would allow cartels to decide upon a fixed price, quickly settle any lawsuits by purchasers, and then continue to charge the illegally fixed price indefinitely. Such a result is an anathema to the antitrust laws and the long line of precedent regarding continuing conspiracies. Plaintiffs respectfully urge that this Court reverse the district court's holding.

V. ARGUMENT

A. Standard of Review

A district court's grant of a motion to dismiss is reviewed *de novo*. *Joyce v. Armstrong Teasdale, LLP*, 635 F.3d 364, 367 (8th Cir. 2011) (reversing and remanding dismissal based upon statute of limitations). In assessing a complaint, a

court must accept all non-conclusory allegations as true, drawing all reasonable inferences in the plaintiff's favor, and should deny a motion to dismiss if those allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

"As a general rule, 'the possible existence of a statute of limitations defense is not ordinarily a ground for Rule 12(b)(6) dismissal unless the complaint itself establishes the defense.'" *Joyce*, 635 F.3d at 367 (quoting *Jessie v. Potter*, 516 F.3d 709, 713 n.2 (8th Cir. 2008)). This is because "[b]ar by a statute of limitation is typically an affirmative defense, which the defendant must plead and prove." *Jessie*, 516 F.3d at 713 n.2. *See also Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2009) ("[A] complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim.") (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995)); *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) ("[D]ismissal is appropriate only if the complaint on its face is conclusively time-barred.").

B. The District Court Erred By Granting Defendants' Motion to Dismiss Because, Given Defendants' Continuing Violation of the Antitrust Laws, Plaintiffs' Claims for Injuries Incurred After March 27, 2010 Are Timely

The continuing violations doctrine, which holds that the statute of limitations runs from each new act or injury that is part of an ongoing violation of the antitrust laws, compels reversal of the district court's order. Plaintiffs have alleged overt acts in furtherance of an ongoing conspiracy – namely, Defendants' charging the collusively-set price and their agreements and mutual reassurances about fill levels, pricing, and market allocation. These acts are more than sufficient to support a finding of an ongoing violation.

Plaintiffs' antitrust claims are subject to a four-year statute of limitations. 15 U.S.C. § 15b. The first complaint in this matter was filed in June, 2014. However, the Federal Trade Commission's filing of an administrative complaint on March 27, 2014, moved the start of the limitations period to March 27, 2010.[4]

Decades-old Supreme Court precedent is clear that, under the continuing violation doctrine, Plaintiffs can recover for each overcharge that accrued during the limitations period. As the Court explained, "[g]enerally, a cause of action [under § 1] accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . [However, i]n the context of a continuing conspiracy to violate the antitrust laws . . . ***each time a plaintiff is injured*** by an act of the defendant[] a cause of action accrues to [it] to recover the damages

[4] The filing of an FTC administrative complaint tolls the statute of limitations for private parties until one year after the resolution of that action. 15 U.S.C. § 16(i). *See also* Order at 7 (JA0339).

caused by that act . . . and . . . as to those damages, the statute of limitations runs from the commission of the act." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (citations omitted) (emphasis added). *Accord Wholesale Grocery*, 752 F.3d at 736 ("Although 'the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period,' the plaintiff is entitled to recover for any discrete overt act occurring *within* the limitations period.") (quoting *Klehr*, 521 U.S. at 189-90). Evidence of events that occurred before the limitations period can be used to infer the continuation of the conspiracy into the limitations period. *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 217-18 (3d Cir. 2008).

In order to invoke the continuing violation doctrine, "an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004) (quoting *Peck v. Gen. Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990)). An overt act must be "a new and independent act that is not merely a reaffirmation of a previous act" and one that "inflict[s] new and accumulating injury on the plaintiff." *Varner*, 371 F.3d at 1019. The "continuing violation theory is based on an initial action that violates the antitrust laws followed by injuries caused by illegal actions

designed to implement and effectuate the initial violation." *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 275 (8th Cir. 2004).

Here, Plaintiffs have alleged two well-recognized types of overt acts that occurred within the limitations period: (1) Defendants' sales to Plaintiffs at artificially inflated prices; and (2) conspiratorial communications between Defendants regarding pricing, fill levels. Either of these activities is sufficient to find a continuing violation of the antitrust laws.

1. *Under Controlling Supreme Court and Eighth Circuit Law, Continued Sales at the Conspiratorial Price Are Overt Acts*

In *Klehr*, the Supreme Court instructed that "[a]ntitrust law provides that, in the case of a 'continuing violation,' say, a price-fixing conspiracy that bring about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, ***each sale to the plaintiff***, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'" 521 U.S. at 189 (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 338b, at 145 (rev. ed. 1995)) (emphasis added). This explanation was consistent with the Court's earlier decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 489 (1968), holding that claims seeking compensation for supra-competitive charges resulting from conduct that occurred more than four years before suit was filed were not

time barred. As the Court explained in allowing such claims to proceed, the defendant's conduct "constituted a continuing violation of the Sherman Act and . . . inflicted continuing and accumulating harm" on the plaintiff. *Hanover Shoe*, 392 U.S. at 502 n.15.

The Supreme Court's clear instruction that "each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times," has been expressly recognized and followed in this Court's decision in *Wholesale Grocery*, which is dispositive of this issue here. 752 F.3d at 736-37 (quoting *Klehr*, 521 U.S. at 189). In *Wholesale Grocery*, this Court held that the statute of limitations did not bar a Sherman Act claim alleging that two grocery wholesalers used a written asset exchange agreement as a subterfuge to horizontally allocate customers and territories, where the exchange agreement was entered into more than four years before the plaintiff filed suit. The defendants had argued that the higher prices were merely the effects of the earlier unlawful agreement – not overt acts. The district court disagreed, holding that the supracompetitive prices (charged within the limitation period) were "new and independent acts that inflicted new and accumulating injury rather than unabated, inertial consequences or reaffirmations of a previous conspiracy." *In re Wholesale Grocery Prods.*, 722 F. Supp. 2d 1079, 1089 (D. Minn. 2010). The Eighth Circuit affirmed, holding that "[t]he timeliness question in this case is

controlled by *Klehr*." *Wholesale Grocery*, 752 F.3d at 736. Consistent with the Supreme Court's instruction, this Court explained that "[u]nder *Klehr*, a monopolist commits an overt act each time he uses unlawfully acquired market power to charge an elevated price." *Id.* Significantly, in holding that "[t]he timeliness question in this case is controlled by *Klehr*," the Eighth Circuit explicitly cited *Klehr*'s language equating overt acts with each new overcharge, but italicized for emphasis the example provided by the Supreme Court: "*e.g., each sale to the plaintiff*[.]" *Id.* (quoting *Klehr*, 521 U.S. at 189).[5]

Under *Klehr* and *Wholesale Grocery*'s precedent, each sale by Defendants of a Filled Propane Exchange Tank at an artificially inflated price constituted an "overt act"—a "sale to the plaintiff" at an unlawful overcharge—that restarts the statute of limitations. This legal principle has also been widely followed by other courts,[6] and as far as Plaintiffs can determine, it has been followed unanimously by

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[5] The Supreme Court subsequently declined to review *Wholesale Grocery*. 135 S. Ct. 2805 (2015).

[6] *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 295 (2d Cir. 1979) ("Although the business of a monopolist's *rival* may be injured at the time the anticompetitive conduct occurs, a *purchaser*, by contrast, is not harmed until the monopolist actually exercises its illicit power to extract an excessive price. . . . So long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide.") (emphasis added); *Imperial Point Colonnades Condo. Inc., v. Mangurian*, 549 F.2d 1029, 1043-44 (5th Cir. 1977) (notwithstanding fact that plaintiffs bought condominium units more than four years before commencing antitrust suit on claim that requirement that plaintiffs enter a 99-year recreational

courts in horizontal price-fixing cases. *See, e.g.*, *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014) ("[T]he Supreme Court and federal appellate courts have recognized that each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act."); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 291 (4th Cir. 2007) (holding horizontal price-fixing claims were not barred by statute of limitations "so long as the plaintiffs made a purchase from the Defendants" within the limitations period); *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 828 (11th Cir. 1999) ("[W]hen sellers conspire to fix the price of a product, each time a customer purchases that product at the artificially inflated price, an antitrust violation occurs and a cause of action accrues. As a cause of action accrues with each sale, the statute of limitations begins to run anew.") (citation omitted); *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 400 (D. Mass. 2013) (where plaintiffs sued for Sherman Act violation more than four years after defendants entered into unlawful horizontal

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facility lease constituted illegal tying, defendant's collection of rent constituted acts injurious to plaintiffs within four years of commencement of suit, and a new cause of action accrued upon each act of collection); *Meijer, Inc. v. 3M*, No. Civ.A. 04-5871, 2005 WL 1660188, at *3-4 (E.D. Pa. July 13, 2005) ("[I]t has long been held that 'a purchaser suing a monopolist for overcharges paid within the previous four years may satisfy the conduct prerequisite to recovery by pointing to anticompetitive actions taken before the limitations period.'") (quoting *Berkey Photo*, 603 F.3d at 296).

agreement to delay market entry of generic drug, "every time the Direct Purchasers were overcharged for brand Nexium, they suffered a cognizable injury"); *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 1:12-md-2343, 2013 WL 2181185, at *29 (E.D. Tenn. May 20, 2013) (holding "plaintiffs should be allowed to proceed with their claims because—even if most or all of the overt acts alleged as part of the continuing [horizontal] conspiracy occurred outside the limitations period—Plaintiffs have sufficiently alleged those acts resulted in Plaintiffs being overcharged for metaxalone well into the limitations period"); *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732, 2007 WL 5215231, at *3 (E.D. Pa. Jan. 18, 2007) ("Civil anti-trust cases carry a four year statute of limitation from accrual of the cause of action, *see* 15 U.S.C. § 15(b), which, in price-fixing cases, occurs when the plaintiff purchases the product at a price inflated due to anti-competitive conduct."); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 551 (D.N.J. 2004) (concluding plaintiffs' antitrust claims alleging defendants conspired to delay market entry of generic drug were not time-barred to the extent that plaintiffs were overcharged for the brand name drug during limitations period); *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2000 WL 1475559, at *6 (E.D. Pa. Oct. 4, 2000) (where plaintiffs alleged horizontal price-fixing conspiracy, "'each overt act that is part of the violation and that injures the plaintiff,' e.g., each sale [of linerboard or linerboard based products to the plaintiffs,] 'starts the statutory period running

again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'") (quoting *Klehr*, 521 U.S. at 189); *In re Nine W. Shoes Antitrust Litig.*, 80 F. Supp. 2d 181, 192 (S.D.N.Y. 2000) (same).

The district court distinguished *Wholesale Grocery* on two grounds, neither of which is consistent with the governing law on continuing violations. First, the district court held that "[u]nlike in *Wholesale Grocery Products*, the anticompetitive nature of Defendants' agreement was not revealed years later, during the limitations period." Order at 10 (JA0342). However, both *Wholesale Grocery* and *Klehr* make clear that—unlike the doctrine of fraudulent concealment—the continuing violation doctrine operates "regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Wholesale Grocery*, 752 F.3d at 736 (quoting *Klehr*, 521 U.S. at 189).

Second, the district court held that "unlike in *Wholesale Grocery Products*, there has been no allegation of a new, separate overt act during the limitations period because there has not been any allegation that Defendants further elevated the relative price of the exchange tanks by further decreasing the fill level." Order at 10 (JA0342). However, this Court's opinion in *Wholesale Grocery* was not based on a price *elevation*, but based on the infliction of a *new injury* during the limitations period by charging inflated prices: "The limitations period begins to run against customers only when the 'customers have reason to know of the violation

and *their damages are sufficiently ascertainable to justify an antitrust action*.'" 752 F.3d at 737 (quoting Areeda & Hovenkamp, *Antitrust Law* ¶ 320c4, at 303–04 (3d ed. 2007) (emphasis added).

There is no basis in antitrust law or economics for any distinction between a supra-competitive, increasing price and a supra-competitive, stable price: it has long been the rule, that in addition to agreements to increase prices, agreements to "stabilize" or "maintain" prices are also *per se* violations of the Sherman Act. *See, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). Indeed, "an illegal antitrust conspiracy may be based on an agreement to keep prices from falling or from falling too much." *In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1156 (D. Kan. 2012). Sales made at a constant price pursuant to such a conspiracy when competitive conditions demand a lower price each result in an antitrust injury sufficient to trigger the rule under *Klehr* and *Wholesale Grocery Products*. As the Supreme Court has explained, "[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of to-morrow." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). However, under the district court's rule, sales pursuant to a continuing price-fixing conspiracy which stabilized prices when competitive conditions should have led to price reductions could never be overt acts, despite the fact that each sale at the

stabilized price would include an overcharge that "inflict[s] new and accumulating injury on the plaintiff." *Varner*, 371 F.3d at 1019.

As a result, under the district court's rule, a direct purchaser class member who first purchased a product from a cartel four years after the cartel was formed would face a Catch-22. He could not sue for the antitrust violation during the first four years after the cartel formed because he would have no injury and no ascertainable damages. *See Berkey Photo*, 603 F.2d at 295 ("[A]t the time a monopolist commits anticompetitive conduct it is entirely speculative how much damage that action will cause its purchasers in the future. Indeed, some of the buyers who will later feel the brunt of the violation may not even be in existence at the time."). Then, as long as the cartel did not further raise the price, he would not be able to sue after he made a purchase because his claim would be barred by the stature of limitations. Such a plaintiff would have no possible cause of action against the cartel, and no remedy whatsoever for the injury he incurred.

The rule fashioned by the district court is also inconsistent with the holding in *United States v. N. Improvement Co.*, 814 F.2d 540 (8th Cir. 1987). There, this Court reversed a district court decision dismissing an alleged horizontal bid-rigging conspiracy on statute of limitations grounds. The bid rigging began before the limitations period, but resulted in receipt of supra-competitive payments by conspirators within the limitations period. The Court explained that "[w]hile a

Sherman Act conspiracy is technically ripe when the agreement to restrain competition is formed, 'it remains actionable until its purpose has been achieved or abandoned,'" and the court had "no difficulty in concluding" that the conspiracy continued until the final supra-competitive payment was received. *N. Improvement*, 814 F.2d at 542 (quoting *United States v. Inryco, Inc.*, 642 F.2d 290, 293 (9th Cir. 1981)). The Court reasoned that "the purpose of entering the conspiracy . . . was not merely to restrain competition for the satisfaction of violating the Sherman Act." 814 F.2d at 542. Rather, "[c]ommon sense tells us that the conspirators' purpose was to reap the benefit of the conspiracy." *Id.* Thus, defendants' "acceptance and retention of payment was an overt act in furtherance of the conspiracy." *Id.* at 543.[7]

Finally, the district court erred by holding that interpreting *Klehr* and *Wholesale Grocery* to hold that each overcharge re-starts the statute of limitations would "effectively abrogate the statute of limitations" or "undermine the policies behind the statutes of limitation." Order at 11 (JA0343). Repose outweighs the competing need to remedy continuing violations of the antitrust laws only where the legality of anticompetitive conduct is uncertain or vague: "Repose is especially valuable in antitrust, where tests of legality are often rather vague, where many

[7] *See also United States v. A–A–A Elec. Co.*, 788 F.2d 242 (4th Cir. 1986); *United States v. Inryco, Inc.*, 642 F.2d 290 (9th Cir. 1981).

business practices can be simultaneously efficient and beneficial to consumers but also challengeable as antitrust violations, where liability doctrines change and expand . . . .” *Id.* at 12 (JA0344) (quoting Areeda & Hovenkamp, *Antitrust Law* ¶ 320a (2015)). Unlike conduct whose legality may be ambiguous under antitrust law, the *per se* illegality of horizontal price-fixing agreements has been settled for well over a century. *See Socony-Vacuum Oil Co.*, 310 U.S. at 218 (“[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act[.]”).[8]

Indeed, the non-binding case relied on by the district court supports the interpretation urged by Plaintiffs here. In *Southeast Missouri Hospital v. C.R. Bard, Inc.*, No. 1:07cv0031 TCM, 2008 WL 4104534 (E.D. Mo. Aug. 27, 2008), plaintiffs sought damages *from before the limitations period* based on the use of allegedly unlawful exclusionary contracts. *Id.* at *1. While the magistrate judge held that “[s]ales of a product pursuant to an allegedly illegal arrangement are not new, overt acts,” *id.* at *3, it quoted the Eighth Circuit explaining that “to apply the continuing violation theory to *non-conspiratorial* conduct, new overt acts must be more than the unabated inertial consequences of the initial violation.” *Id.* at *3

[8] *Cf. Berkey Photo*, 603 F.2d at 295 (“So long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide.”).

(quoting *Midwestern Mach.*, 392 F.3d at 270) (emphasis added). Implicit in this rule is that supra-competitive prices pursuant to a *per se* unlawful conspiracy are not evaluated in the same way as alleged sales pursuant to a vertical agreement or other conduct with ambiguous or uncertain competitive effects. Furthermore, the magistrate judge in *Southeast Missouri Hospital* only dismissed the claims for damages *preceding the limitations period. Id.* at *4. Thus the court implicitly endorsed the rule urged by Plaintiffs here, allowing the plaintiffs to proceed on their claim for damages incurred within the limitations period.

The CAC alleges that Defendants "continued to offer only 15-pound" tanks (CAC ¶ 124 (JA0158)) and charged "supra-competitive prices . . . throughout the Class Period." (CAC ¶ 121 (JA0157)).[9] Customers who continued to purchase at supra-competitive prices after the conspiracy existed for four years are injured by it no less than those who purchased within the initial four-year period.

2. *The District Court Erred in Holding That Unlawful Communications Between Horizontal Competitors Are Not Overt Acts Sufficient To Invoke The Continuing Violations Doctrine*

The Complaint alleges that during the limitations period, in addition to continuing to charge collusively-set prices for propane tanks, Defendants also

[9] Although Plaintiffs requested discovery from the FTC proceedings which ended with the 2015 Consent Agreements enjoining the conspiracy, the District Court stayed all discovery pending resolution of the Motions to Dismiss. Order Granting Defs.' Joint Mot. to Stay Disc., Feb. 24, 2015, ECF No. 119 (JA0186).

engaged in conspiratorial discussions regarding pricing, market allocation, and fill levels. Although this conduct is independently unlawful, the district court held these communications were immune from antitrust scrutiny because they were "mere reaffirmations" of the prior fill-level agreement. Order at 12-13 (JA0344-45). As a preliminary matter, this holding is contradicted by the face of the Complaint, which alleges discussions about pricing to specific customers and market allocation, CAC ¶¶ 13, 92 (JA0134, JA0151) – subjects that go beyond the basic 15-pound fill-level agreement. But even those ongoing communications that were part-and-parcel to Defendants' fill-level agreement were necessary to the continued success of the conspiracy and therefore sufficient to establish a continuing violation. Indeed, the district court's holding, if it were accepted by this Court, would allow unlawful, anti-competitive agreements to continue indefinitely so long as the parties did not materially alter the terms of the initial agreement. Plaintiffs respectfully submit that that holding should be reversed.

As this Court has explained, "[t]he typical antitrust continuing violation occurs in a price-fixing conspiracy, actionable under § 1 of the Sherman Act, when conspirators continue to meet to fine-tune their cartel agreement. These meetings are overt acts that begin a new statute of limitations because *they serve to further the objectives of the conspiracy*." *Midwestern Mach.*, 392 F.3d at 269 (internal citations omitted) (emphasis added). This is so because, as economists and courts

have long recognized, horizontal price fixing agreements cannot continue on their own inertia. "Game theory teaches us that a cartel cannot survive absent some enforcement mechanism because otherwise the incentives to cheat are too great." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993) (citing Richard A. Posner, *Economic Analysis of Law* 265–66 (3d ed. 1986) & Stigler, *infra*).[10]

Plaintiffs' Complaint alleges that the continued contacts between Blue Rhino and AmeriGas served to reinforce and maintain their price-fixing agreement and reduce the risk of either party "cheating" on that agreement. *See* CAC ¶¶ 92-93 (JA0151) ("Through at least the end of 2010 . . . . Should cheating be suspected, Defendants communicated with each other to reassure each other of their compliance with the conspiracy."); CAC ¶¶ 12-13, 46-47, 58, 60 (JA0134, JA0142, JA0144-45).[11] These meetings were a critical element in the conspiracy's

[10] *See also Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1042 (8th Cir. 2000) (citing George J. Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ. 44, 46 (1964)); *id*. at 1038 n.9 ("*[W]ithout* an agreement among oligopolists, the pressure to cut prices is irresistible.") (citing Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 660 (1962)); *F.T.C. v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989) (Posner, J.) ("Colluders are tempted to cheat on their fellows when they can augment their profits by a single large sale (at a shade below the cartel price) that is unlikely to be detected.").

[11] *See also Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 599 (6th Cir. 2014) (explaining that "continuing violations" are frequently found in price-fixing

continued success, and a but-for cause of the overcharge injuries sustained by Plaintiffs within the limitations period.

This Court in *Midwest Machinery* recognized that a cartel is not a static agreement but is rather an "ongoing scheme" that inherently requires continued communications between the co-conspirators in order to endure, and that those communications are evidence of a continuing violation. There, the Court had to determine whether a merger that occurred before the limitations period could be challenged under a continuing violations theory. It held that it could not, because "*[u]nlike a* [horizontal] *conspiracy* or the maintaining of a monopoly, a merger is a discrete act, not an ongoing scheme." *Midwestern Mach.*, 392 F.3d at 271 (emphasis added). The Court distinguished the merger at issue from continued meetings to fine-tune a horizontal cartel agreement, noting the latter "are overt acts that begin a new statute of limitations because *they serve to further the objectives of the conspiracy*." *Id.* at 269 (emphasis added). *See also id*. ("Even if the initial merger violated § 7, it makes little sense to hold that policies were pursued to effectuate the illegal merger as we might in a case involving a conspiracy violating § 1 (e.g., cartel meetings occurred to effectuate a price-fixing agreement) . . . .").[12]

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conspiracy cases because "each price increase requires further collusion between multiple parties to maintain the monopoly [level prices]").

[12] *See also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000) (declining to apply the continuing violation doctrine to a Clayton Act

Moreover, the ongoing communications and agreements between Blue Rhino and AmeriGas are independently unlawful acts, and would thus be actionable even absent the earlier fill-levels conspiracy, because these acts "stabilized" the price of Filled Propane Exchange Tanks. *See* 2 Areeda & Hovenkamp, *Antitrust Law* ¶ 320c(2) (rev. ed. 1995) ("[E]ach new meeting of the cartel is independently unlawful without regard to any meeting that may have occurred previously."). In fact, it is well established that "a conspiracy is presumed to exist until there has been an affirmative showing that it has been terminated so long as there is 'a continuity of purpose and a continued performance of acts.'" *United States v. Williams*, 87 F.3d 249, 253 (8th Cir. 1996) (quoting *United States v. Lewis*, 759 F.2d 1316, 1343 (8th Cir. 1985)); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 318 (4th Cir. 1982).[13] Nor are the "overt acts" required to cause specific, independent antitrust injury above and beyond the overall injury inflicted by the cartel: as the Third Circuit noted in *In re Lower Lake*

Section 7 claim and noting that "[c]ontinuing violations typically arise in the context of Sherman Act or RICO claims where multiple defendants are alleged to be part of an ongoing conspiracy.") (footnote omitted).

[13] This rule applies equally to civil antitrust conspiracies in addition to criminal conspiracies. *See, e.g., Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 828-29 (11th Cir. 1999) *amended in part by* 211 F.3d 1224 (11th Cir. 2000) ("Where there is evidence of the continuing nature of an agreement to eliminate competition, absent an affirmative showing of the termination of that agreement, the conspiracy must be presumed to have continued"; holding continuing violation evidence raised genuine question for trial).

Erie Iron Ore Antitrust Litigation, "overt acts aren't what cause damage. It is the effectiveness of the overall conspiracy that causes damages." 998 F.2d 1144, 1172 (3d Cir. 1993) (quoting District Court record) (rejecting argument that only damage-causing overt acts were enough to restart statute of limitations).

The district court held that the communications alleged in the Complaint were not overt acts because they were "mere reaffirmations" of the prior fill-level agreement. Order at 12-13 (JA0344-45). However, the two cases the district court cited for this proposition—the statute of limitations holding in *Insulate SB, Inc. v. Advanced Finishing Systems, Inc.*, No. 13-2664, 2014 WL 943224 (D. Minn. Mar. 11, 2014), *aff'd on other grounds*, 797 F.3d 538 (8th Cir. 2015), and *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004), *see* Order at 12-13 (JA0344-45)—are both distinguishable because they did not involve horizontal price-fixing cartels, and the continuing conduct alleged in those cases was not necessary to sustain the anti-competitive effects of an earlier agreement.

In *Insulate*, the relevant communication within the limitations period was a letter from a manufacturer, Graco, to its distributors reminding them of its alleged earlier-declared policy prohibiting dealers from carrying a competing product line. *Insulate*, 2014 WL 943224, at *7. However, the district court in *Insulate* explicitly recognized that the challenged agreement (Graco's exclusive distribution policy) did not require any further collusive activity in order to continue, *id.* at *1-2, *6

("Insulate has not alleged that new acts were required to maintain the unlawful arrangements."), and the plaintiffs' complaint acknowledged that "the threat of loss of a distributorship [was] sufficient to hold the conspiracy together." *Id*. (quoting complaint). By contrast, here Plaintiffs explicitly allege a horizontal conspiracy that could *not* have endured to the present day but for the ongoing communications between Blue Rhino and AmeriGas. *See* CAC ¶¶ 12-13, 46-47, 58, 60, 92-93 (JA0134, JA0142, JA0144-45, JA0151).

Moreover, unlike the letter in *Insulate*, the communications alleged here are themselves violations of the antitrust laws. In an alleged vertical agreement, communications like Graco's letter to its dealers are not by themselves unlawful: it is well established that there can be no "meeting of the minds" required for Section 1 liability when a manufacturer simply declares a policy and then refuses to deal with its distributors who violate the policy. *See Insulate*, 797 F.3d at 544 ("Graco's unilateral announcement of its decision not to supply distributors who also sell competing products did not transform a prior innocuous distributor agreement into a contract for exclusive dealing.") (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) and *Concord Boat*, 207 F.3d at 1058). However, a horizontal agreement to prevent prices from falling is *per se* illegal. *Socony-Vacuum Oil Co.*, 310 U.S. at 218; *In re Urethane Antitrust Litig.*, 913 F. Supp. 2d at 1156.

The other case cited by the district court, *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004) (cited in Order at 8 (JA0340)), is similarly inapposite. There, the plaintiffs, former poultry farmers, alleged an illegal tying agreement in the form of their contract with a poultry buyer (Peterson Farms). 371 F.3d at 1019-20. The contract was agreed outside of the limitations period, but the plaintiffs claimed their actions pursuant to the contract (which, among other things, required them to purchase supplies from Peterson) constituted continuing violations. The Court held that "[p]erformance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period." *Id.* at 1020. However, a legally binding contract, the terms of which were fixed years earlier and which is enforceable in a court of law, is very different from an unlawful price-fixing conspiracy that relies on the co-conspirators' mutual reassurances and policing to ward off the ever-present temptation to cheat.[14]

Under the district court's analysis, as long as a price fixing cartel does not "change or modify" its agreement, its members can continue to enforce the cartel and to collect supra-competitive profits indefinitely. Such activity—the classic unlawful conduct the Sherman Act is meant to prevent—cannot be what this Court meant by the "mere reaffirmation of the prior agreement." *See* Order at 13

[14] *See Edward Katzinger Co. v. Chi. Metallic Mfg. Co.*, 329 U.S. 394, 399 (1947) ("price-fixing agreements such as those here involved are unenforceable because of violations of the Sherman Act").

(JA03445); *Varner*, 371 F.3d at 1019.[15] In fact, the rule announced by the district court would allow cartels to decide upon a fixed price, quickly settle any lawsuits, and then continue to reap the profits from the illegally inflated price indefinitely, profits that over the long term would vastly outweigh any earlier settlement payments. Such a result is an anathema to the antitrust laws and the long line of precedent regarding continuing conspiracies.

VI. CONCLUSION

For the reasons stated above, Plaintiffs-Appellants respectfully request that the Court REVERSE the district court's order dismissing their claims and REMAND this matter for further proceedings.

Dated: September 30, 2015

Respectfully Submitted,

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[15] Even if the district court is correct that continuing to meet to enforce an existing price fixing agreement is not an overt act, Plaintiffs allege additional overt acts that are not "mere affirmations" of the existing fill-reduction agreement. For example, through at least 2010, AmeriGas and Blue Rhino continued to have discussions regarding pricing for contracts. CAC ¶ 13 (JA0134). In addition, Defendants allocated customers and markets to avoid competing with each other. *Id.* ¶¶ 90-91 (JA0150-51). Although the Complaint does not specify the timing of the latter agreement, it is not clear from the face of the Complaint that the agreement occurred before the limitations period.

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Dated: September 30, 2015

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