ANTITRUST LAW

Unit 4: Antitrust Class Actions

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AN INTRODUCTION TO ANTITRUST CLASS ACTIONS

A special case of private action is the class action, a procedural device that permits one or more representative or *named plaintiffs* to aggregate in a single lawsuit the claims of similarly situated persons that are not parties before the court and to bind both the representatives and the represented persons with the resulting judgment in the action. The class action is one of the primary forms of private antitrust actions. Outside of criminal prosecution, the class action is the antitrust challenge that defendants fear the most. In antitrust cases, where the injury may extend throughout the market and affect a large number of customers, a class action can threaten liability in the hundreds of millions, if not billions, of dollars.

Absent class members—members of the class that are not named as plaintiffs—receive the benefits, if any, that result from the prosecution of the class action. Conversely, once a class action is decided on the merits, whatever the result, absent class members are precluded from pursuing their individual claims against the defendants in a subsequent lawsuit. Some class actions are defeated on the merits. Others go to trial and prevail, but with the rewards of the case often being less than what some absent class members think is appropriate. Still others are settled, again perhaps with some dissatisfied absent class members. In each instance, the dissatisfied members who remain in the class have lost their right to bring their own separate actions in the hopes of obtaining a better result.[1]

Ordinarily in Anglo-American procedural jurisprudence, an entity will be bound by a judgment only if the entity was party to the action or in privity with a party to the action[2] and subject to the personal jurisdiction of the court.[3] The class action is an exception since absent class members are neither parties nor in privity with a named plaintiff by virtue of their class membership and need not be subject to the personal jurisdiction of the court to be bound by the class action judgment. Moreover, absent class members are likely to have no say in the choice of class counsel, no individual contact with class counsel notwithstanding an apparent attorney-client relationship between them, and no input into class counsel's strategy for the litigation, including settlement.

1. Cooper v. Fed. Rsrv. Bank of Richmond, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.".

2. Hansberry v. Lee, 311 U.S. 32, 40 (1940); *accord* Richards v. Jefferson County, 517 U.S. 793, 798 (1996) ("This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.' ") (citation omitted); Martin v. Wilks, 490 U.S. 755, 761-62 (1989); Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979) ("[T]he Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."); Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n. 7 (1979); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328-329 (1971); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969)

3. *See* Hansberry v. Lee, 311 U.S. 32, 40 (1940); Pennoyer v. Neff, 95 U.S. 714 (1878).

The class action, along with suits by a guardian, trustee, or similar fiduciary, is a species of representative litigation.[4] A congruence of interests among the class members and adequate representation by the named plaintiff is a replacement for individual control.[5] The modern rationale for permitting this exception to the party/privity rule is threefold. First and foremost, the class action promotes procedural fairness and individual redress by providing a means of aggregating small claims where the individual incentives to litigate are too small to justify individual actions.[6] In these situations, the class action both provides redress for the injured parties who otherwise would not have practical access to the courts and deters wrongdoing by the defendant by internalizing the costs that the wrongdoer imposes on its victims.[7] Second, even when the incentives of class members are sufficient to bring their own individual actions, the class action promotes judicial economy by providing a means of avoiding multiple actions on essentially the same claim so that class members, defendants, and the court all are spared the costs and burdens of

4. The two other types of representative litigation are associational representation, where an association may bring an action on behalf of its members when the members themselves would have standing to bring their own individual actions, *see* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 342 (1977), and so-called "third-party" representation, where a litigant may bring an action on behalf of a third-party if the litigant and third-party are both injured by the same wrongful act of the defendant and so have a common interest in the outcome of the litigation, the litigant and the third party share a "close relation," and the third party is hindered from bringing its own action, *see* Powers v. Ohio, 499 U.S. 400, 411 (1991); Singleton v. Wulff, 428 U.S. 106, 112-16 (1976). Arguably, associational representation and third-party representation may be combined, so that an association may bring an action, for example, on behalf of its members' clients. *See* Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc., 280 F.3d 278 (3d Cir. 2002).

5. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625-26 & n.20 (1997); Hansberry v. Lee, 311 U.S. 32, 41-43 (1940); Culver v. City of Milwaukee, 277 F.3d 908, 910 (7th Cir. 2002).

6. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997), *quoted in* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997); *accord* California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2054 (2017). *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("[T]his lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, persons may be without any effective redress unless they employ the class action device."); Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 161 (1974) (where named plaintiff's alleged damages amounted to only $70, "[e]conomic reality dictates that petitioner's suit proceed as a class action or not at all"); Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 41 (1st Cir. 2003) ("The core purpose of Rule 23(b)(3) is to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation.").

7. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985); *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Litig., 55 F.3d 768, 783 (3d Cir. 1995); *see also* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) (recognizing class action as an "evolutionary response to the existence of injuries unremedied by the regulatory action of government").

multiple actions.[8] Third, the class action protects against conflicting adjudications and assures the defendant that its obligations, if any, will be consistent across class members.[9]

Even taken collectively, however, these reasons alone would not be sufficient to override the fundamental notion that a person should not have its rights adjudicated without having the effective opportunity to make its own case to the court. Something more is needed. In part as a requirement of constitutional due process and part as a matter of policy embodied in the law of procedure and the inherent discretion of the court in the exercise of the judicial power, the law imposes the condition that the absent class members be adequately represented in the action, so that—at least in principle—the case the absent class members reasonably would have made had they been parties to the action will be made on their behalf by the named class plaintiffs and class counsel. Much of class action law and litigation involves issues of adequacy of representation. In certain types of class actions, absent class members also must receive notice of the action and be provided with a meaningful opportunity to be heard by the court or, if they wish, exclude themselves or "opt-out" from the class before the judgment can bind them.

In all class actions, if the action is not fully litigated but rather settled so that the disposition of the rights of the parties is the result of a negotiation by the named parties rather than a judicial decision on the merits, the law requires the court to make an independent assessment of the settlement on behalf of the absent class members and to enter it as a final judgment only if the settlement provides a fair, reasonable and adequate outcome for the class.[10] Courts take this obligation to act as "fiduciaries" for the class very seriously.

Class actions are a fixture of modern private antitrust litigation. Antitrust actions are notoriously expensive to prosecute, and aggrieved entities individually often do not have the incentive or the financial wherewithal to pursue a traditional antitrust action. Class actions allow similarly situated potential plaintiffs to aggregate their claims in a single action. Equally, if not more importantly as a practical matter, once aggregated the potential recovery is often large enough to attract not only representation but also litigation financing from plaintiffs' lawyers. Antitrust class actions are almost always financed by law firms operating on some form of contingency fee arrangement, and the financing lawyers almost always select cases that have the potential for substantial damage awards. Plaintiff class action law firms also like their cases to be analytically straightforward, without much dispute as to what has to be shown to establish liability or damages and turn on the proof of relatively few facts. Plaintiff class action lawyers want their cases simple since they

8. *See* General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 155 (1982); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-03 (1980); American Pipe & Const. Co. v. Utah, 414 U.S. 538, 553 (1974); Fed. R. Civ. P. 23 advisory committee notes to 1966 amendments.

9. *See* First Federal of Michigan v. Barrow, 878 F.2d 912, 919 (6th Cir. 1989).

10. Fed. R. Civ. P. 23(e).

are financing the actions themselves; easy to evaluate, so that their investment is more predictable; and with a high payoff in the event of success.[11]

For these reasons, antitrust class actions almost always are grounded in simple per se claims. Rare is the antitrust class action that does not contain a horizontal price-fixing claim, where the per se rule applies, proof of liability is among the simplest in antitrust law, and aggregate damages can be enormous even if class members individually sustain only minimal injuries. Class actions are occasionally used in actions alleging industry-wide tying arrangements, which are also subject to the per se rule. Class actions are almost never employed to challenge mergers, price discrimination, or non-per se violations (such as non-price vertical restraints), where the proof is usually complex and the outcome more unpredictable, or in actions where the restraint is something less than industry-wide, which both complicates proof and reduces the total amount of recoverable damages.

There is a special public interest in antitrust class actions. The private cause of action provisions in the antitrust laws were designed to encourage private enforcement both to compensate those injured by antitrust violations and to create "private attorneys general" whose presence will deter future antitrust violations.[12] These dual objectives cannot be reached if large numbers of potential private plaintiffs lack a cost-effective means of pursuing their claims. A class action also may be the most efficient means for private actions, especially when the antitrust violations have been widespread but the damages suffered by each claimant are small.[13] Moreover, in many instances, a class action by others will be the only way certain consumers would learn of their rights and have a forum for vindication.[14]

Rule 23 of the Federal Rules of Civil Procedure governs the conduct of class actions in federal litigation.[15] Rule 23 has its origins in long-standing equity practice as a device to prevent a multiplicity of suits. The modern form of the rule was created in the 1966 revisions to the Federal Rules of Civil Procedure.[16] Rule 23

11. For these reasons, the real party in interest in class actions is sometimes regarded as class counsel. *Cf.* Reiter v. Sonotone Corp., 442 U.S. 330, 346 (1979) (Rehnquist, J., concurring) (observing that the real party in interest in many consumer antitrust class actions is class counsel); Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co., 834 F.2d 677, 678 (7th Cir. 1987) ("Class actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest."); Culver v. Milwaukee, 277 F.3d 908, 910 (7th Cir. 2002) (same.)

12. *See* Hawaii v. Standard Oil Co. of Calif., 405 U.S. 251, 261 (1972); *In re* Playmobil Antitrust Litig., 35 F. Supp.2d 231, 238 (E.D.N.Y. 1998); *In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 349 (N.D. Ga. 1993); Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34 (S.D.N.Y. 1977); *see also* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338-39 (1980); *see generally* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.").

13. *See In re* Playmobil Antitrust Litig., 35 F. Supp.2d 231, 238 (E.D.N.Y. 1998).

14. *See* Coleman v. Cannon Oil Co. 141 F.R.D. 516, 520 (M.D. Ala. 1992).

15. Fed. R. Civ. R. 23.

16. *See generally* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 375-400 (1967).

provides an unusually large role for courts in the qualification of a lawsuit as a class action, in the conduct of the litigation, and in any settlement or dismissal.[17] The courts' extraordinary involvement stems from the unusual nature of a class action, especially in the relationships among absent class members, the named representatives, and class counsel. As a corollary to the rule that one is not bound by a judgment *in personam* in a litigation in which it is not designated as a party, plaintiffs generally have the freedom to elect which lawsuits they will bring, select the counsel who will represent them, instruct counsel in the conduct of the litigation, and have the final say in matters of settlement or voluntary dismissal. Absent class members, as a matter of legal theory, not just practical reality, have none of these rights. Absent class members have little ability either to shape the claims asserted on their behalf or to participate in the prosecution of the action, assuming that they are aware of the action in the first instance. Once a class is certified, an attorney-client relationship is typically established without any personal contact and often without the class counsel and class member knowing of each other's existence.[18] In the absence of a relationship between class members and class counsel, the courts must ensure that the interests of the absent class members are protected and advanced since class members will be bound by any judgment, favorable or unfavorable, entered in the action.

As a general rule, actions in federal court designed to represent absent persons and bind them to a judgment must proceed as class actions under Rule 23.[19] All class actions must be certified as such by the trial court. The certification process can be complex and time-consuming. The requirements established by the Federal Rules of Civil Procedure to protect the respective interests of absent class members are very involved. Moreover, the stakes in the certification are usually enormous. For the plaintiffs and their counsel, the failure to achieve the certification of a broad class with respect to claims that portend a sufficiently large damages award can reduce or eliminate the financial incentive to go forward with the action and lead to a low settlement or the outright discontinuation of the case. For the defendants, the failure

17. *See, e.g.*, *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995); *In re* Corrugated Container Antitrust Litig., 643 F.2d 195 (5th Cir. 1981). *See also* MANUAL FOR COMPLEX LITIGATION § 30 (3d ed. 1995) (providing guidelines for the management of class actions).

18. Once a class has been certified, the default presumption is that there is an attorney-client relationship between class counsel and the absent class members. *See* 6 WILLIAM RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 19:2 (5th ed. 2011). That said, the duties owed by class counsel and an absent class member are modified in the context of a class action. For example, class counsel may pursue a litigation strategy or a settlement if she believes this to be in the best interests of the class even though some absent class members may object. Although some courts say that no attorney-client relationship exists between class counsel and putative class members, counsel seeking to represent a class, and even more so interim class class, owe some duties to abenst class members. *Id*.

19. *See, e.g.*, Pudela v. Swanson, 1996 WL 754106, at *1-*3 (N.D. Ill. Dec. 31, 1996) (declining to allow plaintiffs in an ERISA action who were successful in establishing liability of a retirement plan's trustees to seek relief on behalf of identically situated plan participants when the action did not proceed as a class action).

to stop the certification, or at least significantly reduce the size of the certified class or the claims on which it may proceed, can mean the difference between a few relatively minor individual damages awards for the named plaintiffs or a bankrupting class award if liability is established.[20] Given these stakes, it should not be surprising that few antitrust damages class actions proceed to judgment. Almost all settle.

Antitrust class actions have their own special settlement dynamic. As noted above, most antitrust class actions allege the existence of a horizontal price-fixing conspiracy in violation of Section 1 of the Sherman Act. Antitrust coconspirators are jointly and severally liable for the injuries caused by the conspiracy and have no right to contribution from other coconspirators. Moreover, the federal antitrust laws provide for the recovery of treble damages. As we saw in Unit 3, a consequence of these two rules is that the settlement amount in antitrust cases is offset against the trebled damages, not the actual damages or the settling defendant's *pro rata* share of actual damages. As defendants settle early in the case for something less than their *pro rata* share of trebled damages—which typically happens—the liability exposure of the remaining nonsettling defendants *increases* with each settlement, sometimes by a very large amount. For example, suppose three defendants have pro rata liability exposure of $100 million each in actual damages for total conspiratorial trebled damages of $900 million. In that case, a settlement by one for $50 million will result in a total residual liability exposure of $850 million, or $425 million pro rata exposure for each of the remaining defendants compared with the $300 million each had before the settlement. This feature of antitrust class actions allows the class to "whipsaw" the defendants into increasingly larger settlements, even with no change in the plaintiff's underlying probability of success in the action or even with a decrease in the probability of success.

One last note before turning to the structure of federal class actions. Although the usual form of a class action is for one or more representative plaintiffs to bring a common claim on behalf of themselves and others similarly situated against one or more named defendants, Rule 23 also permits class actions where the named plaintiffs bring suit in their individual capacity against a named defendant and a class of similarly situated absent defendant class members.[21] Defendant class actions are

20. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); Castano v. American Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not."); *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Litig., 55 F.3d 768, 784 (3d Cir. 1995) ("Another problem is that class actions create the opportunity for a kind of legalized blackmail."); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (noting that a defendant's prospect of all-or-nothing verdict in one presents a high risk that encourages settlement, even when the probability of an adverse judgment is low).

21. Fed. R. Civ. P. 23(a) (providing that "[o]ne or more members of a class may sue *or be sued* as representative parties") (emphasis added)

rare generally and almost unknown in antitrust lawsuits.[22] We will not address defendant class actions in this course.

22. For examples of defendant antitrust class actions, see *In re* Integra Realty Resources, Inc., 262 F.3d 1089 (10th Cir. 2001); Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974); Monument Builders of Pennsylvania, Inc. v. Am. Cemetery Ass'n, 206 F.R.D. 113, 114 (E.D. Pa. 2002) (noting certification of a defendant settlement class consisting of all cemeteries and cemetery associations throughout the Commonwealth of Pennsylvania); New York v. Anheuser-Busch, Inc., 117 F.R.D. 349 (E.D.N.Y. 1987) (certification denied for lack of numerosity); Uniondale Beer Co. v. Anheuser-Busch, Inc., 117 F.R.D. 340, 345 (E.D.N.Y. 1987) (same); Vasiliow Co. v. Anheuser-Busch, Inc., 117 F.R.D. 345 (E.D.N.Y. 1987) (same); Miller v. Hedlund, 1983-1 Trade Cas. (CCH) ¶ 65,754 (D. Or. 1983) (denying certification without prejudice); Thillens, Inc. v. Community Currency Exchange Ass'n, 97 F.R.D. 668 (N.D. Ill. 1983) (certifying class); Wolfson v. Artisans Savings Bank, 83 F.R.D. 547 (D. Del. 1979) (denying certification for failure to show that joinder was impracticable); Coniglio v. Highwood Services, Inc., 60 F.R.D. 359, 363-64 (W.D.N.Y. 1972) (denying certification where selling practiced varied and no representative team could fairly and adequately represent the interests of the class); Research. Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497, 501 (N.D. Ill. 1969) (certifying defendant class in illegal conspiracy to oppose the plaintiff's patent where the alleged conspirators were almost coextensive with the membership of the defendant American Seed Trade Association). *See also* Broadcast Music, Inc. v. CBS, 400 F. Supp. 737, 741 n. 2 (S.D.N.Y. 1975) (certifying defendant class consisting of ASCAP, BMI, their members and affiliates), *rev'd on other grounds*, 562 F.2d 130 (2d Cir. 1977), *rev'd and remanded*, 441 U.S. 1 (1979); National Hockey League v. National Hockey League Players Ass'n, 789 F. Supp. 288 (D. Minn. 1992) (dismissed for lack of a case or controversy).

The Structure of Class Actions

CLASS ACTIONS

Rule 23 of the Federal Rules of Civil Procedure. Class Actions

(a) *Prerequisites*. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Types of Class Actions*. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:
  (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
  (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
  (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
  (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
  (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
  (D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) *For (b)(1) or (b)(2) Classes*. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment*. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General*. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders*. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) *Settlement, Voluntary Dismissal, or Compromise*. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) *Appeals*. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

March 1, 2017

(g) Class Counsel.

(1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel*. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class.

(h) *Attorney's Fees and Nontaxable Costs*. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

RULES ENABLING ACT

28 U.S. Code § 2072 - Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

NOTES

1. The Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure and various other procedural rules are promulgated by the United States Supreme Court pursuant to the Rules Enabling Act of 1934.[1] The Supreme Court adopted the Federal Rules of Civil Procedure, the first of the rules promulgated under the Rules Enabling Act, on December 20, 1937, and the rules became effective on September 16, 1938.

2. "The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules."[2]

3. Administratively, the drafting of new rules and amendments in the first instance is done by the Judicial Conference of the United States, the policymaking arm of the federal courts, which recommends changes to the Supreme Court.[3]

4. As with any rule promulgated under delegated authority, Congress has the legislative power to reject, modify, or defer the rule. To provide an opportunity for Congress to review and change the rules, the Supreme Court must transmit any new or modified rule to Congress not later than May 1 of the year in which the rule is to become effective and the rule is not to become effective until no earlier than December 1.[4]

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1. Ch. 651, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (current version at 28 U.S.C. §§ 2071-2077). For a legislative history of the Rules Enabling Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).
2. Burlington N. R. Co. v. Woods, 480 U.S. 1, 5 (1987).
3. *See* 28 U.S.C. § 2073.
4. 28 U.S.C. § 2074(a).

March 1, 2017

5. The Supreme Court exercised its power to promulgate procedural rules without interference by Congress for almost forty years. In 1973, however, Congress voted to reject the Federal Rules of Evidence after their final approval by the Court. The Federal Rules of Evidence were eventually passed as legislation after substantial changes.[5]

6. Section 2072(b) provides that the rules promulgated under the act will not "not abridge, enlarge or modify any substantive right."[6] In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[7] the Supreme Court summarized the interpretation of this restriction:

> We have long held that this limitation means that the Rule must "really regulat[e] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only "the manner and the means" by which the

5. The Supreme Court adopted the Rules of Evidence on November 20, 1972, to become effective on July 1, 1973. *See* RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, 56 F.R.D. 183 (1972). On February 5, 1973, Chief Justice Warren Burger sent the rules to Congress for its review. *See* COMMUNICATION OF THE CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. NO. 93-46 (Feb. 5, 1973). Two days later, the Senate voted unanimously to create a Select Committee on Presidential Campaign Activities (the "Watergate Committee") to investigate campaign activities related to the presidential election of 1972. On that same day, believing in the circumstances that time was too short to review the evidence rules, the Senate passed a bill to delay enactment of the rules. *See* 119 CONG. REC. 3755 (Feb. 7, 1973). The House of Representatives agreed, but with an amendment that the rules of evidence must be affirmatively approved by Congress. *See* H.R. REP. NO. 93-52 (Mar. 7, 1973); 119 Cong. Rec. 7642-7562 (Mar. 14, 1973) (House debate and passage of bill). The Senate concurred in the amendment, and the bill as amended was enacted into law. *See* Act of Mar. 30, 1973, Pub. Law No. 93-12, 87 Stat. 9 (1973) (stating that the rules "shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress"). After extensive hearings in both the House and Senate and with substantial changes, the rules were enacted as legislation on January 2, 1975. *See* Federal Rules of Evidence. Pub. L. No. 93-595, 93d Cong., 2d Sess., 88 Stat. 1926 (1975) (effective July 1, 1975). Although the 1975 Federal Rules of Evidence are statutory, Congress included a provision in the legislation enabling the Supreme Court to continue to amend them but requiring among other things for the Court to provide Congress with at least 180 days for review. *See id*. § 2(a)(1) (enacting 28 U.S.C. § 2076). Congress also provided that amendments creating, abolishing, or modifying privileges—a major topic of debate over the federal rules of evidence—require affirmative approval by Congress. *Id*. In 1988, Congress retained the enabling provision for the rules of evidence but moved it to a new section. *See* Judicial Improvements and Access to Justice Act of 1988, Pub. L. 100-702, title IV, § 401(a), 102 Stat. 4648 (1988) (current version at 28 U.S.C. § 2072(a)). It also repealed the special timing provisions in Section 2076 and replaced them with a general requirement that Supreme Court must transmit any new or modified rule of any type to Congress not later than May 1 of the year in which the rule is to become effective and the rule is not to become effective until no earlier than December 1. *Id*. (current version at 28 U.S.C. § 2074(a)). It Congress retained the requirement of affirmative congressional approval for rules regarding privileges but moved it to a new section as well. *Id*. (current version at 28 U.S.C. § 2074(b)).

6. 28 U.S.C. § 2072(b)).

7. 559 U.S. 393 (2010).

> litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not.[8]

7. In *Wal-Mart Stores, Inc. v. Dukes*,[9] the Supreme Court held that "trial by formula" violated the Rules Enabling Act, at least where the defendant was entitled to assert statutory defenses against the individual class members. The Court explained the trial by formula accepted below by the Ninth Circuit:

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.[10]

Since this method of proceeding would deprive the defendant of asserting its statutory defences against class members who were not part of the sample, it violated Section 2072(b) of the Rules Enabling Act by abridging a substantive right.

8. *Id*. at 407 (citations omitted).
9. 564 U.S. 338 (2011).
10. *Id*. at 367.

Precertification Case Management

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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IN RE PARKING HEATERS ANTITRUST LITIGATION

MEMORANDUM AND ORDER

This Document Relates To:
ALL ACTIONS

15-MC-0940 (JG) (JO)
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James Orenstein, Magistrate Judge:

The plaintiffs in these eleven consolidated actions, each acting on behalf of a putative class of direct or indirect purchasers of parking heaters, have all asserted claims relating to the alleged existence of a price fixing conspiracy in the sale of parking heaters for commercial vehicles in the aftermarket. *See* Docket Entry ("DE") 1 (consolidation order).[1] Several parties now seek to appoint interim lead class counsel for the putative classes of direct and indirect purchasers, respectively.[2] For the reasons set forth below, I now appoint the firms of Hausfeld LLP ("Hausfeld") and Roberts Law Firm P.A. ("Roberts") as co-lead interim counsel for the putative class of direct purchasers and the Law Offices of Francis O. Scarpulla and Cooper & Kirkham (collectively, "Scarpulla and Cooper") as co-lead interim counsel for the putative class of indirect purchasers; I accordingly deny the remaining motions seeking the appointment of others as interim lead class counsel.

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[1] The direct purchaser actions include *Triple Cities Acquisition LLC v. Espar Inc.*, 15-CV-1343 (JG) (JO); *Nat'l Trucking Reclamation Fin. Svcs. v. Espar Inc.*, 15-CV-2310 (JG) (JO); *Trailer Craft Inc. v. Espar Inc.*, 15-CV-2411 (JG) (JO); *Guay Bros. Co. v. Espar Inc.*, 15-CV-3225 (JG) (JO); *Advance Diesel Svc. v. Espar Inc.*, 15-CV-4350 (JG) (JO); and *Myers Equip. Corp. v. Espar Inc.*, 15-CV-3872 (JG) (JO). The indirect purchaser actions include *Reg'l Int'l Corp. v. Espar Inc.*, 15-CV-1798 (JG) (JO); *Raccoon Valley Transp. Inc. v. Espar Inc.*, 15-CV-1338 (JG) (JO); *Johnson v. Espar Inc.*, 15-CV-3174 (JG) (JO); *Davidson Transfer, LLC v. Espar Inc.*, 15-CV-3005 (JG) (JO); and *N. Jersey Truck Ctr., Inc. v. Espar Inc.*, 15-CV-3290 (JG) (JO). Unless otherwise noted, all docket citations refer to the consolidated docket.

[2] *See* 15-CV-1343 (JG) (JO), DE 14 (Hausfeld's motion for appointment as interim lead class counsel for direct purchasers); 15-CV-2310 (JG) (JO), DE 10 (Roberts' motion of for same); 15-CV-2411 (JG) (JO), DE 9 (motion of Cera LLP ("Cera") for same); 15-CV-3225, DE 8 (motion of Kaplan Fox & Kilsheimer LLP ("Kaplan") for same); 15-CV-1338 (JG) (JO), DE 17 (motion of Hagens Berman Sobol Shapiro LLP ("Hagens Berman") for appointment as interim lead class counsel for indirect purchasers); 15-CV-1798 (JG) (JO), DE 17 (Scarpulla and Cooper's motion for same).

I. Background

On March 16, 2015, Triple Cities Acquisition LLC ("Triple Cities") (a direct purchaser of parking heaters, represented by Hausfeld) and Raccoon Valley Transport, Inc. ("Raccoon Valley") (an indirect purchaser, represented by Hagens Berman) separately filed the first two of eleven class action lawsuits brought to date accusing an array of defendants of participating in a conspiracy to suppress and eliminate competition in the sale of parking heaters for commercial vehicles in the aftermarket. The defendants in the various actions include Espar Inc. ("Espar"), two of its executives, and its related companies; Webasto Products North America, Inc. ("Webasto"), along with its related companies; Proheat Mechanical Systems Inc. and its related companies; Marine Canada Acquisition Inc.; and other as-yet unidentified co-conspirators.

Several motions for appointment as interim lead class counsel were filed between April 15 and May 18, 2015. At a conference on May 22, 2015, I encouraged the parties to confer further about the motions in an attempt to resolve the matter consensually. 15-CV-1343 (JG) (JO), DE 27 (minute entry).

On June 5, 2015, the direct purchaser plaintiffs reported that they had agreed on an executive committee consisting of four firms, one of which would later be appointed as its chair: Hausfeld, Roberts, Cera and Kaplan. DE 9. That proposal collapsed over disagreements about which firm should lead the committee. The four firms then made separate proposals: Kaplan moved to be appointed sole or co-lead counsel, Hausfeld and Roberts proposed to be co-leaders together, and Cera renewed its application for a four-firm committee, with the chair to be selected by the court. DE 25; DE 28; DE 30. In addition to the support of their own clients, Hausfeld and Roberts also have the support of plaintiff Myers Equipment Corp., represented by the firm of Steyer Lowenthal Boodrookas Alvarez & Smith LLP. DE 35.

The indirect purchaser plaintiffs similarly could not reach any agreement. *See* DE 6. Accordingly, Scarpulla and Cooper reinstated their request to serve as co-lead counsel, now supported by all of the other indirect purchaser plaintiffs in the consolidated cases except Raccoon Valley, and added a request that Steven Williams of Cochett, Pitre & McCarthy be appointed as liaison counsel for the group to coordinate administrative matters with the court. *See* DE 26; *see also* Federal Judicial Center, *Manual For Complex Litigation* (the "*Manual*") § 10.221 (4th ed. 2004). Hagens Berman likewise renewed its motion to serve as lead counsel for the indirect purchasers.

II. Discussion

A court "may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." Fed. R. Civ. P. 23(g)(3). The role of such counsel is to "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). Appointing lead counsel helps to promote efficiency and avoid unruly proceedings. *See Farber v. Riker-Maxson Corp.*, 442 F.2d 457, 459 (2d. Cir. 1971); *MacAlister v. Guterma*, 263 F.2d 65, 68-69 (2d Cir. 1958). An interim appointment at this stage, while not required, can help "clarif[y] responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement." *Manual* § 21.11.

A court considering the appointment of interim lead class counsel should consider the same factors that a court appointing lead counsel for a certified class must consider, including the candidates' qualifications and competence, their ability to fairly represent diverse interests, and their attorneys' ability "to command the respect of their colleagues and work cooperatively with opposing counsel and the court." *Manual* § 10.224; *see* Fed. R. Civ. P. Rule 23(g)(1)(C). Also appropriate for consideration is anything else that is "pertinent to counsel's ability to fairly and adequately represent

the interests of the class," Fed. R. Civ. P. 23(g)(1)(B), including "(1) the quality of the pleadings; (2) the vigorousness of the prosecution of the lawsuits; and (3) the capabilities of counsel." *In re Comverse Tech., Inc. Derivative Litig.*, 2006 WL 3761986, at *2-3 (E.D.N.Y. Sept. 22, 2006). Ultimately, the court's task in deciding these motions is "to protect the interests of the plaintiffs, not their lawyers." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* ("*Interchange*"), 2006 WL 2038650, at *4 (E.D.N.Y. Feb. 24, 2006).

At the outset, I note that the factors relating to the qualifications and competence of counsel and the quality of their work are in equipoise: all of the movants appear eminently qualified and I am confident that each candidate would serve the putative classes quite ably in the litigation of these consolidated actions. Thus, while the matter is unquestionably an important one for all concerned, I have no doubt that in a very important sense any resolution of the instant motions could easily be seen as serving each putative class's best interests. But in the absence of agreement, I must necessarily try to discern, at this early stage of the litigation, which of several very good choices will be the best for the putative classes. In attempting to make that decision, I offer no view of the merits of the parties' substantive legal and factual disputes, which are irrelevant to the analysis of the instant motions.

A. Direct Purchasers

I conclude that Hausfeld and Roberts are in the best position to represent the interests of the direct purchaser class. Both firms have already demonstrated their ability to work cooperatively with each other, with the court, and most importantly, with the other attorneys representing plaintiffs with significant interests in this litigation. They have ample resources to conduct the litigation and a wealth of experience in this district. Hausfeld has also already demonstrated its leadership by filing the first direct purchaser complaint. Both firms have conducted thorough and extensive pre-filing

investigations and have shown their legal work to be detailed and high quality, and their joint application has the support of another plaintiff.[3]

The choice between the two competing candidates for lead counsel is a close one. To be sure, Kaplan has likewise performed a thorough investigation. It learned that the Justice Department had granted conditional leniency to Webasto and was the first plaintiff to name two former Espar officers as individual defendants. I conclude that the more widespread support for Hausfeld and Roberts makes their leadership preferable for sophisticated plaintiffs who presumably are in the best position to assess their best interests.

I also conclude that appointing Hausfeld and Roberts is preferable to the four-firm committee that Cera proposes. The parties themselves were unable to reach a consensus about how to make such a leadership structure work, and I doubt that judicial fiat will succeed in creating a workable committee where the parties themselves did not. Moreover, particularly in light of the extent to which prior proceedings may have clarified some of the issues in dispute in these consolidated cases, there seems no need for the inevitable redundancies and inefficiencies attendant to a four-firm leadership structure.[4] While I am confident that Hausfeld and Roberts will welcome the input and participation of all of the plaintiffs' attorneys in deciding how best to advance the interests of the putative class, I conclude there is no need for all of them to be included in the putative class's interim leadership.

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[3] In the parties' written submissions, Hausfeld noted that its client, Triple Cities, was the only plaintiff to whom the United States Department of Justice had thus far provided notice that it was a victim of the alleged anticompetitive conduct. *See* DE 28 at 3. While that would provide it with an advantage that other named plaintiffs lack in terms of positioning itself as an adequate class representative, I have assumed that advantage would be a transient one. At oral argument on August 7, 2015 (the proceedings of which have yet to be transcribed), Cera reported that its client Trailer Craft had received a similar notification.

[4] For example, at least one of the defendants has admitted the existence of the alleged conspiracy. *See, e.g.*, 15-CV-1343 (JG) (JO) DE 1 ¶ 5 (Triple Cities' Complaint) (citing *United States of America v. Espar Inc.*, 15-CR-0028 (JG), DE 16 ¶ 2 (E.D.N.Y. Mar. 12, 2015) (Espar's Plea Agreement, admitting to participation in criminal antitrust conspiracy)).

B. Indirect Purchasers

I conclude for similar reasons that Scarpulla and Cooper are in the best position to represent the interests of the indirect purchase plaintiff class. Scarpulla and Cooper have the support of all of the other named indirect purchaser plaintiffs other than Hagens Berman's clients. They have already demonstrated their ability to work cooperatively with the court and with the other non-lead counsel, they have the support of a larger and more diverse group of clients, and those clients collectively advance a broader array of the legal theories at issue in this litigation.

Hagens Berman offers several arguments in opposition to the Scarpulla and Cooper proposal. First, it contends that only one lead counsel is necessary and that a joint leadership structure would be "overkill, inefficient and promote attorney lodestar over maximizing class member recovery." DE 31 at 3. They are of course correct that, as noted above, there are features of this case that render it less complex than it might otherwise be. But the difference between one law firm and two as leaders seems ultimately a minor one – in either case, multiple attorneys (either in one firm or in more) would necessarily perform litigation tasks and make tactical and strategic decisions for the class. A variety of voices is beneficial for the class, so long as it produces neither paralysis nor inefficiency. The fact that all of the other plaintiffs favor the appointment of Scarpulla and Cooper over Hagens Berman persuades me that those who are best informed and have the greatest incentive to keep attorney fees in check have decided that the risk of inefficiency attendant to the proposed two-firm leadership is an acceptable one.

Second, Hagens Berman notes that it was the first firm to file any case against Espar, the first firm to move for interim lead counsel, the first firm to propose case management procedures and the first firm to propose document production and confidentiality orders. DE 31 at 5. Those are all factors in the firm's favor, but only to a point. They certainly show that Hagens Berman can be a valuable

member of any team of lawyers representing the putative class. But the fact that the firm would consider withholding its expertise from the class leadership if it is not appointed by itself to that role – a threat Hagens Berman made explicit at oral argument – raises some doubts about how well the firm would represent the interests of class members other than its own clients if given such exclusive authority. While the efficiency of a sole leader may have its advantages, they appear in this case to be outweighed by the risk of internal strife within the putative class if Hagens Berman is appointed interim lead counsel, and alleviated by the explicit commitment made by Scarpulla and Cooper at oral argument to solicit the views of other putative class members.

Finally, Hagens Berman asserts that no firm should be appointed as interim lead counsel for a putative class of all indirect purchasers, on the ground that the mix of resellers and end users within that group will necessarily create a disabling conflict of interest. *See* 15-CV-1798, DE 22 at 4; DE 31 at 2. I disagree. As Scarpulla and Cooper argue in opposition, it may well be preferable, and entirely proper, for a putative class of indirect purchasers to try to maximize its collective recovery and then divvy up the spoils among themselves pursuant to judicially supervised procedures. DE 29 at 2-3. Indeed, in articulating the factors to consider in appointing interim lead class counsel, the *Manual* notes the inevitability that some class members will have interests that may ultimately diverge in some ways from those of other members, and cites as a positive attribute a lawyer's ability to fairly represent such diverse interests. *See Manual* § 10.224.

In any event, whichever side is correct about the significance of the existence of different types of indirect purchasers in that putative class, I am satisfied that the record does not yet establish that any actual conflict exists, or that any potential conflict cannot be waived. I therefore conclude that the instant motions can and should be decided without first fully determining the nature and extent of any such conflict. That issue can be addressed, if it ripens, in the context of a motion to disqualify interim

lead class counsel, or in the context of a motion to certify a class defined to include both end users and resellers of parking heaters.

III. Conclusion

For the reasons set forth above, I appoint the Hausfeld and Roberts firms as co-lead interim counsel for the putative class of direct purchasers, the Scarpulla and Cooper firms as co-lead interim counsel for the putative class of indirect purchasers, and Steven Williams as liaison counsel for the indirect purchasers; I accordingly deny the remaining motions seeking the appointment of others as interim lead class counsel.

SO ORDERED.

Dated: Brooklyn, New York
August 11, 2015

/s/
JAMES ORENSTEIN
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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IN RE PARKING HEATERS ANTITRUST LITIGATION — ORDER

This Document Relates To: ALL ACTIONS — 15-MC-0940 (JG) (JO)
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James Orenstein, Magistrate Judge:

I. Designation of Counsel

A. Co-Lead Plaintiffs' Counsel

For the reasons set forth in a Memorandum and Order dated August 11, 2015, docket entry 49, I appoint the firms of Hausfeld LLP and Roberts Law Firm P.A. as co-lead interim counsel for the putative class of direct purchasers of aftermarket parking heaters for commercial vehicles (the "Direct Purchaser Class"), and the Law Offices of Francis O. Scarpulla and Cooper & Kirkham as co-lead interim counsel for the putative class of indirect purchasers of aftermarket parking heaters for commercial vehicles (the "Indirect Purchaser Class").[1] Each team of co-lead counsel shall generally be responsible for coordinating the activities of their respective class plaintiffs during pretrial proceedings and shall:

> determine (after consultation with co-plaintiffs' counsel) and present (in briefs, oral argument, or such other fashion as may be appropriate, personally or by a designee) to the court and opposing parties the position of the class plaintiffs on all matters arising during pretrial proceedings;

[1] The Direct Purchaser Class consists of the named plaintiffs, and member of the putative class each purports to represent, in each of the following pending actions: *Triple Cities Acquisition LLC v. Espar Inc.*, 15-CV-1343 (JG) (JO); *Nat'l Trucking Reclamation Fin. Svcs. v. Espar Inc.*, 15-CV-2310 (JG) (JO); *Trailer Craft Inc. v. Espar Inc.*, 15-CV-2411 (JG) (JO); *Guay Bros. Co. v. Espar Inc.*, 15-CV-3225 (JG) (JO); *Advance Diesel Svc. v. Espar Inc.*, 15-CV-4350 (JG) (JO); and *Myers Equip. Corp. v. Espar Inc.*, 15-CV-3872. The Indirect Purchaser Class consists of the named plaintiffs, and member of the putative class each purports to represent, in each of the following pending actions: *Reg'l Int'l Corp. v. Espar Inc.*, 15-CV-1798 (JG) (JO); *Raccoon Valley Transp. Inc. v. Espar Inc.*, 15-CV-1338 (JG) (JO); *Johnson v. Espar Inc.*, 15-CV-3174 (JG) (JO); *Davidson Transfer, LLC v. Espar Inc.*, 15-CV-3005 (JG) (JO); and *N. Jersey Truck Ctr., Inc. v. Espar Inc.*, 15-CV-3290.

coordinate the initiation and conduct of discovery on behalf of class plaintiffs' consistent with the requirements of Fed. R. Civ. P. 26(b)(1), 26(2), and 26(g), including the preparation of joint interrogatories and requests for production of documents and the examination of witnesses in depositions;

conduct settlement negotiations on behalf of class plaintiffs, but not enter into binding agreements except to the extent expressly authorized;

delegate specific tasks to other counsel or committees of counsel in a manner to ensure that pretrial preparation for the class plaintiffs is conducted efficiently and effectively;

enter into stipulations with opposing counsel as necessary for the conduct of the litigation;

prepare and distribute periodic status reports to the parties;

maintain adequate time and disbursement records covering services as lead counsel;

monitor the activities of co-counsel to ensure that schedules are met and unnecessary expenditures of time and funds are avoided; and

perform such other duties as may be incidental to proper coordination of class plaintiffs' pretrial activities or authorized by further order of the court.

This order does not limit the right of other counsel for class plaintiffs to be heard on matters not susceptible to joint or common action, or when a genuine and substantial divergence of opinion exists among counsel. However, the parties and their counsel are encouraged to avoid presentations of cumulative views, or submissions that differ from those of co-lead counsel in only minor ways.

B. Liaison Counsel

I appoint Steven Williams of the law firm Cochett, Pitre & McCarthy LLP to be liaison counsel for the putative class of Indirect Purchaser Class, and in that capacity to be responsible for facilitating and expediting communications with and among co-lead plaintiffs' counsel for that class.

II. Submission of Time Records

All class plaintiffs' counsel in these class action cases shall submit on a periodic basis a record of the time expended on these matters, in a manner set forth by co-lead counsel.

III. Status Conferences and Status Reports

As discussed at the status conference on August 7, 2015, I will conduct regular status conferences with representatives of parties to this action. Absent a court order or agreement among plaintiffs' counsel to the contrary, all co-lead and liaison counsel for the plaintiffs shall participate in these status conferences.

Prior to each scheduled status conference, the parties' counsel are directed to meet and confer and file a joint report on the progress of the case, any disputes requiring court intervention, and other issues to be discussed at the conference. The status report shall be submitted at least one week prior to the scheduled conference. If warranted, I will entertain a timely application to cancel or adjourn any such conference.

SO ORDERED.

Dated: Brooklyn, New York
August 11, 2015

/s/
JAMES ORENSTEIN
U.S. Magistrate Judge

MAGISTRATE JUDGES

The decision to appoint interim class counsel in *Parking Heaters* was made by a *magistrate judge*. Congress has authorized the judges of each district court to appoint full-time magistrate judges for a term of eight years and part-time magistrate judges for a term of four years.[1] Magistrate judges have a variety of powers prescribed by statute,[2] but for our purposes the most important is that a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court (except a motion for injunctive relief), for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.[3] The resolution of discovery disputes is a prime function for magistrate judges under this provision. More generally, without the consent of the parties, a district court may designate a magistrate judge to hear and decide pretrial matter that, with some important additions, are not dispositive or a party's claim or defense.[4] For these nondispositive pretrial matters, a party may serve and file objections to a magistrate judge's order within fourteen days of being served, and the district judge may modify or set aside the order only to the extent the factual findings are clearly erroneous or the legal conclusions are contrary to law.[5]

The district court judge also may designate a magistrate judge to conduct hearings (including evidentiary hearings) and to submit to the judge proposed findings of fact and recommendations of any excepted pretrial motions.[6] These are often called "dispositive" matters, although they include motions for injunctive relief and class certification, may be referred to a magistrate judge only for recommendations, not decision.[7] The magistrate judge's proposed findings of fact and recommendations, which is submitted to the court with a copy provided to the parties, is usually styled a

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1 28 U.S.C. §§ 631(a), (e).

2 *See id*. § 636.

3 *Id*. § 636(b)(1)(A); *see* FED. R. CIV. P. 72(a).

4 FED. R. CIV. P. 72(a); *see* Arista Records, LLC v. Doe 3, 604 F.3d 110, 116 (2d Cir. 2010).

5 28 U.S.C. § 636(b)(1)(C); *see* FED. R. CIV. P. 72(a); Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1414 (9th Cir. 1991); Moore v. Publicis Groupe SA, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 517207, at *1 (S.D.N.Y. Feb. 14, 2012); *In re* Urethane Antitrust Litig., No. 04-MD-1616-JWL, 2006 WL 3000763, at *2 (D. Kan. Oct. 18, 2006); *In re* Terazosin Hydrochloride Antitrust Litig., No. 99-MDL-1317-SEITZ, 2001 WL 34050474, at *1 (S.D. Fla. Dec. 19, 2001); *but cf.* Park West Radiology v. CareCore Nat. LLC, 547 F. Supp. 2d 320, 322 (S.D.N.Y. 2008) (suggesting that district court may reconsider a magistrate judge's order on a nondispositive matter even if not clearly erroneous or contrary to law).

6 28 U.S.C. § 636(b)(1)(B); *see* FED. R. CIV. P. 72(b).

7 Arista Records, LLC v. Doe 3, 604 F.3d 110, 116 (2d Cir. 2010).

"Report and Recommendation."[8] When the magistrate judge issues a Report and Recommendation, a party may serve and file objections to the order within fourteen days of being served, and the district court judge must make a de novo determination of those portions of the Report and Recommendation that are the subject of the objections.[9] In considering any objections, the district judge has discretion to receive further evidence,[10] although there is authority that the judge does not have to consider newly proffered evidence where the presenting party had a full opportunity to present the evidence to the magistrate judge.[11] The district judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge, or the judge may recommit the matter to the magistrate judge with instructions.[12]

Finally, with the consent of the parties, a magistrate judge may conduct any or all excepted motions and to trying the case and ordering the entry of judgment.[13] The consent of the parties allows a magistrate judge to direct the entry of a judgment of the district court, and an aggrieved party may appeal the judgment directly to the appropriate United States court of appeals in the same manner as an appeal from any other judgment of a district court.[14] In a multiparty action where some but not parties consent to a trial before a magistrate judge, the magistrate judge may enter a judgment as to the consenting parties and a report and recommendation as to the nonconsenting parties.[15]

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8 *See, e.g., In re* Air Cargo Shipping Services Antitrust Litig., No. MD 06-1775(JG)(VVP), 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008) (report and recommendation regarding motions to dismiss); *In re* Payment Card Interchange Fee and Merchant Discount Antitrust Litig., 562 F. Supp. 2d 392 (E.D.N.Y. 2008) (adopting report and recommendation regarding motions to dismiss).

9 28 U.S.C. § 636(b)(1)(C).

10 *Id*.; FED. R. CIV. P. 72(b)(3); *see* United States v. Raddatz, 447 U.S. 667, 673-74 (1980); Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 70 (3d Cir. 2000).

11 *Carpet Group*, 227 F.3d at 70.

12 *Id*.; *see, e.g., In re* Payment Card Interchange Fee & Merchant Discount Antitrust Litig., 562 F. Supp. 2d 392 (E.D.N.Y. 2008) (adopting in full report and recommendation regarding motions to dismiss).

13 28 U.S.C. § 636(c). For examples of antitrust cases tired to a magistrate judge, see, for example, King v. Idaho Funeral Service Ass'n, 862 F.2d 744 (9th Cir. 1988); Eastern Auto Distribs., Inc. v. Peugeot Motors of Am., 795 F.2d 329, 334 (4th Cir. 1986); Conoco Inc. v. Inman Oil Co., 774 F.2d 895, 897 n.1 (8th Cir. 1985); Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1386 n.1 (5th Cir. 1983); St. Francis Med. Ctr. v. C.R. Bard, Inc., 657 F. Supp. 2d 1069 (E.D. Mo. 2009), *aff'd*, 642 F.3d 608 (8th Cir. 2011); Ticket Ctr., Inc. v. Banco Popular de Puerto Rico, 613 F. Supp. 2d 162, 169 (D.P.R. 2008); Miles Distribs., Inc. v. Specialty Constr. Brands, Inc., 417 F. Supp. 2d 1030, 1033 (N.D. Ind. 2006); Jones v. Deja Vu, Inc., 419 F. Supp. 2d 1146, 1148 n.1 (N.D. Cal. 2005).

14 *Id*. § 636(c)(3).

15 *See* United States v. American Soc'y of Composers, Authors and Publishers, 902 F. Supp. 411, 417 n.6 (S.D.N.Y. 1995)

Class Certification

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

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION	:	**MULTIDISTRICT LITIGATION**
	:	
	:	
THIS DOCUMENT APPLIES TO:	:	
ALL DIRECT PURCHASER ACTIONS	:	**No. 08-md-2002**

AMENDED MEMORANDUM[1]

GENE E.K. PRATTER, J. NOVEMBER 10, 2015

The nation's major egg producers are accused by those who purchase eggs directly from them of conspiring to control and limit the supply of eggs and thereby increase the prices of eggs. The claims allege that the Defendants accomplished this objective through three principal means: (1) a series of explicit, short-term production-restriction programs, such as slaughtering hens prematurely; (2) a pretextual animal-welfare program; and (3) a series of exports of eggs at below-market prices.

In addition to a putative class of direct purchasers of eggs ("Direct Purchaser Plaintiffs"—referred to as "Plaintiffs" in this memorandum) (i.e. those who bought eggs or egg products directly from Defendants) two other categories of plaintiffs are pursuing the egg producer defendants, a putative class of indirect purchasers of eggs ("Indirect Purchaser Plaintiffs") (i.e. those who bought eggs produced by Defendants but sold by a party other than a Defendant); and plaintiffs who are bringing their own individual actions ("Direct Action

[1] This Amended Memorandum makes no substantive changes to the Memorandum of September 18, 2015. It corrects various typographical and/or clerical checking oversights.

Plaintiffs"). The Direct Purchaser Plaintiffs seek certification of their proposed class.[2] For the reasons set forth in this Memorandum, the Court will certify the proposed subclass of purchasers of shell eggs but not the proposed subclass of purchasers of egg products.

I. BACKGROUND

a. Allegations of Fact

According to Plaintiffs, in mid-1999, the egg industry was facing a "perceived crisis" on account of the expansion of the supply of eggs, which was pushing down egg prices. DPP Mem. in Supp. of Class Cert. 9 (Doc. No. 979). This alarming trend spurred the egg industry's trade groups, United Egg Producers (UEP) and the United States Egg Marketers (USEM), whose members produce more than 90% of the eggs in the United States, to conspire to take steps to "manage" the egg supply. *Id.* This conspiracy consisted of three general tactics: (1) a series of short-term egg-supply reduction programs, (2) a long-term plan to reduce the supply of eggs under the pretext of an "animal-welfare program," and (3) exporting eggs at a loss.

1. Short-term Egg Supply Reduction Programs

Beginning in 1999, UEP members agreed to a series of programs designed to reduce the supply of eggs in the short-term. These programs included agreeing to induce hens to molt early[3], slaughtering flocks of hens earlier than had been done before, and reducing the hatching of chicks. These programs were implemented by the UEP's "marketing committee," and members of UEP were asked to commit to the programs. By 2004, however, these short-term reduction strategies no longer kept egg prices from falling. In November 2004, UEP held an

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[2] The Indirect Purchaser Plaintiffs also seek certification. Their motion is addressed separately.

[3] Molting is the process whereby hens lose their feathers and regrow them—hens lay no eggs when molting.

"Egg Economic Summit" where members (and non-members) met to discuss the supply reduction programs. At this meeting, the members agreed to continue with the egg reduction programs. They also recommended adopting "animal-welfare" standards, such as increased cage-space for the hens, to reduce the supply of hens. Moreover, UEP members were encouraged to stop backfilling cages (whereby dead hens are replaced with younger hens). These programs were successful in reducing flock size, and, the prices of eggs rose.

2. The Scheme to Reduce the Supply of Eggs Under the Pretext of a Certified Animal-Welfare Program

Beyond these short-term strategies, the conspiracy allegedly included the creation and implementation of a certified program purporting to improve the welfare of the hens. In fact, claim Plaintiffs, this program was a scheme to reduce the supply of eggs, primarily via requirements for increased cage-space per hen. Compliance with this program was monitored by monthly reporting requirements and periodic audits. The cage-space requirement was supplemented by three additional requirements: (1) the 100% rule, which required that all of a producer's facilities, including those of its affiliates (even affiliates that were not themselves UEP members), comply with the Certified Program's cage-space requirements in order for any egg from that producer to be "certified"; (2) a prohibition on backfilling within the certified program; and (3) a rule that failing to comply with the cage-space or backfilling requirements would result in an "automatic fail" of an audit under the certified program—even though other shortcomings under the program (such as improper lighting or handling) did not result in an automatic failing assessment. The certified program was promoted as an animal-welfare program, with labels on egg packaging certifying that the eggs were "Animal Care Certified." According to Plaintiffs, this was merely a pretextual justification for the price-increase-via-

supply-reduction program. In fact, following a Federal Trade Commission investigation concerning whether the "Animal Care Certified" label was misleading, UEP agreed in 2005 to change the name of its certified label from "Animal Care Certified" to "UEP certified."

3. Egg Exports at a Loss

The alleged supply restriction program also included a series of egg exports at a loss. The USEM scheme, which was managed through the UEP Export Committee, required the involvement of all USEM members who had to either export their own eggs at a loss or sell their eggs to UEP at domestic prices, and then later receive a bill for the difference between the domestic price and the export price. USEM members who did not contribute eggs to this export effort contributed money to help fellow members bear the burden of the export losses. These exports, which were also supported by some non-USEM-members, occurred on multiple occasions between 2000 and 2003, and again from 2006 to 2008.

b. Proposed Class and Subclasses

Plaintiffs seek certification of the following class and subclasses:

> All individuals and entities that purchased eggs, including shell eggs[4] and egg products,[5] produced from caged birds in the United States directly from Defendants during the Class Period from September 24, 2004 through the present.
>
> a.) Shell Egg Subclass
>
> All individuals and entities that purchased shell eggs produced from Defendants during the Class Period from September 24, 2004 through the present.

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[4] "Shell eggs" is defined as eggs produced from caged birds that are sold in the shell for consumption or for breaking and further processing.

[5] "Egg products" is defined as the whole or any part of shell eggs that have been removed from their shells and then processed, with or without additives, into dried, frozen, or liquid forms.

b.) Egg Products Subclass

All individuals and entities that purchased egg products produced from shell eggs that came from caged birds in the United States directly from Defendants during the Class Period from September 24, 2004 through the present.

Excluded from the Class and Subclasses are the Defendants, their co-conspirators, and their respective parents, subsidiaries, and affiliates, as well as any government entities. Also excluded from the Class and Subclasses are purchasers of "specialty" shell eggs or egg products (such as "organic," "free range," or "cage free")[6] and purchasers of hatching eggs, which are used by poultry breeders to produce breeder stock or growing stock for laying hens or meat.

II. CLASS CERTIFICATION STANDARD

Rule 23 of the Federal Rules of Civil Procedure, which reads in relevant part, sets the standard for class certification:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

. . .

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

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[6] "Specialty eggs" are further specified to include certified organic, nutritionally enhanced, cage free, free range, and vegetarian fed eggs.

> **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;
> **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> **(D)** the likely difficulties in managing a class action.

Fed. R. Civ. P. 23.

Certifying a class is not a casual endeavor. Rather, courts must conduct a "rigorous analysis" to ensure that Rule 23's standards are met. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008). The Court must determine whether each of Rule 23's standards have been met by a preponderance of the evidence. *Id.* at 321. To do so, the Court necessarily needs to examine issues that, to some extent, overlap issues to be decided at the final merits determination. *Id.* at 316. However, calling upon the analytical restraint often demanded of judges, the Court only examines the merits of the underlying case to the extent such an examination is relevant to the Rule 23 standards. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013).

The standards for Rule 23(a) analysis typically are referred to as "numerosity, commonality, typicality, adequacy, and ascertainability." Every potential class must meet these standards. The Court considers each of these factors before turning to "predominance" under Rule 23(b)(3).

III. RULE 23(a) FACTORS

a. Numerosity

Rule 23(a)(1) requires that a class be so numerous that joinder of all members be impracticable. Although there is no threshold number, the Third Circuit Court of Appeals has provided some guidance by noting that, in general, a proposed class of more than 40 members will satisfy the numerosity requirement. *Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001).

Defendants do not challenge the proposed class as being insufficiently numerous. The Court finds that the proposed class of Direct Purchaser Plaintiffs is sufficiently numerous to satisfy the requirement of Rule 23(a)(1). The proposed class includes members in every state and consists of potentially more than 13,000 members. Joinder of all of these members would certainly be impracticable.

b. Commonality

Rule 23(a)(2) requires that there be questions of law or fact common to the class. The Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011), that Rule 23(a)(2) requires that such a common question "be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." That said, the Third Circuit Court of Appeals has noted that the commonality bar "is not a high one." *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013). Indeed, a single common question can suffice. *Dukes*, 131 S. Ct. at 2556. "The focus of the commonality inquiry is not on the strength of each plaintiff's claim, but instead is on whether the defendant's conduct was common as to all of the class members." *Rodriguez*, 726 F.3d at 382 (internal quotation marks and citations omitted).

There are common questions of law and fact that are central to this litigation. They can be resolved on a classwide basis. Defendants do not contest this notion. The allegations that Defendants conspired to restrict the supply of eggs in violation of the Sherman Antitrust Act are allegations that are common to each putative class member. Likewise, if, in fact, Defendants did not so conspire, there is, across the board, no claim. Therefore, the commonality requirement is met.

c. Typicality and Adequacy

Rules 23(a)(3) and (4) are the "typicality" and "adequacy" prongs of the class action analysis. Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality inquiry ensures "that the class representatives are sufficiently *similar* to the rest of the class—in terms of their legal claims, factual circumstances, and stake in the litigation—so that certifying those individuals to represent the class will be fair to the rest of the proposed class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 597 (3d Cir. 2009). On this point, courts must investigate both the representative parties and the class as a whole and focus "on the similarity of the legal theory and legal claims; the similarity of the individual circumstances on which those theories and claims are based; and the extent to which the proposed representative may face significant unique or atypical defenses to her claims." *Id.* at 597-98.

Adequacy requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This inquiry concerns both (1) the "experience and performance of class counsel;" and (2) the "interests and incentives of the representative plaintiffs." *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 181 (3d Cir. 2012) (citation omitted). Defendants do not challenge the experience or performance of class counsel but they do challenge whether the interests and incentives of the representative plaintiffs align with those of the putative class.[7] The other prong of the adequacy inquiry seeks to assure "that the named plaintiffs' claims are not antagonistic to the class." *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006).

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[7] The Court finds that class counsel meet the standards set forth in Rule 23(g). Counsel are experienced in class action antitrust litigation and have been effective in identifying potential claims and litigating the case.

Although adequacy and typicality are distinct requirements, their analyses tend to merge given that they both focus on the extent to which the class representatives have potential conflicts with the class members. *See id.* ("[T]he typicality and adequacy inquiries often tend to merge because both look to potential conflicts and to whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." (internal quotations and citation omitted)). Unlike the other Rule 23(a) requirements, the burden of proving that class representatives are inadequate falls to the party challenging the class representation.[8] *See Schwartz v. Avis Rent a Car Sys., LLC*, No. 11-4052, 2014 WL 4272018, at *16 (D.N.J. Aug. 28, 2014).

Here, Defendants argue that the class representatives[9] (1) have widely divergent pricing and purchasing arrangements, (2) are subject to individualized defenses, and (3) lack adequate knowledge and understanding of the case, such that Plaintiffs have not satisfied the adequacy and typicality requirements. Defendants note that the class representatives' purchasing processes differed, as some collected bids and selected the lowest price, others negotiated prices, and others "did not negotiate prices and paid the seller's invoice price." Mem. in Opp. to DPP Mot.

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[8] While district courts in the Third Circuit generally have held that the party challenging the adequacy of the class representatives bears the burden, this holding is not universal. *See* 6A Fed. Proc., L. Ed. § 12:148 ("While it has commonly been found that the class representatives have the burden of showing that their representation of the class will be adequate within the meaning of Fed. R. Civ. P. 23(a)(4), there is also authority that the burden is on the party challenging representation to prove that representation would be inadequate."). Here, even if Plaintiffs had the burden, the Court would find that the class representatives satisfy the adequacy and typicality requirements.

[9] The class representatives for direct purchasers of shell eggs are T.K. Ribbing's Family Restaurant, LLC; John A. Lisciandro d/b/a Lisciandro's Restaurant; Eby-Brown Company LLC; and Karetas Foods, Inc. The class representatives for direct purchasers of Egg Products are Somerset Industries, Inc.; Goldberg and Solovy Foods, Inc.; Karetas Foods, Inc.; Nussbaum-SF, Inc.; Wixon, Inc.; and Sensory Effects Flavor Co.

for Class Cert. 38 (Doc. No. 1033). Further, some class representatives purchased eggs based on Urner Berry pricing (pricing via a publisher of commodity prices), others purchased eggs based on fixed-price contracts (of varying lengths) and others negotiated alternative arrangements—although none of the class representatives purchased eggs using cost-plus contracts or grain-based contracts.[10]

Defendants assert that these varied purchasing processes, procedures and arrangements create inter-class conflicts that defeat typicality and adequacy. However, Defendants do little to support their argument beyond simply asserting that these differences undercut the ability of the class representatives to represent the class. Differing purchasing methods and prices do not necessarily defeat a finding of typicality and adequacy, provided that the alleged misconduct applies across the array of methods and prices. *See, e.g.*, *Marcus v. BMW of N. America, LLC*, 687 F.3d 583, 599 (3d Cir. 2012) ("When a class includes purchasers of a variety of different products, a named plaintiff that purchases only one type of product satisfies the typicality requirement if the alleged misrepresentations or omissions apply uniformly across the different product types."); *In re Chocolate Confectionary Antitrust Litigation*, 289 F.R.D. 200, 217 (M.D. Pa. 2012) ("That customers paid different prices or purchased different brands of products does not defeat typicality. Relevant case law addresses the typicality requirement in terms of liability issues, not damages issues. All members of the putative class are direct purchasers of chocolate confectionary products . . . and allege that they made their purchases at supracompetitive prices."

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[10] Defendants also note that class representatives T.K. Ribbings and Lisciandro allege that they only purchased eggs from "Hillandale" and not the specific Hillandale defendants—Hillandale-Gettysburg and Hillandale PA. Plaintiffs counter that Ribbings and Lisciandro are nonetheless direct purchasers insomuch as Hillandale-Gettysburg and Hillandale PA are under common control of Hillandale generally.

(citations omitted)); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 480 (W.D. Pa. 1999) ("The overarching scheme is the linchpin of plaintiffs' amended complaint, regardless of the product purchased, the market involved or the price ultimately paid."); Newberg on Class Actions § 3:35 (5th ed.) ("In price-fixing actions, the proposed class representative's claims are generally held to be typical of the class members' claims even if there are variations in the manner in which members of the class purchased from the defendant, variations in the kind of product purchased, differences in price, and other factors."). Here, the different methods for purchasing and pricing the purchased eggs and egg products do not defeat typicality and adequacy, as the prices were all allegedly subjected, to and affected by, the antitrust conspiracy. Moreover, Defendants offer no coherent theory as to how these differences could create misaligned incentives between class members and the class representatives.

Defendants assert that some class representatives "have specific and individualized defenses based on the bid proposal or bid house procedures at various times during the class period." Mem. in Opp. to DPP Class Cert. 39. However, Defendants provide no support for this notion, and the Court concludes that these purported individualized defenses are nothing but mere speculation, which are insufficient to defeat a finding of typicality and adequacy. *See Allen v. Holiday Universal*, 249 F.R.D. 166, 181 (E.D. Pa. 2008) ("Intraclass conflicts may negate adequacy under Rule 23(a)(4). However such conflicts must not be speculative." (quotation marks and citations omitted)).

Finally, the contention that class representatives lack sufficient knowledge of the facts and theories of the case is unavailing. Defendants point to various deposition statements from class representatives that ostensibly demonstrate that the class representatives "have no actual knowledge of anything and are simply deferring to counsel for everything." Mem. in Opp. to

DPP Class Cert. 41. Defendants quote deposition testimony where the class representatives appear to admit to having little or no firsthand knowledge of the allegations, having little or no understanding of the lawsuit other than knowledge that the case involves a conspiracy to limit the supply of eggs and drive the prices up, and having very limited knowledge of who the defendants are.

But, as Plaintiffs unabashedly note, "A class representative need only possess 'a minimal degree of knowledge necessary to meet the adequacy standard.'" *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007); *see also In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 213 (E.D. Pa. 2001) *aff'd*, 305 F.3d 145 (3d Cir. 2002) ("The adequacy-of-representation test is not concerned whether plaintiff personally derived the information pleaded in the complaint or whether he will personally be able to assist his counsel."); Newberg on Class Actions § 3:67 (5th ed.) ("A proposed representative's knowledge of the case need not be robust."). Plaintiffs also invoke a litany of evidence establishing that the class representatives have reviewed the complaint, understand the general nature of the allegations, and have participated in the litigation by reviewing pleadings and discovery, searching through their own files, providing information about the case, meeting with counsel, and sitting for depositions. This is sufficient knowledge and participation for Rule 23 purposes.

The Court finds that Plaintiffs have demonstrated by a preponderance of the evidence that the adequacy and typicality standards under Rule 23(a) are met.

d. Ascertainability

The Third Circuit Court of Appeals recently explained that certification under Rule 23(b)(3) is inappropriate where the class is not ascertainable. "The ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is defined with reference to objective

criteria; and (2) there is a 'reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (quoting *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)). "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials' then a class action is inappropriate." *Marcus*, 687 F.3d at 593. Plaintiffs must prove ascertainability by a preponderance of the evidence, and the Court is obliged to employ the rigorous analysis applied to Rule 23. *Id.* The proposed method for ascertaining a class must be supported by evidence—assurances of the ability to ascertain a class in the future are insufficient. *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013).

Here, the Court finds that the class is defined with reference to objective criteria and is ascertainable using Defendants' transaction data and Class Members' own purchase records. Defendants do not contest otherwise.

IV. RULE 23(b)(3) FACTORS

To be certified, a class must not only meet the standards set forth in Rule 23(a) but also must meet at least one of the Rule 23(b) standards. Plaintiffs here seek certification under Rule 23(b)(3), which provides that a class action may be certified if Rule 23(a) is satisfied and if:

> **(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> **(D)** the likely difficulties in managing a class action.

Fed. R. Civ. P. 23.

Rule 23(b)(3)'s requirements are commonly referred to as "predominance" and "superiority."

a. Predominance

"[D]esigned for situations in which class-action treatment is not as clearly called for," the "predominance" inquiry is a demanding one. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quotation marks and citation omitted). To assess a putative class for certification under Rule 23(b)(3), the Court must do more than merely ask whether there are common questions of law or fact, as it did for the Rule 23(a) commonality standard. Rather, the Court must determine that these common questions predominate over individual questions. *See Chiang v. Veneman*, 385 F.3d 256, 272-73 (3d Cir. 2004) ("However, because the Rule 23(b)(3) predominance requirements incorporate the commonality requirement of 23(a), it is possible that 'even if Rule 23(a)'s commonality requirement is satisfied ... the predominance criterion is far more demanding.'" (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 623–24 (1997))). A Court must "formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *Hydrogen Peroxide*, 552 F.3d at 311 (quoting *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008)).

Here, Plaintiffs must eventually prove: "(1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that [Plaintiffs were] injured as a proximate result of the concerted action." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 267 (3d Cir. 2009) (citing *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 (3d Cir. 2005)). To put it another way, Plaintiffs must demonstrate "(1) a violation of the antitrust laws-here, § 1 of the Sherman Act, (2)

individual injury resulting from that violation, and (3) measurable damages." *Hydrogen Peroxide*, 552 F.3d at 311-12 (citing 15 U.S.C. § 15). At this stage, Plaintiffs must prove that common issues predominate with respect to these elements. *See id.* at 311 ("If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir. 2001))); *Marcus*, 687 F.3d at 600 ("To assess predominance, a court at the certification stage must examine each element of a legal claim "through the prism" of Rule 23(b)(3)."). Thus, the Court analyzes each element of the antitrust claim and determines whether common issues predominate with respect to the claims asserted.

1. Antitrust Violation

Plaintiffs must demonstrate that common issues predominate as to the question of whether Defendants violated the antitrust laws. Plaintiffs have met this burden. The essence of the underlying claim is that Defendants engaged in a nationwide conspiracy to restrict the supply of eggs. Whether this can be proven will turn on evidence common to the class. Similarly, whether such a conspiracy was illegal is a question of law common to the class.

The potential defenses are also susceptible to common proof. Defendants are likely to argue that (1) the UEP certified program was "*bona fide* animal husbandry program that resulted from the purportedly 'independent' work of a 'scientific advisory' committee;" and (2) the conduct was immunized from the antitrust laws by the Capper-Volstead Act, which might provide certain agricultural associations with some degree of immunity from the antitrust laws. These defenses will succeed or fail on evidence and questions of law common to the class. Accordingly, with respect to whether there was an antitrust violation, the questions common to the classes predominate over questions individual to the class members.

2. Antitrust Injury

Plaintiffs must show that it is possible to prove with common evidence that the class members suffered an injury—or impact—from the antitrust violation. In *Hydrogen Peroxide*, the Third Circuit Court of Appeals articulated it this way:

> Importantly, individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation. In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial.

Hydrogen Peroxide, 552 F.3d at 311-12 (citations omitted).

Plaintiffs propose demonstrating antitrust impact with the following types of common evidence: (a) Defendants' own documents and witness testimony; (b) the characteristics of the egg industry, described by Dr. Gordon Rausser, an expert in the field of agricultural economics, which supposedly render the industry particularly susceptible to price manipulation and would have had an impact on virtually every class member; (c) statistical analysis by Dr. Rausser showing a common movement of prices over time; (d) a regression analysis by Dr. Rausser showing that egg pricing is explained by a predominant set of common factors; and (e) a regression analysis by Dr. Rausser showing that prices during the conspiracy period were higher than they would have been but for the conspiracy. The Court analyzes separately the element of antitrust impact with respect to the shell eggs subclass and with respect to the egg products subclass.

i. Shell Eggs Subclass

The Court concludes that common issues predominate with respect to whether the alleged conspiracy had an impact on the members of the shell eggs subclass. Plaintiffs can use common evidence to demonstrate that (a) Defendants made efforts to reduce the supply of eggs and thereby raise the price of eggs; (b) the egg market was structured so that the alleged conspiracy to restrict the supply of eggs, *if successful*, would have caused all, or virtually all, Direct Purchaser Plaintiffs to pay higher prices than they would have absent the conspiracy; and (c) the conspiracy was successful in raising prices. This satisfies the requirement that common issues predominate as to antitrust impact, because the structured analysis is capable of proving that all or virtually all class members suffered an injury caused by Defendants' alleged anticompetitive conduct. *Cf. McDonough v. Toys R Us, Inc.*, 638 F. Supp. 2d 461, 482-83 (E.D. Pa. 2009) ("In other words, [to prove antitrust impact] a plaintiff must prove "three quite independent requirements: (1) that it suffered an injury; (2) that its injury was caused by an antitrust violation; and (3) that the injury qualifies as 'antitrust injury.'" (citing Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice* § 16.3c (3d ed. 2005))). More specifically, the common evidence offered is capable of proving that Defendants' anti-competitive supply-reduction conspiracy caused an increase in the prices of eggs that affected virtually every member of the shell eggs subclass because of the integrated and commoditized nature of the shell eggs market.

Defendants' Own Documents and Testimony as Common Evidence of a Conspiracy to Reduce the Supply of Eggs

Plaintiffs have collected a detailed discovery record, common to the class, supporting their allegations that Defendants conspired to reduce the supply of eggs. Plaintiffs rely heavily

on contemporaneous documents from Defendants discussing the implementation of the various supply-reduction programs, as well as on deposition testimony from key individuals associated with Defendants. Plaintiffs also contend that Defendants' own documents show that the conspiracy resulted in higher prices. For example, in 2003, "UEP boasted that the success of the UEP 'animal welfare' program had led to some of the highest egg product prices in history." DPP Mem. in Supp. of Class Cert. 68 (citing Bell Dep. Ex. 18 at BELL002761). Also, "[n]ow-settled defendant Cal-Maine acknowledged in a public SEC filing that even small reductions in output would result in increased prices for eggs." *Id.* Defendants have not contended that this evidence is not common to the class.

This referenced evidence is probative of whether common issues will predominate with respect to antitrust impact, as it is probative of whether the conspiracy occurred and was anticompetitive. There is also some indirect evidence of the effects of the conspiracy, as some evidence shows that Defendants believed the supply-reduction programs were resulting in higher prices. Of course, this evidence does not directly show that the conspiracy was implemented or that Plaintiffs were injured as a result. Therefore the Court must analyze whether there is other evidence, common to Plaintiffs, of the effects of the alleged supply-reduction program.

Shell Egg Industry Characteristics as Evidence that a Successful Conspiracy Would Have Affected Virtually All Members of the Proposed Subclass

Plaintiffs contend that because the shell egg industry "exhibits the well-understood characteristics that facilitate successful collusion . . . Defendants' conspiracy would have resulted in inflated prices to all or virtually all class members." *Id.* at 69. These factors are (i) a lack of close substitutes; (ii) Defendants' domination of the market; (iii) high barriers to entry; (iv) inelastic demand; and (v) ease of communication, coordination, and marketing. The Court

finds that these alleged industry characteristics, which are supported by evidence common to the subclass and virtually uncontested by Defendants, are probative of the extent to which a successful supply-reduction conspiracy would have affected all, or virtually all, members of the shell egg subclass.

There are no close substitutes for shell eggs or egg products. Eggs have unique nutritional and functional attributes that make them difficult to replace with other products. *See* Rausser Decl. 11-13 (Doc. No. 979). Dr. Rausser reviewed the economic literature and found that potential substitutes like pork, beef, turkey, cereals, and bakery products are "poor" substitutes for eggs. Because of the lack of close substitutes for eggs, class members could not have systematically avoided the effects of a lower supply of eggs by obtaining a substitute for eggs, but would instead have had to pay the increased prices of eggs. *Cf. In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. 125, 139 (D.P.R. 2010) ("Plaintiffs and other class members have alleged and shown through circumstantial evidence that, because they had no economically viable substitute for the various Puerto Rican cabotage services provided by Defendants, they paid supra-competitive prices for the services purchased.").

There is, however, a high level of demand-side substitutability within the shell eggs market—that is, between different grades and colors of eggs, as well as eggs from different producers. *See* Rausser Decl. 15. Both the economic literature and deposition testimony supports a finding that consumers will substitute between eggs of different grades and colors, and that "eggs are a commodity product and eggs from one producer are interchangeable with eggs from another producer." *See id.* Defendants do not specifically contest the demand-side substitutability of different subsets of the shell egg market. The commoditized nature of the shell egg market is crucial to a finding that common issues predominate as to antitrust impact, because it implies that

no increase in price would be isolated to a single subset of the egg industry. Any increase in the price of, say, brown shell eggs, would result in substitution towards white shell eggs, thereby increasing the price of white shell eggs as well. The commoditized nature of the shell egg market, which is essentially uncontested by Defendants, therefore supports a finding that the alleged conspiracy had an impact on all or virtually all class members.

Plaintiffs' common evidence is also capable of proving that Defendants dominated the market for eggs during the class period, which means that if Defendants acted collusively, they would have been able to successfully restrain the supply of eggs and raise the price of eggs for virtually every class member. Dr. Rausser notes how the U.S. egg industry has become increasingly consolidated over the past 50 years, shrinking from around 8,000 egg producers in 1968 to only 260 in 2003. By 2004, UEP's 200 members owned over 90% of the nation's egg-laying hens. 83% of the nation's egg-laying hens were included in the UEP animal-care certified program. At least one Defendant sold eggs in every state of the Union. Moreover, "[r]elative to other industries, the egg industry is characterized by high barriers to entry." Rausser Decl. 29. Specifically, Dr. Rausser emphasized high fixed costs of starting a large, new egg laying operation, government and industry regulations that are costly and difficult to comply with, and the maturity and vertical integration of the industry. Dr. Rausser and Plaintiffs also argue that any new entrants into the eggs market would have faced strong pressures to join the cartel. According to Plaintiff's expert, these high barriers to entry would help Defendants control prices as applied to virtually every class member.

Because Defendants controlled such a large share of the market, and because the high costs of entering the egg market would have prevented new producers from entering the marketplace and undercutting the conspiracy, the collusive action of Defendants would have

caused a widespread supply shortage that would have had an impact on all, or virtually all, class members, as those class members could not have simply shifted (or threatened to shift) all their purchases to producers outside the conspiracy. Thus, these characteristics of the shell egg industry support a finding that the conspiracy affected all, or virtually all, class members.

Plaintiffs next point to the inelastic demand for eggs with respect to price—that is, the demand for eggs by consumers is largely insensitive to changes in the price of eggs. If a 1% increase in the price of a product results in a 1% decrease in the amount sold, the price elasticity of demand is -1.0. The demand is said to be inelastic where, to explain with an example, a 1% increase in the price of eggs will not result in a 1% or more decrease in the amount of eggs sold—that is, the price elasticity of demand will be lower in magnitude than -1.0 (*i.e.*, the price elasticity of demand will be between -1.0 and 0). Dr. Rausser cites "[n]umerous academic studies [that] have found that the demand for eggs is inelastic." Rausser Decl. 33. Estimates for the price elasticity of demand for table eggs range from -0.02 to -0.17, which is "considered highly inelastic." *Id.* at 33. As an easy-to-understand, candid expression of the inelasticity of demand for shell eggs, Plaintiffs also point to Defendants' statements, such as a statement by the President of Defendant Midwest Poultry Services, Bob Krouse, in an industry publication that "[w]e sell as many eggs at $1.70 as we do as 65 cents." DPP Mem. in Supp. of Class Cert. 72. Further, because demand for eggs is inelastic with respect to price, "small changes in supply can lead to large changes in price." Rausser Decl. 34. A UEP representative allegedly wrote that "[t]he domestic demand for eggs is very inelastic and an adjustment in quantity will result in an effect on price at least five times that in quantity." *Id.*

This characteristic of the shell egg industry further supports Plaintiffs' position that a supply-reduction conspiracy would have led to higher prices across the class, as the inelastic

demand for eggs shows that class members would not have frustrated the conspiracy's efforts by buying significantly fewer eggs. Rather, Defendants would have been able to reduce the supply of eggs and yet earn increased profits because class members would still demand the same amount of eggs at the increased prices caused by the conspiracy.

Finally, Plaintiffs point to the ease of communication, coordination, and marketing that UEP provided. Without enforcement mechanisms, producers might have tried to benefit from the conspiracy's efforts while not implementing the conspiracy's policies themselves. The open communication, coordination, and marketing between and among the conspirators allowed them to adjust supply as one. This is, Dr. Rausser notes, crucial to a successful conspiracy, because it prevents buyers from finding producers willing to "cheat" and divert from the supply reductions mandated by the conspiracy. This is probative of a common impact here because Defendants could ensure that their supply reduction programs were implemented across the industry, and therefore class members could not have avoided the effects of any conspiracy by buying from "cheating" producers who were diverting from the supply-reduction programs implemented by Defendants.

The characteristics of the shell egg industry described above are essentially uncontested by Defendants. The Court finds that they are highly probative of the extent to which the alleged conspiracy, if shown to be successful, would have affected virtually every member of the proposed shell eggs subclass.

Statistical Analysis Corroborating Economic Linkage of Shell Egg Prices As Further Evidence that a Successful Conspiracy Would Have Affected Virtually Every Class Member

Plaintiffs also offer statistical evidence of how the alleged conspiracy would have had an impact on all subclass members. Plaintiffs offer the statistical analyses of Dr. Rausser, who

analyzed both (i) the extent to which the prices of eggs move commonly across regions, types, and other characteristics; and (ii) whether egg pricing is predominantly explained by a common set of factors. These analyses confirm the industry characteristics observed by Dr. Rausser by showing that the shell egg industry is interconnected so that any increase in price affecting one subset of the class would have been corrected for by substitution effects. In other words, this analysis corroborates that "as expected for the economics of demand-side and supply-side substitutability, prices across different types of shell eggs and egg products, and across different regions, move commonly over time." Rausser Decl. at 81.

Defendants contest this analysis on various grounds. First, they criticize Dr. Rausser's analysis for relying on "visual inspection" of graphs of prices, as opposed to a more rigorous methodology. *Id.* at 9. However, this criticism appears to have been abandoned due to Dr. Rausser's Reply Declaration's use of statistical analysis to confirm the visual inspection's conclusions. *See* Rausser Reply Decl. 33-34 (Doc. No. 1059). Second, Defendants criticize Dr. Rausser's use of averages, because averages "by their very nature mask individual differences between purchasers and preclude the ability to determine any impact on any of the plaintiffs." Mem. in Supp. of Mot. to Exclude Dr. Rausser 9 (Doc. No. 1032). Third, they criticize Dr. Rausser's co-movement analysis because it is "meaningless." They argue that prices can co-move even if not commonly affected by an event, and that the comparisons Dr. Rausser makes (such as comparing prices based on geography, type, and so forth) are meaningless because they do not "fit" the theory of the case.

Plaintiffs counter that "Dr. Rausser is not offering co-movement as a means, by itself, to show impact on all or virtually all class members. Rather the finding of co-movement is one of several bases . . . that support a finding of common impact because they tend to show that there

is no subgroup of class members that would have been able to systematically avoid the impact of the conspiracy." Mem. in Opp. of Mot. to Exclude Dr. Rausser 12 (Doc. No. 1058). Dr. Rausser describes the utility of his co-movement analysis as "support[ing] my conclusion regarding a nationwide market for eggs and egg products, as the prices of eggs and egg products are related to each other, irrespective of differences in grade, size, color, egg product type, and so on. Second, the analysis supports that if the Defendants had market power in such a market . . . then their actions to restrict supply would have caused common price increases, again irrespective of differences in grade, size, color, egg product type, and so on." Rausser Reply Decl. 27.

Defendants' expert, Dr. William C. Myslinski, contests Dr. Rausser's methods and conclusions. Dr. Myslinski explains that using averages can "hide substantial variation across individual cases, which may be key to determining whether there is common impact." Myslinski Decl. 25. Dr. Myslinski then goes on to demonstrate how these averages hide wide variations in the prices actually paid in individual transactions. *Id.* at 26-27. By averaging these transactions to arrive at an average price, the data could be hiding the true cause of the co-movement—suppose that, say, only large eggs were changing in price nationwide and that the prices of small and medium eggs were unchanged. Using Dr. Rausser's analysis, that could make it look like the prices of all eggs, including small and medium eggs, co-move in different regions of the country. This could, Dr. Myslinski argues, hide that the prices paid by individual buyers do not display co-movement. *Id.* at 28. Dr. Myslinski then demonstrates how some sets of prices do not exhibit co-movement, such as between the prices of eggs sold by Michael Foods and those sold by Daybreak. *Id.* at 25-39.

Plaintiffs counter that Defendants are merely speculating about how averaging hides differences among individual buyers. Dr. Rausser contends that Dr. Myslinski's hypotheticals of

how averages can hide co-movement are contrary to the structure of the egg industry[11] and, further, that Dr. Myslinski's examples of a lack of co-movement can be explained by the small sizes of the samples tested. By including the data of multiple defendants, contends Dr. Rausser, the co-movement again reappears.

As with the evaluation of the co-movement analysis presented by the Indirect Purchasers Plaintiffs, the Court recognizes the limited value Dr. Rausser's co-movement analysis. True, the co-movement analysis is conducted at a high level of averaging and across wide swaths of class members. As Defendants note, averages "by their very nature mask individual differences between purchasers." Mem. in Supp. of Mot. to Exclude Dr. Rausser 9. Nonetheless, the co-movement analysis has value because it is probative of the extent to which different subsets of the market are related. That is, the co-movement analysis confirms that the various segments of the market for eggs are subject to the same price movements as the overall market for eggs. The implication of this, when considered in conjunction with Dr. Rausser's finding of a nationwide market for eggs with high levels of substitution between different types of eggs and regions of the nation, is that events that effect one set of eggs, will, typically, affect to some degree all other sets of eggs. *See* Michelle M. Burtis & Darwin V. Neher, *Correlation and Regression Analysis in Antitrust Class Certification*, 77 Antitrust L.J. 495, 512 (2011) ("A measured price correlation that is due to the economic linkage effect indicates that a factor that impacts only one of the prices will lead to an impact on the other of the prices because there are economic relationships,

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[11] For example, Dr. Rausser criticizes the hypothetical that the change in the price of large eggs would mask the fact that the prices of small and medium eggs have not changed. He argues that the data and evidence (including Dr. Myslinski's own deposition testimony) show that consumers will quickly switch to small or medium eggs if the price of large eggs jumps up, which means that a significant disequilibrium in price among various sized eggs is impossible. *See* Rausser Reply Decl. 32.

such as substitution relationships between the products. . . . If a measured price correlation captures an economic linkage effect, then the correlation is potentially relevant to the analysis of common impact."); *see also* Rausser Reply Decl. 26 n.45 (citing support for this proposition). As a pair of commentators have explained:

> [I]n order for a correlation analysis to be potentially relevant to class certification, there must be an investigation, or analysis, of the reasons for the observed correlation. . . . An economic linkage may exist between two price series because, for example, the products are substitutes. When the price of one product increases, the demand, and thus the price, of its substitute increases. . . . It might be possible, in certain circumstances where such substitution relationships are integral to price determination, to establish impact using common proof because proof of impact on purchasers of the first product is, via consumer substitution, proof of impact on purchasers of the second product.

Burtis & Neher, *supra*, at 498. Here, the structure of the egg industry is informative as to whether the alleged conspiracy would have affected all or virtually all class members because, if the market for eggs was as integrated as Dr. Rausser's analyses suggest, and if the demand-side substitution in the industry was as pervasive as Dr. Rausser opines that it was, *see* Rausser Decl. 15 (citing economic literature), then the conspiracy's impact would have been felt across the egg industry and would have resulted in higher prices for virtually every direct purchaser of eggs.

The extent to which common factors predominate as to pricing in the egg industry is further confirmed by Dr. Rausser's "common factors" regression, a "reduced form pricing regression" in which Dr. Rausser analyzed how various exogenous factors (*i.e.*, external factors like the price of grain and gasoline) affect the price of eggs. Dr. Rausser analyzed Defendants' transactional data and found that common exogenous factors explained over 60% of the pricing

of eggs and egg products.[12] Those common factors include "product characteristics, product packaging, supply costs, customer size, customer type, brand label, and seasonality." DPP Mem. in Supp. of Class Cert. 73 (quoting Rausser Decl. 82). In his initial Declaration, Dr. Rausser's regressions were based on 32.7 million shell egg transactions and 1 million egg products transactions between 1997 and 2013. From these transactions, Dr. Rausser was able to measure the effect of, for example, the price of gasoline on the price of eggs. If the egg market were not highly integrated and standardized—*i.e.*, if individual purchasers bought at prices set by individual factors—then such a model explaining the pricing of eggs would not be possible, as individualized pricing factors would overwhelm the explanatory value of any common pricing factors. *See* Paul A. Johnson, *The Economics of Common Impact in Antitrust Class Certification*, 77 Antitrust L. J. 533, 535 (2011) ("At the most basic level, I argue that, in antirust cases, the legal standard should be analyzed (at least in part) with the assistance of economic analysis addressing the following question: Are prices paid by putative class members determined in a common way?").

Defendants argue that Dr. Rausser's model is flawed because their expert, Dr. Myslinski, ran Dr. Rausser's regression on various subsets of the data and found inconsistent results. To put it simply, Dr. Rausser's regression was based on all the transactions of all the Defendants for which he had data. Dr. Myslinski tested this regression by seeing if it would apply to just one certain Defendant's transactions. Dr. Myslinski found that even though Dr. Rausser's regression

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[12] In particular, Dr. Rausser's models in his initial Declaration had an "R-squared"—a statistical measure of the fitness of a model to the data—of 65% for shell eggs and 66% for egg products. In his Reply Declaration Dr. Rausser made several supposedly small adjustments to his models that altered the R-squared values slightly. For example, by including "income" as a Demand variable, Dr. Rausser's R-squared for shell eggs stayed the same but his R-squared for egg products fell to 62%.

implies that an increase in gasoline prices would increase the price of eggs (which is to be expected), when one tests this regression using just Daybreak's transactions, one sees that the model suggests an increase in gasoline prices would actually decrease the price of eggs. Dr. Myslinski found other curiosities by running the regression on subparts of Dr. Rausser's model's data, such as, for example, the regression's suggestion that "corn prices had 68 times the effect on shell-egg prices in the benchmark period than they did over the benchmark and alleged conspiracy periods combined." Mem. in Opp. of DPP Class Cert. 30. Moreover, assert Defendants, when running the regression on individual Defendants' data, the overcharge estimates vary from defendant-to-defendant, and one overcharge estimate is negative, implying a lack of antitrust impact. *See id.*

Plaintiffs counter that these curious results demonstrated by Dr. Myslinski are the product of inappropriate "data mining," which "involves applying a model to arbitrary subsets of the transactional data without an economic theory for selecting such subsets." DPP Reply Mem. in Supp. of Class Cert. 30 (Doc. No. 1060). As Dr. Rausser explains, "traditional statistical tests become unreliable under relentless searching to find patterns in data that may merely be the product of chance. Because data mining does not help distinguish between whether a pattern in the data is the result of pure chance or a hypothesis that is relevant to the case, it becomes irrelevant that any results found are statistically significant." Rausser Reply Decl. 96. Further, by narrowing the amount of data, Dr. Myslinski necessarily makes the regression more unstable and unreliable.

The Court does not find Dr. Myslinski's criticisms of Dr. Rausser's model sufficiently convincing to derail class certification at this time. Dr. Myslinski's "sensitivity analysis" involved applying Dr. Rausser's model to isolated subsets of the data. A sensitivity analysis is

"[t]he process of checking whether the estimated effects and statistical significance of key explanatory variables are sensitive to inclusion of other explanatory variables, functional form, dropping of potentially out-lying observations, or different methods of estimation." Jeffrey M. Wooldridge, Introductory Econometrics: A Modern Approach 845 (4th ed. 2009). That is, a sensitivity test looks to determine whether any one factor or variable is driving the observed results in the model—whether the model is "sensitive" to the exclusion of one variable. For instance, one might test whether removing the variable of gasoline prices significantly diminishes the reliability of Dr. Rausser's common factors regression or whether removing Cal-Maine transactions significantly diminishes the reliability of the regression. That is not what Dr. Myslinski did, however. Rather, Dr. Myslinski removed all transaction data except for one subset of the data. At the hearing, Dr. Myslinski could not provide support from the econometric or statistical literature for this form of a sensitivity analysis. *See* Tr. Hr'g 3/11/15 175:7-13.[13]

From the perspective of the Court, a model that purports to describe the pricing of eggs over 32.7 million transactions will not necessarily describe, in a useful way, the pricing of each of its subparts in isolation. The factors in a regression model derive their meaning because of how the data as a whole interacts with respect to these factors. When measuring an isolated subset of the data, those interactions are neglected which can lead to results that appear

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[13] Dr. Myslinski cited a book for the proposition that "if excluding a group such as a country or a firm or a time period drastically affects the results, this should be reported. Particularly, this type of robustness check will help detect whether the results are driven by one small part of the sample as opposed by the whole sample." Tr. Hr'g 3/11/15 175:7-13. Dr. Myslinski's approach is not the same as that advocated in the book. The approach advocated by the book is for a traditional sensitivity test—*i.e.*, removing one element of a model at a time. Dr. Myslinski removed far more than one element of the model at a time, instead excluding all elements of the model except for the single subset of the model he wanted to test. *See id.* at 177:9-14 (cross examination of Dr. Myslinski) (testifying that "I have excluded . . . all of the other customers except for the ten largest retail customers to see if the model is affected.").

contradictory. *See, e.g.*, Andrea Saltelli *et al.*, Global Sensitivity Analysis: The Primer 42 (2008) (describing "[p]iecewise sensitivity analysis, such as when investigating one model compartment at a time," as a "possible pitfall[] for a sensitivity analysis" that "can lead to type II errors if interactions among factors of different compartments are neglected."); *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-1175, 2014 WL 7882100, at *16 (E.D.N.Y. Oct. 15, 2014) *report and recommendation adopted*, 2015 WL 5093503 (E.D.N.Y. July 10, 2015) ("The true question is whether Kaplan observed reliable principles and methods to estimate these sub-regressions. As already discussed, the defendants and their experts admit that these sub-regressions cannot be relied upon to accurately estimate which class members were and were not impacted."); *Air Cargo*, 2014 WL 7882100, at *17 ("[T]he court is not persuaded that Kaplan's sub-regressions are particularly compelling (first, because they are fundamentally mis-specified, and second, because some degree of intra-class variability is permitted under both the antitrust laws and Rule 23) . . . ."). But putting aside these lay observations from the Court, the Court did not find Dr. Myslinski's "sensitivity analyses" persuasive because, when challenged, Dr. Myslinski could not support his contention that his sensitivity analyses were appropriate and instructive as to any flaws or biases in Dr. Rausser's model.[14]

Conclusion As to Whether a Successful Conspiracy Would Have Affected Virtually Every Class Member

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[14] Additionally, Defendants criticize Dr. Rausser's regression model for finding an inverse relationship between price and population, whereby if the population increases, the price for eggs, according to the model, decreases. But this counterintuitive result appears to be satisfactorily explained by the degree to which population is also related to other variables in the model. *See* Rausser Decl. 86 n. 310; *see also In re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2014 WL 6461355, at *37 (N.D. Ohio Nov. 17, 2014) (making a similar finding about counterintuitive coefficients in a regression model).

Dr. Rausser's industry analysis demonstrates that a supply-reduction conspiracy could have succeeded in the shell egg market largely because it would have affected shell egg buyers across-the-board. If certain egg buyers could have avoided the conspiracy, say, by purchasing substitutes for eggs, the conspiracy would not have succeeded because all rational egg buyers would have taken those steps to avoid the conspiracy. But Dr. Rausser's analysis reveals that egg buyers could not have avoided the conspiracy, making the industry susceptible to precisely the type of conspiracy alleged here. Dr. Rausser shows that "one way or another, every egg produced impacts prices." Rausser Decl. 15 (quoting Don Bell, an egg industry analyst, in an exhibit marked BELL002381-406, at 384). Dr. Rausser's industry analysis was corroborated by his statistical analyses of the extent to which egg pricing patterns are similar across products and geographic regions. Moreover, a common set of supply and demand factors predominate in the pricing of eggs and those factors can be measured and accounted for. Thus, Dr. Rausser's industry analysis and statistical analysis supports a finding that a successful supply-reduction conspiracy would have had an impact on the entire egg industry—*i.e.*, virtually all class members.

Plaintiffs have thus shown (a) that a conspiracy occurred (using documentary evidence); and (b) that if the conspiracy had its desired effect, it would have affected virtually every purchaser in the industry because of the structural characteristics of the egg industry. This leaves one step in showing that antitrust impact is capable of proof using common evidence—showing, using evidence common to the class, that the conspiracy had its desired effect and increased prices.

Regression Model as Evidence that Shell Egg Prices were Higher During the Conspiracy Period Than They Would Have Been But For the Conspiracy

Dr. Rausser employed his "common factors" regression model to demonstrate that the conspiracy succeeded in increasing the price of eggs. Dr. Rausser divided his model into a benchmark period (1997 to September 2000) and a conspiracy period (September 2000 to the end of December 2013). September 2000 was selected as the beginning of the conspiracy period because in September 2000, "UEP assumed the management of United States Egg Marketers (USEM) primarily for the purpose of coordinating industry-wide export shipments," and "the UEP Scientific Committee published recommendations for animal welfare guidelines that included recommendations to reduce cage density by providing a minimum of 67-86 square inches of cage space per bird." Rausser Decl. 89. Dr. Rausser assigned an "overcharge indicator" valued at "one" for all transactions during the class period and "zero" for all transactions during the benchmark period. *See id.* at 91. This indicator allowed Dr. Rausser to measure the "effect" of the conspiracy period by examining how prices were affected when the indicator value was "one" and not "zero." To put it more simply, Dr. Rausser controlled for all the "common factors" affecting price and determined whether, all else being equal, prices were higher during the conspiracy period than during the benchmark period. Dr. Rausser found (in his initial Declaration) that conspiracy period prices were, on average, 19.3% higher than benchmark period prices for shell eggs. What this implies is that something outside the measured supply and demand factors caused the prices of eggs to be higher during the conspiracy period than they were during the benchmark period.

Plaintiffs and Defendants dispute whether the Court can infer that this "something" causing the inflated prices from 2000-2013 was the effect of the supply-reduction conspiracy. Plaintiffs argue that the Court can look to the documentary evidence of the conspiracy and the factors controlled for in the model and conclude that the price increase is attributable to the

conspiracy. Plaintiffs argue that they need not measure the supply of eggs themselves, as (a) the documentary evidence shows a conspiracy designed to reduce the supply of eggs; and (b) Dr. Rausser's model accounts for the factors other than a conspiracy that could have affected the price of eggs. In the other words, because Dr. Rausser measured how normal supply and demand factors affect the price of eggs and controlled for those effects, the remaining observed increase in price must be attributable to a reduction in supply.

Defendants, for the most part, do not quibble with the logic of Plaintiffs' theory. Instead, they argue (a) that under the Supreme Court's decision in *Comcast Corp. v. Behrend*, Plaintiffs must measure first the decrease in the supply of eggs and then the price effect; and (b) that the price effect is overstated because of certain missing factors in Dr. Rausser's model. The Court declines to accept either of these arguments.

According to Defendants, *Comcast* requires that Plaintiffs first measure the extent to which Defendants' actions decreased the supply of eggs and then measure the effect on the price. Plaintiffs argue that Defendants are reading *Comcast* too broadly and that their model is directly tied to their theory of liability. Plaintiffs contend that the evidentiary record shows a conspiracy to constrain the growth of supply, so their model need not prove that the conspiracy occurred. Rather, the model's purpose is to measure the extent to which the conspiracy caused prices to go up—*i.e.*, measuring the impact, if any, on class members. *See* Rausser Reply Decl. 66 ("Moreover, such an analysis of supply is unnecessary, if one can reliably analyze pricing, in conjuncture with the detailed discovery evidence that the Defendants did act to reduce supply and the industry characteristics . . . which determine that such actions would have been successful and would have increased prices. Analyzing prices is sufficient because . . . price and quantity are co-determined by supply and demand."). Moreover, Plaintiffs argue, Dr. Rausser's

model does, in fact, measure the conspiracy's effect on supply because it measures the effects of the conspiracy on price, which is determined by supply and demand. Where demand is inelastic, as with eggs, price will be primarily determined by supply (inversely—supply goes up and price goes down).

The Court agrees with Plaintiffs' analysis of the requirements of *Comcast* and the efficacy of their model. In *Comcast*, the plaintiffs sought to certify a class of Comcast subscribers under Rule 23(b)(3) seeking damages for alleged violations of the federal antitrust laws. *See* 133 S. Ct. at 1429-30. The plaintiffs proposed four theories of antitrust impact, but only one was certified as appropriate for class treatment by the district court. *Id.* at 1430-31. The plaintiff's expert, however, had designed a regression model that calculated the damages from all four theories of impact and could not isolate the damages attributable to the sole theory of impact suitable for class treatment. *Id.* at 1431. The district court certified the class despite the limitations of the damages model, but the Supreme Court reversed. *Id.* The Supreme Court held that the district court erred in finding that the proposed damages model could demonstrate Rule 23(b)(3) predominance. *Id.* at 1432. The Supreme Court reasoned that the district court should have resolved the challenges to the damages model, even where those challenges required an inquiry into the merits and that the model's inability to isolate the damages attributable to the sole theory of impact suitable for class treatment was fatal to a finding that common issues would predominate. *Id.* at 1433-35. *Comcast* "turn[ed] on the straightforward application of class-certification principles," because the regression model was the plaintiffs' sole methodology for demonstrating that antirust impact and damages could be proven using common evidence, and that regression model could not attribute the impact and damages found by the model to the theory of liability proper for class treatment. *See id.*

Notably, however, in *Comcast*, all four proposed theories of liability were alleged to have caused an antitrust impact. Although only one theory of impact was found suitable for class treatment, those other three theories of liability were still viable theories that were part of the alleged conduct of Comcast. *See id.* at 1431 n.3 ("The District Court did not hold that the three alternative theories of liability failed to establish antitrust impact, but merely that those theories could not be determined in a manner common to all the class plaintiffs."). Understanding this posture of *Comcast* is a key to understanding its holding.

Because of this posture, the plaintiff's model in *Comcast* could not reliably demonstrate impact to the class from the theory advanced by the class. In order for the plaintiffs' model in *Comcast* to provide any probative evidence of antitrust impact or damages as to the sole theory found appropriate for class treatment, the model would have needed to have been able to isolate that single theory's effect from the effects of the three theories not suitable for class treatment. Otherwise, there was no evidence that any particular class member was actually affected by that sole liability theory pursued by the class, because any damages found by the model might simply be attributable to the three theories as to which individualized issues predominated. Thus, the model could not determine whether the theory suitable for class treatment caused the damages found by the model. Once the model was found unreliable in isolating the impact attributable to the class's theory, an individualized inquiry would have been necessary to untangle the class's theory from the other three theories in order to actually determine whether any particular class member was affected by the class's theory. Similarly, in order to achieve a reasonably accurate measure of damages, one would have needed to determine, individual-by-individual, which of the four harms affected which class members and by how much.

Here, the posture of the case is different from *Comcast*, because none of the alleged means of reducing the supply of eggs have been found inappropriate for class treatment. In other words, this case is in the realm contemplated by the Supreme Court when it reasoned that "[t]his methodology might have been sound, and might have produced commonality of damages, if all four of those alleged distortions remained in the case." *Id.* at 1434. Defendants would have it that Plaintiffs must, at this stage, disaggregate each alleged anticompetitive action and isolate its effect. Such a requirement, Defendants argue, is the only way to ensure that the Court does not face the same difficulties that arose in *Comcast*—that is, "[i]f one or more modes of challenged conduct are found to be lawful, Dr. Rausser's damage model . . . becomes entirely useless, as did the damage model in *Comcast*." Defs. Post-Hr'g Mem. 5 (Doc. No. 1157). But *Comcast* does not stand for the broad proposition Defendants ascribe to it. Although the Court must engage with the merits of the case when they weigh upon the Court's analysis of Rule 23, the Court must not engage in "free-ranging merits inquiries at the certification stage." *Amgen*, 133 S. Ct. at 1194-95. Here, Defendants' proposed disaggregation requirement is based on hypotheticals that the Court has no basis to consider at this moment, as there was no argument at the class certification stage from Defendants that any disaggregated part of the alleged conspiracy should be found lawful or otherwise incapable of common proof. Defendants nevertheless assert that because "*now* is the time to demonstrate compliance with Rule 23," the Court should refuse certification because of the possibility that some conduct that Dr. Rausser included in his damages measurement will be found to relate to "damages" ultimately held to be unrecoverable.[15] But Defendants are asking

[15] Not just any adverse ruling would threaten Plaintiffs' ability to demonstrate antitrust impact and damages using Dr. Rausser's model. A ruling that certain conduct did not occur, or did not actually affect the supply of eggs and thereby affect the price of eggs, for example, would

the Court to do more than ensure compliance with Rule 23—Defendants ask the Court to ensure that compliance with Rule 23 will withstand any possible development moving forward. That is not what *Comcast* required, as implied by the Supreme Court's note that the plaintiffs' methodology in *Comcast* "might have been sound . . . if all four of those alleged distortions remained in the case." *Id.*; *see also Dial Corp. v. News Corp.*, No. 13-6802 2015 WL 4104624, at *8 (S.D.N.Y. June 18, 2015) ("Because the Court declines to reject any of the theories of anticompetitive injury set forth in the Complaint, Plaintiffs' damages model is consistent with *Comcast*). That is, likewise, not what Rule 23 requires as Rule 23(c)(1)(C) provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment"—such a provision would have little utility if the Court had to ensure that a class certification ruling could withstand any potential future developments in a case. The Court would, under Defendants' reading of Rule 23, need to determine not just that common issues are likely to predominate over individual ones, but that Plaintiffs have indeed proven the merits of every aspect of their case, such that no development in the case could threaten the initial decision

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not bias Dr. Rausser's findings because his model measures conduct that, in fact, had an impact on the price of eggs. Only if (a) certain conduct were found to have occurred; and (b) that conduct had an impact on the price of eggs; but (c) that conduct was not legally cognizable vis-à-vis the class, would Dr. Rausser's model potentially face a *Comcast* problem. Such a scenario is not before the Court at this stage.

Admittedly, Plaintiffs certainly run the risk of decertification should Dr. Rausser's model not be flexible enough to accommodate future developments in the case. Dr. Rausser has asserted that "Defendants' alleged conspiracy in this case involved acts that were all designed to serve the same purpose (*i.e.*, to increase prices) and to complement one another. Therefore it is appropriate to consider the combined effect of these acts on prices—*i.e.*, the overall effect of the alleged conspiracy on prices." Rausser Reply Decl. 25. This contention that Defendants' actions are complementary and should not be disaggregated might suggest a difficulty in maintaining a class action should some part of those complementary actions be found lawful. Disentangling a knot of complementary conduct to remove the thread of the lawful conduct might prove beyond even the apocryphal capabilities of Alexander the Great, not to mention the impossibility of unscrambling the eggs in an omelet.

on certification of the class. Class certification is not such a free-ranging inquiry. Rather, as Defendants noted, *now* is the time to consider whether the requirements of Rule 23 have been met. The Court must consider the record before it and, based on that record, "formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate." *Hydrogen Peroxide*, 552 F.3d at 311.

Plaintiffs have shown that common evidence is capable of demonstrating that Defendants engaged in a series of complementary supply-reducing actions as part of a conspiracy to increase the price of eggs. Dr. Rausser has measured whether that conspiracy was successful in increasing the price of eggs. His model fits the theory of liability and satisfies *Comcast*. *Cf. First Data Merch. Servs. Corp. v. SecurityMetrics, Inc.*, No. 12-2568, 2014 WL 6871581, at *11 n.27 (D. Md. Dec. 3, 2014) (distinguishing *Comcast* and rejecting the argument that the plaintiffs "failed to properly disaggregate the damages as they related to the various individual counterclaims," because "there has been no ruling on the various motions for summary judgment and all of the relevant theories still remain at issue in the case."). Defendants have not given the Court reason to predict that certain actions within this alleged conspiracy will be found to have occurred but be unrecoverable and that Plaintiffs will not be able to accommodate such a development.

Plaintiffs have shown that Dr. Rausser's model is reliable enough in attributing the damages found in Dr. Rausser's model to the conspiracy. Courts frequently recognize that "regression analysis can be used to isolate the effect of an alleged conspiracy on price, taking into consideration other factors that might also influence price, like cost and demand." *In re Aftermarket Auto. Lighting Products Antitrust Litig.*, 276 F.R.D. 364, 371 (C.D. Cal. 2011) (quoting *In re Plastics Additives Antitrust Litig.*, No. 03-2038, 2010 WL 3431837, at *15 n.13 (E.D. Pa. Aug. 31, 2010)). Dr. Rausser's model controls for the majority of the factors that

determine pricing in the eggs industry, thereby allowing him to measure the isolated effect of the supply-reduction conspiracy perpetrated by Defendants. The Court rejects the broad notion that the failure to measure the supply effects of the conspiracy—separate and apart from the price effects of the conspiracy—alone defeats the reliability of the model. Antitrust impact and damages are ultimately concerned with whether plaintiffs paid higher prices. Plaintiffs have shown here that Defendants sought to achieve higher prices by restricting supply. The documentary evidence presented is sufficient to prove that Defendants undertook the supply-reduction programs alleged. What remains is a question as to whether that conspiracy affected prices. To prove that the conspiracy affected prices, an analysis such as the one conducted by Dr. Rausser is appropriate, because a supply reduction program, if successfully implemented, will be reflected in the prices paid by consumers—which is why restricting output equates to fixing prices. *See Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594-95 (7th Cir. 1984) ("An agreement on output also equates to a price-fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too—in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus, with exceptions not relevant here, raising price, reducing output, and dividing markets have the same anticompetitive effects.") *cited with approval in California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 777 (1999); *see also Linerboard*, 305 F.3d at 159 ("[T]he corrugated sheets and boxes contain linerboard that was subject to an agreement on output, which is equivalent to a price-fixing agreement.").

Defendants' attempts to decouple the observed price increases from the alleged output restriction do not convince the Court that Dr. Rausser's model is incapable of demonstrating antitrust impact using classwide evidence. Dr. Myslinski used Dr. Rausser's overcharge

regression to attempt to estimate but-for flock size (*i.e.*, Dr. Myslinski took Dr. Rausser's regression, which had used a set of common factors to demonstrate what the price of eggs should have been absent conspiracy behavior, and used the regression to estimate what the quantity of eggs would have been with conspiracy behavior). Dr. Myslinski contends that this analysis revealed that the quantity of eggs was actually higher than the model projects it should have been absent conspiracy behavior. Dr. Myslinski also contends that his results have extraordinarily high R-squared values, meaning that his regression is highly reliable (his R-squares were above 0.95, whereas Dr. Rausser's was .65). But the Court does not find this analysis convincing. The Court notes Dr. Rausser's criticism of Dr. Myslinski's use of the overcharge regression to measure the impact of the conspiracy on flock size. *See generally* Rausser Reply Decl. 72-77. As Dr. Rausser explains, Dr. Myslinski's model uses a different set of data, is based on very few data points, and is an inappropriate application of a pricing model to quantity." Rausser Reply Decl. 75. Dr. Rausser notes that his model included various attributes of eggs that would affect price, but not quantity (such as comparing brown and white eggs, etc.). Dr. Rausser also explains that Dr. Myslinski failed to account for certain important events and factors (such as the alleged anticompetitive exports of eggs, which Dr. Myslinski included as part of the "quantity" of eggs, even though they properly should have been excluded) and that the small number of data points in Dr. Myslinski's regression (203 data points compared to Dr. Rausser's millions of data points) makes the results unreliable. Comparing R-squared values, moreover, would be misleading here because the dependent variables differ. *See* Rausser Reply Decl. 76. Second, the model becomes highly unreliable once organic eggs (which are outside the class definition) and exported eggs are removed from Dr. Myslinski's model. *See id.*

Defendants will certainly be able to argue at summary judgment or at trial that the alleged conspiracy here was not successful in restricting supply and therefore that the observed price increase in Dr. Rausser's model is not attributable to the conspiracy. But that is a common question as to the merits of Plaintiffs' claims. The key question for the Court now is whether the model is not a reliable means of proving the impact of the conspiracy on the class.

Defendants additionally argue that Dr. Rausser's model is not a reliable means of proving impact because (a) the benchmark period data is sparse and unrepresentative; (b) Dr. Rausser failed to consider that cage space would have increased even absent the conspiracy; and (c) Dr. Rausser failed to account for other important determinants of egg prices, such as consumer income, dietary demand trends, and avian disease.

Defendants arguments against the reliability of Dr. Rausser's model are unavailing at present. Defendants argue that Dr. Rausser's regression is flawed because the benchmark period (i.e. the "normal" years against which he compares the conspiracy years to see if the price of eggs was inflated—here, 1997-2000 is the benchmark) is allegedly also tainted by some anti-competitive conduct. As Plaintiffs point out, however, if anything, any anticompetitive activity during the benchmark period would make Dr. Rausser's results conservative. Either Defendants were engaged in anti-competitive conduct in the benchmark period, making Dr. Rausser's model an underestimate of the effect of the conspiracy, or the Defendants were not engaged in anti-competitive conduct and the flaw disappears. This "flaw" of Dr. Rausser's model therefore is of little help to Defendants. The Court also finds unpersuasive Defendants' arguments about the extent to which the benchmark period was "tainted" with anticompetitive conduct. Although Plaintiffs allege that some anti-competitive conduct began during the benchmark period, Defendants acknowledge that the earliest of these allegations pertains to March 1999, towards

the end of the benchmark period. *See* Defs. Mem. in Opp. to DPP Class Cert. 31. Evidence supports Plaintiffs' assertions that these alleged anticompetitive activities would not have begun to yield significant impact on prices until after the end of the benchmark period. *See* DPP Mem. in Supp. of Class Cert. 31-32 (citing UEP reports about the timing of the effect on pricing of the alleged anticompetitive actions).

Defendants also argue that the benchmark comparison is flawed because the shell eggs benchmark period data comes from only four of the Defendants, but the conspiracy period data comes from 11 of the Defendants in the conspiracy period. For egg products, the benchmark period data comes from three of the Defendants and the conspiracy period data comes from ten of the Defendants. Defendants assert that Dr. Rausser has presented no evidence to show that the few defendants from which he derives his benchmark data are representative of the whole. Defendants note that during the alleged conspiracy period, the "average shell egg price of a Defendant without benchmark-data was 14% higher than the average price of shell eggs belonging to a Defendant with benchmark-data." Mem. in Opp. to DPP Class Cert. 32.

Dr. Rausser defends his benchmark data by explaining that he tested his regression by including a set of variables accounting for the defendant-specific differences in pricing. That is, he ran a regression where any potential bias created by certain defendants just having higher prices than other defendants would be negated. He found that his overcharge estimates were robust to the inclusion of variables accounting for the differences in pricing across Defendants. This robustness test satisfies the Court that Dr. Rausser has accounted for any biases attributable to the limited number of Defendants' data available during the benchmark period. The Court finds that the benchmark period used by Dr. Rausser is sufficiently similar to the conspiracy

period and is supported by sufficient data to allow for a probative comparison between benchmark period pricing and conspiracy period pricing.

Defendants also argue that Dr. Rausser's model is unreliable and cannot show impact because it does not account for whether cage spaces would have increased absent the alleged conspiracy. Defendants point to several pieces of evidence showing that there was a consumer push for animal welfare standards (including ballot initiatives and requirements from retailers). They also argue that the model fails to account for the costs of expanding the cages to accommodate an increase in the bird flock (had there been no conspiracy). Plaintiffs respond by arguing that this is a dispute, common to the class, about the merits of the case—whether the cage space increases were driven by demand or by an output reduction conspiracy.

The Court agrees with Plaintiffs. Defendants' argument that cage space would have increased absent the conspiracy, negating all or part of the overcharge found by Dr. Rausser, is common to the class. Defendants have failed to convince the Court that the failure of Dr. Rausser to (somehow) build into his model the but-for cage space increases of Defendants is a fundamental flaw in his model.[16] Although Defendants have adduced some evidence that certain entities were advocating for additional cage space regulations, Defendants have not demonstrated that those cage space regulations would have actually been implemented absent the conspiracy. Instead, the Court considers the evidence presented by Plaintiffs, tending to demonstrate that the cage space requirements were adopted for the purpose of raising the price of eggs, not for the purpose of meeting customers' demands. *See* DPP Reply Mem. in Supp. of Class Cert. 33-34 &

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[16] Notably, Dr. Myslinski conceded at the Class Certification Hearing that he was "not sure" there was a reliable way to include the but-for cage space increase in the regression model. Tr. Hr'g 3/11/15 132:2-18. As he testified, "one can imagine making assumptions about what would have been, but they would be pure assumptions." *Id.* at 132:10-12.

nn.57-59 (citing to deposition testimony, UEP meetings minutes, and documentary evidence that the cage space requirements were implemented for the purpose of raising prices and were considered successful by Defendants). Common evidence is capable of proving that the increase in cage space was the result of the alleged anticompetitive conspiracy, and the Court does not find convincing the argument that the failure to account for but-for cage space increases makes Dr. Rausser's model unreliable.[17]

Finally, Defendants have not identified any variables materially affecting the price of eggs that were not included in Dr. Rausser's models. Over the course of the litigation, Defendants have argued that Dr. Rausser's model is missing several variables, including consumer income, consumer demand, and avian disease. The Court concludes that none of these variables are so significant as to fundamentally bias Dr. Rausser's model. To test whether consumer income affected his eggs pricing model, Dr. Rausser conducted a sensitivity test and included income as an additional control. Dr. Rausser found that the inclusion of income altered his overcharge rates slightly—dropping the overcharge rate from 19.3% to 18.5% for shell eggs and from 13.8% to 12.7% for egg products. Dr. Rausser has shown that his model can account for income, and that the inclusion of income does not eliminate the finding of a significant and positive overcharge during the conspiracy period.

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[17] Defendants also reference cage space legislation in California, as well as proposed federal legislation from 2013. *See* Mem. in Opp. to DPP Class Cert. 34. But the California legislation was only implemented in 2015, *see* Cal. Code Regs. tit. 3 § 1350(d), and the proposed federal legislation, which UEP worked on developing, was not adopted into law, *see* Mem. in Opp. to DPP Class Cert. 34 n.25. Similarly, for present analytical purposes, the Court notes the widely disseminated reports of dire consequences resulting from avian flu, which has reportedly gravely reduced flock-size in the industry. None of these events relate to this case. *See infra* note 17.

Defendants have not offered evidence from which the Court could conclude that the overcharges found by Dr. Rausser are materially biased by dietary trends during the conspiracy period. Dr. Rausser has provided a plausible explanation for his decision not to account for dietary trends in his model. Dr. Rausser examined the literature regarding the economics and history of dietary trends regarding eggs and found that dietary trends rarely affect the demand for eggs for more than a few weeks. *See* Rausser Reply Decl. 93 (citing Chang, H.-H., and Just, D.R., *Health Information Availability and the Consumption of Eggs: Are Consumers Bayesians?*, Journal of Agricultural and Resource Economics, Vol. 32, No. 1, 77-92, at 77 (2007)).

The Court is likewise satisfied with Dr. Rausser's explanation for why he declined to include the effects of avian disease in his model. Although recent events suggest that avian disease can have a tremendous effect on the egg supply,[18] Dr. Rausser examined the history of avian disease during the conspiracy and benchmark periods and found that "only Newcastle disease affected flocks during the conspiracy and benchmark period. However, cumulatively over the last 17 years, only 3 million layers [were] affected by Newcastle disease. To put that (conservatively) into perspective, this total number of layers affected over the 17 years represents only 1% of the total number of layers in the US in 2005." Rausser Reply Dec. 94-95. Defendants assert that these 3 million layers affected by Newcastle disease would have increased prices by approximately 4.4% because, according to Dr. Rausser's elasticity measurements, a 1.2% drop in egg layers results in a 4.4% increase in price. But the number of layers affected was not 1.2% of all layers over the course of the conspiracy, but rather 1.2% at one point during the conspiracy. There may have been a 4.4% increase in price in the aftermath of the outbreak, but that increase

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[18] *See Bird Flu Will Force Egg Prices to a Record, U.S. Says*, N.Y. Times, June 11, 2015, at B2.

in price would not have significantly altered the results found by Dr. Rausser's model, which examined pricing over 17 years and found overcharges of well over 4.4%.[19] Thus, the Court concludes that Dr. Rausser has isolated sufficiently, for present purposes, the effects of the conspiracy and shown that the class suffered an antitrust injury.

Finally, Defendants argue that even if the model observes an overall impact to the class, the class still includes uninjured parties—namely, class members who bought eggs on a cost-plus basis. Defendants argue that Dr. Rausser's model is fatally flawed, much like his model in *In re Rail Freight Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013), because his model would ascribe impact to putative class members with long-term contracts who were potentially insulated from the alleged conspiracy. In particular, Defendants assert that a large amount of eggs were purchased under long-term contract tied to the price of grain, which would insulate the contracts from a reduction in the supply of eggs. Defendants argue that this is the same flaw that caused the D.C. Circuit to reject Dr. Rausser's model in *Rail Freight*.

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[19] In their post-hearing submission, Defendants assert, for the first time, that the failure to account for non-USEM exports biased Dr. Rausser's model. However, Defendants do not sufficiently support this theory. Defendants note that over 3.6 billion eggs were exported from the United States in 2012, but Defendants do not quantify what portion of these exports were from Defendants as opposed to non-defendants, and whether these exports increased over the conspiracy and benchmark periods or rather held steady or even decreased.

Defendants also argue that because in Dr. Rausser's testimony he did find any evidence of an agreement to restrict the construction of additional barns, this makes his model inconsistent with the liability case. To so argue, Defendants take language in the Court's June 10, 2014 Order (Doc. No. 987) out of context. The Court was merely commenting that the UEP Certified Program is but one aspect of the alleged supply-reduction conspiracy that encompassed a number of anticompetitive actions. *See* June 10, 2014 Order at 4 ("Instead, as this Court expressly characterized the DAPs' Complaints in *Eggs II*, the DAPs alleged use of the UEP Certified Program, *among and along with other agreed-upon activities*, to suppress or control supply. The supply control, rather than the UEP Certified Program itself, was the per se antitrust violation without procompetitive justification." (emphasis in original)).

In *Rail Freight*, the D.C. Circuit Court of Appeals considered a class action against rail freight shippers who had allegedly conspired to add a "fuel surcharge," violating the antitrust price-fixing prohibition. *Id.* at 247. Dr. Rausser provided a regression estimating an average overcharge and seeking to demonstrate that the class could prove common injury through common proof. *Id.* at 250. Defendants argued that Dr. Rausser's model was flawed because it would have ascribed an injury even to those Plaintiffs who had negotiated legacy contracts with the Defendants before the alleged conspiracy period. *Id.* The Court of Appeals vacated the District Court's certification of the class, finding that the District Court had not adequately considered this flaw. *Id.* at 255.

Plaintiffs here assert that the "small number of contracts cited by Defendants would be impacted by the conspiracy." DPP Reply Mem. in Supp. of Class Cert. 27. Plaintiffs argue that, unlike the contracts in *Rail Freight*, here, the contracts were entered into during the conspiracy, "meaning they embody prices that were already inflated." *Id.* In other words, these contracts would be affected because the conspiracy "set an artificially high baseline for price negotiations." *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 346 (D. Md. 2012) *amended*, 962 F. Supp. 2d 840 (D. Md. 2013). Also, Plaintiffs contend, the grain-based contracts were, in fact, "set with regard to market conditions." DPP Reply Mem. in Supp. of Class Cert. 27. Dr. Rausser's Reply Declaration provides support for Plaintiffs counterarguments. *See* Rausser Reply Decl. 99-102. Dr. Rausser examined all the contracts cited by Dr. Myslinski as well as others he located in the discovery record. Dr. Rausser notes that all but one of these challenged contracts were set during the conspiracy period, and that even those set based on grain prices were affected by market prices. He also found that many of the contracts either factored in the market price or gave the seller the option to alter the price due to market

conditions. Finally, even those Defendants with these ostensibly immunized contracts also purchased eggs outside these contracts, meaning they would have been injured by the conspiracy regardless. *Id.*

The Court agrees with Plaintiffs that the cost-plus contracts identified by Defendants do not cause individual issues to predominate. Dr. Rausser's model here does not suffer from the same flaws as his model in *Rail Freight*. The contracts here were set during the conspiracy period, unlike the contracts in *Rail Freight*, which were set prior to the conspiracy period, making injury impossible. *Cf. In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1267 (10th Cir. 2014) ("Second, Dr. McClave's model does not suffer from the same flaw identified in *In re Rail Freight.* There, the appeals court could not credit the expert's opinion because his methodology yielded damages for a time period in which prices had been freely set. Thus, the expert found damages for plaintiffs who could not possibly have suffered injury. Here, by contrast, Dow has not identified a single class member for whom injury was impossible."). This is a significant distinction because the artificially inflated price would have served as the baseline market price for the negotiations. *See Polyurethane Foam*, 2014 WL 6461355, at *33 ("Contract negotiations thus took place in the context of artificially inflated baseline pricing, effects which likely became "baked into" the contracts."). Further, Dr. Rausser's analysis of the cost-plus contracts revealed that the grain-based contracts were tied to market prices because they either factored in the market price or gave the seller the option to alter the price due to market conditions. Finally, even those Defendants with these ostensibly immunized contracts also purchased eggs outside these contracts, meaning they would have been injured by the conspiracy regardless. The Court

therefore concludes that cost-plus contracts here would not have immunized more than a de minimis number of class members.[20]

Conclusion as to Antitrust Impact for the Shell Eggs Subclass

The Court finds by a preponderance of the evidence that common issues predominate as to antitrust impact to the shell eggs subclass. Plaintiffs have shown that Defendants made efforts to reduce the supply of eggs and thereby raise the price of eggs, that the egg market was structured so that the alleged conspiracy to restrict the supply of eggs, *if successful*, would have caused all, or virtually all, Direct Purchaser Plaintiffs to pay higher prices than they would have absent the conspiracy and that the conspiracy was successful in raising prices. Plaintiffs' logical progression did require two inferential steps: (1) an inference that because the market was structured in such a way that any price increase would have affected the entire market, that all class members were affected; and (2) an inference that because every significant supply and

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[20] The Court acknowledges that this conclusion is different from the conclusion reached in the opinion denying class certification for the classes of indirect purchasers. The contrary result here is explained by several factors. For one, Plaintiffs here have examined the cost-plus contracts at issue, unlike the Indirect Purchaser Plaintiffs who admitted to not knowing the details or prevalence of cost-plus contracts at issue. Dr. Rausser here examined all the contracts cited by Dr. Myslinski as well as others he located in the discovery record. Because he did so, he was able to determine that few lasted longer than one-year, and of the 67 contracts cited by Dr. Myslinski, all but one was entered into during the class period. Part of the difficulty for Indirect Purchaser Plaintiffs in regard to reviewing the contracts at issue was that, unlike Plaintiffs here, Indirect Purchaser Plaintiffs sought to recover for transactions between non-defendant firms and non-plaintiff direct purchasers. The details of these transactions were notably absent from Indirect Purchaser Plaintiffs' materials—let alone details about any cost-plus transactions. A second distinction is that those class members here who bought on cost-plus contracts here also likely bought eggs outside those contracts. *See* Rausser Reply Decl. 101-02. Of the cost-plus contracts cited, many of the most prominent were from firms such as Kroger and GSF which also purchased eggs outside of these cost-plus contracts during the class period. Members of the proposed indirect purchaser class did not share this quality, as their purchasing patterns were far less ascertainable. Members of the proposed indirect purchaser class might have bought eggs from Kroger only during the period when Kroger was purchasing eggs on a cost-plus basis, for example. Such a class member might well have not been affected by the conspiracy.

demand factor has been controlled for, the observed increase in the price of eggs can be attributed to the effects of the conspiracy. The Court believes both these inferences are permissible and reasonable here.

The first inferential step is permissible and has been employed in other antitrust class action cases. *See, e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06- 1175, 2014 WL 7882100, at *49 (E.D.N.Y. Oct. 15, 2014) *report and recommendation adopted*, No. 06-1775, 2015 WL 5093503 (E.D.N.Y. July 10, 2015) ("Analogizing to a murder trial, the plaintiffs' evidence of a violation tends to establish the weapon used, while Tollison's market analysis provides a motive and an opportunity. The court should not be deprived of such evidence simply because it does not include a smoking gun."), *53 ("[T]he court finds that Tollison's testimony permits a reasonable inference of classwide impact. Effectively, this section of Dr. Tollison's declaration tends to establish that *if* the defendants implemented an unlawful price-fixing conspiracy, such a conspiracy would likely be successful.");[21] *Titanium Dioxide*, 284 F.R.D. at 346 (D. Md. 2012) ("Having reviewed the submissions and the parties' arguments, this Court concludes that the evidence of the nearly simultaneous price increase announcements, in conjunction with the structural factors present in the TiO_2 industry, *see supra,* makes the element of antitrust impact 'capable of proof at trial through evidence that is common to the class rather than individual to its members.'" (quoting *Hydrogen Peroxide,* 552 F.3d at 311–12)); *In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 220-25 (E.D. Pa. 2012) (making such an inference

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[21] Although the court in *Air Cargo* later in its opinion declined to infer that the regression model showing aggregate damages permitted an inference of classwide impact, this finding was partially due to "the potential variability within the class,"—a characteristic not shared by the proposed shell eggs subclass here. *See Air Cargo*, 2014 WL 7882100, at *54 (E.D.N.Y. Oct. 15, 2014).

based on similar evidence); *Puerto Rican Cabotage*, 269 F.R.D. at 139 ("Plaintiffs and other class members have alleged and shown through circumstantial evidence that, because they had no economically viable substitute for the various Puerto Rican cabotage services provided by Defendants, they paid supra-competitive prices for the services purchased."); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 92 (D. Conn. 2009) (market analysis "lay[s] the groundwork for plaintiffs' argument that, if collusive behavior did occur, it would have been effective in raising prices across the class, thus demonstrating class-wide injury-in-fact"). It is also a reasonable inference because, even though the use of a single average overcharge to demonstrate the impact of a conspiracy across the class can be problematic, Plaintiffs have laid a sufficient foundation for the inferential finding that the impact reflected in the single average overcharge was shared by virtually every class member. As the Court has discussed, Defendants have largely not contested the results of the pricing structure analysis conducted by Dr. Rausser, which found that class members would not have been able to escape the effects of the conspiracy, because the egg industry is an integrated, nationwide commodity with significant demand- and supply-side substitutability.

This finding is also supported by the inability of Defendants to identify any significant subset of class members who might have been uninjured by the conspiracy. Except for purchases made from cost-plus contracts, which the Court finds do not defeat predominance because purchasers on those contracts would have been affected, Defendants have failed to explain how any significant number of class members could have escaped the impact of the conspiracy. This lack of identified potentially uninjured members distinguishes this case from others in which courts declined to infer that an observed price increase would have had an impact on virtually every class member. *See, e.g.*, *Rail Freight*, 725 F.3d at 253 (vacating and remanding because

the district court "did not, however, address the defendants' concern that the damages model yielded false positives with respect to legacy shippers."); *Vista Healthplan, Inc. v. Cephalon, Inc.*, No. 2:06-CV-1833, 2015 WL 3623005, at *18-21 (E.D. Pa. June 10, 2015) *reconsideration denied*, No. 2:06-CV-1833, 2015 WL 4737288 (E.D. Pa. Aug. 4, 2015) (identifying various groups of uninjured members of the putative class).

The second inferential step identified above—that the observed price increase is a result of the conspiracy—is also permissible and reasonable. As the Court has explained, Defendants have not identified any missing variables from Dr. Rausser's model that could preclude his ability to isolate the effects of the conspiracy. Such an inference comports with the economic theory behind treating supply-reduction conspiracies as *de facto* price-fixing conspiracies. *See Gen. Leaseways*, 744 F.2d at 594-95 ("An agreement on output also equates to a price-fixing agreement.").

The Court concludes that common issues predominate with respect to the antitrust injury to the shell eggs subclass.

ii. Egg Products Subclass

The egg products subclass, however, is a different story. Plaintiffs have not demonstrated that common issues predominate as to the antitrust impact to the egg products subclass. Essential to the Court's conclusions as to shell eggs was the extensive industry analysis conducted by Dr. Rausser, which demonstrated that the shell eggs industry was a highly consolidated, integrated, and commoditized industry. No such extensive analysis has been conducted for the egg products market, and the Court cannot conclude that common issues predominate as to egg products.

Egg Product Industry Characteristics

Whereas Dr. Rausser's industry analysis as it pertains to shell eggs is well-supported and supports a finding of common impact, Dr. Rausser's industry analysis as it pertains to egg products lacks the rigor needed for the Court to reach the conclusion that common issues are likely to predominate as to egg products. Dr. Rausser analyzes and opines on the degree to which shell eggs are a commodity product with demand-side substitutability, but his analysis is silent with respect to demand-side substitutability of different types of egg products. *See* Rausser Rep. 15 ("In the egg industry, there is, unsurprisingly, a high degree of demand-side substitution between eggs of different colors (brown and white), and different grades, as confirmed by industry studies and witness testimony."); Defs. Mem. in Opp. to DPP Class Cert. 60 (noting that Dr. Rausser acknowledged at his deposition that he did not analyze demand-side substitutability for egg products (quoting Rausser Dep. at 111:11-25, Defs. Ex. 35)). Dr. Rausser opines that there is supply-side substitutability between shell eggs and egg products, because shell eggs can be easily designated for use in egg products and vice versa, but he does not fully analyze whether, at the egg products processing level, there is supply-side substitutability between differing types of egg products. *See* Rausser Rep. 15-16. Dr. Rausser's report does posit that "[b]reaking eggs can end up as any one of [frozen, dried, or liquid egg products], with the decision largely determined by the relative demand, prices available, and quantity of surplus reported for each product type," *see id.* at 17-18, but it takes more than eggs to make egg products—it takes infrastructure to process those eggs—an aspect of the industry Dr. Rausser does not address. *See* Myslinski Decl. 66-68 (discussing how the equipment and facilities for producing egg products limits the supply-side substitutability of egg products). Dr. Rausser thus stops short of fully analyzing the extent to which producers can substitute between shell and breaking eggs as well as between different types of egg products.

Dr. Rausser also fails to analyze whether egg products prices are integrated across the United States, *see* Rausser Decl. at 20-22 (discussing how shell eggs prices are integrated across the United States). Nor does Dr. Rausser analyze whether the defendant egg-product producers had sufficient market share to effectuate an increase in the price of egg products. Dr. Rausser studied the percentage of egg layers owned by Defendants and within the certified program, *see id.* at 26-27, but did not study whether, at the egg-product level, non-defendants have a large enough market share to combat an attempt to fix prices by Defendants. Dr. Rausser also did not analyze the demand elasticity for egg products—only for the breaking eggs that are processed into egg products. *See id.* at 33.

These gaps in Dr. Rausser's industry analysis significantly hinder his ability to demonstrate that common issues predominate as to the element of antitrust impact on the purchasers of egg products.

Statistical Analysis of Egg Products Pricing

Because Dr. Rausser's industry analysis of egg products is far less extensive than his industry analysis of shell eggs, Dr. Rausser's egg products statistical analyses are far less probative than his shell eggs statistical analyses. As discussed above, co-movement analysis is of limited probative value. Co-movement analysis is capable of corroborating an economic link between two price series, but evidence must demonstrate what that economic link is and how that economic link is relevant to a finding of antitrust impact across the class. *See* Burtis & Neher, *supra*, at 498 ("[I]n order for a correlation analysis to be potentially relevant to class certification, there must be an investigation, or analysis, of the reasons for the observed correlation."). Dr. Rausser demonstrated that in the shell egg industry those links are demand-side substitutability among egg types, the commoditized nature of eggs, the nationwide

integration of the egg market, and the lack of adequate substitutes for eggs. *See supra* Part IV.a.2.i. Dr. Rausser has not sufficiently demonstrated what the economic links explaining the co-movement of egg products are. He has not shown that egg products are substitutable for shell eggs or that various types of egg products are substitutable. He has likewise not shown that egg products are commoditized such that branding is immaterial, and he has not shown that the market for egg products is integrated nationally. Because he has not established these baseline facts about the egg industry, his co-movement analyses are of little probative value as to whether a conspiracy to fix the price of eggs would have had an antitrust impact across the subclass of consumers purchasing egg products.

Indeed, Dr. Myslinski's expert analysis on behalf of Defendants provides evidence that the egg products industry is structured differently than the shell eggs industry. Dr. Myslinski explains that Dr. Rausser failed to distinguish between low- and high-value-added products. *See* Myslinski Decl. 68. Dr. Myslinski then demonstrates that the price movements of shell eggs and the price movements of high-value-added egg products do not resemble each another, as the high-value-added egg product prices tend to remain constant where shell egg prices fluctuate. *See id.* at 69. This analysis implies that the market for egg products has different structural characteristics than the shell eggs market and suggests that differences in the prices of shell eggs are not necessarily reflected in the prices of high-value-added egg products. Dr. Rausser's response to this analysis does not convince the Court that Plaintiffs have adequately assessed whether purchasers of high-value-added egg products would have been affected by the alleged conspiracy. Dr. Rausser argues that Dr. Myslinski's analysis is "hardly informative" because "he is comparing very thinly traded egg products to average prices for the entire shell egg industry." *See* Rausser Reply Decl. 40-41. But Dr. Rausser does not fully substantiate or explain this

criticism, asserting only that it is "unsurprising that such a comparison will not evidence co-movement." *Id.* at 41. This response fails to address the crucial questions: Why do these prices fail to exhibit co-movement? What does the lack of co-movement say about the market for egg products, and what does it say about whether purchasers of such products would have been affected by the conspiracy? Plaintiffs' failure to answer these questions weighs against a finding that common issues predominate as to the proposed egg products subclass. The common factors regression likewise cannot demonstrate that the antitrust impact would have been common to the egg products subclass, because Plaintiffs have failed to lay the groundwork to show why the prices can be explained by these common factors and what this implies about the likelihood the alleged conspiracy would have had an impact on all or virtually all class members.

Thus, the regression model demonstrating an average overcharge to the class as a whole is not sufficient to demonstrate antitrust impact for virtually all members of the class.

Conclusion as to Predominance of Antitrust Impact of the Egg Products Subclass

In the shell eggs context, the Court first determined that the alleged conspiracy, if successful, would have affected virtually every member in the class. The Court then determined, relying on Dr. Rausser's regression, that common evidence could demonstrate that the conspiracy had, in fact, successfully had an impact on the class. The Court then made the reasonable inference that the impact affected virtually every class member. The Court cannot make that same inference here because it is not convinced that the alleged conspiracy, if successful, would have affected virtually every member of the egg products subclass. Plaintiffs have not demonstrated that the egg products industry operates like the shell egg industry in this regard. The Court therefore can only speculate that the demonstrated average antitrust impact

would have affected virtually every class member. This speculation cannot prove by a preponderance of the evidence that common issues predominate as to antitrust impact.[22]

3. Measurable Damages

Plaintiffs also need to demonstrate that common issues predominate as to the element of "measurable damages" on a classwide basis. *Hydrogen Peroxide*, 552 F.3d at 311-12 (citing 15 U.S.C. § 15). "At the class certification stage, the plaintiffs are not required to prove damages by calculating specific damages figures for each member of the class, but rather they must show that a reliable method is available to prove damages on a class-wide basis." *In re Wellbutrin XL Antitrust Litig.*, 282 F.R.D. 126, 144 (E.D. Pa. 2011). That is, Plaintiffs must show that there is a reliable means for measuring damages with reasonable accuracy in the aggregate. *See King Drug Co. v. Cephalon, Inc.*, No. 2:06-1797, 2015 WL 4522855, at *14 (E.D. Pa. July 27, 2015) ("Courts have held that proof of aggregate damages is appropriate in class actions." (citing *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197 (1st Cir. 2009)). "Calculations

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[22] Defendants also contest that the egg products subclass is overbroad because it would include purchasers of egg products made from eggs produced by non-defendants. Defendants contend that the eggs sold by non-defendants are not "price-fixed" and therefore the egg products are not price fixed. To hold otherwise, Defendants argue, would run afoul of the Third Circuit Court of Appeals' prohibition on "umbrella" damages, as announced in *Mid-West Paper Products Co. v. Cont'l Group, Inc.*, 596, F.2d 573 (3d Cir. 1979). The Court does not reach this issue, as it finds that common issues do not predominate as to the eggs products subclass. The Court observes, however, that the failure to investigate the effect of the eggs from non-defendants on the prices of egg products weighs against a finding that the conspiracy would have had a common impact on the members of the putative subclass. As noted in *Mid-West Paper*, non-conspiring producers might price their products differently than conspirators. This difference in the prices of non-defendants' eggs might manifest itself in the prices of egg products, even if sold by Defendants, meaning that certain subclass members might not have experienced an impact as a result of the conspiracy. Plaintiffs have not addressed how the Court can reconcile this possibility with a finding of predominance as to antitrust impact.

need not be exact," but must be consistent with the theory of antitrust impact. *Comcast*, 133 S. Ct. at 1433.

Dr. Rausser's damages calculations are a reliable means for measuring the damages of the class with reasonable accuracy. As the Court discussed in detail above, Dr. Rausser's model isolates the effects of the conspiracy on price, allowing for a calculation of "the difference between the illegal price that was actually charged and the price that would have been charged 'but for' the violation multiplied by the number of units purchased." *See Flonase*, 284 F.R.D. at 232 (citation omitted). The Court rejects Defendants' arguments that Dr. Rausser's model fails to include significant variables that bias his model, as the model reliably attributes the damages to the conspiracy. *Cf. Comcast*, 133 S. Ct. at 1433 ("[A] model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory."). Accordingly, the Court finds that Plaintiffs have met their burden of demonstrating that common issues predominate as to measurable damages.

The Court also rejects Defendants' arguments premised on the notion that variation of damages between and among class members defeats predominance, as "[a]t the class certification stage, the plaintiffs are not required to prove damages by calculating specific damages figures for each member of the class, but rather they must show that a reliable method is available to prove damages on a class-wide basis." *Vista Healthplan,* 2015 WL 3623005, at *22 (citing *In re Wellbutrin XL,* 282 F.R.D. at 144); *23 ("Circuit courts have largely rejected the interpretation urged by Defendants—that variations in damages calculations between and among class members defeat predominance." (collecting cases)). Thus, the Court rejects the argument that Dr. Rausser would have needed to account for the differences in damages of different class members with respect to the effects of the alleged exports. *See* Mem. in Opp. to

DPP Class Cert. 26. Dr. Rausser does not need to account for each aspect of the conspiracy in isolation, as explained above, and even if a class member was not affected by a particular export, that class member would have been affected by the other aspects of the alleged conspiracy. *See SmithKline Beecham Corp. v. Apotex Corp.*, 383 F. Supp. 2d 686, 702 (E.D. Pa. 2004) ("Though we have found that the Settlement did not produce an antitrust injury, Torpharm alleges that SmithKline entered into the Settlement as part of a larger scheme to maintain its monopoly in the market for paroxetine hydrochloride. Because we must consider the anticompetitive effect of SmithKline's acts as a whole, we cannot conclude as a matter of law that those acts did not produce an antitrust injury." (citations omitted)).

4. **Conclusion as to Predominance**

As discussed, the Court concludes that Plaintiffs have demonstrated that common issues predominate over individual questions with respect to the shell egg subclass. Plaintiffs have not demonstrated that common questions predominate with respect to the egg products subclass, as they have not demonstrated that the element of antitrust impact is capable of common proof, which the Court finds would result in individualized questions predominating overall with respect to the egg products subclass.

b. Superiority and Manageability

The "superiority" requirement asks whether a case is better brought as a class action or in an alternative form of litigation, such as individual lawsuits. Rule 23(b)(3) sets out four factors for the Court to consider: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability

of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action.

Defendants do not contest Plaintiffs' assertion that these considerations weigh in favor of finding that the superiority and manageability requirements are met here. The Court agrees that these requirements are met here. The interests of efficiency and economy favor litigating the antitrust claims of the thousands of class members, who are widely dispersed geographically, in a single forum. Otherwise, scores of individual lawsuits would rely on similar evidence and proof. The Court perceives no prejudice to the interests of class members who might want to individually control the prosecution of a separate action. Such class members will be afforded an opportunity to opt out of the class, as several entities have already done for settlement purposes. The Court also perceives no difficulty in managing this class action, as common issues predominate over common ones and the claims asserted are common to the class.

The Court therefore finds that the elements of superiority and manageability are met.

V. CLASS PERIOD DETERMINATION

Plaintiffs and Defendants dispute the appropriate class period. Plaintiffs have proposed a class extending from September 24, 2004 through the present. Defendants propose that the class period should extend only through 2008, arguing that because the Court has partially limited discovery of post-2008 materials, the class period should not extend past 2008. Defendants also argue that the conspiracy's effects must have ended in 2008 when the lawsuit was initiated, as the secrecy essential to the conspiracy was lost.

Despite the extensive briefing of the class certification issue generally, the arguments articulated by both sides as to the proper cutoff date of the class period have thus far not provided the Court with sufficient reasoning justifying the competing cutoff dates proposed for

the shell egg subclass. Therefore, the Court will grant the motion to certify the shell egg subclass but will deny without prejudice the Plaintiffs' motion to extend the class period from September 24, 2004 through the present. The Court requests both sides submit further briefing addressing their respective proposed cutoff dates for the shell egg subclass.

VI. CONCLUSION

For the above reasons, the Court will certify the proposed class in part. The Court will not certify the Direct Purchaser Plaintiffs' egg products subclass. The Court will certify the Direct Purchaser Plaintiffs' shell egg subclass but will deny without prejudice with respect to the class period proposed by the Plaintiffs. The parties are instructed to submit supplemental briefing. An appropriate order follows.

BY THE COURT:

GENE E.K. PRATTER
United States District Judge

APPEALILITY OF CLASS ACTIONS SETTLEMENTS

Rule 23(f) of the Federal Rules of Civil Procedure. Class Actions

(f) *Appeals*. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Expert Evidence in Class Certification

A NOTE ON EXPERT EVIDENCE[1]

As a general rule, a witness may not testify at trial to a matter on which the witness lacks personal knowledge. Rule 602 of the Federal Rules of Evidence provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.[2]

Although the Supreme Court has yet to hold definitively that a Rule 702 inquiry (often called a *Daubert* inquiry) is necessary to evaluate expert opinions offered in support of class certification, the weight of authority in the lower courts indicates that a Rule 702 inquiry is appropriate and perhaps even necessary at class certification as part of the "rigorous analysis" required by *Falcon* of the class certification requirements.[3]

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1. Importantly, this note addresses the use of expert evidence at trial. For the special considerations in using expert evidence in class certification proceedings, see the Class Notes.

2. FED. R. EVID. 602.

3. *See* General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982) (requiring a "rigorous analysis" of whether a putative class satisfies the Rule 23 requirements). In dicta, the Supreme Court commented that the district court in the case "concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . . ." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354 (2011). For cases holding that expert testimony in the class certification record must satisfy Rule 702, see, for example, Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 665 n.7 (9th Cir. 2022) ("In a class proceeding, defendants may challenge the reliability of an expert's evidence under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Rule 702 of the Federal Rules of Evidence."); Prantil v. Arkema Inc., 986 F.3d 570, 575 (5th Cir. 2021); Sali v. Corona Reg'l Med. Ctr., 909 F.3d 996, 1006 (9th Cir. 2018) ("[I]n evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*."); *In re* Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015) ("Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that the Rule 23(a) prerequisites have been met 'in fact,' nor can it establish 'through evidentiary proof' that Rule 23(b) is satisfied."); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812 (7th Cir. 2012); American Honda Motor Co. v. Allen, 600 F.3d 813, 815 (7th Cir. 2010); Unger v. Amedisys Inc., 401 F.3d 316, 319 (5th Cir. 2005) (holding that "findings [at the class certification stage] must be made based on adequate admissible evidence to justify class certification"); *but see In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011) (no error by the district court in conducting a *Daubert* analysis at class certification but not requiring a *Daubert* inquiry at the class certification stage). *See generally In re* Namenda Indirect Purchaser Antitrust Litig. No. 15-cv-6549, 2021 WL 1000489, at *8 (S.D.N.Y. Jan. 12, 2021) ("Namenda VII") (discussing cases).

Rule 702 governs the admissibility of opinion testimony by a qualified expert.[4] Rule 702 embodies separate requirements on qualifications, relevance, and reliability:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.[5]

Subject to Rule 702 and the other rules of evidence, Rule 704(a) permits experts to offer opinion testimony about an ultimate issue of fact in the case.[6] But neither Rule 702 nor Rule 704(a) allows an expert to offer legal conclusions.[7]

Rule 702 was amended in 2000 to its current form to incorporate the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[8] and *Kumho Tire Co. v. Carmichael*.[9] *Daubert*, which involved scientific expert testimony, assigned the trial court the "gatekeeper" role of "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[10] *Kumho* clarified that *Daubert's* gatekeeping obligation also applies to all types of expert testimony.[11] The 2000 amendment reaffirms the trial court's role as a gatekeeper and imposes requirements of relevance, qualification, and reliability on expert testimony.

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4. FED. R. EVID. 702.

5. *Id*. 702 (as amended in 2023). In limited circumstances, lay persons may give opinion testimony under Rule 701: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FED. R. EVID. 701.

6. *Id*. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue."). Rule 704 abolished the old common law prohibition against any witness, including an expert, from offering an opinion on the "ultimate issue" in the case.

7. *See, e.g.*, Nationwide Transp. Fin. v. Cass Info. Sys., 523 F.3d 1051, 1059-60 (9th Cir. 2008); Good Shepherd Manor Found., Inc. v. City of Chicago, 323 F.3d 557, 564 (7th Cir. 2003); C.P. Interests, Inc. v. Cal. Pools, Inc., 238 F.3d 690, 697 (5th Cir. 2001); Berry v. City of Detroit, 25 F.3d 1342, 1353 (6th Cir. 1994) ("Although an expert's opinion may embrace an ultimate issue to be decided by the trier of fact, the issue embraced must be a factual one.") (citation, brackets, and quotation marks omitted).

8. 509 U.S. 579 (1993).

9. 526 U.S. 137 (1999).

10. *Daubert*, 509 U. at 597; *accord Kumho*, 526 U.S. at 141.

11. *Kumho*, 526 U.S. at 147.

Relevance. Rule 702 requires that the "expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."[12] The Advisory Committee observed that the helpfulness inquiry is "whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute."[13] Expert testimony that is not helpful to the trier of fact is inadmissible.[14]

One aspect of the relevancy requirement is that the expert's analysis is probative of a question of fact in the case under the proper legal standard. At trial, the expert must testify in a manner that does not run counter to the established legal rules or runs the risk of confusing the jury regarding the proper legal test. So, for example, courts have excluded expert testimony where the expert's theory of market definition contradicted the applicable legal standards.[15]

Qualifications. Rule 702 requires that an expert witness be qualified by scientific, technical, or other specialized knowledge. Without this specialized knowledge, the expert's testimony would not be helpful to the jury: the trier of fact can simply perform the analysis on its own. Courts have construed this requirement liberally.[16] In assessing an expert's qualifications, the court should consider a proposed expert's full range of practical experience as well as academic or technical training.[17] When the expert is otherwise qualified, courts should not exclude the expert's testimony merely because the expert did not have the degree or training the court believes would be most appropriate.[18] But the expert's qualifications must be relevant to the opinion the expert is offering. Although qualified as an expert in one area of

12. FED. R. EVID. 702.

13. Fed. R. Evid. 702 advisory committee's note to the original proposed rule; *see* Superior Prod. P'ship v. Gordon Auto Body Parts Co., 784 F.3d 311, 323 (6th Cir. 2015) (affirming exclusion of expert testimony that the defendant's pricing strategy reflected an intent to force the plaintiff out of the market where no expert testimony on intent was needed); *In re* Se. Milk Antitrust Litig., No. 2:07-CV 208, 2010 WL 8228830, at *3 (E.D. Tenn. Dec. 8, 2010) (granting motion to exclude expert testimony that did no more than collate the plaintiffs' evidence and summarize it in nontechnical form, without the application of any expertise).

14. *See* United States v. Duncan, 42 F.3d 97, 101 (2d Cir. 1994) ("When an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury's. When this occurs, the expert acts outside his limited role of providing the groundwork in the form of an opinion to enable the jury to make its own informed determination. In evaluating the admissibility of expert testimony, this Court requires the exclusion of testimony which states a legal conclusion.") (emphasis in original).

15. *See, e.g.*, Superior Prod. P'ship v. Gordon Auto Body Parts Co., 784 F.3d 311, 325 (6th Cir. 2015) (affirming exclusion of expert testimony that defendant's prices were below cost where expert used an incorrect test for below-cost pricing under Sixth Circuit precedent); Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995); Bailey v. Allgas, Inc., 148 F.Supp.2d 1222, 1242-45 (N.D. Ala. 2000), *aff'd*, 284 F.3d 1237, 1247-49 (11th Cir. 2002).

16. *See, e.g.*, *In re* Paoli R.R. Yard PCB Litig. (Paoli II), 35 F.3d 717, 741 (3d Cir. 1994).

17. *See In re* Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. 154, 163 (S.D. Ind. 2009).

18. *See, e.g.*, *Paoli II*, 35 F.3d at 741.

expertise, a person may be precluded from offering opinions beyond that area of expertise.[19] Moreover, while an expert may be "qualified" sufficient to satisfy the standards of Rule 702, the nature of the qualifications may affect the weight to be given to the testimony.[20]

Facts and data. By its terms, a necessary requirement under Rule 702 for the admissibility of expert opinion testimony is that the testimony be based on "sufficient data or facts." An expert may obtain her data or facts from one of three sources:[21]

1. The expert may have first-hand personal knowledge of them, such as when the expert is a treating physician who directly observed the patient.
2. The expert may be provided data and facts at trial, such as when the expert attended the testimony of fact witnesses in which the data and facts were disclosed or when counsel during the expert's examination (especially cross-examination) presented the expert with data or facts in a hypothetical situation on which the expert was asked to opine.
3. More commonly, especially for economic experts in antitrust cases, the expert obtained her data or facts from third-party sources and so does not have "personal knowledge" of them within the meaning of Rule 602.

Rule 703 governs the facts or data on which an expert may base an opinion:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.[22]

The first sentence of Rule 703 handles the expert's first-hand knowledge as well as data or facts provided at trial. The rest of the rule handles data and facts from third-party sources. Note that the expert may rely on data and facts that are not admitted, or even are inadmissible, if experts in the field reasonably rely on them.[23]

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19. *See* Weisgram v. Marley Co., 169 F.3d 514, 518 (8th Cir. 1999) (holding that a city fire captain, although qualified as an expert on fire investigation, and therefore qualified to testify as to his opinion that a fire started in the entryway and radiated to a sofa, was not qualified to testify as to his unsubstantiated theories of a malfunction that might have caused the fire)

20. *See, e.g.*, *In re* Mushroom Direct Purchaser Antitrust Litig., No. 06-0620, 2015 WL 5767415, at *3-*5 (E.D. Pa. July 29, 2015) (finding Einer Elhauge, a professor at Harvard who teaches and has published in antitrust law, "qualified" within the meaning of Rule 702 to offer economic opinions based on the use of regression analysis even though he has no formal training in economics, econometrics or statistics, but noting that his lack of formal training typical of testifying economic experts would factor in the weight given to his testimony).

21. FED. R. EVID. 703 advisory committee's note to the original proposed rule.

22. FED. R. EVID. 703.

23. This is an exception to Rule 104(b), which provides: "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the

Under Rule 703, experts are entitled to use assistance in formulating expert opinions, and their assistants need not themselves testify to make the expert's opinion testimony admissible.[24] The opposing party, however, may examine the expert to determine whether there was adequate supervision and whether relying on such assistance was standard practice in the field.[25] Where the expert relied on an assistant's work, the opposing party may also depose the assistant to determine how the task was performed and whether it was performed competently. Where the data or facts on which the expert relied cannot be shown to be reliable, either by the expert herself or other testimony, the opinions that depend on those data or facts will be excluded.[26]

As a general rule, an expert does not have to disclose in the expert's direct testimony the data and facts on which an opinion is based, but the relevant data and facts may be the subject of cross-examination. Rule 705 provides:

> Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.[27]

Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure and Rule 16 of the Federal Rules of Criminal Procedure, however, require disclosure in advance of trial of the basis and reasons for an expert's opinions.[28]

Reliable principles and methods. Rule 702 requires that the expert testimony "is the product of reliable principles and methods."[29] The *Daubert* Court identified several factors that the court may consider when making this determination, including (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence, and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.[30] These factors are not exhaustive, and the trial court has "broad latitude when it decides *how* to determine reliability."[31]

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fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later." *Id*. 104(b).

24. *See In re* Sulfuric Acid Antitrust Litig., 235 F.R.D. 646, 658 (N.D. Ill. 2006).

25. *Id*.

26. *See, e.g.*, Orthofix Inc. v. Lemanski, No. 13-11421, 2015 WL 12990115, at *1 (E.D. Mich. Sept. 29, 2015).

27. FED. R. EVID. 705. Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure and Rule 16 of the Federal Rules of Criminal Procedure, however, require disclosure in advance of trial of the basis and reasons for an expert's opinions. *See* FED. R. CIV. P. 26(a)(2)(B), 26(e)(1); FED. R. CRIM. P. 16.

28. *See* FED. R. CIV. P. 26(a)(2)(B), 26(e)(1); FED. R. CRIM. P. 16.

29. FED. R. EVID. 702.

30. *See, e.g.*, *In re* Paoli R.R. Yard PCB Litig. (Paoli II), 35 F.3d 717, 742 n.8 (3d Cir. 1994).

31. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 142 (1999) (emphasis in original).

Reliable application. Rule 702 requires that "the expert has reliably applied the principles and methods to the facts of the case."[32] In other words, "the expert's testimony must be relevant for the purposes of the case and must assist the trier of fact."[33] This requirement is commonly known as "fit."[34] The *Daubert* Court observed that "[f]it" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."[35]

As a general matter, flaws in a proffered expert's analysis typically go to the weight, rather than the admissibility, of the expert's testimony.[36] The evidentiary requirement of reliability is lower than the merits standard of correctness.[37] As the Third Circuit explained:

> A judge frequently should find an expert's methodology helpful even when the judge thinks that the expert's technique has flaws sufficient to render the conclusions inaccurate. He or she will often still believe that hearing the expert's testimony and assessing its flaws was an important part of assessing what conclusion was correct and may certainly still believe that a jury attempting to reach an accurate result should consider the evidence.[38]

Two areas of particular interest in antitrust cases are regression analysis and surveys.

Regression analysis is a well-accepted economic tool that courts have accepted when reliably applied.[39] The Supreme Court addressed the application reliability of opinions based on regression analysis in *Bazemore v. Friday*, an employment discrimination case:

> While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors "must be considered unacceptable as evidence of discrimination." Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.[40]

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32. FED. R. EVID. 702.

33. Schneider ex rel. Estate of Schneider v. Fried, 320 F.3d 396, 404 (3d Cir. 2003); *accord In re* Mushroom Direct Purchaser Antitrust Litig., No. 06-0620, 2015 WL 5767415, at *2 (E.D. Pa. July 29, 2015).

34. *See, e.g.*, *Paoli II*, 35 F.3d at 743; *In re* Nexium (Esomeprazole) Antitrust Litig., 842 F.3d 34, 52 (1st Cir. 2016); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1055 (8th Cir. 2000).

35. *Daubert*, 509 U. at 591.

36. *See, e.g.*, *In re* Live Concert Antitrust Litig., 863 F. Supp. 2d 966, 973 (C.D. Cal. 2012).

37. *Paoli II*, 35 F.3d at 744; *In re* Mushroom Direct Purchaser Antitrust Litig., No. 06-0620, 2015 WL 5767415, at *6 (E.D. Pa. July 29, 2015).

38. *Id*. at 744-45.

39. *See, e.g.*, *In re* Flat Glass Antitrust Litig., 191 F.R.D. 472, 486 (W.D. Pa. 1999) (collecting cases).

40. Bazemore v. Friday, 478 U.S. 385, 400 (1986). For applications in antitrust cases, see, for example, *In re* Urethane Antitrust Litig., 768 F.3d 1245, 1260-61 (10th Cir. 2014) ("The validity of a regression analysis depends on selection of the appropriate independent variables. Consequently,

Generally, courts recognize that the economic tools used in antitrust cases require the exercise of professional judgment, often resulting in disagreements between the opposing experts, and that these disagreements typically should be resolved by the trier of fact in the adversarial process and not by the court in a *Daubert* proceeding.[41] In some cases, however, the analysis may be so incomplete as to the "major factors" as to be inadmissible as irrelevant.[42] Courts have yet to establish a bright-line test for determining when a regression analysis is "so incomplete" as to be irrelevant, but instead have more generally held that the burden is on the opposing party to show that the regression omitted material variables or was otherwise misspecified in a way that, if the regression analysis had been correctly performed, would have changed the outcome of the analysis.[43] Merely identifying variables that the opposing party believes should have been included in the analysis, without showing how the inclusion of these variables would affect the result, is not enough.[44]

To assess the reliability of opinions based on surveys, courts have examined a variety of factors, including whether (1) the "universe" of the survey was defined correctly, (2) a representative sample of that universe was selected, (3) the questions to be asked of interviewees were framed in a clear, precise and non-leading manner, (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted, (5) the data gathered was accurately reported, (6) the data was analyzed following accepted statistical principles and (7) the objectivity of the entire process was

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the exclusion of major variables or the inclusion of improper variables may diminish the probative value of a regression model. But such defects do not generally preclude admissibility, and courts allow use of a regression model as long as it includes the variables accounting for the major factors."); *In re* Capacitors Antitrust Litig., (No. III), No. 17-MD-02801-JD, 2018 WL 5980139, at *6 (N.D. Cal. Nov. 14, 2018) ("The appropriate concerns at this stage are not about the quality of the data Dr. McClave [plaintiffs' expert] used or whether he included all the potential variables in his model. Challenges along those lines do not go to the admissibility of his opinions, but rather to matters of weight and probative value for a jury to evaluate."); *In re* Mushroom Direct Purchaser Antitrust Litig., No. 06-0620, 2015 WL 5767415, at *11 (E.D. Pa. July 29, 2015) (*Daubert* decision denying motion to exclude Einer Elhauge); *In re* Linerboard Antitrust Litig., 497 F. Supp. 2d 666, 678 (E.D. Pa. 2007) ("[I]t is only the rare case where the regressions are so incomplete as to be irrelevant and the expert's decisions regarding control variables are the basis to exclude the analysis.") (internal citations omitted).

41. *See In re* Mushroom Direct Purchaser Antitrust Litig., No. 06-0620, 2015 WL 5767415, at *6 (E.D. Pa. July 29, 2015); *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06–1175, 2014 WL 7882100, at *8 (E.D.N.Y. Oct. 15, 2014).

42. *See Live Concert*, 863 F. Supp. at 973 (quoting *Bazemore*, 478 U.S. at 400 n.10); Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic, 152 F.3d 588, 593 (7th Cir.1998) (finding expert damages reports were "worthless" because they controlled for only a single factor).

43. *See, e.g.*, Resco Prod., Inc. v. Bosai Minerals Grp., No. CIV.A. 06-235, 2015 WL 5521768, at *5 (W.D. Pa. Sept. 18, 2015); *In re* Mushroom Direct Purchaser Antitrust Litig., No. 06-0620, 2015 WL 5767415, at *11 (E.D. Pa. July 29, 2015) (rejecting Daubert challenge on omitted variables for failure to show that the omitted variables mattered).

44. *See, e.g.*, Resco, 2015 WL 5521768, at *5; *In re* Linerboard Antitrust Litig., 497 F. Supp. 2d 666, 678 (E.D. Pa. 2007); *In re* Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348, 1365 (N.D. Ga. 2000).

ensured.[45] Still, these are only factors for the court to consider. Unless the court determines that the survey is fundamentally unreliable, the expert testimony should be admitted and then tested through cross-examination at trial.[46]

Prejudice. Even if admissible under Rule 702, expert testimony is still subject to exclusion under Rule 403, which permits the court to exclude otherwise admissible evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[47] Courts are likely to use this rule if there is substantially more reliable and accurate evidence to answer the question in issue.

Daubert motions. The admissibility of expert testimony is a question for the court. Rule 104(a) requires that "[t]he court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege."[48] *Daubert* held that when a party proffers expert testimony, the trial court, under Rule 104(a), must "determine at the outset" whether the testimony is admissible.[49] The court's inquiry must focus on the qualifications, relevance, and reliability of the expert and her testimony, not on the conclusions the expert reaches nor the expert's credibility.[50]

Although Rule 103(a) generally provides that parties must make a timely objection to the admission of evidence to impose an obligation on the court to determine admissibility (and to preserve a claim of error as to the determination), *Daubert* imposes an independent requirement that trial courts conduct a preliminary assessment of the admissibility of expert testimony, even in the absence of an objection.[51] There is no requirement, however, that the district court conduct sua sponte an in-depth *Daubert* analysis and make explicit findings on the record as to the elements of Rule 702. Rather, it is enough that the district court is alert to the requirements on the admissibility of expert testimony and assures itself that these requirements are facially satisfied by the proffered expert testimony.

Finally, *Daubert* imposed the gatekeeper role on the courts to ensure that the trier of fact will not be exposed to unreliable or irrelevant testimony about scientific, technical or other specialized matters. But the need for a gatekeeper in advance is significantly diminished when the trier of fact is the judge and not a jury.

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45. *See, e.g.*, Estes Park Taffy Co., LLC v. Original Taffy Shop, Inc., No. 15-CV-01697-CBS, 2017 WL 2472149, at *3 (D. Colo. June 8, 2017); LG Electronics U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 940, 952 (N.D. Ill. 2009).

46. *See, e.g.*, *Estes Park Taffy*, 2017 WL 2472149, at *4 (denying motion to exclude).

47. FED. R. EVID. 403.

48. *Id*. 104(a).

49. *Daubert*, 509 U.S. at 592.

50. *See, e.g.*, *In re* Scrap Metal Antitrust Litig., 527 F.3d 517, 529 (6th Cir. 2008); *In re* Paoli R.R. Yard PCB Litig. (Paoli II), 35 F.3d 717, 743 (3d Cir. 1994)

51. *See* Hoult v. Hoult, 57 F.3d 1, 4-5 (1st Cir. 1995).

> That is not to say that the scientific reliability requirement is lessened in such situations; the point is only that the court can hear the evidence and make its reliability determination during, rather than in advance of, trial. Thus, where the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702.[52]

While courts certainly can make Rule 702 determinations as the evidence is presented, not making an earlier determination can creates significant inefficiency on the court and the parties. In the absence of an earlier *Daubert* decision, the parties must prepare and present their evidence and arguments for both contingencies: that the expert evidence will be accepted and that it will be excluded. Especially when multiple experts are testifying, all of which are being challenged, the burden can be substantial.

Burden of proof and standard of review. The burden of laying the proper foundation for the admission of expert testimony is on the party offering the testimony and admissibility must be shown by a preponderance of the evidence.[53] As with other evidentiary rulings, the decision to admit or exclude expert testimony is within the discretion of the court.[54] Appellate court review the district court's decision for abuse of discretion.[55]

52. *In re* Salem, 465 F.3d 767, 777 (7th Cir. 2006) (internal citation omitted); *accord In re* Rail Freight Fuel Surcharge Antitrust Litig., No. 07-0489 (PLF), 2016 WL 2962186, at *1 (D.D.C. May 20, 2016) (denying motion to exclude).

53. Rule 702 was amended in 2023 to provide for the admissibility of expert testimony only when providing admissibility "the proponent demonstrates to the court that [satisfaction of the requirements] is more likely than not." This follows what most courts had held prior to 2023. *See, e.g.*, *Daubert*, 509 U.S. at 593 n.10 (1993); Wills v. Amerada Hess Corp., 379 F.3d 32, 47 n.9 (2d Cir. 2004); Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1261 (11th Cir. 2004); Lauzon v. Senco Prods., Inc., 270 F.3d 681, 686 (8th Cir. 2001); Meister v. Medical Engineering Corp., 267 F.3d 1123, 1128 n.9 (D.C. Cir. 2001); Cooper v. Smith and Nephew, Inc., 259 F.3d 194, 199 (4th Cir. 2001); Nelson v. Tenn. Gas Pipeline Co., 243 F.3d 244, 251 (6th Cir. 2001); Oddi v. Ford Motor Co., 234 F.3d 136, 144 (3d Cir. 2000); Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999); United States v. Griffith, 118 F.3d 318, 321 (5th Cir. 1997); FED. R. EVID. 702 advisory committee's note to 2000 amendments (observing that "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.").

54. *See, e.g.*, Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1079 (10th Cir. 2006); United States v. Gabaldon, 389 F.3d 1090, 1098 (10th Cir. 2004); Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 264-65 (2d Cir. 2002).

55. *See, e.g.*, Superior Prod. P'ship v. Gordon Auto Body Parts Co., 784 F.3d 311, 322 (6th Cir. 2015); *In re* Nexium (Esomeprazole) Antitrust Litig., 842 F.3d 34, 52 (1st Cir. 2016).

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: LITHIUM ION BATTERIES ANTITRUST LITIGATION

This Order Relates to:

All Indirect Purchaser and Direct Purchaser Actions

Case No.: 13-MD-2420 YGR

ORDER DENYING WITHOUT PREJUDICE MOTIONS FOR CLASS CERTIFICATION; GRANTING IN PART AND DENYING IN PART MOTIONS TO STRIKE EXPERT REPORTS OR PORTIONS THEREOF

DKT. NOS. 1036, 1553, 1554, 1565, 1569, 1582__

This antitrust action concerns two putative plaintiff classes, indirect and direct purchasers, who allege a multi-year, international price-fixing conspiracy among Japanese and Korean manufacturers of lithium ion battery cells, as well as their American subsidiaries.[1] The putative class representatives are denominated the Indirect Purchaser Plaintiffs ("IPPs") and the Direct Purchaser Plaintiffs ("DPPs," and collectively with the IPPs, "Plaintiffs"). Both putative classes have filed motions for class certification. (Dkt. Nos. 1036, 1582.) In connection with those motions, defendants have moved to strike or exclude certain expert reports. (Dkt. Nos. 1553, 1554, 1565, 1569.)

[1] The IPP and DPP complaints each named as defendants the same eighteen corporate entities, which Plaintiffs have grouped identically into corporate families. Defendant GSYuasa was voluntarily dismissed from both complaints. (Dkt. No. 819.) A number of other defendants have entered into settlement agreements with the IPPs, DPPs, or both. The non-settling defendants are:

for DPPs: LG Chem, Ltd. and LG Chem America, Inc. (collectively, "LG Chem"); Samsung SDI Co., Ltd., and Samsung SDI America, Inc. (collectively, "Samsung"); and Sanyo Electric Co., Ltd., and Sanyo North America Corp. (collectively, "Sanyo"); and

for IPPs: Samsung; Sanyo; Toshiba; and Panasonic Corp. and Panasonic Corp. of North America (collectively, "Panasonic").

The Court, having considered the admissible evidence, the papers in support and in opposition to the motion, the pleadings, and the oral arguments of the parties, and for the reasons stated herein, **ORDERS** as follows:

1. The IPP Plaintiffs' Motion for Class Certification (Dkt No. 1036) is **DENIED WITHOUT PREJUDICE** on the grounds that they have failed to establish typicality and their ability to prove antitrust impact on a class-wide basis;

2. The DPP Plaintiffs' Motion for Class Certification (Dkt. No. 1582 is **DENIED WITHOUT PREJUDICE** on the grounds that they have failed to establish typicality, adequacy, and their ability to prove antitrust impact on a class-wide basis;

3. The Motion of Panasonic and Sanyo to Strike the Proposed Expert Testimony of Dr. Edward E. Leamer (Dkt. No. 1553) is **GRANTED IN PART** on the grounds that his analyses rely on too narrow a range of data;

4. The Motion of Panasonic and Sanyo to Strike the Proposed Expert Testimony of Dr. Rosa M. Abrantes-Metz (Dkt. No. 1554) is **DENIED** on the grounds identified in the motion;

5. The Motion of Toshiba to Strike Certain Testimony of DPP Expert Dr. Roger Noll (Dkt. No. 1565) is **DENIED** on the grounds identified in the motion; and

6. The Motion of Toshiba to Strike Certain Proposed Testimony of DPP Expert Mr. James L. Kaschmitter (Dkt. No. 1569) is **GRANTED IN PART** as stated herein.

I. BACKGROUND

These actions arise out of an alleged price-fixing conspiracy for lithium ion battery (LIB) cells. The Court has previously outlined the allegations but summarizes the essential background, based on the allegations of the operative complaints, here.

LIBs serve as the predominant form of rechargeable batteries used in portable consumer electronics today, powering devices ranging from smartphones to laptop computers to cameras to cordless power tools. An LIB cell stores and releases electricity through chemical means. The cell consists of four basic components: a cathode, an anode, electrolyte, and separators. After manufacture, one or more cells are "packed" inside a casing, sometimes with protective circuitry.

The casing makes the cell usable as a battery, or, in the case of multiple cells in a single casing, as a battery pack. Batteries and their cells exist in one of three general formats: (i) cylindrical, (ii) prismatic, and (iii) polymer.

In 1991, defendant Sony Corporation invented lithium ion batteries and dominated the market until 1999 and 2000, when Korean manufacturers LG and Samsung entered the scene. Both the DPPs and IPPs allege that, sometime in 2000, defendants here stopped competing and began sharing information through high-level executive meetings in Asia. These meetings began no later than March 2002 and continued in rough, semi-annual intervals for approximately two years. Beginning in 2004 and continuing through 2006, defendants are alleged to have met with increased frequency. Both complaints allege that, in this period, defendants determined that price competition would diminish the "health" of the entire lithium ion battery industry and agreed to refrain from such competition. Plaintiffs further allege that in February 2007, the price of cobalt, an important component for manufacture of lithium ion battery cells, increased sharply. Defendants allegedly agreed on a formula for collectively raising the price of lithium ion batteries in response, allegedly using the cobalt price increase as a pretext for this coordinated price increase. Thereafter, in mid-to-late 2008, despite a drop in cobalt prices and a global economic downturn and reduction in demand for lithium ion batteries, defendants allegedly collaborated on strategies for stabilizing and maintaining artificially high prices. Plaintiffs allege that from 2009 to 2011, defendants continued to exchange sensitive, non-public information to coordinate prices.[2]

[2] On September 20, 2013, in a related criminal proceeding, defendant Sanyo Electric Co., Ltd. ("Sanyo Electric") entered a guilty plea to one count of conspiring to fix prices of cylindrical lithium ion battery packs used in notebook computers, from about April 2007 to about September 2007, in violation of Section 1 of the Sherman Act. (Case No. 13-cr-472, Dkt. No. 32.) Pursuant to its plea agreement, Sanyo Electric agreed to pay a criminal fine of $10,731,000.00, but no restitution. On October 10, 2013, defendant LG Chem, Ltd entered a guilty plea to one count of conspiring to fix prices of cylindrical lithium ion battery packs used in notebook computers, from about April 2007 to about September 2007in violation of Section 1 of the Sherman Act. (Case No. 13-cr-473, Dkt. No. 28.) LG Chem, Ltd. agreed to pay a criminal fine of $1,056,000.00. Restitution in both matters was deferred to the civil litigation.

II. APPLICABLE STANDARDS

A. Class Certification

Federal Rule of Civil Procedure 23, which governs class certification, has two distinct sets of requirements that plaintiffs must meet before the Court may certify a class. Plaintiffs must meet all of the requirements of Rule 23(a) and must satisfy at least one of the prongs of Rule 23(b), depending upon the nature of the class they seek to certify. *See also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 394 (2010) (setting forth requirements of Rule 23). Under Rule 23(a), the Court may certify a class only where:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Courts refer to these four requirements as "numerosity, commonality, typicality[,] and adequacy of representation." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012).[3]

While some inquiry into the substance of a case may be necessary to determine whether these requirements are satisfied, the court must not advance a decision on the merits to the class certification stage. As the United States Supreme Court has stated:

> Although we have cautioned that a court's class-certification analysis must be "rigorous" and may "entail some overlap with the merits of the plaintiff's underlying claim," Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent — but only to the extent —that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.

[3] The Ninth Circuit found that no separate "administrative feasibility" or ascertainability requirement exists in Rule 23. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 n.4 (9th Cir. 2017). To the extent concerns arise about the identification of class members, those concerns are subsumed in Rule 23's superiority analysis, which considers whether the class is defined clearly and with objective criteria, and is manageable. *Id.* at 1127 ("Rule 23(b)(3) already contains a specific, enumerated mechanism to achieve that goal [of mitigating burdens of trying a class action]: the manageability criterion of the superiority requirement.").

Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194-95 (2013). Within the framework of Rule 23, the Court ultimately has broad discretion over whether to certify a class. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.) *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001).

Rule 23(a)(1)'s numerosity requirement means that a class be so numerous that joinder of all class members is "impracticable." Fed. R. Civ. P. 23(a)(1). Where the precise size of the class is unknown, but "'general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.'" *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. C 07-01819 CW, 2008 WL 4447592, at *7 (N.D. Cal., Sept. 29, 2008) (quoting 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 3:3 (4th ed. 2002)).

Rule 23(a)(2) requires the party seeking certification to show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To satisfy this requirement, the common question "must be of such a nature that it is capable of class[-]wide resolution – which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Dukes*, 564 U.S. at 350. "[F]or purposes of Rule 23(a)(2), even a single common question will do." *Id.* at 359. "'[T]he very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.'" *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at *3 (N.D. Cal. June 5, 2006); *see also In re Online DVD Rental Antitrust Litig.*, No. 09-2029 PJH, 2010 WL 5396064, at *3 (N.D. Cal. Dec. 23, 2010) ("*Online DVD*").

Typicality, as defined in Rule 23(a)(3), requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). That is, the named plaintiffs must "suffer the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (*quoting Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992)). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named

plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (internal quotation marks omitted). Class representatives' claims "need not be substantially identical" to those of absent class members, as "[s]ome degree of individuality is to be expected in all cases." *Cifuentes v. Red Robin Int'l, Inc.*, No. C-11-5635-EMC, 2012 WL 693930, at *5 (N.D. Cal. Mar. 1, 2012).

Adequacy of representation under Rule 23(a)(4) requires the Court to consider: "(1) [whether] the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

Once the threshold requirements for certification are met, a plaintiff must establish that the class is appropriate for certification under one of the provisions in Rule 23(b). Here, the plaintiff classes seek certification under Rule 23(b)(3). Rule 23(b)(3) requires plaintiffs to establish "that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis supplied). Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," and is similar to, but more demanding than the commonality analysis under Rule 23(a). *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Superiority, on the other hand, tests whether the class action mechanism would be preferable to individual actions or would "unnecessarily burden the judiciary . . . [and] prove uneconomic for potential plaintiffs." *Hanlon*, 150 F.3d at 1023. Courts consider such factors as: the interest of members of the class in controlling their individual claims or defenses; the extent of any litigation already commenced by or against the class members; the desirability of concentrating the litigation in a particular forum; and the difficulties likely to be encountered in management of the class action, such as difficulty identifying who is bound by the judgment or individualized issues among the class members. *Amchem*, 521 U.S. at 615-16.

B. Standards Applicable to Expert Testimony

Defendants have moved to strike or exclude certain expert reports, or portions thereof, offered in support of the motions for class certification. Defendants rely on Rules 104(a) and 702 of the Federal Rules of Evidence, as well as the principles set forth in *Daubertv. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

Federal Rule of Evidence 702 controls expert witness testimony. The admissibility of an expert opinion requires a three-step analysis:

> The admissibility of expert testimony, Rule 702, requires that the trial court make several preliminary determinations, Rule 104(a). [1] The trial court must decide whether the witness called is properly qualified to give the testimony sought. A witness may be qualified as an expert on the basis of either knowledge, skill, experience, training, or education or a combination thereof, Rule 702. [2] The trial court must further determine that the testimony of the expert witness, in the form of an opinion or otherwise, will assist the trier of fact, i.e., be helpful, to understand the evidence or to determine a fact in issue, Rule 702(a). [3] Finally the trial court must determine that as actually applied in the matter at hand, Rule 702(d), to facts, data, or opinions sufficiently established to exist, Rule 702(b), including facts, data, or opinions reasonably relied upon under Rule 703, sufficient assurances of trustworthiness are present that the expert witness' explanative theory produced a correct result to warrant jury acceptance, i.e., a product of reliable principles and methods, Rule 702(c).

Michael H. Graham, 5 HANDBOOK OF FED. EVID. § 702:1 (7th ed.) (footnotes omitted). Under Rule 703, expert opinion may be based on three possible sources: firsthand knowledge; admitted evidence; and facts or data not otherwise admitted, if they are the kind of information on which experts in the particular field reasonably would rely in forming opinions on the subject. *See* 29 FED. PRAC. & PROC. EVID. (2d ed.) §6274. In the analysis under Rule 701 and *Daubert*, the court is tasked with determining that the opinion has the objective earmarks of scientific or technical reliability, not making a conclusive determination about whether the opinions ultimately are reliable or correct. *Id.* Thus, for instance, the Ninth Circuit has held that the district courts should, in the first instance, determine whether statistics offered are sufficiently probative of the ultimate fact in issue, regardless of the statistical significance levels associated with them. *See Contreras v. City of Los Angeles*, 656 F.2d 1267, 1273 (9th Cir. 1981) (citing *Dothard v. Rawlinson*, 433 U.S.

321, 338 (Rehnquist, J., concurring)); *see also In re High-Tech Employee Antitrust Litig..*, No. 11-CV-02509-LHK, 2014 WL 1351040, at *15 (N.D. Cal. Apr. 4, 2014) (fact that variables were not statistically significant at the 1%, 5%, and 10% levels goes to the weight, not the admissibility of expert's model, even if those are the "conventional" levels statisticians typically use); *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362 (7th Cir.2001) (use of five percent test is arbitrary and does not govern admissibility).

An expert is generally not permitted to opine on an ultimate issue of fact except in limited circumstances, since such opinions may "invade the province of" the jury. *See Nationwide Transport Finance v. Cass Information Systems, Inc.*, 523 F.3d 1051, 1060 (9th Cir. 2008) ("evidence that merely tells the jury what result to reach is not sufficiently helpful to the trier of fact to be admissible"). Nor may an expert opine on questions which are matters of law for the court. *See id.* at 1058 (deciding questions of law is the exclusive province of the trial judge); *McHugh v. United Service Auto Assoc.*, 164 F.3d 451, 454 (9th Cir. 1999) (expert testimony cannot be used to provide the legal meaning or interpretation of insurance policy terms); *Aguilar v. Int'l Longshoremen's Union Local No. 10,* 966 F.2d 443, 447 (9th Cir. 1992) (expert opinion that reliance was reasonable and foreseeable were inappropriate subjects for expert testimony). However, as a practical matter, experts may express opinions based upon hypotheticals and information which would otherwise be inadmissible hearsay on its own. Additionally, experts can rely upon the opinions of other experts. *See DataQuill Ltd. v. High Tech Computer Corp.*, 887 F.Supp.2d 999, 1026 (S.D. Cal. 2011) ("It is routine and proper for a damages expert in a technical patent case to rely on a technical expert for background."); *United States v. 1,014.16 Acres of Land, More or Less, Situated in Vernon Cnty., State of Mo*., 558 F. Supp. 1238, 1242 (W.D. Mo. 1983) *aff'd*, 739 F.2d 1371 (8th Cir. 1984) (reasonable to expect that experts will rely on the opinion of experts in other fields as background material, as permitted by FRE 703); *Interwoven, Inc. v. Vertical Computer Sys.*, CV 10-04645 RS, 2013 WL 3786633, at *7 (N.D. Cal. July 18, 2013) ("Experts are, however, permitted to rely on hearsay evidence in coming to their conclusions, so long as an expert in the field would reasonably rely on that information").

Thus, while expert testimony cannot be used as an end-run around the rules of evidence to admit the underlying evidence, experts in a particular field routinely opine based upon a set of factual assumptions given to them. They need not be experts in all fields. Nor must they have personal knowledge of the factual background in the case. At trial, the proponent of the expert bears the burden of persuading the jury that the expert's opinion is, in fact, based upon a reasonable and convincing set of assumptions, or that the underlying facts upon which the expert's opinion is based exist. Thus, a jury is routinely charged:

> [Expert] [o]pinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Ninth Circuit Manual of Model Civil Jury Instructions, 2.11. And, at trial, an expert generally will not be called to opine until the evidence underlying the opinion has actually been admitted.

Moreover, at the class certification stage, the Court does not make an ultimate determination of the admissibility of an expert's report for purposes of a dispositive motion or trial. *Dukes v. Wal–Mart Stores, Inc.* (*Dukes II*), 603 F.3d 571, 602 n. 22 (9th Cir. 2010) *rev'd on other grounds* by 564 U.S. 338 (2011); *Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, 979 (9th Cir. 2009). Rather, the court considers only whether the expert evidence is "useful in evaluating whether class certification requirements have been met." *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 495–96 (C.D. Cal. 2012) (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011)); *see also Rai v. Santa Clara Valley Trans.*, 308 F.R.D. 245 (N.D. Cal. 2015). At class certification, "the relevant inquiry is a tailored *Daubert* analysis which scrutinizes the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." *Rai*, 308 F.R.D. at 264.

III. IPP MOTION FOR CLASS CERTIFICATION

IPPs seek to certify a Rule 23(b)(3) class defined as follows:

> All persons and entities who, as residents of the United States and during the period from January 1, 2000 through May 31, 2011, indirectly purchased new for their own use and not for resale one of the following products which contained a lithium-ion cylindrical battery manufactured by one or more defendants or their co-conspirators: (i) a portable computer; (ii) a power tool; (iii) a camcorder; or (iv) a replacement

> battery for any of these products. Excluded from the class are any purchases of Panasonic-branded computers. Also excluded from the class are any federal, state, or local governmental entities, any judicial officers presiding over this action, members of their immediate families and judicial staffs, and any juror assigned to this action.
>
> All non-federal and non-state governmental entities in California that, during the period from January 1, 2000 through May 31, 2011, indirectly purchased new for their own use and not for resale one of the following products which contained a lithium-ion cylindrical battery manufactured by one or more defendants or their co-conspirators: (i) a portable computer; (ii) a power tool; (iii) a camcorder; or (iv) a replacement battery for any of these products. Excluded from the class are any purchases of Panasonic-branded computers. Also excluded from the class are any federal, state, or local governmental entities, any judicial officers presiding over this action, members of their immediate families and judicial staffs, and any juror assigned to this action.

The requirements of numerosity, adequacy, and Rule 23(a) commonality are met here, and essentially non-controversial. The class as defined would include hundreds of thousands of purchasers throughout the United States. There are at least some questions of law and fact common to the class members, including the existence of the alleged price-fixing conspiracy and the identity of the conspirators. The proposed representatives do not have conflicts of interest with other class members and proposed class counsel are qualified.

The focus of the parties' arguments on the IPP class certification motion is whether:(1) the class representatives are sufficiently typical of the class they seek to represent; and (2) common questions predominate such that class certification is appropriate, including whether California law can be applied to the entire class.[4]

A. Typicality

Defendants challenge IPPs' typicality showing on two grounds: (*i*) lack of evidence of class membership; and (*ii*) lack of similarity of purchasing power of the putative class representatives in relation to other business and institutional class members. First, defendants contend that IPPs have

[4] Defendants also argue that the class is not sufficiently ascertainable. However, in light of the Ninth Circuit's recent *Briseno* decision, the arguments are more appropriately part of the Court's analysis of the typicality of the class representatives' claims, as well as the superiority of the class mechanism and concomitant questions of manageability of the class action.

failed to put forward evidence from the class representatives[5] to demonstrate that their claims are typical. Defendants argue that, without documentation supporting their purchase of a product within the class definition, the class representatives cannot determine whether they are part of the class and may be subject to unique defenses. Defendants contend that, even if class members can document that they purchased a product, they can provide evidence that the product they purchased contained a cylindrical lithium-ion battery. Rule 23 does not require documentation of a purchase in order to be part of the class, and each class representative has offered other evidence of a purchase. IPPs offer evidence that the available information will allow a determination that a putative class members' purchase falls within the class definition, including: market share; markings on finished products, packs, and cells; and defendants' own data tracing cells to finished products in the context of product recalls. (*See* Declaration of Steven N. Williams ISO Class Cert., Dkt. No. 1036-4, Exh. 199-204.) IPPs' proffer, at this stage, is sufficient.

Next, defendants argue that the proposed class representatives are not typical because they are individuals who purchased small numbers of LIB products from resellers at non-negotiable prices, but the IPP class is comprised substantially of business entities and other institutional end-users who purchased products in bulk and had the power to negotiate pricing. For this argument defendants rely on two cases: *In re Facebook, Inc., PPC Advert. Litig.*, 282 F.R.D. 446, 454 (N.D. Cal. 2012), *aff'd sub nom. Fox Test Prep v. Facebook, Inc.*, 588 F. App'x 733 (9th Cir. 2014) ("*Facebook Ads*") and *Soto v. Castlerock Farming & Transp., Inc.*, No. 1:09-CV-00701-AWI, 2013 WL 6844377, at *20 (E.D. Cal. Dec. 23, 2013), *report and recommendation adopted*, No. 1:09-CV-00701-AWI, 2014 WL 200706 (E.D. Cal. Jan. 16, 2014). The court in *Facebook Ads* denied certification, but did not do so based upon typicality. To the contrary, the court there found that the

[5] Proposed class representatives of the nationwide IPP class are: Christopher Hunt, Shawn Sellers, Kristina Yee, Piya Robert Rojanasathit, Richard E. Johns, Steve Bugee, Tom Pham, Hathaway & Associates, Keith Uehara, Bradley Seldin, Patrick McGuinness, John Kopp, Joseph Pankow, Drew Fennelly, Jason Ames, William Cabral, Donna Shawn, Robert L. McGranahan, David Beson, Murray "Kim" Billingsly, Joseph O'Daniel, Cindy Booze, Matthew Ence, David Tolchin, Matt Bryant, Valentina Juncai, Kathleen Alice Tawney, Sheri Harmon, Christopher Bessette, Caleb Batey, David Reymann, Gail Murphy, Linda Lincoln, Bradley Van Patten, and class representatives of the governmental subclass are City of Palo Alto and City of Richmond.

putative class representatives' claims arose out of the same allegations as the absent class members and typicality was met. *Facebook Ads*, 282 F.R.D. at 453-54. Certification ultimately was denied on a failure to establish plaintiffs were adequate representatives, because they did not offer evidence that they suffered any concrete injury from the wrongdoing alleged. *Id.* at 454. As part of the adequacy analysis, the court also noted that plaintiffs' interests were different from others in the class, since they contracted with Facebook under different terms and using different advertising channels from the direct advertisers in the putative class. *Id.* In *Soto*, plaintiff and putative class members were employed by the same defendant and worked under the same policies and procedures, but other putative class members offered differing accounts of whether the employer required them to work off-the-clock without pay to complete certain tasks. *Soto*, 2013 WL 6844377, at *20. The *Soto* court found that plaintiff had not shown his claims were typical of the members of the proposed class based on these conflicting declarations. *Id.*

Defendants' authorities do not persuade. Here, plaintiffs' contention is that the class was harmed by the price-fixing conspiracy, which is common to all purchasers in the class. Defendants provide no evidence that certain class members were not harmed, or harmed in some materially different way. Instead, defendants offer mere speculation and argument that the price-fixing scheme would have impacted bulk purchasers differently than individual purchasers. As the district court found in the *In re SRAM* litigation, so, too, does this Court find that the overarching price-fixing scheme is the gravamen of the claim, regardless of the type of product purchased, the quantity, the purchasing procedures, or the price paid. *In re Static Random Access memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 609 (N.D. Cal. 2009). While the Court has some lingering questions about whether individual purchasers actually were injured in the same way and to the same degree as bulk purchasers, the evidence at this stage indicates that all class members have the same or similar injury based on the same conduct. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). In the absence of evidence establishing material differences in the liability and impact as between different class members, the Court finds the present showing sufficient to meet the typicality requirement.

B. Predominance of Common Questions

The analysis of whether questions of law or fact common to class members predominate begins with the elements of the underlying cause of action. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011). For antitrust price-fixing cases, the elements are: (1) a conspiracy to fix prices in violation of the antitrust laws; (2) an antitrust injury – *i.e.*, the impact of the defendants' unlawful activity; and (3) damages caused by the antitrust violations. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 600 (N.D. Cal. 2010), *amended in part*, No. M 07-1827 SI, 2011 WL 3268649 (N.D. Cal. July 28, 2011) (citing *In re Static Random Access memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 610-11 (N.D. Cal. 2009)).

The crux of defendants' opposition to class certification focuses on their argument that IPPs have failed to offer reliable methods to show class-wide impact or class-wide damages.[6] IPPs counter that the reports of Dr. Rosa Abrantes-Metz and Dr. Edward Leamer are sufficient to establish: (*i*) antitrust impact on a class-wide basis; (*ii*) an overcharge passed through to indirect purchasers; and (*iii*) a common method for calculating damages. Dr. Abrantes-Metz's report offers opinions, based on qualitative and quantitative data, to show the alleged collusion had a cohesive effect across defendants' prices and caused a market-wide impact. Dr. Leamer's report consists of four opinions: a correlation study between cells and packs and an overcharge analysis, which combine to show class-wide impact; a pass-through analysis to establish liability to indirect purchasers; and a damages model.

1. Common Proof of Antitrust Impact

Under "the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated." *Dow Chem. Co. v. Seegott Holdings, Inc., (In re Urethane Antitrust Litig.)*, 768 F.3d 1245, 1254 (10th Cir. 2014). However, such an inference must still be supported by evidence of class-wide impact. "[O]n a

[6] Defendants essentially agree that the evidence of a conspiracy to fix prices would apply class-wide, based on the guilty pleas of defendants Sanyo and LG Chem, as well as evidence obtained by IPPs in the course of discovery regarding meetings and exchange of information by defendants. (Williams Decl., Exh. 1, Exh. 4.)

motion for class certification, the Court only evaluates whether the method by which plaintiffs propose to prove class-wide impact could prove such impact, not whether plaintiffs in fact can prove class-wide impact." *LCD I*, 267 F.R.D at 313. Stated another way, all that is required is that plaintiffs present a "'plausible methodology to demonstrate that antitrust injury can be proven on a class-wide basis.'" *Id.* at 311; *see also In re Online DVD Rental Antitrust Litig.*, No. M 09-2029 PJH, 2010 WL 5396064, at *10 (N.D. Cal. Dec. 23, 2010), *aff'd sub nom. In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015) (objections ultimately directed to the merits of plaintiffs' ability to prove impact did not establish that plaintiffs' methodology would require individualized evidence, and therefore did not bar certification).

In a class of indirect purchasers, the issue of class-wide impact is complicated by the need to demonstrate a method for showing whether, and to what extent, the overcharge "impact" is passed on to each of the indirect purchasers in the distribution chain. *In re Static Random Access memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 613 (N.D. Cal. 2009). "Each divergent factor—customer size, type, procurement channel, product, distribution step—is a factor that increases the likelihood that proof of pass-through can only be shown with resort to individualized proof." *California v. Infineon Technologies AG*, No. C 06-4333 PJH, 2008 WL 4155665, at *11 (N.D. Cal. Sept. 5, 2008). There are five classes of factors that should be considered in evaluating whether generalized evidence can be used to determine the rate of pass-through. These include temporal relationships, pricing practices, directness of affected costs, supply and demand. *SRAM*, 264 F.R.D. at 613.

IPPs offer two expert reports detailing statistical analyses they contend will demonstrate that the alleged LIB price-fixing scheme here had a class-wide impact and that overcharges were passed through to the indirect purchasers.

a. Dr. Abrantes-Metz

Dr. Abrantes-Metz offers an opinion, based upon information about the LIB industry, to show that the impact of a conspiracy would be class-wide. She opines that cylindrical batteries were highly standardized and commodified, that defendants controlled some 93 percent of the market at the time, and that barriers to entry into the market prevented the entry of any significant

new competitors during that time. Abrantes-Metz also provides a statistical analysis of price changes using a regression model to show that battery cell prices were more similar across defendants during the class period than before or after and that, even when controlling for the effect of other forces on the prices of different battery models.

Defendants critique Dr. Abrantes-Metz's report on several grounds, namely that (1) she uses screening methods not generally accepted by other economists and which cannot be tested; (2) her opinions invade the province of the factfinder and are not the proper subject of expert testimony; and (3) she uses non-representative data in her quantitative analyses. The Court finds as follows:

First, while Dr. Abrantes-Metz has apparently done work in the area of screening techniques, she is not relying on such techniques in reaching her qualitative opinions. Instead, she is offering an opinion based upon her expertise in forensic investigation of the categories of facts that indicate or facilitate collusive behavior among market competitors.

Second, while opinions about the intent or motive of parties are not a proper role for expert testimony, this expert's opinions about features of defendants' contacts that are indicative of collusion and the features of the cylindrical LIB market that make it susceptible to successful coordination, are proper for the purposes of class certification.[7] *Cf. In re Processed Egg Prod. Antitrust Litig.*, 81 F. Supp. 3d 412, 423 (E.D. Pa. 2015) (expert's opinion "tying the evidence of the case to the economic theory of collusion" by explaining factors conducive to collusion present in the record was admissible); *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3, AFL-CIO*, 313 F. Supp. 2d 213, 236 (S.D.N.Y. 2004) (expert properly opined on the market and features thereof by interpreting evidence in the case based on his knowledge as an economist). Given Dr. Abrantes-Metz's qualifications, she appears capable of providing the jury with tools they can use to aid their fact-finding obligations, rather than usurping the jury's fact-finding role.

Third, as to the data selection argument, Dr. Abrantes-Metz provided an opinion on all of the useable data provided in discovery at that time. Whether this will be sufficient at the time of

[7] This ruling is without prejudice to further motion practice on the manner in which IPPs seek to admit the opinions without invading the jury's province.

trial or summary judgment remains an open question, but it suffices to support her opinions in support of class-wide impact at this stage.

Thus, defendants' motion to strike Dr. Abrantes-Metz's report from consideration in connection with class certification is **DENIED**. It is evidence the Court considers for purposes of determining whether IPPs can meet their burden to establish impact on a common basis.

b. Dr. Leamer

Dr. Leamer first offers opinions concerning the impact of the conspiracy on LIB prices. Dr. Leamer uses a multi-variable reduced form regression analysis to estimate the impact of the conspiracy on the prices of cylindrical LIB cells. The regression controls for a number of variables including changes in the price of cobalt, portable computer pricing, housing starts, and industrial production. Dr. Leamer then estimates, on a month-by-month basis for the proposed class period, the relationship between the variables and the cost of the cells, as well as the co-movements of prices paid by different customers. Dr. Leamer performed regression analyses based on monthly weighted average prices of individual manufacturer cell codes – regression analyses for each individual manufacturer cell part number (or product code) in the dataset, totaling around 680 separate regressions. The majority of the estimates showed price coordination, which Dr. Leamer opines is strong evidence of impact on cell and pack price by the alleged conspiracy. He also analyzed movement of prices paid by different customers, comparing each customer/purchaser against all others.

Dr. Leamer's analysis shows a statistically significant impact on actual prices of cells and packs throughout the alleged conspiracy period. Even in those parts of the alleged conspiracy period where the difference in the actual and but-for prices is diminished (*i.e.*, outside the cobalt period), Dr. Leamer's regressions still indicate a statistically significant difference, indicating impact of the alleged conspiracy on LIB prices.[8]

[8] Dr. Guerin-Calvert's chart showing the confidence intervals of but-for data overlapping the actual data was calculated incorrectly, according to Dr. Leamer's Reply Report at ¶¶ 17 and 18. (*cont'd . . .*)

Dr. Leamer also conducted analyses to show that the price overcharges were passed through to the indirect purchasers in the class. Dr. Leamer used regression analyses to estimate 32 pass-through rates for nineteen companies at different points on the distribution chain for lithium-ion batteries (*See* Leamer Decl. I, Fig. 46)—seven original equipment manufacturers ("OEMs"), three distributors, and nine retailers (two with data on power tools, one with data on cameras, one with data only on notebook computers, and five with data on one or more products in the class definition). On reply, based on additional information provided, Dr. Leamer ran more regressions, for a total of ten OEMs, three distributors, and 19 retailers. (Leamer II at Fig 18, 19.)

Defendants attack Dr. Leamer's report on five grounds. First, they argue that Dr. Leamer espouses views about confidence levels that are not accepted within the relevant expert community. However, defendants fail to acknowledge that all or nearly all of Dr. Leamer's regression analyses result in estimates statistically significant at either the 90% or 95% confidence levels, both widely accepted as valid for evidentiary purposes. (*See* Leamer Decl. I, at ¶¶ 11-15, 77-91, Fig. 34-36.)[9] Dr. Leamer's conspiracy indicator coefficient had significance at the 90% level for cells and 99% level for packs. His pass-through analysis meets the 95% confidence level in all but one instance, and the 90% level for all instances. Moreover, courts generally have found that a statistical confidence level is more a matter of weight than admissibility. *See,e.g., In re High-Tech Employee Antitrust Litig..*, No. 11-CV-02509-LHK, 2014 WL 1351040, at *15 (N.D. Cal. Apr. 4, 2014) ("the

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(. . . *cont'd*)
Dr. Leamer opines that, if one calculates the confidence intervals by accepted methods, none of the 90% confidence intervals overlap the actuals. Ultimately, this may present a battle of the experts, but the dispute need not be resolved at this stage of the litigation. At class certification, it suggests that these are determinations that can be made on a class-wide basis.

[9] In addition, multi-variable regression is the sort of analysis most routinely accepted as the appropriate tool for estimating impact and damages in antitrust cases. *See, e.g. In re Steel Antitrust Litig.*, No. 08 C 5214, 2015 WL 5304629, at *11 (N.D. Ill. Sept. 9, 2015) (multiple regression analysis is "generally considered an appropriate tool for estimating antitrust damages on a class-wide basis," citing multiple authorities); *In re Optical Disk Drive Antitrust Litig.*, 303 F.R.D. 311, 321 (N.D. Cal. 2014) (regression analyses may be employed to establish class-wide impact in an antitrust case).

fact that these two variables are not statistically significant at the 1%, 5%, and 10% levels goes to the weight, not the admissibility" of the statistical model).

Second, defendants argue that aggregate and averaged data masks important differences in the pass-through analysis. However, the Court finds that these differences go to the weight of Dr. Leamer's opinion rather than its admissibility. As the court in *SRAM* noted, the pass-through question is not about tracing a specific price increase through the distribution chain to a specific class member, but rather how the anti-competitive conduct affected the prices paid by the consumers. *SRAM*, 264 F.R.D. at 614 (citing *Gordon v. Microsoft Corp.*, No. MC 00-5994, 2003 WL 23105550, at *3 (Minn. Dist. Ct. Dec. 15, 2003)). Determination of the difference between prices paid and prices that would have been paid "but-for" the unlawful conduct is necessarily hypothetical. *Id.* "Thus, average pass through rates appear reasonable and even necessary to prove damages." *Id.* "Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that, as here, the price range was affected generally." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 523 (S.D.N.Y. 1996). "Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class." *Id.*; *see also Presidio Golf Club of San Francisco, Inc. v. Nat'l Linen Supply Corp.*, No. C-71-431 SW, 1976 WL 1359, at *5 (N.D. Cal. Dec. 30, 1976) (proof of a price fixing claim requires only "an illustration of generalized injury" not proof of an effect on every item sold or else sophisticated conspirators could create complex price fixing agreements with price differentials "to run afoul of the antitrust laws with impunity").

Next, defendants' offer a variety of objections they believe affect the overall reliability of the analysis, namely that: (*i*) fragility testing was not performed; (*ii*) data collection was delegated to third party; and (*iii*) the data used was not a random sample. The Court finds these objections without merit. None of them affects whether IPPs have offered a reasonable method for determining impact on a class-wide basis. Moreover, the suggestion that the experts should use a random sample rather than an analysis based upon all usable data is debatable in a litigation context, and in any event, not dispositive in terms of striking the opinion.

However, the Court finds other of defendants' objections to be well-stated. The Court agrees that Dr. Leamer's analysis relative to the issue of the pass-through rate is too abbreviated. While Dr. Leamer's analysis thus far indicates that there is a statistically significant pass-through rate approaching 100% for the class, the Court is not persuaded that the analysis sufficiently captures the variety of different types of class members and product categories. Most glaringly, there is no analysis for packers in the IPP class since plaintiffs had not obtained data from any of the packers for the cylindrical batteries covered by the class definition. Plaintiffs only obtained data from a packer of prismatic LIBs, used in mobile phones and GPS devices, none of which are included in the class here or shown to be sufficient substitutes for the batteries and products included in the IPP class.

Further, the Court is not satisfied that plaintiffs or their experts have explained how the pass-through analysis here demonstrates the antitrust impact is "passed on" to each level of the indirect purchasers in the distribution chain. As the *SRAM* court indicated, indirect purchaser plaintiffs must find a "way to account for the decision-making of a variety of resellers and manufacturers in an intricate distribution chain" and must take into account the effect of the product at issue being but one component of an end product. *SRAM*, 264 F.R.D. at 613. For instance, Dr. Leamer acknowledged that bundling, rebates, and discounts would affect the accuracy of cost data, but apparently has offered no methodology to account for it in his analysis. Likewise, Dr. Leamer's opinions, on reply, about focal point pricing and adjustments to quality rather than cost, were not adequately supported or explained in his pass-through analysis.

As a consequence, the Court finds the Leamer declarations insufficient to show that pass-through and damages can be established by expert analysis on a class-wide basis. Plaintiffs have suggested, at least with respect to some of these issues, that they may be able to make a more fulsome showing, and may bring a renewed motion if the available information permits them to cure the deficiencies identified. The motion to strike Dr. Leamer's opinions is **GRANTED IN PART** to the extent defendants object to the lack of representativeness in the data used to conduct the analyses, but is otherwise denied. This ruling is without prejudice to IPPs revising the analysis to cure the defects identified.

2. Choice of Law

Although the motion may be denied without reaching the choice of law issues, the Court provides the following guidance to the parties, should plaintiffs elect to renew their motion.

Plaintiffs contend that purchasers of lithium ion battery products nationwide may bring claims under California's Cartwright Act because: (1) defendants conducted conspiratorial activity in California; (2) defendants targeted their collusion at California; and (3) each defendant maintained substantial contacts with California by locating their headquarters in California, doing business in California, sending employees to California, and/or selecting California law to govern their lithium ion battery contracts.

In determining what law should apply, the Court must first look to whether the application of California law to plaintiffs' claims violates due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). In *Phillips Petroleum*, the United States Supreme Court held that a forum state may apply its own substantive law to the claims of a nationwide class without violating the federal due process clause or full faith and credit clause if the state has a "'significant contact or significant aggregation of contacts" to the claims of each class member such that application of the forum law is "not arbitrary or unfair." *Id.* at 821–822.

Even where its own law may be constitutionally applied, California follows a three-step "governmental interest analysis" to determine whether conflicts of law exist, and to ascertain the most appropriate law applicable to the issues, in the absence of an effective choice-of-law agreement. *Washington Mut. Bank, FA v. Superior Court*, 24 Cal.4th 906, 919 (2001) (internal citations omitted). "Under the first step of the governmental interest approach, the foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California." *Id.* at 919-20. The mere fact that two or more states are involved does not indicate a conflict of laws problem absent a material difference. *Id.* If the court finds the laws materially different, it proceeds to the second step and determines what interest, if any, each state has in having its own law applied to the case. *Id.* at 920. Even if there are material differences, there is no choice of law problem if only one state has an interest in having its law applied. *Id.* Thus, the court may properly find California law applicable without

proceeding to the third step in the analysis if the foreign law proponent fails to identify any actual conflict or to establish the other state's interest in having its own law applied. *Id.* Only if the trial court determines that the laws are materially different *and* that each state has an interest in having its own law applied (*i.e.*, an actual conflict) must the court take the final step and select the law of the state whose interests would be "more impaired" if its law were not applied. *Id.* Under California law, a court must make this determination on a case-by-case basis, taking into account the circumstances of the particular case. *Kearney v. Salomon Smith Barney*, 39 Cal. 4th 95, 107-08 (2006); *see also Bruno v. Eckhart*, 280 F.R.D. 540 (CD Cal. 2012) (post-*Mazza*).

Plaintiffs have the initial burden to establish "significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class . . . in order to ensure that the choice of . . . [forum] is not arbitrary or unfair." *Shutts*, 472 U.S. at 821-22. "To the extent a defendant's conspiratorial conduct is sufficiently connected to California, and is not 'slight and casual,' the application of California law to that conduct is 'neither arbitrary nor fundamentally unfair,' and the application of California law does not violate that defendant's rights under the Due Process Clause." *AT & T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1107 (9th Cir. 2013) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)). Application of California law is fair where "more than a *de minimis* amount of that defendant's alleged conspiratorial activity leading to the sale of price[-]fixed goods to plaintiffs took place in California." *Id.* at 1113.

Here, Plaintiffs offer evidence to indicate that, of the defendants remaining in the IPP litigation at the time of the motion, two (Samsung SDI America, Inc. and Sanyo North American Corp.) have principal places of business in California and eight are located outside the United States (and thus, have no expectation in the application of one state's laws over another). Three are headquartered in New Jersey. Plaintiffs also offer evidence of numerous meetings with, communications from, and actions by defendants' California-based employees regarding pricing and implementation of pricing directives. Many defendants' employees traveled to and conferred with one another at trade association meetings in California. Some defendants maintained offices in California and conducted business with California customers. Many are registered to do business in California and maintain an agent for service of process in California. And some

contracts for LIB with certain defendants (Panasonic, LG Chem, Sanyo, Sony, and Toshiba) included California choice of law provisions. (*See, e.g.*, Exhs. 55, 56, 57, 82, 100, 152, 174.)

Defendants contend that only the location of the purchase of the price-fixed goods is relevant to contacts for purposes of the due process analysis. However, *AT&T Mobility* held that "[t]he relevant transaction or occurrence in a price-fixing case involves both the conspiracy to illegally fix prices and the sale of price-fixed goods." *AT&T Mobility*, 707 F.3d at 1113-14. The Court further held that a "place-of-purchase focus severely truncates the scope of anticompetitive conduct that the Act proscribes" and the "transaction or occurrence" includes. *Id.* at 1110. "Rightly understood then, the 'transaction or occurrence" proscribed by the Cartwright Act includes "the full extent of incipient conspiratorial conduct." *Id.* at 1110. Indeed, in *AT&T Mobility*, no products were sold in California, but maintenance of offices, entrance into agreements, and participation in price-sharing information were sufficient to show that contacts were not "slight and casual" and satisfied due process. *Id.*

Mazza, cited by defendants, is not to the contrary. There, the Ninth Circuit found due process satisfied given the "constitutionally sufficient aggregation of contacts to the claims of each putative class member in this case because Honda's corporate headquarters, the advertising agency that produced the allegedly fraudulent misrepresentations, and one fifth of the proposed class members [were] located in California." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 590 (9th Cir. 2012). Proceeding to the three-part choice of law test under California law, the Ninth Circuit further held that defendant had met its burden to show California law should not apply since: material differences between California consumer protection law and the laws of the other states at issue existed; other states had interests in enforcing the level of liability their legislatures and courts had set; and California's interests in applying its consumer protection laws were attenuated. Only then did the court find that each class member's consumer protection claims should be governed by the consumer protection laws in which the transaction took place. Moreover, *Mazza* did not concern alleged violations of the Cartwright Act.

Here, on the three-factor test, plaintiffs concede the first two prongs—that the relevant law is different in New Jersey versus California, and that a "true conflict" exists—because New Jersey

law would not provide standing to indirect purchaser plaintiffs. *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 877 A.2d 267 (App. Div. 2005). *(See* Plaintiffs' Reply at 25.) Thus, the dispute centers on the third prong of the test: which state's interests would be more impaired by not having its law apply. Defendants contend that other states that have not repealed *Illinois Brick* to permit indirect purchaser standing have an interest in shielding resident businesses from excessive litigation, which would be impaired if the Cartwright Act were to be applied class-wide. Plaintiffs counter by citing to *AT&T Mobility*, which held that "[a]pplying California law to anticompetitive conduct undertaken within California advances the Cartwright Act's 'overarching goals of maximizing effective deterrence of antitrust violations, enforcing the state's antitrust laws against those violations that do occur, and ensuring disgorgement of any ill-gotten proceeds.'" *AT&T Mobility*, 707 F.3d at 1112-13. "California courts, when determining whether a foreign jurisdiction's stricter recovery rules should apply over California's more liberal rule, have held that a jurisdiction's only interest in having its damages limitation rules applied is to protect its resident defendants from excessive financial burdens or exaggerated claims . . . ." *Munguia v. Bekins Van Lines, LLC*, Nos. 1:11-cv-01134-LJO-SKO, 1:11-cv-01675- LJO-SKO, 2012 WL 5198480, at *6-10 (E.D. Cal. Oct. 19, 2012) (collecting cases).

Plaintiffs contend that New Jersey's interest in limiting the liability of the three New Jersey-based defendants is small. However, the Ninth Circuit has held that each non-California jurisdiction has an interest in "calibrat[ing] liability to foster commerce" and "shielding out-of-state business from what [they] may consider to be excessive litigation." *Mazza*, 666 F.3d at 592-93. As other courts have found, given *Illinois Brick*'s express bar on indirect purchaser claims, and the failure of a state to repeal that bar, "it is too much of a stretch to employ California law as an end run around the limitations those states have elected to impose on standing" to protect its resident businesses. *In re Optical Disk Drive Antitrust Litig.*, 2016 WL 467444, at *13 (N.D. Cal. Feb. 8, 2016). [10]

[10] The Court notes that the nationwide IPP classes certified in this district have been for injunctive relief to the class, not damages. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 597 (N.D. Cal. 2010), *amended in part,* No. M 07-1827 SI, 2011 WL 3268649 (N.D. (*cont'd* . . .)

Because the Court finds that the interests of *Illinois Brick* non-repealer states in precluding indirect purchaser claims would be impaired more significantly by applying the Cartwright Act than California's interests would be impaired by limiting its application to *Illinois Brick* repealer states, the Court finds that a nationwide class under the Cartwright Act would not be appropriate. However, as to the *Illinois Brick* repealer states, California's interests would prevail over less significant issues of whether a state follows some or all of the standing factors in *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983), statute of limitations differences, and the like.[11] Any renewed motion for class certification should take this determination into account.

IV. DPP MOTION FOR CLASS CERTIFICATION

DPPs[12] assert a claim for violation of Section 1 of the Sherman Act on behalf of themselves and the proposed DPP Class. DPPs purchased allegedly price-fixed Lithium Ion Cells as components of LIBs or LIB Products. DPPs now move pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure for certification of a class consisting of:

> All persons and entities that purchased a cylindrical or prismatic Lithium Ion Battery Cell or a Lithium Ion Battery or Lithium Ion Battery Product containing a

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(. . . *cont'd*)
Cal. July 28, 2011); *In re Static Random Access memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 610 (N.D. Cal. 2009).

[11] The Court understands the *Illinois Brick* repealer states relevant here to include: Arizona, California, Florida, Hawaii, Illinois, Kansas, Maine, Michigan, Minnesota, Nebraska, Nevada, New York, South Dakota, Tennessee, and Wisconsin; and possibly to also include: Alabama, Arkansas, District of Columbia, Iowa, Massachusetts, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Utah, Vermont, and West Virginia. (*cf.* Mot. 51:5-8; Oppo. at 46:15-18; Reply at 27:26-27 [fn. 100].) The Court makes no legal determination as to which are states are or are not repealer states, given that this issue is not material to resolution of the motion. The parties should clarify this list upon any renewed motion.

[12] DPP Plaintiffs and proposed class representatives are Automation Engineering LLC; Charles Carte; Alfred H. Siegel, acting solely in his capacity as the Liquidating Trustee of Circuit City Stores, Inc. Liquidating Trust; First Choice Marketing, Inc.; James O'Neil; Alfred T. Giuliano, as the Chapter 7 Trustee of Ritz Camera & Image, LLC; The Stereo Shop; Univisions-Crimson Holding, Inc.; and Terri Walner. Proposed class counsel are the law firms of: Saveri & Saveri, Inc.; Pearson, Simon & Warshaw, LLP; and Berman DeValerio.

> cylindrical or prismatic[13] Lithium Ion Battery Cell from any Defendant, or any division, subsidiary or affiliate thereof, or any co-conspirator in the United States from May 1, 2002 through May 31, 2011. Excluded from the Class are Defendants, their parent companies, subsidiaries and affiliates, any Co-Conspirators, federal governmental entities and instrumentalities of the federal government, states and their subdivisions, agencies and instrumentalities, and any judge or jurors assigned to this case.

In their motion, DPPs define certain terms in the class definition: (1) "Lithium Ion Batteries" are batteries[14] that are rechargeable and use lithium ion technology; (2) "Lithium Ion Cells" are the main components of Lithium Ion Batteries; and (3) "Lithium Ion Products" are notebook (or netbook) computers, digital cameras, camcorders, cell phones, digital music players, power tools, personal digital assistants ("PDAs"), and mobile terminals sold by defendants that contain one or more Lithium Ion Cells. (Motion at 3:14-20.)

DPPs posit a shorter class period than IPPs, extending from May 1, 2002 through May 31, 2011, and characterized by four distinct periods of antitrust activity:

1. May 2002 through March 2007:

   Actual collusion beginning about May 2002 and continuing through March 2007, as the Defendants began to meet regularly, and reached agreements to fix prices and restrict capacity.

2. April 2007 through September 2008:

   The period for which LG Chem and Sanyo pled guilty—all manufacturers agreed to use the cost of cobalt, a major input of LIB, as a focal point for raising prices.

3. October 2008 through January 2010:

   DPPs contend that defendants adjusted their strategies while the cost of cobalt declined, but continued to share information and agree on prices until Japanese regulators demanded that competitor firms cease contact with each other.

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[13] DPPs have not sought certification of claims concerning polymer LIBs used primarily in Apple iPhones, iPods, iPads, and notebook computers. (Kaschmitter Report at 34.) They did so because they believed the transactional data produced for polymer LIBs was insufficient to produce a reliable price model. (Noll Report ¶ 22.)

[14] DPPs use the terms "battery" and "pack" interchangeably. (*See* Motion at 3:16.)

4. February 2010 until May 2011:

Defendants alleged to have continued to conspire, but gradually grew more concerned about potential antitrust prosecution with less regular contacts, ending when the DOJ issued subpoenas to several defendants in May 2011.

As with the IPP certification motion, defendants here challenge predominance of common questions. Specifically, defendants dispute that DPPs have offered sufficient evidence that antitrust impact and damages can be proven on a class-wide basis. Defendants also raise questions about the typicality of certain class representatives.[15] The Court addresses each issue in turn.

A. PREDOMINANCE

DPPs' proffer regarding class-wide impact rests largely the expert report of Dr. Roger Noll, who provides statistical analysis, opinions about the structure of the industry, and a model for assessing the amount of damages. DPPs also offer the declaration of James L. Kaschmitter[16] to provide information on the LIB industry and characteristics of the products at issue.

[15] Defendants also argue that class representatives who are bankruptcy trustees are not adequate because they may have a conflict of interest with unnamed class members. The Court sees no substantial basis for finding the bankruptcy trustees for Circuit City and Ritz Camera to be inadequate at this juncture. Moreover, the adequacy requirement normally would be satisfied so long as at least one of the class representatives is adequate. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 961 (9th Cir. 2009). Defendants make no showing of any true conflict of interests.

[16] Defendants moved to strike portions of Kaschmitter's expert report as being based upon unverified material, particularly with respect to certain demonstrative figures in the report. DPPs counter that Kaschmitter is simply offered as an industry expert, not a scientific expert, and so his opinions are not subject to the exacting standards in *Daubert* and *Kumho Tire*. Because DPPs failed to disclose the source of some of Kaschmitter's industry information, the Court finds most of defendants' objections well taken. The motion to strike is **GRANTED IN PART AND DENIED IN PART**. The following portions of his report are stricken from consideration in connection with the class certification motion: Table 2, Figures 35-36 and 38-39, and the statements concerning the percentage of pack costs comprised of cell costs, as well as the statement characterizing data in Figures 38 and 39 as typical. More specifically, Kaschmitter's opinions that cell cost represents 2/3 the materials' cost per pack is stricken from his report without prejudice to offering some reliable basis for that opinion in connection with further proceedings. However, based on his industry experience, his more general opinion that materials' costs predominate the cost of a pack, regardless of cell technology will be considered.

Defendants contend that Dr. Noll's opinions are impermissible because: (1) he cannot opine on whether collusion occurred; (2) he artificially divided the alleged time period to make it appear there is statistically significant impact; (3) his use of averaging masks the lack of impact to some class members; (4) he improperly relied on relative cost information in Mr. Kaschmitter's report; and (5) they lack actual cost data to support his impact opinions. The Court addresses each of these objections to Dr. Noll's report.

As to the first argument, Dr. Noll's statements about conditions conducive to collusion are, like Dr. Abrantes-Metz's statements, grounded in expertise about the economic theory concerning price-fixing conspiracies. Dr. Noll's economic expertise permits him to state a factual basis and offer opinions about whether such facts would indicate market conditions susceptible to collusive activity, and other indicators of collusion. *See In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d at 421-25; *U.S. Info. Systems*, 313 F. Supp. 2d at 236. Whether evidence of collusion is admitted at trial, and would ultimately support any opinion about indicators of collusion, is a separate question. Moreover, Dr. Noll outlines the communications and documents he reviewed relating to the alleged collusion to support his goal of "construct[ing] a regression model that would detect the anticompetitive effects of collusion only for firms, products, and time periods for which evidence of collusion exists." (Noll Reply Report ¶ 91.) Thus, the focus of Dr. Noll's report is his econometric analyses which show elevated prices corresponding to defendants' conduct, and which provide a means for demonstrating class-wide impact and estimating class-wide damages. Again, the manner in which testimony is allowed at trial is a separate question.

Second, the Court finds defendants' criticism of Dr. Noll use of sub-periods within the eleven-year class period, and the differences in the evidence concerning what communications and information exchanges were taking place unwarranted. Dr. Noll's models test whether the impact was constant throughout the class period, or if the identified sub-periods correspond with differing levels of price elevation. Dr. Noll relies on empirical evidence to support his hypothesis of significant price elevations coinciding with these real world events and time periods. As the court in the *Processed Egg Product* case stated, "it is consistent with sound economic practice to review the factual record and formulate a hypothesis that can then be tested using economic theory — the

examination of the factual record is necessary . . . to confirm that the stories drawn from the data and from the factual record are consistent." *In re Processed Egg Products Antitrust Litig.*, 2015 WL 337224, at *11; *see also In re Blood Reagents Antitrust Litig.*, No. 09-2081, 2015 WL 6123211, at *12 (E.D. Pa. Oct. 19, 2015) (declining to exclude expert damages model that assumed a conspiracy start date later than that alleged in initial complaint, citing *Processed Egg Products*). Dr. Noll's effort to map the factual record of the case onto the empirical data from his calculations is not a reason to exclude his opinions.[17]

Third, defendants' argument that average measures of impact might mask that certain class members had no overcharge while others did is not a reason to exclude Dr. Noll's opinions. As stated above, in attempting to measure how anti-competitive conduct might have affected prices as compared to a hypothetical, "but-for" world, it is both reasonable and necessary to rely on a certain amount of averaging, and is not a reason to either exclude the opinion or to find that it prevents class certification. *See SRAM*, 264 F.R.D. at 614; *In re NASDAQ*, 169 F.R.D. at 523; *Presidio Golf Club*, 1976 WL 1359 at *5.

Fourth, Dr. Noll's reliance on Mr. Kaschmitter's opinions about the relative cost of materials in a cell is not *per se* improper. Experts may rely on information from other experts. Dr. Noll did not rely on a specific percentage or ratio from Mr. Kaschmitter's report as a basis of his regression model. Moreover, Mr. Kaschmitter's reply declaration offered additional bases for his opinions about relative cost of materials in a cell and cells being the predominate cost of all packs. Again, the Court does not find this objection to be a basis for excluding Dr. Noll's opinions.

Notwithstanding the foregoing, Dr. Noll's analysis fails to provide a firm foundation for class certification because he was unable to complete an analysis based on the actual cost data for any products other than Toshiba laptops. Further, even in his analysis of the Toshiba products, the data was limited and required some extrapolation. The data for all other products was, by Dr. Noll's own admission, insufficient to run an analysis as to any of the other products types covered

[17] Defendant's criticism that Drs. Noll and Leamer have taken different approaches to solving the same question does not in and of itself invalidate them. Such is the case in many industries, and economics is no exception.

by the class definition. (*See* Noll Decl. ¶¶ 100, 108, 147, 167.) While it is unclear where to lay the blame, the Court nevertheless cannot ignore the large gaps in the evidence supporting the ability to demonstrate impact and damages on a class-wide basis.

The inadequacy of the data to perform the required analyses spills over into other arguments made by defendants. For instance, defendants object to Dr. Noll's report on the grounds that his regressions combine and average LIB cells (the alleged price-fixed item) with LIB packs, and therefore fail to isolate the effects, if any, on cells. Therefore, defendants contend, the model does not fit the theory of liability. The reality is that cells are only used in finished products in packs, making a combination of the data appear to be reasonable. Moreover, Dr. Noll attempted to run regressions isolating cell and pack data from each other, and he found those regressions demonstrated statistically significant overcharges. (Noll Reply ¶¶ 190-93.) However, these analyses appear to suffer from the same problems of being based on incomplete, and admittedly insufficient data sets.

In summary, while the Court does not find Dr. Noll's methodology to be unreliable, it does find that Dr. Noll's analysis ultimately does not satisfy DPPs' burden under Rule 23(b)'s predominance requirement. Thus, the motion to strike Dr. Noll's report at this juncture is **DENIED**, but the report fails to support class certification. This finding is without prejudice to DPPs making a renewed motion based on a showing derived from additional data, or some other evidentiary basis upon which common questions predominate. As it stands, the analysis of the Toshiba laptops alone does not satisfy the Court that a showing of antitrust impact for that product can be extrapolated as a measure of impact for the rest of the Cells, Batteries and Finished Products in the class definition.

B. TYPICALITY

In cases involving an alleged price-fixing conspiracy, a representative plaintiff's claim is generally typical of the unrepresented members even if plaintiff's purchase was through different procedures, for different quantities, or at different prices than those unrepresented members. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 300 (N.D. Cal. 2010) (abrogated on other grounds in *In re ATM Fee Antitrust Litig.*, 686 F.3d 741 (9th Cir. 2012)). Defendants contend that, because the DPP class would include individuals, small and large retailers, and OEMs, the claims

of the class members are not sufficiently typical of larger OEM or big box retailers to satisfy Rule 23(a).

Defendants rely heavily on the district court's decision in *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478 (N.D. Cal. 2008) ("*GPU*"). The district court in *GPU* discussed a variety of cases finding that differences in products and pricing within the class definition undercut class treatment, either as part of a commonality, typicality, or adequacy analysis, in antitrust direct purchaser class actions. *Id*. at 484-89. Common themes in the cases discussed were whether the named plaintiffs, often representing individual or smaller purchasers, could be expected to present claims typical of, or raising common questions in relation to, the claims of larger purchasers, such as original equipment manufacturers or large retailers. In surveying the decisions, the *GPU* court concluded that the "decisions indicate that evaluating the requirements for class certification in this context involves a particularized analysis of the specific industry and chain of distribution [and] . . . [f]actors favoring certification have been price lists and commodity products as opposed to individually negotiated deals and customized products." *GPU*, 253 F.R.D. at 489. Examining those factors in the context of a class of purchasers of graphics chips and graphics cards, the *GPU* court found the differences between individual purchasers of graphics cards and OEMs purchasing graphics chips in bulk for production of laptops and other products to be too great. *Id.* at 489. The named plaintiffs purchased a single standardized graphics card at retail, whereas the unrepresented class members purchased enormous quantities of customized cards. *Id.* at 489. Importantly, however, in *GPU*, direct sales of graphics cards to individual consumers accounted for only 0.5% of defendants' sales, while wholesale purchasers of chips and cards accounted for the remaining 99.5% of defendants' business. *Id.* at 490.

Here, the class representatives include individual consumers, small- and medium-sized companies, and large retailers. The kind of extreme disconnect in the market share representation shown in *GPU* is not present. However, the class definition covers all purchasers of "a Lithium Ion Battery Cell or a Lithium Ion Battery or Lithium Ion Battery Product," and plaintiffs' representatives do not appear to include those who purchased only cells, nor is it clear that their expert analysis could account for impact on those who purchased cells, rather than "batteries" or

"products." While the Court is inclined to find that the proposed class representatives here are typical of a class of purchasers of Lithium Ion Battery Products, whether they are typical of purchasers of cells or batteries is less certain. While this generally might not preclude a finding of typicality, where there is significant uncertainty about whether impact is common for Cells, Batteries, and Products, typicality of the representatives' claims is necessarily uncertain as well. The Court leaves the ultimate determination of whether the class representatives' claims meet the typicality requirement for any renewed class certification motion.[18]

As a consequence of the Court's determinations that DPPs have not established typicality and predominance of common questions, DPPs motion for class certification is **DENIED**.

V. CONCLUSION

For the reasons stated herein, the Court **ORDERS** that:

1. The IPP Plaintiffs' Motion for Class Certification (Dkt No. 1036) is **DENIED WITHOUT PREJUDICE** on the grounds that they have failed to establish typicality and their ability to prove antitrust impact on a class-wide basis;

2. The DPP Plaintiffs' Motion for Class Certification (Dkt. No. 1582 is **DENIED WITHOUT PREJUDICE** on the grounds that they have failed to establish typicality, adequacy, and their ability to prove antitrust impact on a class-wide basis;

3. The Motion of Panasonic and Sanyo to Strike the Proposed Expert Testimony of Dr. Edward E. Leamer (Dkt. No. 1553) is **GRANTED IN PART** on the grounds that his analyses rely on too narrow a range of data;

[18] Defendants contend that the class contains members who lack standing or were not harmed because it includes purchasers of Packs or Finished Products that were preceded by sales to third-party battery-pack manufacturers or third-party original design manufacturers ("ODMs"), making them, essentially, indirect purchasers of the Packs of Finished Products. Defendants' argument turns on a determination of whether purchases from certain entities defendant-affiliated entities would meet the "ownership or control" exception to the *Illinois Brick* doctrine. There are factual issues not properly before the Court in this motion that must be resolved on the "ownership or control" question. Thus, the Court declines to reach this issue in the context of this class certification motion.

4. The Motion of Panasonic and Sanyo to Strike the Proposed Expert Testimony of Dr. Rosa M. Abrantes-Metz (Dkt. No. 1554) is **DENIED**;

5. The Motion of Toshiba to Strike Certain Testimony of DPP Expert Dr. Roger Noll (Dkt. No. 1565) is **DENIED** on the grounds stated in the motion;

6. The Motion of Toshiba to Strike Certain Proposed Testimony of DPP Expert Mr. James L. Kaschmitter (Dkt. No. 1569) is **GRANTED IN PART** as to Table 2, Figures 35-36 and 38-39, and the statements concerning the percentage of pack costs comprised of cell costs, as well as the statement characterizing data in Figures 38 and 39 as typical.

This Order terminates Docket Nos. 1036, 1553, 1554, 1565, 1569, and 1582.

IT IS SO ORDERED.

Dated: April 12, 2017

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

United States District Court
Northern District of California

Class Certification Notice

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

IN RE: BLOOD REAGENTS ANTITRUST LITIGATION	**MDL Docket No. 09-2081**
THIS DOCUMENT RELATES TO ALL ACTIONS	**HON. JAN E. DUBOIS**

ORDER APPROVING FORMS OF CLASS NOTICE AND PROPOSED NOTICE PLAN AND AUTHORIZING DISSEMINATION OF CLASS NOTICE

It is hereby ORDERED AND DECREED as follows:

1. The Court approves the form and content of the: (a) Notice of Class Action, attached hereto as Exhibit 1, to be mailed to class members as described in Paragraph 3, below; and (b) Summary Notice of Class Action, attached hereto as Exhibit 2, to be published in the *AABB News* as described in Paragraph 4, below.

2. The Court finds that the mailing and publication of the Notices in the manner set forth herein constitute the best notice practicable under the circumstances, is due and sufficient notice to all persons entitled thereto and complies fully with the requirements of Federal Rule of Civil Procedure 23 and the due process requirements of the Constitution of the United States.

3. The Notice shall be mailed by first class mail, postage prepaid, on or about **February 19, 2016** to all members of the Litigation Class whose names and addresses can be derived from the electronic transactional sales information produced by Defendants. The Notice also shall be provided to all persons who request it in response to the published Summary Notice provided for in Paragraph 8 herein.

4. Class Counsel are hereby directed to cause a Summary Notice to be published on one occasion in the **March** edition of the ***AABB News***, which is mailed to subscribers around **March 15, 2016**.

5. All requests for exclusion from the Litigation Class must be **received** no later than **April 6, 2016** and must otherwise comply with the requirements set forth in the Notice.

6. Class Counsel shall cause to be filed with the Clerk of this Court, and served upon counsel for Defendants, affidavits or declarations of the person under whose general direction the mailing of the Notice and the publication of Summary Notice were made, showing that mailing and publication were made in accordance with this Order on or before **April 15, 2016**, and the valid exclusions that were received pursuant to paragraph 5 above.

7. Class Counsel shall file with the Court and serve on the parties their motion for ongoing litigation expenses on or before **March 23, 2016**.

8. Any member of the Immucor settlement class that did not request exclusion from the Immucor Settlement Class and who objects to Class Counsel's request to utilize a portion of the Immucor Settlement Fund to cover continuing costs of litigation, including trial preparation, must do so in writing. The objection must include the caption of this case, be signed, and be **received** by the Court and Class Counsel no later than **April 6, 2016** and shall otherwise comply with the requirements set forth in the Notices.

9. Class Counsel shall file with the Court and serve on the parties their responses to any objection(s) to their request for ongoing litigation expenses on or before

April 13, 2016.

SO ORDERED this 26th day of JANUARY, 2016.

Jan E. DuBois

HONORABLE JAN E. DUBOIS
DISTRICT COURT, EASTERN DISTRICT
OF PENNSYLVANIA

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Exhibit 1

If you purchased Traditional Blood Reagents on or after November 4, 2000, a class action lawsuit may affect you.

A federal court authorized this notice. This is not a solicitation from a lawyer.

- **A class has been certified in a class action lawsuit alleging claims against certain manufacturers of Traditional Blood Reagents: Ortho-Clinical Diagnostics, Inc. ("Ortho") and Immucor, Inc. ("Immucor") (collectively, the "Defendants"). If you purchased Traditional Blood Reagents directly from one or both of the Defendants between November 4, 2000 and October 19, 2015, you may be a member of the class described below. Other requirements apply—see Section 2.1 on Page 3 to see if this notice applies to you.**

- This notice describes a class action lawsuit, pending in the United States District Court for the Eastern District of Pennsylvania, in which the Plaintiffs allege that certain blood reagents manufacturers conspired to fix prices in violation of federal antitrust law.

- The lawsuit claims that, as a result of Defendants' alleged conduct, the prices paid by individuals and entities for Traditional Blood Reagents were higher than they otherwise would have been. The lawsuit seeks treble damages (triple the amount of actual damages), attorneys' fees and costs from Defendants. The Defendants deny that any of their conduct was unlawful. The Court has not yet heard or resolved the merits of Plaintiffs' claims, or determined whether Plaintiffs' or Defendants' contentions are true. A trial of this case has not yet been scheduled.

- In 2012, Immucor settled the lawsuit and paid $22,000,000 for the benefit of a class of purchasers of Traditional Blood Reagents. The Court entered final approval of the Immucor settlement and dismissed Immucor as a Defendant. More information regarding the Immucor settlement is available on Page 4 and at www.bloodreagentsantitrustlitigation.com.

- The lawsuit continues against the non-settling Defendant, Ortho, on behalf of a class, or group of people, that might include you. The continuing lawsuit affects persons and entities in the United States who purchased Traditional Blood Reagents directly from either Defendant between November 4, 2000 and October 19, 2015 (the "Litigation Class").

TO DETERMINE WHETHER YOU ARE AFFECTED BY THE PENDING CLASS ACTION LAWSUIT, PLEASE SEE SECTION 2.1 ON PAGE 3.

Your rights and options – **and the deadlines to exercise them** – are explained in this notice.

Please contact www.bloodreagentsantitrustlitigation.com or the Blood Reagents Antitrust Litigation Administrator at 1-855-231-9423 for court documents about the settlement with Immucor and the pending lawsuit against the non-settling Defendant, Ortho, frequently asked questions, and more information.

DO NOT CONTACT THE COURT OR DEFENDANTS IF YOU HAVE QUESTIONS REGARDING THIS NOTICE

PART 1: GENERAL INFORMATION

WHAT IS THIS NOTICE ABOUT?

1.1 Why has this notice been issued?

This notice explains your legal rights and options regarding the pending class action lawsuit that continues against the non-settling Defendant, Ortho.

1.2 What is the lawsuit about?

This lawsuit was filed by F. Baragaño Pharmaceuticals, Inc.; Community Medical Center Health Care System; Professional Resources Management of Crenshaw LLC d/b/a Crenshaw Community Hospital; Douglas County Hospital; Health Network Laboratories, L.P.; Larkin Community Hospital; Legacy Health System; Mary Hitchcock Memorial Hospital, Inc.; Regional Medical Center Board d/b/a Northeast Alabama Regional Medical Center; Sacred Heart Hospital of the Hospital Sisters of the Third Order of St. Francis; St. Anthony's Memorial Hospital, of the Hospital Sisters of the Third Order of St. Francis; St. Elizabeth's Hospital of the Hospital Sisters of the Third Order of St. Francis; St. Francis Hospital of the Hospital Sisters of the Third Order of St. Francis; St. John's Hospital of the Hospital Sisters of the Third Order of St. Francis; St. Joseph's Hospital, Breese, of the Hospital Sisters of the Third Order of St. Francis; St. Joseph's Hospital of the Hospital Sisters of the Third Order of St. Francis (Chippewa Falls); St. Joseph's Hospital, of the Hospital Sisters of the Third Order of St. Francis (Highland); St. Mary's Hospital Medical Center of Green Bay, Inc.; St. Mary's Hospital, Streator, of the Hospital Sisters of the Third Order of St. Francis; St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis; St. Nicholas Hospital of the Hospital Sisters of the Third Order of St. Francis; St. Vincent Hospital of the Hospital Sisters of the Third Order of St. Francis; Schuylkill Medical Center - East Norwegian Street; Schuylkill Medical Center - South Jackson Street; and Warren General Hospital (collectively, "Plaintiffs" or "Class Representatives") individually and as representatives of all persons in the United States who purchased Traditional Blood Reagents directly from the Defendants. The lawsuit asserts that, as a result of the alleged conduct of the Defendants, the prices paid for Traditional Blood Reagents were higher than they otherwise would have been. The Plaintiffs seek to recover three times the actual damages that they allege Defendants' conduct caused, as well as attorneys' fees and costs. The Defendants deny Plaintiffs' allegations. The Court has not yet heard or resolved the merits of Plaintiffs' claims, or determined whether Plaintiffs' or Defendants' contentions are true.

1.3 What are blood reagents and Traditional Blood Reagents?

Blood reagents are products designed and manufactured to test, match, detect, screen, diagnose and/or otherwise identify certain properties of the cell and serum components of human blood. "Traditional Blood Reagents," as used herein, are primarily used to test blood manually in test tubes. In contrast, proprietary blood reagents, as used herein, are primarily used to test blood in automated and/or semi-automated platforms. Proprietary reagents sold by Defendants include, but are not limited to, Ortho's ID-MTS gel products and Immucor's Capture products. For purposes of this litigation, the definition of Traditional Blood Reagents does not include Ortho's 0.8% red blood cell reagents and the certified class includes purchases of only Traditional Blood Reagents; the certified class does not include purchases of proprietary blood reagents and/or Ortho's 0.8% red blood cell reagents.

1.4 Who are the Defendants in this case?

The Defendants are Immucor and Ortho.

1.5 What is a class action lawsuit?

In a class action, people or entities called class representatives sue on behalf of people or entities that have similar claims. All these entities make up the class and are called class members. The Court then resolves the issues for all class members, except for those who exclude themselves from the class. U.S. District Court Judge Jan E. DuBois in the U.S. District Court for the Eastern District of Pennsylvania is overseeing this lawsuit.

1.6 What is the current status of the lawsuit?

Several lawsuits were originally filed beginning in May 2009, and the cases were consolidated before Judge DuBois in the Eastern District of Pennsylvania. The Court certified this lawsuit as a class action on August 22, 2012 for all purposes, including trial and any future settlements, and appointed the named Plaintiffs and the law firm of Spector Roseman Kodroff & Willis, PC to represent the class. On October 25, 2012, the Third Circuit Court of Appeals accepted Ortho's appeal of the District Court's class certification decision, and on April 8, 2015, the Third Circuit vacated the District Court's decision because it relied, in part, on a Third Circuit decision that the Supreme Court reversed in 2013. On remand from the Third Circuit, the District Court re-certified the lawsuit as a class action on October 19, 2015.

The Plaintiffs reached a settlement with Immucor in the amount of $22,000,000 on January 11, 2012, which was granted final approval by the Court on September 6, 2012. As a result of this settlement, Immucor was dismissed from the case. A trial of this case against the non-settling Defendant, Ortho, has not yet been scheduled. In addition to a trial on issues common to the class, there may be separate proceedings to make a formal decision regarding any individualized issues relating to damages and to Plaintiffs' and the other class members' claims of fraudulent concealment.

PART 2: THE LITIGATION CLASS

SUMMARY OF YOUR LEGAL RIGHTS AND OPTIONS IN THE CLASS ACTION LAWSUIT:	
Remain a Class Member by Doing Nothing	You do not need to do anything at this time to remain a member of the Litigation Class. You will be bound by any decision of the Court in this case, and you will give up your rights to sue Ortho about the same legal claims involved in this case. By remaining in the Litigation Class, you make yourself eligible to receive a share of any money that may be recovered by the Litigation Class.
Exclude Yourself	If you exclude yourself from the Litigation Class, you will not be bound by the decisions of the Court and will not be entitled to receive any money that may be recovered for the Litigation Class in the future.
Hire Your Own Lawyer	You may, but are not required to, hire your own lawyer at your expense to advise you of your rights in the class action lawsuit. You have the right to enter an appearance in the case through your lawyer if you wish.

WHO IS AFFECTED BY THE CLASS ACTION LAWSUIT?

2.1 How do I know if I am part of the pending class action lawsuit?

The Litigation Class includes persons and entities that purchased Traditional Blood Reagents in the United States directly from either of the Defendants, Ortho or Immucor, during the period from November 4, 2000 through October 19, 2015.

Even if you meet these requirements, you are not a member of the Litigation Class if you are a federal governmental entity, a Defendant, or a Defendant's parent, subsidiary, or affiliate.

EXCLUDING YOURSELF FROM THE CLASS ACTION LAWSUIT

If you do not want to remain a member of the Litigation Class, or if you want to be able to start your own lawsuit or be part of a different lawsuit against Ortho involving the same claims as in this lawsuit, then you must take steps to remove yourself from the Litigation Class. This is called "excluding yourself" or "opting out" of the class.

2.2 How do I exclude myself from the Litigation Class?

If you want to exclude yourself from the Litigation Class, you must mail a written request to be excluded from the Litigation Class to the Blood Reagents Antitrust Litigation Administrator at the following address: Blood Reagents Antitrust Litigation, P.O. Box 43058, Providence RI 02940-3058. The written request must include your name and address and specifically state that you request exclusion from the Litigation Class. The written request must be received no later than April 6, 2016. If you elect to be excluded from the Litigation Class, you will not be legally bound by any judgment or decision in this case and will remain free to pursue any legal rights you may have against Ortho. If you are excluded from the Litigation Class, you will not receive any money or other benefits which are awarded to the Litigation Class if the case is successful, and you will not be allowed to object to any settlement.

If you wish to remain in the Litigation Class, you do not need to do anything at this time.

THE LAWYERS REPRESENTING THE CLASS

2.3 Do I have a lawyer in this case?

The Court has appointed the following law firm to represent the Litigation Class (called "Class Counsel"):

SPECTOR ROSEMAN KODROFF & WILLIS, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 496-0300

You will not be personally charged for the services of these attorneys in litigating this case against the Defendants. If you want to be represented by your own lawyer, you may hire one at your own expense. You have the right to enter an appearance in the case through your lawyer if you wish.

2.4 How will the lawyers be paid?

Attorneys for the class are undertaking this litigation on a completely contingent fee basis, and are not requesting an award of attorneys' fees at this time. Class Counsel will, at a later time, seek Court approval of an award of reasonable attorneys' fees to be paid from settlement funds and any damages awarded in this case.

Class Counsel previously sought, and the Court approved, an award of $500,000 from the Immucor Settlement Fund to cover ongoing costs of litigation, all of which has been spent pursuing certification of the Litigation Class. As a result, Class Counsel intends to seek an award of an additional $2,000,000 from the Immucor Settlement Fund to cover continuing costs of litigation, including trial preparation. The Court can approve or deny such a request.

TAKING NO ACTION

2.5 What happens if I do nothing at all?

If you are a member of the Litigation Class and you choose to take no action, your interests as a member of the Litigation Class will be represented by the Plaintiffs and Class Counsel and you will be bound by any decision or judgment entered by the Court. You will not be able to start or continue with a lawsuit against Ortho regarding the claims described herein. If the Litigation Class is successful at trial on issues common to the class, you will be entitled to present evidence of your Traditional Blood Reagents purchases from the Defendants within the Litigation Class Period in order to potentially recover any overcharges you may have paid (net of attorney fees and expenses, which may be determined by the Court to be payable from the recovery). In addition, you will have an opportunity to present evidence in support of a claim of fraudulent concealment, in order to toll the statute of limitations that might otherwise bar some or all of your claim to recover for any overcharges. As a member of the Litigation Class, you will not be responsible for attorneys' fees or litigation expenses.

GETTING MORE INFORMATION

2.6 How can I get more information?

This notice is only a summary of the Court's decision. You may obtain copies of the class certification opinion by visiting www.bloodreagentsantitrustlitigation.com or by calling 1-855-231-9423.

PLEASE DO NOT CONTACT THE COURT, THE CLERK OF THE COURT OR DEFENDANTS. IF YOU HAVE ANY QUESTIONS REGARDING THIS NOTICE, PLEASE DIRECT THEM ONLY TO THE BLOOD REAGENTS ANTITRUST LITIGATION ADMINISTRATOR.

PART 3: THE IMMUCOR SETTLEMENT CLASS

3.1 What does the Immucor Settlement provide?

The Plaintiffs reached a settlement agreement with Immucor in the amount of $22,000,000, which was signed by Plaintiffs and Immucor on January 11, 2012, and granted preliminary approval by the Court on March 5, 2012. Notice of the settlement was mailed to potential settlement class members on April 19, 2012. A summary notice was also published in the April 2012 edition of *AABB News*. The notices informed settlement class members of the settlement terms with Immucor and their options with respect to the settlement. The deadline to request exclusion from the Immucor Settlement Class was June 1, 2012, and a final approval hearing was held on June 15, 2012. The Court granted final approval of the Immucor settlement and dismissed Immucor from the case on September 6, 2012. At that time, the Court also awarded Class Counsel $500,000 of the settlement amount to cover ongoing litigation expenses, all of which has been spent pursuing certification of the Litigation Class. As a result, Class Counsel intend to seek an award of an additional $2,000,000 from the Immucor Settlement Fund to cover continuing costs of litigation, including trial preparation. Class Counsel must file their motion for ongoing litigation expenses on or before March 23, 2016.

3.2 If I do not like Class Counsel's request for ongoing litigation expenses, how do I tell the Court?

If you did not request exclusion from the Immucor settlement class prior to June 1, 2012, you are a member of the Immucor Settlement Class and may object to Class Counsel's request to utilize an additional $2,000,000 from the Immucor Settlement Fund to cover continuing costs of litigation, including trial preparation. If you wish to object to that request, you must specify, in writing, all of your objections and the basis for those objections, as well as (i) the name, address, and telephone number of the person objecting and, if represented by a lawyer, of his or her lawyer; and (ii) a statement describing any purchases of Traditional Blood Reagents you made directly from defendants from January 1, 2000 through October 19, 2015, including the dates and amounts of such purchases. You must mail your written objection to the Clerk of the Court, 601 Market Street, Philadelphia, PA 19106, so it is received and filed no later than April 6, 2016. You must also send copies of any objections to:

Jeffrey J. Corrigan
SPECTOR ROSEMAN KODROFF & WILLIS, P.C.
1818 Market Street, Suite 2500, Philadelphia, PA 19103
Tel.: (215) 496-0300 Fax: (215) 496-6611
COUNSEL FOR PLAINTIFFS AND CLASS COUNSEL

3.3 Will I receive any money from the Immucor Settlement?

If you failed to request exclusion from the Immucor settlement class in 2012, you are bound by the Court's decision with respect to that settlement and you are eligible to receive a share of the Immucor settlement amount. At a later date, Class Counsel will file with the Court a plan of distribution of the Immucor funds. After payment of any court-ordered attorneys' fees, reimbursement of litigation expenses, incentive awards to the class representatives, class notice and administration expenses (including tax-related expenses), the balance will be distributed to Immucor settlement class members. More information regarding the Immucor settlement is available at www.bloodreagentsantitrustlitigation.com.

IF YOU HAVE ANY QUESTIONS REGARDING THIS NOTICE, PLEASE DIRECT THEM ONLY TO THE BLOOD REAGENTS ANTITRUST LITIGATION ADMINISTRATOR.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Exhibit 2

If you purchased Traditional Blood Reagents on or after November 4, 2000, a class action lawsuit may affect you.

A federal court authorized this notice. This is not a solicitation from a lawyer.

- A class has been certified in a class action lawsuit alleging claims against certain manufacturers of Traditional Blood Reagents: Ortho-Clinical Diagnostics, Inc. ("Ortho") and Immucor, Inc. ("Immucor") (collectively, the "Defendants"). If you purchased Traditional Blood Reagents directly from one or both of the Defendants between November 4, 2000 and October 19, 2015, you may be a member of the class.

- **THIS NOTICE IS TO INFORM YOU THAT A PLAINTIFF LITIGATION CLASS HAS BEEN CERTIFIED ON BEHALF OF DIRECT PURCHASERS OF TRADITIONAL BLOOD REAGENTS.**

- **This is a summary notice.** If you have not yet received the "Long" or "Comprehensive" Notice you may obtain copies by visiting www.bloodreagentsantitrustlitigation.com, calling 1-885-231-9423, or writing to Blood Reagents Antitrust Litigation Administrator, P.O. Box 43058, Providence RI 02940-3058.

WHAT IS THIS LAWSUIT ABOUT?

- The Plaintiffs in the lawsuit claim that Defendants violated federal antitrust law and, as a result, the prices paid by persons and entities that purchased Traditional Blood Reagents directly from Defendants were higher than they otherwise would have been. The Plaintiffs seek to recover three times the actual damages that they allege were caused by Defendants, as well as attorneys' fees and costs.

- The Defendants deny the Plaintiffs' allegations. The Court has not yet heard or resolved the merits of Plaintiffs' claims, or determined whether Plaintiffs' or Defendants' contentions are true. A trial of this case has not yet been scheduled. In addition to a trial on the issues common to the class, there may be proceedings to adjudicate any individualized issues relating to damages and to Plaintiffs' and the other class members' claims of fraudulent concealment.

AM I A MEMBER OF THE LITIGATION CLASS?

- The Court has certified a "Litigation Class" consisting of all individuals or entities that purchased Traditional Blood Reagents in the United States between November 4, 2000 and October 19, 2015 directly from either of the Defendants listed above. Excluded from the class are Defendants, and their respective parents, subsidiaries and affiliates, as well as any federal government entities.

- This Class has been certified for all purposes, including trial and any future settlements. If you are a member of the litigation class, as described above, your rights will be affected unless you exclude yourself from the class as described below.

- If you do NOT exclude yourself from the litigation class, you will be bound by any judgment that the court enters in this case. The deadline to exclude yourself is **April 6, 2016**. If you wish to exclude yourself from the Litigation Class, please see the "Long Notice" or contact Blood Reagents Antitrust Litigation Administrator for information on requesting exclusion.

- Your decision on whether to remain in this Litigation Class will not affect your rights with respect to the Immucor settlement, described below.

WHO REPRESENTS YOU?

- The Court appointed the law firm of Spector Roseman Kodroff & Willis, P.C. to represent you as "Class Counsel." You don't have to pay Class Counsel or anyone else to participate. Instead, Class Counsel will ask the Court for attorneys' fees and costs, which would be paid by Defendants or out of money recovered, before giving the rest to the Litigation Class. You may hire your own lawyer to appear in Court for you; if you do, you are responsible for paying that lawyer.

IMMUCOR SETTLEMENT:

- Plaintiffs in this case previously reached a settlement with Immucor in the amount of $22,000,000. Notices of the Immucor settlement, and the opportunity to request exclusion from it, were mailed and published in April-May 2012. On September 6, 2012, the Court granted final approval to the settlement and dismissed Immucor from the case. The Court also awarded Plaintiffs $500,000 of the settlement amount to cover ongoing litigation expenses, all of which has been spent pursuing certification of the Litigation Class. As a result, Class Counsel intend to seek an award of an additional $2,000,000 from the Immucor Settlement Fund to cover continuing costs of litigation, including trial preparation. Class Counsel must file their motion for ongoing litigation expenses on or before **March 23, 2016**. If you did not request exclusion from the Immucor settlement class, you may object to Class Counsel's motion for ongoing litigation expenses. The deadline to submit an objection is **April 6, 2016**. If you wish to object to Class Counsel's request, please see the "Long Notice" or contact Blood Reagents Antitrust Litigation Administrator for information on objecting.

- If you failed to request exclusion from the Immucor settlement class in 2012, you are bound by the Court's decision with respect to that settlement and you are eligible to receive a share of the Immucor settlement amount. At a later date, Class Counsel will file with the Court a plan of distribution. After payment of any court-ordered attorneys' fees, reimbursement of expenses, incentive awards, class notice and administration expenses (including tax-related expenses), the balance will be distributed to Immucor settlement class members. More information regarding the Immucor settlement is available at www.bloodreagentsantitrustlitigation.com.

HOW CAN I GET MORE INFORMATION?

Visit www.bloodreagentsantitrustlitigation.com, call 1-885-231-9423, or write Blood Reagents Antitrust Litigation Administrator, P.O. Box 43058, Providence RI 02940-3058.

PLEASE DO NOT CONTACT THE COURT, THE CLERK OF THE COURT OR DEFENDANTS. DIRECT ALL QUESTIONS TO THE BLOOD REAGENTS ANTITRUST LITIGATION ADMINISTRATOR.

Class Action : Active Cases : Blood Reagents Antitrust Litigation

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Immucor Settlement Home
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Welcome to the Blood Reagents Antitrust Litigation Website

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

A class has been certified in a class action lawsuit alleging claims against certain manufacturers of Traditional Blood Reagents: Ortho-Clinical Diagnostics, Inc. ("Ortho") and Immucor, Inc. ("Immucor") (collectively, the "Defendants"). The Court has scheduled a Trial Date for the litigation against Ortho for June 4, 2018.

If you purchased Traditional Blood Reagents directly from one or both of the Defendants between November 4, 2000 and October 19, 2015, you may be a member of the class described below and this class action lawsuit may affect you.

A class action lawsuit is pending in the United States District Court for the Eastern District of Pennsylvania, in which the Plaintiffs allege that certain blood reagents manufacturers conspired to fix prices in violation of federal antitrust law. The lawsuit claims that, as a result of Defendants' alleged conduct, the prices paid by individuals and entities for Traditional Blood Reagents were higher than they otherwise would have been. The lawsuit seeks treble damages (triple the amount of actual damages), attorneys' fees and costs from Defendants. The Defendants deny that any of their conduct was unlawful. The Court has not yet heard or resolved the merits of Plaintiffs' claims, or determined whether Plaintiffs' or Defendants' contentions are true. A trial of this case has been scheduled for June 4, 2018.

In 2012, Immucor settled the lawsuit and paid $22,000,000 for the benefit of a class of purchasers of Traditional Blood Reagents. The Court entered final approval of the Immucor settlement and dismissed Immucor as Defendant. For more information regarding the Immucor settlement, please click here.

The lawsuit continues against the non-settling Defendant, Ortho, on behalf of a class, or group of people, that might include you. The continuing lawsuit affects persons and entities in the United States who purchased Traditional Blood Reagents directly from either Defendant between November 4, 2000 and October 19, 2015 (the "Litigation Class").

TO DETERMINE WHETHER YOU ARE AFFECTED BY THE PENDING CLASS ACTION LAWSUIT, PLEASE SEE THE NOTICE FOUND ON THE 'CLASS NOTICE' PAGE.

Your rights and options – **and the deadlines to exercise them** – are explained in the Notice and on this website in the 'Frequently Asked Questions' page.

IF YOU HAVE ANY QUESTIONS REGARDING THIS SETTLEMENT, PLEASE DRIECT THEM ONLY TO THE BLOOD REAGENTS ANTITRUST LITIGATION ADMINISTRATOR. DO NOT CONTACT THE COURT OR DEFENDANTS IF YOU HAVE QUESTIONS REGARDING THIS SETTLEMENT

Settlement

EXECUTION COPY

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE NYC BUS TOUR ANTITRUST LITIGATION	Master Case File No. 13-CV-0711 (ALC)(GWG) **RELATED TO ALL CASES** **ECF Case** **JURY TRIAL DEMANDED**

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into this 30th day of April 2014, by and between defendants Twin America, LLC, Coach USA, Inc., International Bus Services, Inc., CitySights LLC and City Sights Twin, LLC ("Defendants") and named class plaintiffs Natasha Bhandari and Tracey L. Nobel ("Class Plaintiffs"), for themselves and on behalf of each Class Member[1] in *In re NYC Bus Tour Antitrust Litigation*, 13-CV-0711. Subject to the approval of the Court, this Agreement is intended by the Settling Parties to fully, finally and forever compromise, resolve, release, discharge and settle all Released Claims as against the Releasees, upon and subject to the terms and conditions hereof.

WHEREAS, Class Plaintiffs have alleged, among other things, that (1) Defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by limiting competition and fixing prices in the alleged market for "hop-on, hop-off" bus tours in New York City, and these acts caused Class Members to incur monetary damages; (2) Defendants violated Section 2 of the Sherman Act, by possessing monopoly power in the alleged market for "hop-on, hop-off" bus

tours in New York City, and acquired that market by anticompetitive conduct; (3) Defendants violated Section 7 of the Clayton Act by creating a joint venture that lessened competition and tended to create a monopoly; and (4) Defendants violated the Donnelly Act, N.Y. Gen. Bus. Law § 340;

WHEREAS, Defendants have denied and continue to (1) deny that they have liability for the claims and allegations of wrongdoing made by Class Plaintiffs in the Action and maintain that they have meritorious defenses; (2) deny all charges of fault, liability and wrongdoing against them arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Action, and contend that the factual allegations made in the Action relating to them are materially inaccurate; (3) deny that Class Plaintiffs or Class Members have asserted any valid claims as to any of them; and (4) deny that the Class Plaintiffs or Class Members were harmed by any conduct of Defendants alleged in the Action or otherwise;

WHEREAS, Class Plaintiffs, for themselves and on behalf of each Class Member, acknowledge and agree that neither this Agreement nor the payment of the Settlement Amount nor any statement made in the negotiation of this Agreement shall be deemed or construed to be an admission or evidence of (1) any violation of any statute or law or of any fault, liability or wrongdoing by Defendants or any other Releasee whatsoever, (2) the truth of any of the claims or allegations alleged in the Action, or (3) any infirmity in the defenses that the Defendants have, or could have, asserted;

---

[1] All capitalized terms shall have the meaning set forth herein in the text or in ¶ 1 of this Agreement.

WHEREAS, arm's length settlement negotiations have taken place, through counsel, between Defendants and Class Plaintiffs, with the assistance of a respected and neutral third party mediator, and this Agreement embodies all of the terms and conditions of the Settlement between Defendants and Class Plaintiffs, both individually and on behalf of each Class Member;

WHEREAS, Defendants have agreed to pay a Settlement Amount of $19,000,000 in exchange for the release of the claims asserted in the Action against them and of the other consideration provided by Class Plaintiffs as specified herein, pursuant to the terms and subject to the conditions set forth below;

WHEREAS, Class Plaintiffs' Counsel have concluded, after due investigation and after carefully considering the relevant circumstances, including, without limitation, the claims asserted in the Action, the legal and factual defenses thereto and the applicable law, that (1) it is in the best interests of the Class to enter into this Agreement in order to avoid the uncertainties of litigation and to assure that the benefits reflected herein are obtained for the Class and (2) the Settlement set forth herein is fair, reasonable and adequate and in the best interests of Class Members; and

WHEREAS, the Defendants, without any admission or concession whatsoever and despite believing that they are not liable for the claims asserted against them in the Action and that they have good and meritorious defenses thereto, have nevertheless agreed to enter into this Agreement to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation, and thereby to put to rest this controversy and avoid the risks inherent in complex litigation.

NOW, THEREFORE, IT IS HEREBY AGREED by and among the Class Plaintiffs (for themselves and each Class Member) and Defendants, by and through their respective counsel or attorneys of record, that, subject to the approval of the Court, the Action as against Defendants shall be dismissed with prejudice and all Released Claims as against all Releasees shall be fully, finally and forever compromised, settled, released, resolved, relinquished, waived and discharged, as set forth below.

1. Definitions. As used in this Agreement and any exhibits attached hereto the following capitalized terms have the meanings specified below.

(a) "Action" means *In re NYC Bus Tour Antitrust Litigation*, Master Docket No. 13-cv-0711(ALC)(GWG), which is currently pending in the U.S. District Court for the Southern District of New York.

(b) "Agreement" means this Settlement Agreement, together with any exhibits attached hereto, which are incorporated herein by reference.

(c) "Authorized Claimant" means any Class Member who, in accordance with the terms of this Agreement, is entitled to a distribution from the Net Settlement Fund pursuant to any Distribution Plan established by the Court.

(d) "Claims Administrator" means the firm or firms retained by Class Plaintiffs' Counsel on behalf of the Class Plaintiffs, subject to approval by the Court, to provide all notices approved by the Court to potential Class Members and to administer the Settlement.

(e) "Class" means, for purposes of this Settlement only, all persons who, or entities that, purchased Defendants' "hop-on, hop-off" bus tours in New York City from February 1, 2009, until the date of the Preliminary Approval Order (the "Class Period").

Excluded from the Class are Defendants, their present and former parents, subsidiaries, affiliates, and employees.

(f) "Class Member" means a Person who is a member of the Class and has not timely and validly excluded themselves from the Class in accordance with the procedure to be approved by the Court.

(g) "Class Plaintiffs" means Natasha Bhandari and Tracey L. Nobel.

(h) "Class Plaintiffs' Counsel" means the law firm of Susman Godfrey LLP.

(i) "Court" means the U.S. District Court for the Southern District of New York, and the Honorable Andrew L. Carter, Jr. and the Honorable Gabriel W. Gorenstein, as well as their successors.

(j) "Defendants" means Twin America, LLC, Coach USA, Inc., International Bus Services, Inc., CitySights LLC and City Sights Twin, LLC, as well as all current and former subsidiaries, affiliates, predecessors, and successors and their respective current and former employees, directors and officers.

(k) "Distribution Plan" means any plan or formula of allocation of the Gross Settlement Fund that is approved by the Court, whereby the Net Settlement Fund shall in the future be distributed to Authorized Claimants.

(l) "Effective Date" means the date on which this Agreement is executed by the last party to do so.

(m) "Escrow Account" means an account invested consistent with the provisions of ¶ 9 herein opened by the Escrow Agent to hold the Settlement Fund, which account shall be deemed to be in the custody of the Court and shall remain subject to the jurisdiction of the Court until such time as the funds therein are paid out as provided for

in this Agreement, and wherein the Settlement Amount shall be deposited and held in escrow.

(n) "Escrow Agent" means the entity jointly designated by Class Plaintiffs' Counsel and Defendants, and any successor agent, to maintain the Settlement Fund.

(o) "Escrow Agents Costs" has the meaning set forth in ¶ 9, below.

(p) "Fee and Expense Application" has the meaning set forth in ¶ 21, below.

(q) "Fee and Expense Award" has the meaning set forth in ¶ 22, below.

(r) "Final" means, with respect to any order of a court, including, without limitation, the Judgment, that such order represents a final and binding determination of all issues within its scope and is not subject to further review on appeal or otherwise. An order becomes "Final" when: (i) no appeal has been filed and the prescribed time for commencing, filing or noticing any appeal has expired; or (ii) an appeal has been filed and either (1) the appeal has been dismissed and the prescribed time, if any, for commencing, filing or noticing any further appeal has expired, or (2) the order has been affirmed in its entirety and the prescribed time, if any, for commencing, filing or noticing any further appeal has expired. For purposes of this paragraph, an "appeal" includes appeals as of right, discretionary appeals, interlocutory appeals, proceedings involving writs of certiorari or mandamus, and any other proceedings of like kind. Any appeal or other proceeding pertaining solely to any order issued in respect of an application for attorneys' fees and expenses shall not in any way delay or prevent the Judgment from becoming Final.

(s) "Final Approval Order" means the Court's approval of the Settlement following preliminary approval thereof, Notice to the Class and a hearing on the fairness of the Settlement.

(t) "Gross Settlement Fund" means the Settlement Amount plus any interest that may accrue thereon.

(u) "Hop-on, hop-off bus tours" has the meaning set forth in ¶¶ 16-17 of the First Amended Class Action Complaint, filed November 14, 2013 in 13-cv-711 (Dkt. #83).

(v) "Judgment" means the order of judgment and dismissal of the Action with prejudice as to Defendants, the form of which shall be mutually agreed upon by the Settling Parties, and submitted to the Court for approval thereof.

(w) "Net Settlement Fund" means the Gross Settlement Fund, less the payments set forth in ¶ 16(a)-(f), below.

(x) "Notice" means the form of written notice of the proposed Settlement, the Settlement Hearing, the proposed Distribution Plan and the Fee and Expense Application to be provided to Class Members as provided in this Agreement and the Preliminary Approval Order, in each case as further described in ¶ 5, below.

(y) "Notice and Administrative Costs" has the meaning set forth in ¶ 9, below.

(z) "Person(s)" means an individual, corporation, limited liability corporation, professional corporation, limited liability partnership, partnership, limited partnership, association, joint stock company, estate, legal representative, trust, unincorporated association, and any spouses, heirs, predecessors, successors, representatives or assignees of any of the foregoing.

(aa) "Preliminary Approval Order" has the meaning set forth in ¶ 3, below.

(bb) "Proof of Claim and Release," means the form to be sent to Class Members, upon order(s) of the Court, by which any Class Member may make a claim against the Net Settlement Fund.

(cc) "Released Claims" means any and all manner of claims, demands, rights, actions, suits, counterclaims, cross claims, set offs, causes of action of any type, whether class, individual or otherwise in nature, fees, costs, penalties, fines, debts, expenses, attorney fees, damages whenever incurred, and liabilities of any nature whatsoever (including joint and several), known or unknown, fixed or contingent, matured or unmatured, accrued or unaccrued, liquidated or unliquidated, suspected or unsuspected, asserted or unasserted, whether based on federal, state, local or foreign statutory law or common law, equity, rule or regulation or any other source which Releasors or any of them, whether directly, representatively, derivatively, or in any other capacity, ever had, now have or hereafter can, shall or may have against Releasees, relating in any way to (i) the claims that were asserted in the Action, and (ii) the claims that could have been asserted against any of the Releasees in any forum that arise out of, are based upon or are related to the allegations, transactions, facts (including allegations of anticompetitive conduct with respect to any acquisition of Defendants' hop-on, hop-off bus tours by Class Members during the Class Period), matters or occurrences, representations or omissions involved, set forth, or referred to in the First Amended Consolidated Class Action Complaint in the Action (Dkt #83). Released Claims shall only be released against Releasees.

(dd) "Releasees" means each of the Defendants, their predecessors, successors and assigns, their current and former direct and indirect parents, subsidiaries, and affiliates, and their respective current and former officers, directors, employees, managers, members, partners, agents, vendors, resellers, wholesalers, shareholders (in their capacity as shareholders), insurers, attorneys, and legal representatives, and the predecessors, successors, heirs, executors, administrators and assigns of each of the foregoing. As used in this paragraph, "affiliates" means entities controlling, controlled by or under common control with a Releasee.

(ee) "Releasors" means Class Plaintiffs and each and every Class Member on their own behalf and on behalf of their respective predecessors, successors and assigns, their current and former direct and indirect parents, subsidiaries, divisions, groups, conduits for entering transactions, and affiliates, their respective current and former officers, directors, employees, agents, and legal representatives, and the predecessors, successors, heirs, executors, estates, administrators, representatives, trustees, and assigns of each of the foregoing. As used in this paragraph, "affiliates" means entities controlling, controlled by or under common control with a Releasor.

(ff) "Settlement" means the settlement of the Released Claims set forth herein.

(gg) "Settlement Amount" means nineteen million dollars ($19,000,000).

(hh) "Settlement Fund" means the Escrow Account in which the Escrow Agent maintains the Settlement Amount after payment thereof by Defendants.

(ii) "Settlement Hearing" has the meaning set forth in ¶ 5, below.

(jj) "Settling Parties" means Defendants and the Class Plaintiffs (for themselves and on behalf of each Class Member).

(kk) "Summary Notice" has the meaning set forth in ¶ 6, below.

B. Preliminary Approval Order, Notice Order, and Settlement Hearing

2. Reasonable Best Efforts to Effectuate this Settlement. The Settling Parties agree to cooperate with one another to the extent reasonably necessary to effectuate and implement the terms and conditions of this Agreement and to exercise their reasonable best efforts to accomplish the terms and conditions of this Agreement.

3. Motion for Preliminary Approval. Within thirty (30) calendar days after the Effective Date, Class Plaintiffs' Counsel shall submit this Agreement to the Court and shall apply for entry of an order (the **"Preliminary Approval Order"**) requesting, *inter alia*, preliminary approval of the Settlement, the scheduling of a Settlement Hearing, certification of the Class for purposes of the Settlement only, and for a stay of all proceedings in the Action against the Releasees until the Court renders a final decision on approval of the Settlement. The motion shall include the proposed form of an order preliminarily approving the Settlement, a copy of which is attached hereto as Exhibit A. Defendants shall be provided with an opportunity to review and comment on the Motion for Preliminary Approval, including all supporting materials such as a memorandum and exhibits (including, but not limited to, the proposed forms of notice), seven (7) calendar days before the Motion is submitted to the Court, and shall provide any comments to Class Plaintiffs' Counsel no later than three (3) calendar days before the Motion is submitted to the Court.

4. Stipulation to Certification of a Settlement Class. The Settling Parties hereby stipulate for purposes of the Settlement only and for no other purpose, (a) certification of the Action as a class action pursuant to the requirements of Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, and, subject to Court approval, (b) the description of the Class in ¶ 1(e) above shall be certified as to Defendants, and (c) the appointment of Class Plaintiffs'

Counsel as class counsel pursuant to Rule 23(g). If the Settlement as described herein is finally disapproved by any court, if this Agreement or the Settlement is terminated as provided herein, or if the Settlement is reversed or vacated following any appeal taken therefrom, then this stipulation that a class should be certified becomes automatically null and void *ab initio*, and Defendants reserve all rights to contest that the Class should be certified.

5. Notice to Class. In the event that the Court preliminarily approves the Settlement, Class Plaintiffs' Counsel shall, in accordance with Rule 23 of the Federal Rules of Civil Procedure and the Preliminary Approval Order, provide Class Members whose identities can be determined after reasonable efforts with notice of the date of the hearing scheduled by the Court under Rule 23(e)(2) of the Federal Rules of Civil Procedure to consider the fairness, adequacy and reasonableness of the proposed Settlement (the **"Settlement Hearing"**). The Notice shall also include the general terms of the Settlement set forth in this Agreement, the general terms of the proposed Distribution Plan, the general terms of the Fee and Expense Application, and a description of Class Members' rights to object to the Settlement, request exclusion from the Class, which must occur at least 45 days prior to the Settlement Hearing, and/or appear at the Settlement Hearing.

6. Publication. Class Plaintiffs' Counsel shall cause to be published a summary of the notice (**"Summary Notice"**) in accord with the notice plan submitted to the Court by Class Plaintiffs' Counsel and approved by the Court.

7. Motion for Final Approval and Entry of Final Judgment. Thirty (30) days prior to the date for the Settlement Hearing set by the Court in the Preliminary Approval Order, Class Plaintiffs' Counsel shall submit a motion for final approval of the Settlement by the Court after Notice to Class Members of the Settlement Hearing, and the Settling Parties shall

jointly seek entry of the Final Approval Order and Judgment. Defendants shall be provided with an opportunity to review and comment on the Motion for Final Approval and Final Approval Order and Judgment seven (7) calendar days before the Motion is submitted to the Court, and shall provide any comments to Class Plaintiffs' Counsel no later than three (3) calendar days before the Motion is submitted to the Court. Except as described in ¶ 8, the obligations of the Defendants hereunder are contingent upon the entry of a Final Approval Order and Judgment that shall:

(a) fully and finally approve the Settlement contemplated by this Agreement and its terms as being fair, reasonable and adequate within the meaning of Rule 23 of the Federal Rules of Civil Procedure and direct its consummation pursuant to its terms and conditions;

(b) contain a finding that the Notice given to Class Members complies in all respects with the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process;

(c) direct that the Action be dismissed with prejudice as to Defendants and, except as provided in ¶15 herein, without costs;

(d) contain a complete bar order that discharges and releases the Released Claims as to all of the Releasees;

(e) permanently bar, enjoin and restrain the institution and prosecution, by Class Plaintiffs and any Class Member, either directly, individually, representatively, derivatively or in any other capacity, by whatever means, of any other action against the Releasees in any court, or in any agency or other authority or arbitral or other forum wherever located, asserting any of the Released Claims;

(f) reserve continuing and exclusive jurisdiction over the Settlement, including all future proceedings concerning the administration and enforcement of this Agreement;

(g) contain a determination that there is no just reason for delay and directing entry of a Final Judgment as to Defendants; and

(h) contain such other and further provisions consistent with the terms of this Agreement to which the Settling Parties expressly consent in writing.

Sufficiently before the Settlement Hearing, Class Plaintiffs' Counsel also will request that the Court approve the application for attorneys' fees and expenses (as described below). Class Plaintiffs' Counsel also will timely request that the Court approve the proposed Distribution Plan.

C. Settlement Fund

8. Payments made by Defendants. In consideration of the full and complete settlement by the Releasors of the Released Claims and the other consideration specified herein, Defendants shall pay by wire transfer five million dollars ($5,000,000) of the Settlement Amount into the Settlement Fund within thirty (30) business days after the entry of the Preliminary Approval Order having the terms specified in ¶ 3 by the Court. The balance of the Settlement Amount, fourteen million dollars ($14,000,000), shall be paid into the Settlement Fund by Defendants within thirty (30) business days after the Court enters the Final Approval Order having the terms specified in ¶ 7. All interest earned by the Settlement Fund shall be added to, and become part of, the Gross Settlement Fund. The Settlement Amount shall not be subject to reduction, and upon the occurrence of the Final Judgment, no funds may be returned to Defendants, except as set forth in this Agreement.

9. Disbursements Prior to Final Judgment. No amount may be disbursed from the Gross Settlement Fund unless and until Final Judgment, except that upon written notice to the Escrow Agent by Class Plaintiffs' Counsel, with a copy to Defendants: (i) costs of the Notice actually incurred (**"Notice and Administrative Costs"**) described in ¶¶ 5 and 6 above, may be paid from the Gross Settlement Fund as they become due; (ii) Taxes and Tax Expenses (as defined in below) may be paid from the Gross Settlement Fund as they become due; and (iii) costs of the Escrow Agent (**"Escrow Agent Costs"**) may be paid from the Gross Settlement Fund as they become due. Class Plaintiffs' Counsel will attempt in good faith to minimize the amount of Notice and Administrative Costs. All funds held by the Escrow Agent shall be deemed to be in the custody of the Court and shall remain subject to the jurisdiction of the Court until such time as the funds shall be distributed or returned pursuant to the terms of this Agreement and/or further order of the Court. The Escrow Agent shall invest any funds in the Escrow Account in United States Treasury Bills (or a mutual fund invested solely in such instruments) and shall collect and reinvest all interest accrued thereon, except that any residual cash balances of less than $250,000.00 may be deposited in any account that is fully insured by the FDIC. In the event that the yield on United States Treasury Bills is negative, in lieu of purchasing such Treasury Bills, all or any portion of the funds held by the Escrow Agent may be deposited in any account that is fully insured by the FDIC or backed by the full faith and credit of the United States.

10. Refund by Escrow Agent. If the Class Plaintiffs do not seek final approval of the Settlement at least thirty (30) calendar days prior to the Settlement Hearing date set by the Court in the Preliminary Approval Order, or the Settlement as described herein is finally disapproved by any court or the Agreement is terminated as provided herein, or the

Judgment is overturned on appeal or by writ, the Gross Settlement Fund, including all interest earned on such amount while held in the Escrow Account, excluding only (i) previously disbursed Notice and Administrative Costs, (ii) previously disbursed Taxes and Tax Expenses, and (iii) previously disbursed Escrow Agent Costs, will be refunded, reimbursed, and repaid by the Escrow Agent to Defendants within three (3) business days after receiving notice pursuant to the terms of this Agreement.

11. No Additional Payments by Defendants. Payment of the Settlement Amount by Defendants in accordance with the terms of this Agreement constitutes the entirety of Defendants' and Releasees' payment obligation with respect to this Agreement, and under no circumstances will Defendants be required to pay anything other than the Settlement Amount. The payment of any Fee and Expense Award, Escrow Agent Costs, the Notice and Administrative Costs, and any other costs associated with the implementation of this Agreement, shall be made exclusively from the Settlement Amount. Releasees shall have no responsibility for or liability whatsoever with respect to the allocation of any Fee and Expense Award.

12. Taxes. The Settling Parties and the Escrow Agent agree to treat the Gross Settlement Fund as being at all times a "qualified settlement fund" within the meaning of Treas. Reg. § 1.468B-1. The Escrow Agent shall timely make such elections as necessary or advisable to carry out the provisions of this paragraph, including the "relation-back election" (as defined in Treas. Reg. § 1.468B-1) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Escrow Agent to prepare and deliver timely and properly the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing to occur.

(a) For the purpose of § 468B of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, the "administrator" shall be the Escrow Agent. The Escrow Agent shall satisfy the administrative requirements imposed by Treas. Reg. § 1.468B-2 by, *e.g.*, (i) obtaining a taxpayer identification number, (ii) satisfying any information reporting or withholding requirements imposed on distributions from the Gross Settlement Fund, and (iii) timely and properly filing applicable federal, state and local tax returns necessary or advisable with respect to the Gross Settlement Fund (including, without limitation, the returns described in Treas. Reg. § 1.468B-2(k)) and paying any taxes reported thereon. Such returns (as well as the election described in this paragraph) shall be consistent with this paragraph and in all events shall reflect that all Taxes on the income earned by the Gross Settlement Fund shall be paid out of the Gross Settlement Fund;

(b) All (i) taxes (including any estimated taxes, interest or penalties) arising with respect to the income earned by the Gross Settlement Fund, including, without limitation, any taxes or tax detriments that may be imposed upon Defendants or its counsel with respect to any income earned by the Gross Settlement Fund for any period during which the Gross Settlement Fund does not qualify as a "qualified settlement fund" for federal or state income tax purposes (collectively, "Taxes"), and (ii) expenses and costs incurred in connection with the operation and implementation of this paragraph, including, without limitation, expenses of tax attorneys and/or accountants and mailing and distribution costs and expenses relating to filing (or failing to file) the returns described in this paragraph (collectively, "Tax Expenses"), shall be paid out of the Gross Settlement Fund; in all events, neither Defendants nor its counsel shall have any liability

or responsibility for the Taxes or the Tax Expenses. With funds from the Gross Settlement Fund, the Escrow Agent shall indemnify and hold harmless Defendants and its counsel for Taxes and Tax Expenses (including, without limitation, Taxes payable by reason of any such indemnification). Further, Taxes and Tax Expenses shall be treated as, and considered to be, a cost of administration of the Gross Settlement Fund and shall timely be paid by the Escrow Agent out of the Gross Settlement Fund without prior order from the Court and the Escrow Agent shall be obligated (notwithstanding anything herein to the contrary) to withhold from distribution to Authorized Claimants any funds necessary to pay such amounts, including the establishment of adequate reserves for any Taxes and Tax Expenses (as well as any amounts that may be required to be withheld under Treas. Reg. § 1.468B-2(1)(2)); neither Defendants nor its counsel is responsible therefor, nor shall they have any liability therefor. The Settling Parties agree to cooperate with the Escrow Agent, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions of this paragraph.

13. Releases. Upon the entry of the Final Approval Order and Judgment, the Releasors, and any other Person claiming against the Gross or Net Settlement Fund (now or in the future) through or on behalf of any Releasor, shall be deemed to have, and by operation law and of the Judgment shall have fully, finally, and forever compromised, settled, released, relinquished, dismissed and discharged all Released Claims against Defendants and any and all of the other Releasees and shall have covenanted not to sue any Releasee with respect to any such Released Claim, and shall be permanently barred and enjoined from instituting, commencing, or prosecuting any such Released Claim against any of the Releasees. Each Releasor shall be deemed to have released all Released Claims against the Releasees regardless

of whether any such Releasor ever seeks or obtains by any means, including without limitation, by submitting a Proof of Claim and Release, any distribution from the Gross Settlement Fund or Net Settlement Fund. The Releases contained in this ¶ 13 were separately bargained for and are essential elements of the Settlement as embodied in this Agreement.

14. Unknown Claims/California Civil Code Section 1542. The release set forth in ¶ 13, above, constitutes a waiver of Section 1542 of the California Civil Code (to the extent it applies to the Action), which provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

The release set forth in ¶ 13, above, also constitutes a waiver of any similar provision, statute, regulation, rule or principle of law or equity of any other state or applicable jurisdiction. The Releasors acknowledge that they are aware that they may hereafter discover facts in addition to, or different from, those facts which they know or believe to be true with respect to the subject matter of this Agreement, but that it is their intention to release fully, finally and forever all of the claims released in ¶ 13, above, including all unknown claims, and in furtherance of such intention, the release shall be and remain in effect notwithstanding the discovery or existence of any such additional or different facts. The waiver contained in this ¶ 14 was separately bargained for and is an essential element of the Settlement as embodied in this Agreement.

15. Payment of Fees and Expenses. Subject to Court approval, Class Plaintiffs and Class Plaintiffs' Counsel shall be reimbursed and paid solely out of the Gross Settlement Fund for all expenses including, but not limited to, attorneys' fees and past, current, or future litigation expenses. The Defendants shall not be liable for any costs, fees, or expenses

of any of Class Plaintiffs' or of any Class Member's respective attorneys, experts, advisors, agents, or representatives.

D. Administration and Distribution of Gross Settlement Fund

16. Distribution of Gross Settlement Fund. As part of the Preliminary Approval Order, Class Plaintiffs shall seek appointment of a Claims Administrator. The Claims Administrator, subject to such supervision and direction of the Court, shall administer the claims submitted by Class Members and shall oversee distribution of the Net Settlement Fund to Authorized Claimants pursuant to the Distribution Plan. Class Plaintiffs' Counsel shall provide Defendants notice of their intent to make distribution from the Net Settlement Fund at least twenty-one (21) days before making the first distribution from the Net Settlement Fund.

Subject to the terms of this Agreement and any order(s) of the Court, the Gross Settlement Fund shall be applied as follows:

(a) to pay any Fee and Expense Award that is allowed by the Court;

(b) to pay Notice and Administrative Costs;

(c) to pay Escrow Agent Costs;

(d) to pay all costs and expenses actually incurred by the Claims Administrator or Class Plaintiffs' Counsel in assisting Class Members with the filing and processing of claims against the Net Settlement Fund;

(e) to pay the Taxes and Tax Expenses; and

(f) the costs incurred in distributing the Net Settlement Fund to Authorized Claimants as allowed by the Agreement, the Distribution Plan, and order of the Court.

17. Distribution of Net Settlement Fund. Upon Final Judgment and thereafter, and in accordance with the terms of this Agreement, the Distribution Plan, or such further order(s) of the Court as may be necessary or as circumstances may require, the Net

Settlement Fund shall be distributed to Authorized Claimants, subject to and in accordance with the following:

(a) Unless otherwise ordered by the Court in an approved Distribution Plan, each Class Member who claims to be an Authorized Claimant shall be required to submit to the Claims Administrator a completed Proof of Claim and Release signed under penalty of perjury and supported by such documents as specified in the Proof of Claim and Release that are reasonably available to such Class Member.

(b) Except as otherwise ordered by the Court in an approved Distribution Plan, each Class Member who fails to submit a Proof of Claim and Release within such period as may be ordered by the Court, or otherwise allowed, shall be forever barred from receiving any payments pursuant to this Agreement and the Settlement set forth herein, but shall in all other respects be subject to and bound by the provisions of this Agreement, the releases contained herein, and the Judgment;

(c) The Net Settlement Fund shall be distributed to Authorized Claimants in accordance with the Distribution Plan to be approved by the Court upon such further notice to the Class as may be required. Subject to approval of the Court, Class Plaintiffs' Counsel shall have full discretion over the Distribution Plan, and Defendants shall have no control over the Distribution Plan. The Distribution Plan may include a minimum amount of the Net Settlement Fund that will be distributed to Authorized Claimants, which may include a minimum amount of the Net Settlement Fund to be distributed to Authorized Claimants regardless of the number of claims submitted. No funds from the Net Settlement Fund shall be distributed to Authorized Claimants until the Final Judgment; and

(d) All Class Members shall be subject to and bound by the provisions of this Agreement, the releases contained herein, and the Judgment with respect to all Released Claims, regardless of whether such Class Members seek or obtain by any means, including, without limitation, by submitting a Proof of Claim and Release or any similar document, any distribution from the Net Settlement Fund.

18. No Authority or Liability for Distribution of Settlement Funds. Neither the Releasees nor their counsel shall have any responsibility for, interest in, or liability whatsoever with respect to the investment, disbursement or distribution of the Gross Settlement Fund, the Distribution Plan, the determination, administration, or calculation of claims, the payment or withholding of Taxes or Tax Expenses, the distribution of the Net Settlement Fund, or any losses incurred in connection with any of the foregoing matters. Releasors hereby fully, finally, and forever release, relinquish, and discharge the Releasees and their counsel from any and all such liability. No Person shall have any claim against Class Plaintiffs' Counsel or the Claims Administrator based on the distributions made substantially in accordance with the Agreement and the Settlement contained herein, the court-approved Distribution Plan, or further orders of the Court.

19. Balance Remaining in Net Settlement Fund. Within two hundred and ten days (210) days after the Claims Administrator has distributed the Net Settlement Fund to Authorized Claimants following Final Judgment, if there is any balance remaining in the Net Settlement Fund (whether by reason of tax refunds, uncashed checks, undistributed funds, or otherwise), the Claims Administrator shall provide notice to the Settling Parties of the balance remaining in the Net Settlement Fund and fifteen (15) days thereafter shall distribute the entire

balance to the Department of Justice, Antitrust Division, and/or the New York Attorney General's Office. This is a material term of this Settlement Agreement.

E. Discovery

20. Stay of Discovery. The Settling Parties agree to a stay of all discovery upon entry of the Preliminary Approval Order. The stay will automatically be dissolved if (i) the Court does not enter the Final Approval Order or the Judgment, or (ii) the Court enters the Final Approval Order and the Judgment and appellate review is sought and, on such review, the Final Approval Order or the Judgment is finally vacated or reversed.

F. Attorneys' Fees and Reimbursement of Expenses

21. Fee and Expense Application. Defendants shall have no interest or right in or to any portion of the Gross Settlement Fund based on any ruling the Court makes on any application by Class Plaintiffs' Counsel for fees, costs or expenses. Class Plaintiffs' Counsel may, at their discretion and election, choose to submit an application or applications to the Court (the **"Fee and Expense Application"**) for distributions to them from the Gross Settlement Fund, for an award of attorneys' fees or reimbursement of expenses incurred in connection with prosecuting the Action, and for an award of an incentive compensation to the Class Plaintiffs, not to exceed $20,000 for each Class Plaintiff, for their efforts in prosecuting this case. Defendants and the Releasees will take no position on any Fee and Expense Application.

22. Payment of Fee and Expense Award. Any amounts that are awarded by the Court pursuant to ¶ 21 above (the **"Fee and Expense Award"**) shall be paid from the Gross Settlement Fund, as provided in ¶ 16 above, following Final Judgment.

23. Award of Fees and Expenses not Part of Settlement. A Fee and Expense Award or award of other attorneys' fees and expenses is not a necessary term of this Agreement and is not a condition of the Settlement embodied herein. The allowance or

disallowance by the Court of the Fee and Expense Application are not part of the Settlement set forth in this Agreement, and are to be considered by the Court separately from the Court's consideration of the fairness, reasonableness and adequacy of the Settlement set forth in this Agreement. Any order or proceeding relating to the Fee and Expense Application, or any appeal from any Fee and Expense Award or any other order relating thereto or reversal or modification thereof, shall not operate to terminate or cancel this Agreement or the Releases set forth herein, or affect or delay the finality of the Judgment and the Settlement of the Action as set forth herein. No order of the Court or modification or reversal on appeal of any order of the Court concerning any Fee and Expense Award shall constitute grounds for termination of this Agreement.

24. No Liability for Fees and Expenses of Class Plaintiffs' Counsel. The Releasees shall have no responsibility for, and no liability whatsoever with respect to, any payment(s) to Class Plaintiffs' Counsel pursuant to ¶¶ 21-22, above, and/or to any other Person who may assert some claim thereto, or any Fee and Expense Award that the Court may make in the Action.

G. Conditions of Settlement, Effect of Disapproval or Termination

25. Effective Date. The Effective Date of this Agreement is set forth in ¶ 1(l).

26. Occurrence of Final Judgment. Upon the Judgment becoming Final, any and all remaining interest or right of Defendants in or to the Gross Settlement Fund, if any, shall be absolutely and forever extinguished, and the Gross Settlement Fund (less any Notice and Administrative Costs, Taxes or Tax Expenses, Escrow Agent Costs or any Fee and Expense Award paid) shall be transferred from the Escrow Agent to the Claims Administrator at the written direction of Class Plaintiffs' Counsel.

27. **When Settlement Becomes Final.** This Settlement shall become Final on the date that: (a) the Court has entered the Final Approval Order and Judgment, approving this Settlement Agreement, and all of its material terms and conditions, under Rule 23(e) of the Federal Rules of Civil Procedure and dismissing the Action against all Releasees with prejudice as to all Settlement Class Members and without costs; and (b) the time for appeal or to seek permission to appeal from the Court's approval of this Settlement Agreement and entry of the order of Judgment as described in clause (a) above has expired or, if appealed, approval of this Settlement Agreement and the Final Approval Order and Judgment has been affirmed in its entirety by the court of last resort to which such appeal has been taken and such affirmance is no longer subject to further appeal or review. The parties agree that neither the provisions of Rule 60 of the Federal Rules of Civil Procedure nor the All Writs Act, 28 U.S.C. 1651, shall be taken into account in determining the above-stated times.

28. **Rejection or Alteration of Settlement.** If the Court declines to grant either preliminary or final approval (as set forth in ¶¶ 3 and 7 above respectively); or if after the Court's approval, such approval is set aside on appeal; or if the Court does not enter the Final Approval Order and Judgment; or if the Court enters the Final Approval Order and Judgment and appellate review is sought, and on such review, the Final Approval Order and Judgment is not affirmed; or if the Court does not approve the distribution set forth in ¶ 19, then any Defendant, in its sole discretion, or Class Plaintiffs, at their sole discretion so long as the Class Plaintiffs each agree, shall have the option to rescind and terminate this Agreement in its entirety by providing written notice of their election to do so to Class Plaintiffs' Counsel or Defendants' Counsel, provided that such notification shall be given no later than ten (10) days after the occurrence of the event giving rise to the option to terminate.

29. Consequences of Termination. Unless otherwise ordered by the Court, in the event that this Agreement should terminate, or be cancelled, or otherwise fail to become effective for any reason, including but not limited to pursuant to ¶ 28, then:

(a) the Settlement and the relevant portions of this Agreement shall be canceled and terminated and any certification of the Action as a class action shall be vacated;

(b) within three (3) business days after written notification of such event is sent by counsel for Defendants and Class Plaintiffs' Counsel to the Escrow Agent, the Gross Settlement Fund, including the Settlement Amount and all interest earned in the Settlement Fund and all payments disbursed, including all expenses, costs, excluding only Notice and Administrative Costs that have either been properly disbursed or are due and owing, Taxes and Tax Expenses that have been properly paid or that have accrued and will be properly payable at some later date, and Escrow Agent Costs that have either been properly disbursed or are due and owing, will be refunded, reimbursed, and repaid by the Escrow Agent to Defendants;

(c) the Escrow Agent or its designee shall apply for any tax refund owed to the Gross Settlement Fund and pay the proceeds to Defendants, after deduction of any fees or expenses reasonably incurred in connection with such application(s) for refund;

(d) the Settling Parties shall be restored to their respective positions in the Action as of the Effective Date, with all of their respective legal claims and defenses, preserved as they existed on that date; and

(e) any Judgment or order entered by the Court in accordance with the terms of this Agreement shall be treated as vacated, *nunc pro tunc*.

H. No Admission of Liability

30. Final and Complete Resolution. The Settling Parties intend the Settlement as described herein to be a final and complete resolution of all disputes between them with respect to the Action, and it shall not be deemed an admission by any Settling Party as to the merits of any claim or defense or any allegation made in the Action.

31. Use of Agreement as Evidence. Neither this Agreement nor the Settlement, nor any act performed or document executed pursuant to or in furtherance of this Agreement or the Settlement: (i) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Released Claims, of any allegation made in the Action, or of any fault, wrongdoing or liability of Releasees; (ii) shall be construed against any of Releasees as an admission, concession, or presumption that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial; or (iii) is or may be deemed to be or may be used as an admission of, or evidence of, any liability, fault or omission of the Releasees in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal. Neither this Agreement nor the Settlement, nor any act performed or document executed pursuant to or in furtherance of this Agreement or the Settlement shall be offered or admissible in any proceeding for any purpose, except to enforce the terms of the Settlement, and except that the Releasees may file this Agreement and/or the Judgment in any action for any purpose, including, but not limited to, in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim. The limitations described in this paragraph apply whether or not the Court enters the Preliminary Approval Order, the Final Approval Order or the Judgment.

I. Miscellaneous Provisions

32. Defendants' Right to Communicate. Class Plaintiffs' Counsel acknowledges and agrees that Defendants have the right to communicate orally and in writing with, and to respond to inquiries from, Class Members, including (without limitation): (i) communications between Class Members and representatives of Defendants whose responsibilities include client relations to the extent such communications are initiated by Class Members; (ii) communications between Class Members who are ongoing clients of Defendants, or who seek to become clients of Defendants; and (iii) communications that might be necessary to conduct Defendants' business.

33. Voluntary Settlement. The Settling Parties agree that the Settlement Amount and the other terms of the Settlement as described herein were negotiated in good faith by the Settling Parties, and reflect a Settlement that was reached voluntarily after consultation with competent legal counsel.

34. Consent to Jurisdiction. Each Settling Party hereby irrevocably submits to the exclusive jurisdiction of the Court only for the specific purpose of any suit, action, proceeding or dispute arising out of or relating to this Agreement or the applicability of this Agreement.

35. Resolution of Disputes; Retention of Exclusive Jurisdiction. Any disputes between or among Defendants and any Class Member or Members (or their counsel) concerning matters contained in this Agreement shall, if they cannot be resolved by negotiation and agreement, be submitted to the Court. The administration and consummation of the Settlement as embodied in this Agreement shall be under the authority of the Court, and the Court shall retain exclusive jurisdiction for the purpose of entering orders providing for awards of attorneys' fees and over the implementation and enforcement of this Agreement.

36. Binding Effect. This Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto and to all Releasees. Without limiting the generality of the foregoing, each and every covenant, undertaking and agreement herein by Class Plaintiffs and Class Plaintiffs' Counsel shall be binding upon all Class Members.

37. Authorization to Enter Settlement Agreement. The undersigned representatives of Defendants represent that they are fully authorized to enter into and to execute this Agreement on behalf of Defendants. Class Plaintiffs' Counsel, on behalf of the Class Plaintiffs, represent that they are, subject to Court approval, expressly authorized to take all action required or permitted to be taken by or on behalf of this Class pursuant to this Agreement to effectuate its terms and to enter into and execute this Agreement and any modifications or amendments to the Agreement on behalf of the Class that they deem appropriate.

38. Notices. All notices under this Agreement shall be in writing. Each such notice shall be given either by (i) e-mail; (ii) hand delivery; (iii) registered or certified mail, return receipt requested, postage pre-paid; (iv) FedEx or similar overnight courier; or (v) facsimile and first class mail, postage pre-paid, and, if directed to any Class Member, shall be addressed to Class Plaintiffs' Counsel at their addresses set forth on the signature page hereof, and if directed to Defendants, shall be addressed to their attorneys at the addresses set forth on the signature pages hereof or such other addresses as Class Plaintiffs' Counsel or Defendants may designate, from time to time, by giving notice to all parties hereto in the manner described in this paragraph.

39. No Conflict Intended. The headings used in this Agreement are intended for the convenience of the reader only and shall not affect the meaning or interpretation of this Agreement.

40. No Party Deemed to Be the Drafter. None of the parties hereto shall be deemed to be the drafter of this Agreement or any provision hereof for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof.

41. Choice of Law. This Agreement and the exhibit(s) hereto shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of New York, and the rights and obligations of the parties to this Agreement shall be construed and enforced in accordance with, and governed by, the internal, substantive laws of the State of New York without giving effect to that State's choice of law principles.

42. Amendment; Waiver. This Agreement shall not be modified in any respect except by a writing executed by all the parties hereto, and the waiver of any rights conferred hereunder shall be effective only if made by written instrument of the waiving party. The waiver by any party of any breach of this Agreement shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent or contemporaneous, of this Agreement.

43. Execution in Counterparts. This Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. Counsel for the parties to this Agreement shall exchange among themselves original signed counterparts and a complete set of executed counterparts shall be filed with the Court.

44. Integrated Agreement. This Agreement constitutes the entire agreement between the Settling Parties and no representations, warranties or inducements have been made to any party concerning this Agreement other than the representations, warranties and covenants

contained and memorialized therein. All provisions of this Agreement are contractual and not mere recitals.

45. Optional Termination of Agreement. The Settlement and this Agreement may be terminated under the following circumstances:

(a) If Class Plaintiffs do not seek preliminary approval of the Settlement within thirty (30) days of the Effective Date, Defendants, provided they unanimously agree, shall each have the right to terminate the Settlement and this Agreement by providing written notice of their election to do so ("Termination Notice") to the Class Plaintiffs' Counsel and upon receipt of such Termination Notice this Agreement shall be null and void, and the Escrow Agent shall return to Defendants the Gross Settlement Fund, less any reasonable expenses, as provided above.

(b) Pursuant to ¶ 28 above.

46. Reservation of Rights. This Agreement does not settle or compromise any claims by Class Plaintiffs or any Class Member asserted in the Action against any defendants or any potential defendants other than the Releasees. All rights of any Class Member against any other person or entity other than the Releasees are specifically reserved by Class Plaintiffs and the Class Members.

47. Confidentiality of Negotiations. Whether or not this Agreement is approved by the Court and whether or not the Settlement is consummated, the Settling Parties and their counsel shall use their best efforts to keep all negotiations, discussions, acts performed, agreements, drafts, documents signed and proceedings in connection with this Agreement confidential.

48. **Confidentiality of Settlement Agreement.** Unless Defendants otherwise consent, the confidentiality of the Settlement Agreement is to be maintained by the Class Plaintiffs and Class Plaintiffs' Counsel and not to be disclosed until Class Plaintiffs' Counsel submits the Motion for Preliminary Approval to the Court, the date of which Class Plaintiff Counsel will inform Defendants 48 hours in advance. After submission of the Motion for Preliminary Approval, the Class Plaintiffs and Class Plaintiffs' Counsel shall provide Defendants with 48-hour advance notice of the content of any public statements the Class Plaintiffs and/or Class Plaintiffs' Counsel intend to make regarding the Settlement Agreement.

IN WITNESS WHEREOF, the parties hereto, through their fully authorized representatives, have executed this Agreement as of the date set forth below.

DATED: April 30, 2014

Signed By,

William Christopher Carmody (WC8478)
Arun Subramanian (AS2096)
Seth Ard (SA1817)
Mark Howard Hatch-Miller (MH4981)
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Attorneys for Coach USA, Inc. and

DATED: April 30, 2014

Signed By,

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Attorneys Twin America, LLC, CitySights, LLC, and City Sights Twin, LLC

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE NYC BUS TOUR ANTITRUST LITIGATION	Master Case File No. 13-CV-0711 (ALC)(GWG) **RELATED TO ALL CASES** **ECF Case** **JURY TRIAL DEMANDED**

PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH DEFENDANTS

Plaintiffs hereby move for an Order granting preliminary approval of a settlement agreement between Plaintiffs Natasha Bhandari and Tracey L. Nobel ("Class Plaintiffs"), individually and on behalf of the putative class in this action (the "Class"), and defendants Twin America, LLC., Coach USA, Inc., International Bus Services, Inc., CitySights LLC and City Sights Twin, LLC ("Defendants").

Pursuant to the Settlement Agreement with Defendants, a copy of which is attached as Exhibit 1 to the Declaration of William Christopher Carmody, submitted herewith, and as described in the accompanying Memorandum of Law, Defendants have agreed to pay $19 million in exchange for dismissal of claims by the Class against Defendants in this litigation.

Therefore, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs respectfully request that the Court enter an Order:

a) Preliminarily approving the Settlement Agreement and the plan of distribution;

b) Certifying the proposed Class as defined in the Settlement Agreement;

c) Appointing Susman Godfrey LLP as counsel for the Class pursuant to Fed. R. Civ. P. 23(g) and the named plaintiffs as class representatives;

d) Approving the Notice Program and Forms submitted with the Declaration of Shannon R. Wheatman, Ph.D; and

e) Granting such other and further relief as may be appropriate.

This Motion is supported by the Settlement Agreement; Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Approval, submitted herewith; the Declaration of William Christopher Carmody, submitted herewith; the Declaration of Antonio Piazza, submitted herewith; the Declaration of Shannon R. Wheatman, Ph.D., submitted herewith; all pleadings filed in this case; and such additional evidence or argument as may be presented to the Court. This Motion is uncontested by Defendants.

DATED: May 20, 2014

Respectfully submitted,

/s/ William Christopher Carmody

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Seth Ard (SA1817)
Mark Howard Hatch-Miller (MH4981)
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CERTIFICATE OF SERVICE

On May 20, 2014, I caused copies of Plaintiffs' Uncontested Motion For Preliminary Approval of Settlement with Defendants to be served on the following counsel via electronic mail:

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Attorneys for Defendants Coach USA, Inc. and International Bus Services, Inc.

DATED: New York, New York
May 20, 2014

/s/ Mandi Bruns
Mandi Bruns

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE NYC BUS TOUR ANTITRUST LITIGATION	Master Case File No. 13-CV-0711 (ALC)(GWG) **RELATED TO ALL CASES** **ECF Case** **JURY TRIAL DEMANDED**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH DEFENDANTS

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Plaintiffs Natasha Bhandari and Tracey L. Nobel ("Class Plaintiffs," or "Plaintiffs"), individually and on behalf of the putative Class of purchasers in this action (the "Settlement Class," or "Class"), have entered into an agreement (the "Settlement") with defendants Twin America, LLC, Coach USA, Inc., International Bus Services, Inc., CitySights LLC and City Sights Twin, LLC ("Defendants").[1] Plaintiffs respectfully move the Court for an order preliminarily approving the Settlement, certifying the Settlement Class, and appointing Plaintiffs as class representatives and Susman Godfrey LLP as class counsel for purposes of the Settlement, approving the form and manner of providing notice of the Settlement to the Class, and setting a hearing at which the Court will consider final approval of the Settlement, final approval of a distribution plan, and Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses. Because the Settlement Agreement was negotiated at arm's length by experienced counsel and is reasonable and appropriate, Plaintiffs respectfully request the Court's preliminary approval.

I. INTRODUCTION

Plaintiffs have reached an agreement with Defendants to settle this Action in exchange for a $19 million cash payment by Defendants. By any measure, the proposed Settlement represents an outstanding result. Defendants operate hop-on, hop-off bus tours in New York City—tours where a consumer can hop on a tour bus, hop off at a stop of interest (such as the Empire State Building) and then hop back on the bus to continue the tour. In 2009, Defendants created a joint venture from two entities that Plaintiffs allege were previously fierce competitors. Plaintiffs allege that this joint venture, and other actions, violated the antitrust laws in a manner that caused consumers to pay an overcharge of $5 or more per ticket for Defendants' hop-on,

[1] Unless otherwise defined, all Capitalized Terms in this memorandum have the same meaning as set forth in the Settlement Agreement.

hop-off tours during the Class Period. The United States Department of Justice and the New York Attorney General (the "Government Entities") have similarly alleged that the joint venture violates the antitrust laws in an action that is still pending before this Court, which seeks injunctive and other equitable relief (the "Government Action"). If approved by the Court, the $19 million will provide substantial relief to Class Members who could not justify the expense of bringing individual claims, and will supplement any relief that the Government Entities may obtain in the Government Action. If any settlement funds are unclaimed by Class Members, the remainder of the funds will be provided to the Government Entities. If the Settlement is finally approved and a final judgment is entered, no funds will be returned to Defendants under any circumstances.

The substantial settlement is the direct result of the significant efforts undertaken by Plaintiffs and their counsel in prosecuting and settling this action. Among other things, Plaintiffs reviewed more than 500,000 pages of documents and several gigabytes of transaction data, briefed class certification, and participated in 29 depositions—including the depositions of senior current and former employees of Defendants. Significantly, the Settlement was reached after fact discovery was nearly complete, and only after protracted, arm's-length settlement negotiations, including negotiations facilitated first by Judge Gorenstein and later by Antonio Piazza, an experienced and highly respected mediator.

The significant benefit the proposed Settlement will provide to the Class, if approved, is particularly noteworthy when considered against the risk that the Class might recover less (or nothing) if the action were litigated through dispositive motions, trial, and any appeals that would follow, a process that could last many months, or even years. For example, although Plaintiffs allege that Defendants' merger gave them sufficient market power to raise and sustain

prices above a competitive level, Defendants vigorously dispute, among other issues, that there is any identifiable market, that the prices are supracompetitive, or that there are any barriers to entry into the alleged market.

Plaintiffs also face risks in establishing damages. Defendants have vigorously contested the conclusions of Plaintiffs' damages expert in quantifying the alleged overcharge, and argue that relevant benchmarks show that the prices of Defendants' post-joint-venture hop-on, hop-off tours have been below the prices that the benchmarks indicate would have existed without the joint venture. Plaintiffs dispute this argument.

The proposed Settlement, if approved, will enable the Class to recover a very significant sum while eliminating the risk that Defendants would prevail at class certification, summary judgment, trial, or in subsequent appeals. At the final approval hearing (the "Settlement Hearing"), the Court will have before it more extensive motion papers submitted in support of the Settlement, and will be asked to make a determination as to whether the Settlement is fair, reasonable, and adequate under all of the circumstances surrounding the action. At this time, Plaintiffs request only that the Court grant preliminary approval of the Settlement so that notice of the Settlement may be disseminated to the Class and the Settlement Hearing may be scheduled.

Plaintiffs respectfully request that this Court enter the proposed Order Preliminarily Approving Class Action Settlement ("Preliminary Approval Order"), which has been agreed upon by the Parties, a copy of which is attached as Exhibit 1 to the Notice of Motion. The Preliminary Approval Order will: (i) preliminarily approve the Settlement on the terms set forth in the Stipulation; (ii) certify the Class, appoint Plaintiffs as class representatives and their counsel, Susman Godfrey LLP, as Class Counsel, for purposes of the Settlement only; (iii)

approve the form and manner of giving notice to the Class; and (iv) set a date for the Settlement Hearing at which the Court will consider final approval of the Settlement, final approval of a distribution plan, and Counsel's application for attorneys' fees, expenses and incentive awards to Plaintiffs.

II. BACKGROUND

A. The Litigation

On December 11, 2012, the United States of America and State of New York filed an antitrust complaint against Defendants in this Court. *See United States v. Twin America, LLC*, No. 12-CV-8989. Since then, individual plaintiffs including Ms. Bhandari and Ms. Nobel have filed five different class action complaints against defendants. *See Bhandari v. Twin America*, No. 13-cv-0711; *Hanson vs. Twin America*, No. 12-cv-9066; *Nobel v. Twin America*, No. 12-cv-9128; *Hinton vs. Twin America*, No. 12-cv-9175; and *Mercado v. Twin America*, No. 13-cv-1973. In its Order of April 5, 2013 (Dkt. # 36), the Court appointed Susman Godfrey LLP to serve as Interim Co-Lead Counsel for the plaintiff Class. In its Order of April 24, 2013 (Dkt. # 38), this Court consolidated the foregoing class actions under Docket No. 13-cv-0711 for all purposes, including trial.

The current consolidated complaint (Dkt. # 83) alleges that Defendants engaged in a *per se* unlawful conspiracy to fix prices above the market rate, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The complaint also alleges monopolization of the relevant market in violation of Section 2 of the Sherman Act, *id*. § 2, and an illegal merger in violation of Section 7 of the Clayton Act, *id.* § 18. Between May 2013 and February 2014, Plaintiffs served a total of seven sets of document requests and one set of interrogatories on Defendants. Between July 2013 and February 2014, Plaintiffs served a total of 19 third-party subpoenas, calling for both documents and deposition testimony. Plaintiffs received and reviewed over 500,000 documents

from these entities and several gigabytes of transactional data. *See* Declaration of William Christopher Carmody In Support of Motion for Preliminary Approval of Settlement ("Carmody Decl."), ¶ 8.

On December 6, 2013, Plaintiffs commenced merits depositions. To date, Plaintiffs have taken or defended 29 depositions, many in cooperation with the United States Department of Justice and the New York Attorney General. These included defenses of Plaintiffs' proposed class representatives, economic expert, and declarant regarding class notice and administration, as well as depositions of Defendants' employees, officers, and corporate designees, and multiple third parties subpoenaed by Plaintiffs, Defendants, and the Government Entities. *Id.*

On November 4, 2013, Plaintiffs filed a motion for class certification, which was supported by a declaration from an economic expert and a declaration on the feasibility of class notice and administration. (Dkt. # 70-77). Defendants opposed that motion on January 10, 2014, including a declaration of their own expert disputing Plaintiffs' conclusions concerning class certification, and Plaintiffs filed their reply brief on February 26, 2014. (Dkt. # 97-98). Fact discovery was scheduled to end on April 28, 2014.

B. Settlement Negotiations

Settlement discussions began last year with several informal discussions between the parties. *See* Carmody Decl. ¶¶ 5-6. On December 12, 2013, Judge Gorenstein held a Settlement Conference. *Id.* ¶ 6; Dkt. # 88. Prior to that conference, the parties submitted letters to the Court outlining their positions on the merits and for settlement. The parties exchanged demands and offers both before and during that conference.

After engaging in further direct discussions, the parties hired a private mediator, Antonio Piazza, to facilitate further discussions. *Id.* ¶ 4. Mr. Piazza is the principal of Mediated Negotiations, and has been involved with the settlement of over 4,000 cases since 1981,

including numerous consumer class actions filed in federal court. *See* Declaration of Antonio Piazza In Support of Motion for Preliminary Approval of Settlement ("Piazza Decl.") ¶ 2. Mr. Piazza is one of the most highly respected and competent mediators in the country. On March 12, 2014, Mr. Piazza conducted a mediation between the parties in San Francisco. *Id.* ¶ 3. In advance of the mediation, counsel for the parties submitted detailed mediation statements setting forth their positions on the key liability and damages issues. *Id.* ¶ 4. After a spirited, full-day mediation, the parties reached an agreement, which was memorialized in a written term sheet that contained the terms of this Settlement. The mediator effectively assisted the parties in coming to a fair and equitable resolution despite the rival positions taken by opposing counsel and their clients. Mr. Piazza believes that the proposed $19 million settlement is fair and reasonable, and is a highly successful result for members of the proposed Class. *Id.* ¶ 10.

C. The Settlement Agreement

1. Consideration and Settlement Class

Defendants have agreed to pay $19,000,000 in exchange for dismissals with prejudice and a release of claims. Carmody Decl., Ex. 1. No unclaimed funds will revert to Defendants; instead, any residual funds will be given to the Government Entities. *Id.* ¶ 19.

The Settlement defines the settlement Class as:

> [A]ll persons who, or entities that, purchased Defendants' "hop-on, hop-off" bus tours in New York City from February 1, 2009, until the date of the Preliminary Approval Order (the "Class Period"). Excluded from the Class are Defendants, their present and former parents, subsidiaries, affiliates, and employees.

Id., Ex. 1 at ¶ 1(e). Under the terms of the Settlement, Defendants stipulate for purposes of settlement only that this Class should be certified under Rule 23(b)(3), and that Susman Godfrey LLP should be appointed as class counsel pursuant to Rule 23(g). *Id.* ¶ 4.

2. Release and Opt-Outs

Upon final approval of the Settlement, Plaintiffs and Class Members will release all claims they have against Defendants that relate to the claims asserted in the lawsuit and "arise out of, are based upon or are related to the allegations, transactions, facts (including allegations of anticompetitive conduct with respect to any acquisition of Defendants' hop-on, hop-off bus tours by Class Members during the Class Period), matters or occurrences, representations or omissions involved, set forth, or referred to in the First Amended Consolidated Class Action Complaint in the Action." *Id.* Ex. 1 ¶ (cc). Specifically excluded from the definition of "Class Member" are those who "timely and validly excluded themselves from the Class in accordance with the procedure to be approved by the Court." *Id.* ¶ 1(f).

3. Costs, Fees and Distribution Plan

The Settlement Agreement provides that a portion of the Settlement Amount may be used for Notice and Administration costs of the Settlement. *Id.* ¶ 16. Plaintiffs intend to use this portion of the Settlement Amount for the distribution and administration of notice and a separate claim form, and include such costs related to: (1) creation and distribution of notice to potential Class Members, (2) publication of notice and/or claim forms to potential Class Members, (3) designing, mailing of, and administration of a separate claim form to potential Class Members, and (4) administration of the notice and allocation process for this case.

The Settlement Agreement also provides that "Class Plaintiffs' Counsel may, at their discretion and election, choose to submit an application or applications to the Court (the 'Fee and Expense Application') for distributions to them from the Gross Settlement Fund, for an award of attorneys' fees or reimbursement of expenses incurred in connection with prosecuting the Action, and for an award of an incentive compensation to the Class Plaintiffs, not to exceed $20,000 for each Class Plaintiff, for their efforts in prosecuting this case." *Id.* Class Counsel

will do so at least 20 days before the objection deadline for Class Members in connection with this Settlement. Any Fee and Expense Award will be paid from the Gross Settlement Fund. *Id.* ¶¶ 16, 22.

The Distribution Plan, as set forth in the notice papers, will allocate up to $20 as a recovery for each class member's qualifying ticket purchase, reduced on a *pro rata* basis if the submitted claims exceed the net settlement fund. *See* Long Form Notice, Wheatman Decl., Ex. 6, Question 9.

III. ARGUMENT

A. The Proposed Settlement Warrants Preliminary Approval

1. Legal Standard Governing Preliminary Approval

The settlement of complex litigation is strongly favored. The Second Circuit is "mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) (internal quotation marks and citation omitted); *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.").

The approval of a proposed class action settlement is a matter of discretion for the trial court. *See Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072, 1079 (2d Cir. 1998). "In exercising this discretion, courts should give proper deference to the private consensual decision of the parties." *Clark v. Ecolab, Inc.,* Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (internal quotation marks omitted). "In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation . . . ." *Id.* (internal quotation marks omitted).

Preliminary approval, which is what Plaintiffs seek here, is the first step in the settlement process. Preliminary approval "simply allows notice to issue to the class and for Class Members to object to or opt-out of the settlement." *Clem v. Keybank*, No. 13 Civ. 789, 2014 WL 1265909, at *1 (S.D.N.Y. Mar. 27, 2014). "After the notice period, the Court will be able to evaluate the settlement with the benefit of the Class Members' input." *Id.*

"Preliminary approval of a settlement agreement requires only an 'initial evaluation' of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties." *Id.* (quoting *Clark*, 2009 WL 6615729, at *3). To grant preliminary approval, "the court need only find that there is 'probable cause to submit the [settlement] proposal to class members and hold a full-scale hearing as to its fairness.'" *Id.* (quoting *In re Traffic Executive Ass'n,* 627 F.2d 631, 634 (2d Cir. 1980)). If, after a preliminary evaluation of the proposed settlement, the court finds that it "appears to fall within the range of possible approval," the court should order that the class members receive notice of the settlement. *Id.* (quoting *Clark*, 2009 WL 6615729, at *3 (citing Herbert & Conte, *Newberg on Class Actions* (4th ed. 2002) ("*Newberg*") § 11.25)); *see Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 34 (E.D.N.Y. 2006) ("[A] full fairness analysis is unnecessary at this stage; preliminary approval is appropriate where a proposed settlement is merely within the range of possible approval.").

In conducting a preliminary approval inquiry, a court considers both the negotiating process for the settlement (procedural fairness) and the settlement's substantive terms (substantive fairness). *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (citations omitted). Preliminary approval is granted so long as the settlement was arrived at through a fair process and the terms of the settlement are within the "range of

possible approval." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (emphasis added) ("*NASDAQ II*"); *see In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) ("Where the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." (quoting *NASDAQ II*, 176 F.R.D. at 102)).

2. The Proposed Settlement is Procedurally Fair

The negotiations that resulted in the proposed settlement were fairly conducted by highly qualified counsel who endeavored to obtain the best possible result for their clients and the Settlement Class. *See* Carmody Decl. ¶¶ 5-9. When counsel for the parties engage in diligent arm's-length negotiations, a settlement is generally entitled to a presumption of fairness. *See In re NASDAQ Mkt. Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) ("*NASDAQ III*"). Moreover, when a settlement is the product of negotiations between experienced and informed counsel, courts tend to give counsel's opinion considerable weight because they are closest to the facts and risks associated with continuing the litigation. *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997).

The Court previously found that Interim Lead Counsel have the requisite qualifications and experience to lead this litigation on behalf the proposed Settlement Class. (Dkt. # 36). The terms of the Settlement Agreement were negotiated at arm's length through extensive meetings and discussions over the course of several months, and included two mediation sessions—first with Judge Gorenstein and then with a highly experienced private mediator. *See* Carmody Decl., ¶¶ 4-6; Piazza Decl. ¶ 3. During this period of time, there were numerous telephone calls and email exchanges regarding the settlement terms. *See* Carmody Decl. ¶ 6. The discussions were

meaningful and informed as they occurred only after the parties had reviewed hundreds of thousands of pages of documents, conducted dozens of depositions, and briefed class certification. Aided by this experience and two rounds of mediation briefing, Interim Lead Counsel analyzed all the contested legal and factual issues posed by the litigation to advocate for a fair settlement that serves the best interests of the Settlement Class. *See id*. ¶¶ 7-8. It is the opinion of Interim Lead Counsel that this settlement is fair and reasonable. *Id.* ¶ 10. Two experienced mediators assisted the parties with the settlement negotiations and presided over two mediations: "This reinforces the non-collusive nature of the settlement." *Clem*, 2014 WL 1265909, at *3 (citing (*Capsolas v. Pasta Res. Inc.,* No. 10 Civ. 5595, 2012 WL 1656920, at *1 (S.D.N.Y. May 9, 2012)).

3. The Proposed Settlement is Substantively Fair

A proposed settlement is substantively fair, for preliminary approval purposes, if it falls within the "range of possible approval." *Reade-Alvarez*, 237 F.R.D. at 34. The settlement here contains a substantial cash payment of $19 million, which is an excellent result for the Settlement Class.

In order to determine whether a proposed class action settlement is substantively fair, reasonable and adequate for purposes of **final approval**, courts in this Circuit may consider the *Grinell* factors:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

See City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). "[N]ot every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 456 (internal quotation marks and citation omitted). In determining whether a settlement falls within the "range of possible approval," for purposes of preliminary approval, courts rarely assess the *Grinell* factors, but rather focus on the procedural fairness of the settlement. *See, e.g.*, *Clem*, 2014 WL 1265909, at *2-4.

Regarding the first factor, "antitrust cases, by their nature, are highly complex." *Wal-Mart Stores, Inc.*, 396 F.3d at 122. In the absence of this Settlement, the litigation of this complex case would likely have consumed many more years of Court resources. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[t]he potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class"). The Settlement allows the parties and the Court system to avoid the significant expenses of continued litigation. The costs of further expert reports and summary judgment motion practice as well as trial and appeals would have been substantial. The proposed Settlement eliminates the foregoing complexities and substantial expenses. *See In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. at 210 ("[I]t may be preferable to take the bird in the hand instead of the prospective flock in the bush." (internal quotation marks omitted)).

The second factor is premature. The third factor is designed to "assure the Court that counsel for the plaintiffs have weighed their position based on a full consideration of the possibilities facing them." *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. at 458. As detailed above, extensive fact discovery and investigation had been completed before the proposed Settlement was reached.

Regarding factors 4, 5 and 6, the "the complexity of Plaintiffs' claims *ipso facto* creates uncertainty." *Currency Conversion*, 263 F.R.D. at 123. Continuing this complex litigation would entail a lengthy and highly expensive legal battle involving complex legal and factual issues relating to both liability and damages. For example, although Plaintiffs allege that Defendants' merger gave them sufficient market power to raise and sustain prices above a competitive level, Defendants vigorously dispute, among other issues, that there is any identifiable market, that the prices are supracompetitive, and that there are any barriers to entry into the alleged market. Plaintiffs also faced risks in establishing damages. Defendants have vigorously contested the conclusions of Plaintiffs' damages expert in quantifying the alleged overcharge, and argue that relevant benchmarks show that the prices of the relevant tours have been below the prices that the benchmarks indicate would have existed without the joint venture, and that Plaintiffs' damages expert's model returns false positives. *See, e.g.*, Defendants' Opposition to Plaintiffs' Motion for Class Certification, Dkt. # 90-1, at 25-26. Plaintiffs dispute these arguments.

Regarding factor 7, even if Defendants could withstand a greater judgment, this does not undermine the fairness of the Settlement even for final approval. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 460 ("[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate.")

Regarding factors 8 and 9, a $19 million payment is a significant recovery in light of the total projected damages and the risks of litigation. Illustrative modeling performed for class certification by Plaintiffs' economic expert, Dr. Hal Singer, estimated pre-trebling damages of approximately $29 million for a class period ending shortly before the submission of class certification expert reports (Dkt. # 74, Singer Decl. ¶ 46 & tab. 5); the settlement amount of $19

million thus represents a substantial recovery, certainly well within the permitted range even on final approval. *See Grinnell Corp*., 495 F.2d at 455 & n. 2 (in theory, even a recovery of only a fraction of one percent of the overall damages could be a reasonable and fair settlement). The Settlement is especially fair in the context of this case: the Government Actions against Defendants are ongoing, and the Government Entities may obtain further relief in that case. In addition, any unclaimed funds will not revert to Defendants, but rather will be given to the Government Entities.

For the foregoing reasons, the Settlement Agreement is well within the possible range of final approval as a "fair, reasonable and adequate" resolution of Plaintiffs' claims. *See id.* at 463. The proposed Settlement, if approved, will enable the Class to recover a very significant sum without running the risk that Defendants would prevail at class certification, summary judgment, trial, or in subsequent appeals. Given this uncertainty, "[a] very large bird in the hand of this litigation is surely worth more than whatever birds are lurking in the bushes." *In re Chambers Dev. Sec. Litig*., 912 F. Supp. 822, 838 (W.D. Pa. 1995).

B. The Proposed Settlement Class Should Be Certified

The Second Circuit has long recognized the propriety of certifying a class solely for purposes of settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 451. Certification of a settlement class "has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *Prudential*, 163 F.R.D. at 205. Conditional certification for settlement purposes only is appropriate to facilitate notice of a preliminarily approved settlement. *E.g.*, *DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 939 (10th Cir. 2005) (describing simultaneous preliminary settlement

approval and conditional class certification); *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 815 (6th Cir. 2004) (same).

A court may grant certification where, as here, the proposed Settlement Class satisfies the four requirements of Rule 23(a) and at least one subsection of Rule 23(b). *See Weinberger*, 698 F.2d at 73. However, the manageability concerns of Rule 23(b)(3) are not at issue. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 593 (1997) ("Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested . . . ."). The parties have fully briefed Plaintiffs' motion for class certification, and Plaintiffs incorporate their briefing herein. Dkt. # 71-77, 97. In support of preliminary approval, Plaintiffs state the following:

1. The Settlement Class Meets the Requirements of Rule 23(a)

a. Ascertainability

Although not mentioned in Rule 23, many courts have held that a certifiable class must be ascertainable—that is, the class's membership must be "defined by identifiable objective criteria." *Engel v. Scully & Scully, Inc.*, 279 F.R.D. 117, 128 (S.D.N.Y. 2011). Here, Plaintiffs' proposed Settlement Class is:

> [A]ll persons who, or entities that, purchased Defendants' "hop-on, hop-off" bus tours in New York City from February 1, 2009, until the date of the Preliminary Approval Order (the "Class Period"). Excluded from the Class are Defendants, their present and former parents, subsidiaries, affiliates, and employees.

Carmody Decl., Ex. 1 at ¶ 1(e). This is an objective definition—it is clear who is in the Class and who is not: either a Class Member did or did not purchase one of Defendants' hop-on, hop-off New York City bus tours during the relevant time period.

b. Numerosity

Rule 23(a) requires that a class be so numerous that joinder of all members would be "impracticable." Fed. R. Civ. P. 23(a)(1). The Second Circuit will generally "find a class sufficiently numerous when it comprises forty or more members." *In re Indep. Energy Holdings*, 210 F.R.D. 476, 479 (S.D.N.Y. 2002); *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). Plaintiffs' expert Dr. Hal Singer estimated that there were approximately 3.9 million Class Members as of the class certification briefing (Dkt. # 74, Singer Decl. ¶ 48 n. 22), a number that will increase as the proposed class period extends through the date of the preliminary approval order.

c. Commonality

Commonality requires the identification of a common contention, one "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The proof of the elements of Plaintiffs' antitrust claims will require the resolution of many common questions, as discussed in Plaintiffs' briefing in support of class certification. Dkt. # 72 at pp. 12-19; Dkt. # 97 at pp. 9-15. For example, Plaintiffs allege *per se* horizontal price-fixing, and in cases of *per se* illegal horizontal conspiracies, courts "have consistently held that the very nature of a conspiracy in an antitrust action compels a finding that questions of common questions of fact and law exist." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486, 2006 WL 1530166, at *3 (N.D.Cal. June 5, 2006) (*quoting In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 351 (N.D.Cal. 2005)); *see Newberg* § 3:10 at 278 (in an "antitrust action on behalf of purchasers who have bought the defendants' products at prices that have been maintained above competitive levels by unlawful conduct, the courts have held that the existence of an alleged

conspiracy or monopoly is a common issue that will satisfy the Rule 23(a)(2) prerequisite"). There are also common issues of law and fact relating to market share and barriers to entry, causation and injury, and damages. *See* Dkt. # 72 at pp. 15-19.

d. Typicality

Third, Rule 23(a) requires that claims of Class Plaintiffs be typical of the claims of other Class Members. *See* Fed. R. Civ. P. 23(a)(3). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux*, 987 F.2d at 936-37. Both Class Plaintiffs present claims that are typical of the class: they alleged that they suffered an injury by paying an overcharge for Defendants' hop-on, hop-off New York City bus tours, just as the rest of the class allegedly did. *See* Dkt. # 72 at pp. 19-20.

e. Adequacy

Finally, Rule 23(a) requires that the representative parties "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(a)(4). As the Second Circuit has noted, "adequacy of representation is measured by two standards: "First, class counsel must be 'qualified, experienced and generally able' to conduct the litigation. Second, the class members must not have interests that are 'antagonistic' to one another." *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *see also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 142 (2d Cir. 2001).

Both requirements are satisfied here for the Settlement Class. The Court previously found that Interim Lead Counsel have the requisite qualifications and experience to lead this litigation on behalf the proposed Class, and Plaintiffs' counsel prosecuted the case vigorously, and conducted a thorough examination of the merits before reaching this hard-fought, arm's-

length Settlement. (Dkt. # 36). Moreover, in reaching the Settlement Agreement, the interests of all Class Members were adequately protected and there are no conflicts between or among the named Plaintiffs and other Class Members. All Class Members share an overriding interest in obtaining the largest monetary recovery possible from Defendants. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 453 (certifying settlement class and finding that "[t]here is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery.").

2. The Settlement Class Meets the Requirements of Rule 23(b)(3)

Certification under Rule 23(b)(3) requires a showing that "questions of law or fact predominate over any questions affecting only individual members," and the class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3))—two requirements referred to as "predominance" and "superiority." *Amchem Prods.*, 521 U.S. at 615. However, the manageability concerns of Rule 23(b)(3) are not at issue in settlement classes. *Id.* at 593 ("Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested . . . .").

a. Common Questions of Law and Fact Predominate

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623-24. Predominance is clearly met here given the number of common issues described above and in Plaintiffs' briefing in support of class certification. *See id.* at 625 ("Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws."); *see also Newberg* § 18.26 ("In antitrust suits, the issues of conspiracy, monopolization, and conspiracy to monopolize have been viewed as central issues which satisfy the predominance requirement."). Not only will common liability issues predominate, but also Dr. Singer's Declaration in support of class certification presented a

sample damages methodology to calculate damages on a classwide basis. Singer Decl. ¶¶ 31-33; *see In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 88 (D. Conn. 2009) ("[O]ne way of demonstrating predominance is to show that there is a common method for proving that the class plaintiffs paid higher actual prices than in the but-for world, such as using an econometric regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period . . . ."). Even if there were any individual issues, the common liability and damages issues would still predominate. *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 518 (S.D.N.Y. 1996) ("*NASDAQ I*") ("[E]xistence of a conspiracy is the predominant issue in price fixing cases, warranting certification of the class even where significant individual issues are present.").

b. A Class Action is Superior

The Court must balance, in terms of fairness and efficiency, the advantages of class action treatment against alternative available methods of adjudication. *In re Nigeria Charter Flights Contract Litig.*, 233 F.R.D. 297, 301 (E.D.N.Y. 2006); *see* Fed. R. Civ. P. 23(b)(3) (listing four considerations relevant to this determination). The Court needs to consider "the efficient resolution of the claims or liabilities of many individuals in a single action, as well as the elimination of repetitious litigation and possibly inconsistent adjudications." *D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. 451, 458 (E.D.N.Y. 1996). Here, any interests of Class Members in individually controlling the prosecution of separate claims are outweighed by the efficiency of the class mechanism. *See In re Buspirone Patent Litig.,* 210 F.R.D. at 58 ("The numerous common issues of fact and law and the difficulty of numerous individual lawsuits indicates that a class action is superior to other methods for a fair and efficient adjudication of the controversy."); *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d at 249 (certifying a class because "proceeding forward as a class action for liability is superior and would avoid duplication,

unnecessary costs and a wasting of judicial resources"). Further, many of Defendants' arguments on superiority related to the alleged manageability concerns of this litigation—not a factor to consider in settlement classes. *Amchem*, 521 U.S. at 593 ("Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested . . . .").

3. Proposed Class Counsel Satisfy Rule 23(g)

Rule 23(g) governs appointment of class counsel. Not only has class counsel vigorously prosecuted this case, class counsel also spent tireless hours achieving this highly favorable Settlement for the Class. Carmody Decl. ¶ 8. Susman Godfrey LLP has significant experience in antitrust litigation and class actions, including settlements thereof, which makes the firm particularly well-suited to serve as Settlement class counsel. *Id.* ¶ 2.

C. Notice to the Class

Rule 23(e)(1) states that, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." For a class certified under Rule 23(b)(3), the notice must meet the additional requirements in Rule 23(c)(2)(B): it must specify (i) the nature of the action, (ii) the definition of the class certified, (iii) the class claims, issues, or defenses, (iv) that a class member may enter an appearance through an attorney if the member so desires, (v) that the court will exclude from the class any member that requests exclusion, (vi) the time and manner for requesting exclusion, and (vii) the binding effect of a judgment on class members. Fed. R. Civ. P. 23(c)(2)(B). The standard for adequacy of a settlement notice ultimately is one of reasonableness. As the Second Circuit has held, "[t]here are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that

are open to them in connection with the proceedings." *Wal-Mart Stores, Inc.*, 396 F.3d at 113-14 (internal quotations and citations omitted).

The form of notice is "adequate if it may be understood by the average class member." *Newberg* § 11.53. Notice to the class must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem*, 521 at 617. Publication notice is an acceptable method of providing notice where the identity of specific class members is not reasonably available. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (citing Manual § 21.311).

As outlined in the attached declaration of Dr. Shannon Wheatman, who has served as a class notice expert in many state and federal class actions, including consumer class actions with millions of purchasers, the notices prepared in this case will effectively communicate the required information to Class Members. Wheatman Decl. ¶¶ 41-45. (Dr. Wheatman was involved in developing illustrative model notices for the Federal Judicial Center, making her particularly well-suited as an expert to develop the notices for use in this matter. *Id.* ¶ 8.) The notices, which are attached as exhibits to Dr. Wheatman's declaration, communicate in plain language the essential elements of the Settlement and the options available to Class Members in connection with the settlement. *Id.* Exs. 3-6.

Dr. Wheatman also opines that the notice plan proposed in this case satisfies the requirements of due process and Rule 23 in providing the best notice practicable to Class Members. *Id.* ¶¶ 2, 14, 20, 46. The notice plan has several elements: (1) direct notice by mail or email to all Class Members who can be identified with reasonable effort (*id.* ¶¶ 12, 21-23); (2) print media publication notice, including publications in *Parade*, *USA Weekend*, *People*, and

Time (*id.* ¶¶ 24-29); (3) internet publication notice with an internet advertising campaign, both domestically and internationally, using several internet ad networks as well as banner ads on Facebook (*id.* ¶¶ 30-33); (4) earned media with a globally distributed press release, translated into foreign languages (*id.* ¶¶ 34-35); and (5) a settlement website, toll-free number, and mailing address for Class Members to obtain more information (*id.* ¶¶ 35-37). Dr. Wheatman states that the notice plan will reach approximately 80% of a target audience of U.S. residents with the demographic characteristics of persons who engaged in sightseeing in New York (*id.* ¶¶ 17, 40), and is the best notice practicable under the circumstances of this case (*id*. ¶¶ 2, 14, 20, 46).

Notice plans with a mix of direct and publication notice following similar procedures for reaching members of a class located both in the U.S. and abroad have been approved by numerous district courts in this Circuit and elsewhere. *See, e.g., In re Vitamin C Antitrust Litig.*, No. 06-MD-1738, 2012 WL 5289514, at *2 (E.D.N.Y. Oct. 23, 2012); *Jermyn v. Best Buy Stores, L.P.*, No. 08 Civ 00214, 2010 WL 5187746, at *4-5 (S.D.N.Y. Dec. 6, 2010); *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 107-09 (S.D.N.Y. 2007); *In re Imprelis Herbicide Marketing, Sales Practices & Prods. Liab. Litig.*, 296 F.R.D. 351, 363 (E.D. Pa. 2013); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080.

D. The Proposed Distribution Plan is Reasonable

A distribution plan is fair and reasonable as long as it has a "reasonable, rational basis." *Maley v. Del Global Techs. Corp*., 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002); *accord In re Initial Pub. Offerings Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). Because it is impossible in a large class to calculate each member's claim with mathematical precision, courts recognize that "the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *In re PaineWebber Ltd. P'ships Litig*., 171 F.R.D. 104,

133 (S.D.N.Y. 1997). A distribution plan that compensates class members based on the type and extent of their injuries is generally considered reasonable. Here, the distribution will be up to $20 for each class member's ticket, on a *pro rata* basis, with no class members being favored over others. *See* Long Form Notice, Wheatman Decl., Ex. 6, Question 9. This represents a fair estimation of the damages suffered by each class member, including treble damages. The illustrative econometric modeling prepared by plaintiffs' expert, Dr. Hal Singer, analyzed the first round of price increases around the time of the joint venture, and Dr. Singer found an average overcharge of around $5 per ticket. Singer Decl. ¶¶ 18-20, 27 & tab. 1. Dr. Singer noted that defendants implemented a second round of price increases in early 2013, which was approximately the same magnitude of the first (that is, another $5 per ticket increase). *Id.* ¶ 20 n. 6. A recovery of up to $20 per class member's ticket is therefore a fair result given the average treble actual damages allegedly suffered by each class member.

This type of distribution has frequently been determined to be fair, adequate, and reasonable. *See In re Vitamins Antitrust Litig.*, 2000 WL 1737867 at *6 (D.D.C. Mar. 31, 2000) ("Settlement distributions, such as this one, that apportions funds according to the relative amount of damages suffered by class members, have repeatedly been deemed fair and reasonable."); *In re Lloyds' Am. Trust Fund Litig.*, 2002 WL 31663577 at *19 (S.D.N.Y. Nov. 26, 2002) ("*pro rata* allocations provided in the Stipulation are not only reasonable and rational, but appear to the fairest method of allocating the settlement benefits"); *In re Paine Webber P'ship Litig.*, 171 F.R.D. 104, 135 (S.D.N.Y. 1997) ("pro rata distribution of the Settlement on the basis of Recognized Loss will provide a straightforward and equitable nexus for allocation and will avoid a costly, speculative and bootless comparison of the merits of the Class Members' claims").

The proposed distribution plan is recommended by Lead Counsel, which finds it to be fair and reasonable, especially in light of counsel's detailed assessments of the strengths and weaknesses of the claims asserted, the applicable damages, and the likelihood of recovery. Carmody Decl. ¶ 11. Lead Counsel's conclusion that the distribution plan is fair and reasonable is entitled to great weight. *See In re Am. Bank Note Holographics, Inc.* 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001) ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel"; approving allocation plan and according counsel's opinion "considerable weight"). Accordingly, the distribution plan is fair and reasonable, and should be preliminarily approved.

IV. CONCLUSION

For the foregoing reasons, Class Plaintiffs respectfully request that the Court (i) preliminarily approve the proposed Settlement as within the range of fairness, reasonableness and adequacy; (ii) certify the Class and Lead Plaintiffs as Class representatives and appoint Susman Godfrey LLP as Class Counsel for purposes of the Settlement only; (iii) approve the proposed form and manner of notice to putative Class Members; and (iv) schedule a date and time for the Settlement Hearing to consider final approval of the Settlement and related matters. The proposed Preliminary Approval Order is attached to Notice of Motion as Exhibit 1.

DATED: May 20, 2014

Respectfully submitted,

/s/ William Christopher Carmody

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CERTIFICATE OF SERVICE

On May 20, 2014, I caused copies of the Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Settlement with Defendants to be served on the following counsel via electronic mail:

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DATED: May 20, 2014
New York, New York

/s/ Mandi Bruns
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE NYC BUS TOUR ANTITRUST LITIGATION	Master Case File No. 13-CV-0711 (ALC)(GWG) **RELATED TO ALL CASES** **ECF Case** **JURY TRIAL DEMANDED**

DECLARATION OF MEDIATOR ANTONIO PIAZZA
IN SUPPORT OF PRELIMINARY APPROVAL OF SETTLEMENT

Antonio Piazza declares as follows:

1. I submit this declaration in support of preliminary approval of the proposed class action settlement between named plaintiffs Natasha Bhandari and Tracey L. Nobel ("Class Plaintiffs"), for themselves and on behalf of the proposed Class, and defendants Twin America, LLC, Coach USA, Inc., International Bus Services, Inc., CitySights LLC and City Sights Twin, LLC ("Defendants").
2. I am the principal of Mediated Negotiations. In serving as a mediator since 1981, I have been involved with the settlement of over 4,000 cases, including numerous consumer class actions filed in federal court. Individual settlements have exceeded one billion dollars.
3. I conducted a mediation between the parties on March 12, 2014 that produced the settlement now before the Court for preliminary approval. The discussions between the parties were vigorous, the negotiations were conducted at arm's length, and the settlement was reached in good faith. Based on my thirty-three years of experience as a

mediator, and my personal discussions with the parties, I believe that the proposed $19 million settlement is fair and reasonable. Without waiving the mediation privilege, I provide the following information in support of my view.

Mediation Process and Result

4. In advance of the mediation, counsel for the parties submitted detailed mediation statements setting forth their positions on the key liability and damages issues.
5. The mediation opened with each party giving presentations regarding the strengths and weaknesses of the case, and the risks of continuing the litigation. Subsequently, I met separately with counsel from each party to discuss the goals for settlement, and to discern areas of common ground. During these individual sessions, I engaged in candid discussions with counsel from each party concerning the risks associated with their respective positions.
6. Both parties were represented by highly experienced counsel who fought vigorously for their respective clients. My individual discussions with counsel confirmed my initial assessment of their mutual commitment to pursuing the best outcomes for their clients. It was clear to me that Class Plaintiffs' counsel and Defendants' counsel were both prepared to try this case.
7. After a grueling day of negotiation, the parties reached the proposed settlement and an outline of its key terms under my supervision. The $19 million settlement represents the total fund, from which the court may award reasonable attorneys' fees and costs. Defendants have agreed not to take any position with respect to these fees.
8. In my opinion, the $19 million fund is a fair and reasonable settlement, given the risks facing the Class Plaintiffs in this case and the Defendants' desire to avoid further expense

and inconvenience of protracted litigation and unwavering denial of any liability in this case. Importantly, the final agreement precludes any monies from reverting to the Defendants in the event that monies go unclaimed, and instead requires any unclaimed funds to be distributed to the government.

9. As a result, the $19 million settlement in this consumer class action is a beneficial outcome achieved under a substantial risk of loss.

Conclusion

10. Based on my experience, the proposed $19 million settlement is fair and reasonable, and it is a successful result for members of the proposed Class. This figure was reached through arm's-length negotiation conducted under my supervision. I believe that the proposed settlement is eminently reasonable in light of the considerable risks faced by Class Plaintiffs in obtaining class certification, establishing liability, and securing adequate damages for the members of the proposed Class. I therefore strongly support Class Plaintiffs' motion for preliminary settlement approval.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: May __, 2014

Antonio Piazza

Carter, a.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE NYC BUS TOUR ANTITRUST LITIGATION	Master Case File No. 13-CV-0711 (ALC)(GWG) **RELATED TO ALL CASES** **ECF Case** **JURY TRIAL DEMANDED**

~~[PROPOSED]~~ ORDER PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT

WHEREAS, Class Plaintiffs' Counsel (as defined in the Settlement Agreement, dated April 30, 2014 ("Agreement")) have applied for an order preliminarily approving the terms and conditions of the Settlement with defendants Twin America, LLC, Coach USA, Inc., International Bus Services, Inc., CitySights LLC and City Sights Twin, LLC ("Defendants"), as set forth in the Agreement, together with the Exhibits annexed thereto;

WHEREAS, the Settlement requires, among other things, that all Released Claims against Releasees be settled and compromised;

WHEREAS, this application is uncontested by Defendants; and

WHEREAS, this Court having considered the Agreement and Exhibits annexed thereto, Class Plaintiffs' Motion for Preliminary Approval of the Settlement and all papers filed in support of such motion;

NOW, THEREFORE, pursuant to the Federal Rule of Civil Procedure 23, it is hereby ORDERED that:

1. The capitalized terms used herein shall have the meanings set forth in the Agreement.

2. The Court preliminarily approves the Settlement as set forth in the Agreement, including the releases contained therein, as being fair, reasonable and adequate to the Class, subject to the right of any Class Member to challenge the fairness, reasonableness or adequacy of the Agreement and to show cause, if any exists, why a final judgment dismissing the Action against Defendants, and ordering the release of the Released Claims against Releasees, should not be entered after due and adequate notice to the Class as set forth in the Agreement and after a hearing on final approval.

3. The Court finds that the Agreement was entered into at arm's length by highly experienced counsel and is sufficiently within the range of reasonableness that notice of the Agreement should be given as provided in the Agreement.

4. The Court finds that the proposed distribution plan is sufficiently fair and reasonable that notice of the distribution plan should be given as provided in the Notice.

5. The Court conditionally certifies the Class (set forth herein) for purposes of the Settlement as to Defendants:

> All persons who, or entities that, purchased Defendants' "hop-on, hop-off" bus tours in New York City from February 1, 2009, until the date of the Preliminary Approval Order (the "Class Period"). Excluded from the Class are Defendants, their present and former parents, subsidiaries, affiliates, and employees.

6. The Court finds that the certification of the Class for purposes of the Settlement as to Defendants is warranted in light of the Settlement because: (i) the Class is so numerous that joinder is impracticable; (ii) Class Plaintiffs' claims present common issues that are typical of the Class; (iii) Class Plaintiffs and Class Plaintiffs' Counsel will fairly and adequately represent the

Class; and (iv) common issues predominate over any individual issues affecting the Class Members. The Court further finds that Class Plaintiffs' interests are aligned with the interests of all other Class Members. The Court also finds that resolution of this action on a class basis for purposes of the Settlement as to Defendants is superior to other means of resolution.

7. The Court hereby appoints Class Plaintiffs' Counsel as counsel to the Class for purposes of the Settlement, having determined that the requirements of Rule 23(g) of the Federal Rules of Civil Procedure are fully satisfied by this appointment.

8. Class Plaintiffs Natasha Bhandari and Tracey L. Nobel will serve as representatives of the Class for purposes of the Settlement.

9. The Court appoints Rust Consulting, a competent firm, as the Claims Administrator. The Claims Administrator shall be responsible for receiving requests for exclusion from the Class Members.

10. As of the date hereof, all proceedings in the action as to Defendants shall be stayed and suspended until further order of the Court, except as may be necessary to implement the Settlement or comply with the terms of the Agreement.

11. All protective orders in force as of the date of this Order are hereby amended to apply to all materials and information provided by Defendants in connection with the Settlement (including but not limited to information with respect to the potential or actual Class Members).

12. The Court approves the proposed notice program, including the Forms of Notice, and also approves the Claim Form, attached as exhibits to the Declaration of Shannon R. Wheatman, Ph.D. ("Wheatman Declaration").

13. The Court finds that the manner of distribution of the Notice set forth in the Wheatman Declaration constitutes the best practicable notice under the circumstances as well as

valid, due and sufficient notice to all persons entitled thereto and complies fully with the requirements of Federal Rule of Civil Procedure 23 and the due process requirements of the United States Constitution.

14. Upon entry of the Preliminary Approval Order, Class Counsel shall begin implementation of the notice program as outlined in the Wheatman Declaration. Additionally, the Notice shall be published in accord with the Wheatman Declaration (including but not limited to the means of publication) in the same form as referenced above. Class Counsel shall also provide a copy of the Notice to all persons who request it and shall post a copy of the Notice on the Internet at the address identified in the Notice.

15. At least ten (10) calendar days before the objection deadline, Class Counsel shall cause to be filed with the Clerk of this Court an affidavit or declaration of the person under whose general direction the mailing of the Notice was made, showing that mailing was made in accordance with this Order.

16. Any member of the Settlement Class may request to be excluded from the Class. To be effective, written notice must be postmarked as set forth in the Notice (by September 5, 2014), which is 45 days prior to the final fairness hearing, and must otherwise comply with the requirements set forth in the Notice. Any member of the Settlement Class who does not timely seek exclusion from the Class and who wishes to object to the terms of the relevant Proposed Settlement must do so in writing, must mail or deliver copies of such objection to Counsel for the Settling Parties and the Clerk of the Court (by September 5, 2014), which is 45 days prior to the final fairness hearing ("objection deadline"), and must otherwise comply with the requirements set forth in the Notice.

17. The Court hereby schedules a hearing to occur on October 20th 2014, at 10:00 a.m. before the Honorable Andrew L. Carter Jr. in United States District Court for the Southern District of New York, Thurgood Marshall United States Courthouse, 40 Foley Square New York, NY 10007 to determine whether (i) the proposed Settlement as set forth in the Agreement, should be finally approved as fair, reasonable and adequate pursuant to the Federal Rule of Civil Procedure 23; (ii) an order approving the Agreement and a Final Judgment should be entered; (iii) an order approving a proposed distribution plan should be approved; and (iv) the application of Class Plaintiffs' Counsel for an award of attorneys' fees, incentive awards, and expenses ("Fee Request") in this matter should be approved. All papers in support of any Fee Request, all papers in support of the proposed distribution plan, and all papers in support of final approval of the Settlement, shall be filed no later than (20) days before the objection deadline. No later than seven (7) days before the final fairness hearing, all relevant reply papers shall be filed and served by the parties to the action.

18. Neither this Order, the Agreement, the Settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Agreement or Settlement is or may be used as an admission or evidence (i) of the validity of any claims, alleged wrongdoing or liability of Defendants or (ii) of any fault or omission of Defendants in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal.

19. Neither this Order, the Agreement, the Settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Agreement or Settlement is or may be used as an admission or evidence that the claims of Class Plaintiffs lacked merit in any proceeding against anyone other than Defendants in any court, administrative agency or other tribunal.

20. In the event that the Agreement is terminated in accordance with its provisions, the Settlement and all proceedings had in connection therewith shall be null and void, except insofar as expressly provided to the contrary in the Agreement, and without prejudice to the status quo ante rights of Class Plaintiffs, Defendants and the Class Members.

21. No later than ten (10) days after the Motion for Preliminary Approval of the Settlement has been filed with the Court, Defendants will serve the Class Action Fairness Act ("CAFA") Notice on the Attorney General of the United States and the state attorneys general as required by 28 U.S.C. § 1715(b). Thereafter, Defendants will serve any supplemental CAFA Notice as appropriate.

ENTERED this 16 day June of 2014.

Hon. Andrew L. Carter, Jr.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE NYC BUS TOUR ANTITRUST LITIGATION	Master Case File No. 13-CV-0711 (ALC)(GWG) **RELATED TO ALL CASES** **ECF Case** **JURY TRIAL DEMANDED**

~~[PROPOSED]~~ ORDER AND FINAL JUDGMENT APPROVING *IN RE NYC BUS TOUR ANTITRUST LITIGATION* CLASS ACTION SETTLEMENT

WHEREAS, Class Plaintiffs Natasha Bhandari and Tracey L. Nobel ("Class Plaintiffs," or "Plaintiffs"), individually and on behalf of the Class of purchasers in this action (the "Settlement Class," or "Class"), entered into an agreement (the "Settlement") with defendants Twin America, LLC, Coach USA, Inc., International Bus Services, Inc., CitySights LLC and City Sights Twin, LLC ("Defendants").

WHEREAS, On June 16, 2014 the Court entered its Order granting preliminary approval of the proposed settlement ("Preliminary Approval Order") (Dkt. # 107). Among other things, the Preliminary Approval Order authorized Class Plaintiffs to disseminate notice of the Settlement, the fairness hearing, and related matters to the Class. Notice was provided to the Class pursuant to the Preliminary Approval Order and the Court held a fairness hearing on October 20, 2014 at 10:00 a.m.

Having considered Class Plaintiffs' Motion for final approval of the Settlement, oral argument presented at the fairness hearing, and the complete records and files in this matter, and for the reasons stated at the fairness hearing:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The capitalized terms used herein shall have the meanings set forth in the Settlement, Exhibit 1 to the Declaration of William Christopher Carmody in Support of Preliminary Approval of Settlement (Docket # 104) ("Settlement Agreement").

2. The Preliminary Approval Order outlined the form and manner by which the Class Plaintiffs would provide the Class with notice of the Settlement, the fairness hearing, and related matters. Proof that mailing and publication complied with the Preliminary Approval Order has been filed with the Court. This Notice given to Class Members complied in all respects with the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process, and provided due and adequate notice to the Class.

3. The Court approves, as to form and content, the Class Action Fairness Act ("CAFA") Notice that was served within 10 days after the filing of the Motion for Preliminary Approval of the Settlement (an example of the Notice is attached as **Exhibit 1**). The Court finds that the Attorney General of the United States and the state attorneys general have received notice of the Settlement Agreement in accordance with the terms of CAFA, 28 U.S.C. § 1715(b).

4. The Settlement was attained following an extensive investigation of the facts. It resulted from vigorous arm's-length negotiations which were undertaken in good faith by counsel with significant experience litigating antitrust class actions.

5. In the Preliminary Approval Order, pursuant to Federal Rule of Civil Procedure 23 and in light of the proposed Settlement, the Court certified the following class for settlement purposes (the "Settlement Class"):

> All persons who, or entities that, purchased Defendants' "hop-on, hop-off" bus tours in New York City from February 1, 2009, until the date of the Preliminary Approval Order (the "Class Period"). Excluded from the Class are Defendants, their present and former parents, subsidiaries, affiliates, and employees.

6. The Settlement is fully and finally approved because its terms are fair, reasonable and adequate within the meaning of Rule 23 of the Federal Rules of Civil Procedure and the Court directs its consummation pursuant to its terms and conditions.

7. In reaching this conclusion, the Court considered the complexity, expense, and likely duration of the litigation, the Class's reaction to the Settlement, and the result achieved.

8. As set forth in Exhibit A of the Supplemental Declaration of Milan Mader, filed October 13, 2014, four individuals submitted timely and valid requests for Exclusion from the Class. These four individuals are not included in or bound by this Order and Final Judgment, and are not entitled to any recovery from the settlement proceeds obtained through this Settlement.

9. The Action is dismissed with prejudice as to Defendants and, except as provided in ¶ 15 of the Settlement Agreement, without costs to either party.

10. This Order and Final Judgment shall operate as a complete bar order that discharges and releases the Released Claims by the Releasors as to all the Releasees.

11. The institution and prosecution, by Class Plaintiffs and any Class Member, either directly, individually, representatively, derivatively or in any other capacity, by whatever means, of any other action against the Releasees in any court, or in any agency or other authority or arbitral or other forum wherever located, asserting any of the Released Claims is permanently barred, enjoined and restrained.

12. The Court reserves continuing and exclusive jurisdiction over the Settlement, including all future proceedings concerning the administration and enforcement of the Settlement Agreement.

13. There is no just reason for delay and directing entry of a Final Judgment as to Defendants.

14. The Escrow Account established by Class Plaintiffs and Defendants, and into which Defendants deposited a total of nineteen million dollars ($19,000,000) as the Gross Settlment Fund, plus accrued interest thereon, is approved as a Qualified Settlement Fund pursuant to Internal Revenue Code Section 468B and the Treasury Regulations promulgated thereunder.

15. Neither the Settlement Agreement, nor any act performed or document executed pursuant to the Settlement Agreement, may be deemed or used as an admission of wrongdoing in any civil, criminal, administrative, or other proceeding in any jurisdiction.

16. Without affecting the finality of this Order and Final Judgment, the Court retains exclusive jurisdiction over: (a) the enforcement of this Order and Final Judgment; (b) the enforcement of the Settlement Agreement; (c) any application for attorneys' fees and reimbursement made by Plaintiffs' Counsel; (d) any application for notice and administration costs, taxes and tax expenses fees; (e) any application for service awards for the Class Plaintiffs; and (f) the distribution of the settlement proceeds to the Class Members.

ENTERED this 21 day October of 2014.

Hon. Andrew L. Carter, Jr.

EXHIBIT 1

COVINGTON & BURLING LLP

BEIJING BRUSSELS LONDON NEW YORK
SAN DIEGO SAN FRANCISCO SEOUL
SHANGHAI SILICON VALLEY WASHINGTON

THOMAS O. BARNETT
1201 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20004-2401
T 202.662.5407
tbarnett@cov.com

May 29, 2014

VIA FEDERAL EXPRESS

Attorney General Eric H. Holder
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: **Notice of Proposed Settlement Pursuant to 28 U.S.C. § 1715**
***In re NYC Bus Tour Antitrust Litigation*, Case No. 13-CV-0711 (ALC)(GWG)**
United States District Court for the Southern District of New York

Dear Attorney General Holder:

Pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715, Defendants Coach USA, Inc. and International Bus Services, Inc. (collectively "Coach USA"), CitySights LLC and City Sights Twin, LLC (collectively "CitySights") and Twin America, LLC provide notice of the parties' proposed settlement in the above-titled action.

BACKGROUND

Defendants provide various transportation services, including sightseeing tours, in New York City. In March 2009, Coach USA, Inc. and CitySights formed a joint venture called Twin America. Twin America provides hop-on, hop-off bus tours in New York City. In 2013, a class action suit was filed in federal court in the Southern District of New York on behalf of a class of individuals who purchased hop-on, hop-off bus tours from Twin America.

Plaintiffs allege that Defendants violated federal and state antitrust laws by limiting competition and conspiring to fix prices in the alleged market for hop-on, hop-off bus tours in New York City. Defendants have denied, and continue to deny, each and every claim and allegation of wrongdoing in this lawsuit and have asserted a number of defenses to Plaintiffs' claims. Nevertheless, Defendants have concluded that further litigation will likely be protracted and expensive and have therefore agreed to settle Plaintiffs' claims pursuant to the terms of the enclosed Settlement Agreement.

On May 20, 2014, Plaintiffs filed a motion with the Court seeking preliminary approval of a proposed settlement with Defendants. The motion included a copy of the parties' written settlement agreement, together with various related documents. Plaintiffs' filing triggered the notice provisions of 28 U.S.C. § 1715.

A copy of this Notice is concurrently provided to the Attorneys General of every state, as well as the Department of Justice's Antitrust Division.

COMPLIANCE WITH 28 U.S.C. § 1715

Each of the requirements of notice pursuant to 28 U.S.C. §§ 1715(b)(1)-(8) are addressed below. All referenced exhibits are provided electronically as PDF files on the enclosed CD.

1. *Complaints and Related Materials* (28 U.S.C. § 1715(b)(1))

Enclosed as Exhibit 1 (Ex. 1.pdf) is a copy of the Class Action Complaint in *Bhandari v. Twin America, LLC, et al.*, Case No. 13-CV-00711(ALC)(GWG) filed in the Southern District of New York. Enclosed as Exhibit 2 (Ex. 2.pdf) is a copy of the First Amended Class Action Complaint in *Bhandari v. Twin America, LLC, et al.*, Case No. 13-CV-00711(ALC)(GWG). Enclosed as Exhibit 3 (Ex. 3.pdf) is a copy of the Consolidated Class Action Complaint in *In re NYC Bus Tour Antitrust Litigation,* Case No. 13-CV-00711(ALC)(GWG). Enclosed as Exhibit 4 (Ex. 4.pdf) is a copy of the First Amended Consolidated Class Action Complaint in *In re NYC Bus Tour Antitrust Litigation*, Case No. 13-CV-0711 (ALC)(GWG).

2. *Notice of Any Scheduled Judicial Hearing* (28 U.S.C. § 1715(b)(2))

A hearing has not been held or scheduled on Plaintiffs' motion for preliminary approval.

The Court also has not scheduled a hearing on final approval of the settlement. However, given CAFA's 90-day rule from the date of this notice, the hearing on final approval cannot occur until August 28, 2014 at the earliest. The final approval hearing will be held at the United States District Court for the Southern District of New York, United States Courthouse, 40 Foley Square, New York, New York 10007.

3. *Proposed Notification to Class Members* (28 U.S.C. § 1715(b)(3))

A Notice Plan and a copy of the proposed notice to class members advising them of the proposed settlement and their right to request exclusion from the class has been filed with the Court as part of Plaintiffs' Motion for Preliminary Approval. *See* Ex. 5, Decl. of Shannon R. Wheatman, Ph.D. in Support of Motion for Preliminary Approval of Class

Action Settlement Re: Adequacy of Notice Program and Exhibits (Ex. 5.pdf). The Court has not yet ruled on that motion.

4. *Proposed Class Action Settlement Agreement* (28 U.S.C. § 1715(b)(4))

A copy of the executed Settlement Agreement between Plaintiffs and Defendants, including all exhibits, is enclosed as Exhibit 6 (Ex. 6.pdf).

5. *Any Settlement or Other Agreement* (28 U.S.C. § 1715(b)(5))

No agreement has been made between class and Defendants' counsel other than the Settlement Agreement made by counsel on behalf of their respective clients. *See* Ex. 6.

6. *Final Judgment* (28 U.S.C. § 1715(b)(6))

There has been no final judgment or notice of dismissal entered by the Court. Nor have the parties filed with the Court a proposed Final Approval Order.

7. *Estimate of Class Members in Each State* (28 U.S.C. § 1715(b)(7)(B))

It is not feasible for Defendants to identify the names of all class members in each state or to determine precisely the proportionate share of the claims of class members for each state. A primary obstacle to determining this information is that Defendants do not maintain data in a way that permits Defendants to readily and precisely identify someone as a class member or to identify the residence of every purchaser of Defendants' hop-on, hop-off bus tours, especially given that many such ticket sales occur through street sellers, including at times through cash transactions. While Defendants have identified addresses for certain customers who purchased their tickets through Defendants' website, these purchasers amount to only a small proportion of the entire settlement class, *i.e.*, approximately 10%.

Plaintiffs have estimated that the class contains at least 3.9 million class members. After reasonable inquiry, Defendants believe that within the group of settlement class members for whom Defendants have identified addresses, it appears that approximately ten percent of those individuals reside in New York. The remaining individuals reside in foreign countries around the world, as well as other states within the United States, with each state appearing to represent approximately 0.1% to 6% of the approximately 10% of settlement class members for whom Defendants have identified addresses.

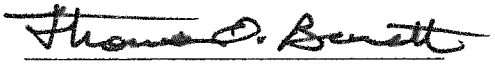
8. *Judicial Opinions Related to the Settlement* (28 U.S.C. § 1715(b)(8))

At present there are no judicial opinions related to the Settlement.

*****

If you have any questions about this notice, the lawsuits or the enclosed materials, or if you have any difficulties accessing any materials electronically, please feel free to contact the undersigned counsel.

Sincerely,



Thomas O. Barnett
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue NW
Washington, DC 20004-2401
Telephone: 202-662-5407
Facsimile: 202-662-6291

cc: The Attorney General of each of the United States, the District of Columbia, and Puerto Rico and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (addresses on Exhibit 7 hereto)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE NYC BUS TOUR ANTITRUST LITIGATION	Master Case File No. 13-CV-0711 (ALC)(GWG) **RELATED TO ALL CASES** **ECF Case** **JURY TRIAL DEMANDED**

[redacted] ORDER APPROVING DISTRIBUTION

WHEREAS, Class Plaintiffs' Counsel, Susman Godfrey LLP, seeks this Court's approval to distribute the Net Settlement Fund to Authorized Claimants including Class Members who submitted or requested permission to submit claims by January 31, 2015, distribute any balance remaining in the Net Settlement Fund to the Government Entities, pay settlement administration costs and Class Plaintiffs' Counsel's expenses from the Gross Settlement Fund, and release any further claims against the Net Settlement Fund or any persons involved in processing the claims discussed herein.

WHEREAS, Defendants do not oppose this application;

WHEREAS, the Claims Deadline has passed;

WHEREAS, the Claims Administrator received claims for 241,686 tickets from 87,832 Authorized Claimants by the Claims Deadline, and additional claims or requests to file claims for 647 tickets from 184 Class Members, who would otherwise be Authorized Claimants, before January 31, 2015, for a total of 242,333 tickets claimed by 88,016 Authorized Claimants or Class Members that Plaintiffs request be qualified as Authorized Claimants;

WHEREAS, allocating $20 per qualifying class member ticket purchase, Plaintiffs propose distributing $4,846,660 from the Net Settlement Fund to Authorized Claimants, including Class Members who submitted late claims (the "Distribution");

WHEREAS, there may be residual funds in the Net Settlement Fund following the distribution to Authorized Claimants, and the Settlement provides that no unclaimed funds will revert to Defendants and instead any residual funds will go to the Department of Justice, Antitrust Division, and/or the New York Attorney General's Office ("Government Entities");

WHEREAS, the Claims Administrator has incurred costs and expenses in assisting Class Members with the filing and processing of claims, and will incur costs and expenses in distributing the Net Settlement Fund to Authorized Claimants; and

WHEREAS, this Court having considered Class Plaintiffs' Motion for Approval of Distribution and all papers filed in support of such motion;

NOW, THEREFORE, pursuant to the Federal Rule of Civil Procedure 23, it is hereby ORDERED that:

1. The Court qualifies the 184 Class Members who submitted or requested permission to submit claims for 647 tickets after the Claims Deadline but before January 31, 2015 as Authorized Claimants.

2. The Court approves the Distribution allocating $20 per qualifying class member ticket purchase, and the Court approves distributing $4,846,660 from the Net Settlement Fund to Authorized Claimants.

3. In the event that there is any balance remaining in the Net Settlement Fund, Plaintiffs are authorized to distribute the residual funds to the Government Entities as specified in Paragraph 19 of the Settlement.

4. Plaintiffs are authorized to pay from the Gross Settlement Fund costs and expenses incurred and expected to be incurred by the Claims Administrator in assisting Class Members with filing and processing claims and distributing the Net Settlement Fund.

5. Plaintiffs are authorized to pay from the Gross Settlement Fund Class Plaintiffs' Counsel's costs and expenses of $3,671.89 incurred in connection with the October 20, 2014 fairness hearing.

6. Class Members are barred from making any further claims against the Net Settlement Fund (regardless of whether or not they receive payment from the Net Settlement Fund), and all persons, including the Claims Administrator, Plaintiffs and Class Plaintiffs' Counsel, involved in the processing of the claims discussed herein are released and discharged from from any claims arising out of such involvement.

ENTERED this 21 day September of 2015.

Hon. Andrew L. Carter, Jr.

READY MIXED SETTLEMENTS

March 8, 2010

Defendant	Settlement amount	Filed	Final	Criminal fines	Order
American Concrete	368,000	October 29, 2007	April 4, 2008		Not charged
Shelby	4,700,000	November 5, 2007	April 4, 2008	Amnesty	1
Southfield Corp. (Prairie)	19,000,000	April 24, 2008	August 7, 2008	na	Not charged
IMI	29,000,000	December 15, 2009		29,000,000	2
Beaver	200,000	February 1, 2010		1,750,000	Tried
Hughey (Carmel)	375,000	February 1, 2010		225,000	4
Builder's Ready Mixed (???)				4,000,000	3
	53,643,000			34,975,000	
Total sales: Est. $700m	7.7%				

As of March 8, 2010, Builder's is the only remaining nonsettling defendant

Appeals of Class Action Settlements

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 14, 2021 Decided July 9, 2021

No. 19-7058

IN RE: DOMESTIC AIRLINE TRAVEL ANTITRUST LITIGATION,

Appeal from the United States District Court
for the District of Columbia
(No. 1:15-mc-01404)

Anna St. John argued the cause for appellants. With her on the briefs was *Theodore H. Frank*.

Halle Edwards, Student Counsel, argued the cause as *amicus curiae* in support of jurisdiction. With her on the briefs were *Erica Hashimoto*, Director, appointed by the court, and *Alexander Bodaken*, Student Counsel.

Jeannine M. Kenney argued the cause for appellees. With her on the brief were *Adam J. Zapala*, *Anton Metlitsky*, *Benjamin Bradshaw*, *Katrina M. Robson*, *Michael D. Hausfeld*, *Hilary K. Scherrer*, *Alden L. Atkins*, *Joshua S. Johnson*, and *Roberta D. Liebenberg*. *Ashley Robertson*, *Jonathan Hacker* and *Richard G. Parker* entered appearances.

Before: TATEL, RAO and WALKER, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALKER.

WALKER, *Circuit Judge*: Frank Bednarz and Theodore Frank are class action objectors in a multidistrict litigation proceeding that involves four airlines and millions of settlement class members. Bednarz and Frank have appealed the district court's order approving settlements between the plaintiffs and two airlines.

We hold that the court's order is not an appealable final judgment or interlocutory order. We therefore dismiss for lack of jurisdiction.

I

In 2015, plaintiffs in districts across the country filed class action complaints against four airlines: Southwest, American, Delta, and United. Each class action alleged the airlines violated Sections 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3, by colluding to decrease capacity and raise prices.

These lawsuits were consolidated and transferred to the District of Columbia for multidistrict litigation proceedings. *In re Domestic Airline Travel Antitrust Litigation*, 140 F. Supp. 3d 1344 (J.P.M.L. 2015). By 2019, this litigation included 105 consolidated cases on behalf of more than 100 million settlement class members.[1]

The plaintiffs reached settlement agreements with Southwest and American. The district court preliminarily approved both settlements. *In re Domestic Airline Travel Antitrust Litigation*, MDL No. 2656, No. 15-1404 (CKK)

[1] Settlement class members include anyone who purchased flights from the defendant airlines for a period after July 2011. *In re Domestic Airline Travel Antitrust Litigation*, MDL No. 2656, No. 15-1404 (CKK) (D.D.C. May 9, 2019) (order).

(D.D.C. Jan. 3, 2018) (order); *In re Domestic Airline Travel Antitrust Litigation*, MDL No. 2656, No. 15-1404 (CKK) (D.D.C. June 18, 2018) (order). Meanwhile, the litigation against Delta and United continued.

Under the proposed settlements, Southwest agreed to pay $15 million and American agreed to pay $45 million. The amount ultimately received by each settlement class member may increase at the close of litigation against Delta and United. Because the settling parties wanted to avoid piecemeal payments, the proposed settlements left open the question of how the funds should be allocated and distributed until the entire lawsuit concluded. *See In re Domestic Airline Travel Antitrust Litigation*, 378 F. Supp. 3d 10, 21-22 (D.D.C. 2019).

Bednarz and Frank objected to the settlements. They argued the settlement notice should have detailed how the funds would be distributed. In particular, they objected to the possibility of a cy pres distribution of funds to undisclosed recipients.

After a fairness hearing, the district court approved the settlements and rejected Bednarz and Frank's objections. *Id.* at 29-30. The court dismissed Southwest and American from the consolidated action but declined to make the dismissal a final judgment subject to appeal under Federal Rule of Civil Procedure 54(b). *In re Domestic Airline Travel Antitrust Litigation*, MDL No. 2656, 2019 WL 5727957, at *7 (D.D.C. Nov. 5, 2019) ("this Court sees no reason to issue a Rule 54(b) judgment").

Nevertheless, Bednarz and Frank appeal.

II

Under 28 U.S.C. § 1291, federal circuit courts "have jurisdiction of appeals from all final decisions of the district courts of the United States." A district court's judgment is "final" when it disposes of all the claims and all the parties. *See* Fed. R. Civ. P. 54(b); *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 409 (2015) (a final decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment") (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). So as a general matter, when orders don't terminate all the claims and all the parties, we have no jurisdiction to review them.

Federal Rule of Civil Procedure 54(b) "relaxes" that "general practice." *Gelboim*, 574 U.S. at 409 (cleaned up). Even if a decision is not final, a district court may still "direct entry of a final judgment as to one or more, but fewer than all, claims or parties." Fed. R. Civ. P. 54(b). But Rule 54(b) has limits: A district court "may direct entry of a final judgment" for "fewer than all[] claims or parties only if the court expressly determines that there is no just reason for delay." *Id.*

Here, the district court's settlement approval order wasn't final under § 1291 because it dismissed claims against only two of the four defendants in the consolidated action. And the court expressly declined to enter a Rule 54(b) final judgment because it found "just reason for delay." *In re Domestic Airline Travel Antitrust Litigation*, MDL No. 2656, 2019 WL 5727957, at *7 (D.D.C. Nov. 5, 2019) (cleaned up). Specifically, the court sought to "prevent[] a fragmented appeal with regard to issues that have been determined by this Court to be obviously premature." *Id.*

Bednarz and Frank argue that *Gelboim v. Bank of America* supports an additional appellate route unique to multidistrict litigation. There, antitrust plaintiffs filed a class action against banks. 574 U.S. at 408. Their antitrust class action was consolidated in multidistrict litigation with other cases alleging additional claims against those banks. *Id.* The district court later dismissed the antitrust plaintiffs' sole claim, which ended the entire lawsuit filed by the antitrust plaintiffs. *Id.* Because of the other parties' cases, the multidistrict litigation continued. *Id.*

The Supreme Court held that the dismissal order in *Gelboim* was final and appealable under § 1291 because it dismissed the plaintiffs' individual case "in its entirety." *Id.* at 413. Since "[c]ases consolidated for [multidistrict litigation] pretrial proceedings ordinarily retain their separate identities," *id.*, the order dismissing the plaintiffs' only claim ended the case "on the merits," *id.* at 414. And because the antitrust plaintiffs' entire suit was dismissed, no other orders in the proceedings would "qualify as the dispositive ruling [plaintiffs sought] to overturn on appeal." *Id.* at 415.

By clarifying that the ordinary requirements of finality apply to appeals from multidistrict litigation, *Gelboim* provides no support for Bednarz and Frank's argument. In fact, *Gelboim* undermines it. Here, unlike in *Gelboim*, later orders by the multidistrict litigation court or originating courts will relate to the plaintiffs' claims. That's because the order dismissed only two of the four defendant airlines. Because that order did not dispose of the consolidated action or any of the individual cases in their entirety, Bednarz and Frank may not appeal the court's settlement approval at this time.[2]

[2] *Cf. Gelboim*, 574 U.S. at 413 n.4 ("We express no opinion on whether an order deciding one of multiple cases combined in an all-

The court-appointed amicus alternatively argues that the settlement approval order is an appealable interlocutory order under 28 U.S.C. § 1292(a)(1). That provision allows appellate courts to review "injunctions." 28 U.S.C. § 1292(a)(1). It also narrowly applies to certain interlocutory orders that have the "practical effect" of granting or refusing an injunction. *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981). An appellant can appeal such an order "only if it affects predominately all of the merits" or "might have a serious, perhaps irreparable, consequence, and . . . can be effectually challenged only by immediate appeal." *Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258, 1262 (D.C. Cir. 2012) (cleaned up); *cf. id*. at 1261 ("we must take care not to turn the barrier against piecemeal appeals into Swiss cheese").

This case is unlike *Carson*. There, "prospective relief was at the very core" of the interlocutory order. *Carson*, 450 U.S. at 84; *see also Salazar*, 671 F.3d at 1260, 1262. Here, the gist of the settlement agreements was the large amount of money the defendants agreed to pay the plaintiffs. And although the agreements require the settling defendants to cooperate with the plaintiffs during the ongoing litigation, that requirement is not at the agreements' "very core." *Carson*, 450 U.S. at 84. Further, the court's approval order didn't anticipate enjoining any party after distribution of the settlement funds. *Cf. In re Domestic Airline Travel Antitrust Litigation*, 378 F. Supp. 3d 10, 26 (D.D.C. 2019) (approving the settlements "despite the lack of injunctive relief"). We therefore do not have jurisdiction under § 1292(a)(1).

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purpose consolidation qualifies under § 1291 as a final decision appealable of right.").

* * *

The appealed order is not a final judgment. We therefore dismiss for lack of jurisdiction.

Conflicts of Interest

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2015

(Argued: September 28, 2015 Decided: June 30, 2016)

Docket Nos. 12-4671-cv(L); 12-4708(CON); 12-4765(CON); 13-4719(CON); 13-4750(CON); 13-4751(CON); 13-4752(CON); 14-32(CON); 14-117(CON); 14-119(CON); 14-133(CON); 14-157(CON); 14-159(CON); 14-192(CON); 14-197(CON); 14-219(CON); 14-241(CON); 14-250(CON); 14-266(CON); 14-303(CON); 14-331(CON); 14-349(CON); 14-404(CON); 14-422(CON); 14-443(CON); 14-480(CON); 14-497(CON); 14-530(CON); 14-567(CON); 14-584(CON); 14-606(CON); 14-663(CON); 14-837(CON)

- -x

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

- -x

Before: WINTER, JACOBS, and LEVAL, Circuit Judges.

This antitrust class action was brought on behalf of approximately 12 million merchants against Visa and MasterCard, which are the two largest credit card issuing networks in the United States, as well as against various issuing and acquiring banks, alleging a conspiracy in violation of Section 1 of the Sherman

Act. After nearly ten years of litigation, the parties agreed to a settlement that released all claims in exchange for disparate relief to each of two classes: up to $7.25 billion would go to an opt-out class, and a non-opt-out class would get injunctive relief. The district court certified these two settlement-only classes, and approved the settlement as fair and reasonable. On this appeal, numerous objectors and opt-out plaintiffs argue that this class action was improperly certified and that the settlement was unreasonable and inadequate. We conclude that the class plaintiffs were inadequately represented in violation of Rule 23(a)(4) and the Due Process Clause. Accordingly, we vacate the district court's certification of this class action and reverse the approval of the settlement.

Vacated, reversed, and remanded.

Judge Leval concurs in a separate opinion.

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DENNIS JACOBS, Circuit Judge:

This antitrust class action was brought on behalf of approximately 12 million merchants against Visa U.S.A. Inc. ("Visa") and MasterCard International Incorporated ("MasterCard"), which are the two largest credit card issuing networks in the United States, as well as against various issuing and acquiring banks (collectively with Visa and MasterCard, the "defendants"), alleging a conspiracy in violation of Section 1 of the Sherman Act. After nearly ten years of litigation, the parties agreed to a settlement that released all claims in exchange for disparate relief for each of two classes: up to $7.25 billion would go to an opt-out class, and a non-opt-out class would get injunctive relief. The district court certified these two settlement-only classes, and approved the settlement as

fair and reasonable. On this appeal, numerous objectors and opt-out plaintiffs argue that this class action was improperly certified and that the settlement was unreasonable and inadequate. We conclude that the class plaintiffs were inadequately represented in violation of Rule 23(a)(4) and the Due Process Clause. Accordingly, we vacate the district court's certification of this class action and reverse the approval of the settlement.

BACKGROUND

Detailed information about how the credit card industry operates is set out in the district court opinion approving the settlement in this case, In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig. ("Payment Card I"), 986 F. Supp. 2d 207, 214-15 (E.D.N.Y. 2013), and in our previous opinions dealing with past antitrust lawsuits against Visa and MasterCard, Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 101-02 (2d Cir. 2005); United States v. Visa U.S.A., Inc., 344 F.3d 229, 234-37 (2d Cir. 2003); In re Visa Check/MasterMoney Antitrust Litig. ("Visa Check"), 280 F.3d 124, 129-31 (2d Cir. 2001). This section of the opinion lays out only the facts and procedural history needed to explain our analysis and result.

In general terms, a Visa or MasterCard credit card transaction is processed as follows: the customer presents a credit card to pay for goods or services to the merchant; the merchant relays the transaction information to the acquiring bank; the acquiring bank processes the information and relays it to the network (here, Visa or MasterCard); the network relays the information to the issuing bank; if the issuing bank approves the transaction, that approval is relayed to the acquiring bank, which then relays it to the merchant. If the transaction is approved, the merchant receives the purchase price minus two fees: the "interchange fee" that the issuing bank charged the acquiring bank and the "merchant discount fee" that the acquiring bank charged the merchant.

In a given transaction, the interchange fee that the acquiring bank pays (and is in turn paid by the merchant) varies depending on the credit card network and the type of credit card. Thus, the American Express credit-card network generally charges a higher interchange fee than the Visa or MasterCard networks. And Visa and MasterCard have different product levels within their credit card portfolios, such as cards that give consumers generous rewards, and typically charge a higher interchange fee than cards that offer few rewards or none. The difference in interchange fee between American Express and Visa or MasterCard

is one at the brand level, while the difference between, e.g., a rewards card from Visa and a no-rewards card from Visa is one at the product level.

Plaintiffs are all merchants who accept Visa- and MasterCard-branded credit cards and are therefore bound by the issuers' network rules. Plaintiffs challenge as anti-competitive several of the following network rules (which are effectively identical as between Visa and MasterCard). The "default interchange" fee applies to every transaction on the network (unless the merchant and issuing bank have entered into a separate agreement). The "honor-all-cards" rule requires merchants to accept all Visa or MasterCard credit cards if they accept any of them, regardless of the differences in interchange fees. Multiple rules prohibit merchants from influencing customers to use one type of payment over another, such as cash rather than credit, or a credit card with a lower interchange fee. These "anti-steering" rules include the "no-surcharge" and "no-discount" rules, which prohibit merchants from charging different prices at the point of sale depending on the means of payment.

Plaintiffs allege that these Visa and MasterCard network rules, working in tandem, allow the issuing banks to impose an artificially inflated interchange fee that merchants have little choice but to accept. The argument is that the

honor-all-cards rule forces merchants to accept all Visa and MasterCard credit cards (few merchants can afford to accept none of them); the anti-steering rules prohibit them from nudging consumers toward cheaper forms of payment; the issuing banks are thus free to set interchange fees at a supra-competitive rate; and that rate is effectively locked in via the default interchange fee because the issuing banks have little incentive to deviate from it unless a given merchant is huge enough to have substantial bargaining power.

The first consolidated complaint in this action was filed in 2006. Developments since then have altered the credit card industry in important ways. Both Visa and MasterCard conducted initial public offerings that converted each from a consortium of competitor banks into an independent, publicly traded company. The "Durbin Amendment" to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 limited the interchange fee that issuing banks could charge for debit card purchases, and allowed merchants to discount debit card purchases relative to credit card purchases. Finally, pursuant to a consent decree with the Department of Justice in 2011, Visa and MasterCard agreed to permit merchants to discount transactions to steer consumers away

from credit cards use. None of these developments affected the honor-all-cards or no-surcharging rules, or the existence of a default interchange fee.

Notwithstanding these pro-merchant industry developments, the plaintiffs pressed on. Discovery included more than 400 depositions, 17 expert reports, 32 days of expert deposition testimony, and the production of over 80 million pages of documents. The parties fully briefed a motion for class certification, a motion to dismiss supplemental complaints, and cross-motions for summary judgment. Beginning in 2008, the parties participated in concurrent settlement negotiations assisted by well-respected mediators. At the end of 2011, the district judge and the magistrate judge participated in the parties' discussions with the mediators. In October 2012, after several more marathon negotiations with the mediators (including one more with the district court and magistrate judges), the parties executed the Settlement Agreement. The district court granted preliminary approval of the proposed settlement on November 27, 2012, and final approval on December 13, 2013. Payment Card I, 986 F. Supp. 2d at 213, 217.

The Settlement Agreement divides the plaintiffs into two classes: one – the Rule 23(b)(3) class – covers merchants that accepted Visa and/or MasterCard from January 1, 2004 to November 28, 2012; the other – the Rule 23(b)(2) class – covers

merchants that accepted (or will accept) Visa and/or MasterCard from November 28, 2012 onwards forever. The former class would be eligible to receive up to $7.25 billion in monetary relief; the latter would get injunctive relief in the form of changes to Visa's and MasterCard's network rules. Because of the difference between Rule 23(b)(3) and Rule 23(b)(2), members of the first class (which receives money damages in the settlement) could opt out, but members of the second, forward-looking class (which receives only injunctive relief) could not.

The most consequential relief afforded the (b)(2) class was the ability to surcharge Visa- and MasterCard-branded credit cards at both the brand and product levels. That is, a merchant could increase the price of a good at the point of sale if a consumer presents (for example) a Visa card instead of cash, or a Visa rewards card instead of a Visa card that yields no rewards. The incremental value and utility of this relief is limited, however, because many states, including New York, California, and Texas, prohibit surcharging as a matter of state law. See, e.g., Expressions Hair Design v. Schneiderman, 808 F.3d 118, 127 (2d Cir. 2015) (upholding the New York ban on credit-card surcharges); Rowell v. Pettijohn, 816 F.3d 73, 80 (5th Cir. 2016) (upholding the Texas ban on credit-card surcharges). But see Dana's R.R. Supply v. Attorney Gen., Florida, 807 F.3d 1235,

1249 (11th Cir. 2015) (striking down Florida ban on credit-card surcharges). Moreover, under the most-favored-nation clause included in the Settlement Agreement, merchants that accept American Express cannot avail themselves of the surcharging relief because American Express effectively prohibits surcharging, and the Settlement Agreement permits surcharging for Visa or MasterCard only if the merchant also surcharges for use of cards issued by competitors such as American Express.

Visa and MasterCard also agreed to modify their network rules to reflect that they will: negotiate interchange fees with groups of merchants in good faith, lock-in the benefits of the Durbin Amendment and Department of Justice consent decree, and permit a merchant that operates multiple businesses under different names or banners to accept Visa or MasterCard at fewer than all of its businesses.

The Settlement Agreement provides that all of the injunctive relief will terminate on July 20, 2021.

In return, the plaintiffs are bound by a release that waives any claims they would have against the defendants for: all of the conduct challenged in the operative complaint, all other policies and practices (concerning credit card transactions) that were in place as of November 27, 2012, and any substantially

similar practices they adopt in the future. While the injunctive relief for the (b)(2) class will expire on July 20, 2021, this release has no end date. It operates in perpetuity, provided only that Visa and MasterCard keep in place the several rules that were modified by the injunctive relief provided to the (b)(2) class (including, inter alia, permitting merchants to surcharge), or impose rules that are substantially similar to the modified rules. That is, after July 20, 2021, for as long as Visa and MasterCard elect to leave in place their network rules as modified by the Settlement Agreement or adopt rules substantially similar thereto, the defendants continue to enjoy the benefit of the release as to all claims the plaintiffs potentially had against the defendants for any of the network rules existing as of November 27, 2012.

If, after July 20, 2021, the Visa or MasterCard networks rules are changed such that they are no longer substantially similar to their form as modified by the Settlement Agreement, then merchants are freed from the release as to claims arising out of that new network rule – but only as to such claims. For example, if Visa or MasterCard revert to their pre-Settlement Agreement rules by forbidding merchants from surcharging, then the release will not bar future merchants included in the (b)(2) class from bringing antitrust claims arising out of the

prohibition on surcharging; but the rest of release would remain in effect, so that a suit by the future plaintiff could not challenge any of the unchanged network rules, such as the honor-all-cards rule or imposition of default interchange fees. In sum, regardless what Visa or MasterCard do with their network rules after July 20, 2021, no merchant will ever be permitted to bring claims arising out of the network rules that are *unaffected* by this Settlement Agreement, including most importantly, the honor-all-cards rule or existence of default interchange fees.

Appellants, including those that opted out from the (b)(3) class and objected to the (b)(2) class, argue that the (b)(2) class was improperly certified and that the settlement was inadequate and unreasonable.

DISCUSSION

Certification of a class is reviewed for abuse of discretion, i.e., whether the decision (i) rests on a legal error or clearly erroneous factual finding, or (ii) falls outside the range of permissible decisions. In re Literary Works in Elec. Databases Copyright Litig. ("Literary Works"), 654 F.3d 242, 249 (2d Cir. 2011). The district court's factual findings are reviewed for clear error; its conclusions of law are reviewed de novo. Charron v. Wiener, 731 F.3d 241, 247 (2d Cir. 2013).

Class actions are an exception to the rule that only the named parties conduct and are bound by litigation. See Hansberry v. Lee, 311 U.S. 32, 40-41 (1940). "In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Wal-Mart v. Dukes, 131 S. Ct. 2541, 2550 (2011) (internal quotation marks and citations omitted). That principle is secured by Rule 23(a)(4) and the Due Process Clause. Rule 23(a)(4), which requires that "the representative parties . . . fairly and adequately protect the interests of the class," "serves to uncover conflicts of interest between named parties and the class they seek to represent," as well as the "competency and conflicts of class counsel." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625, 626 n.20 (1997). "[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). Class actions and settlements that do not comply with Rule 23(a)(4) and the Due Process Clause cannot be sustained.

We conclude that class members of the (b)(2) class were inadequately represented in violation of both Rule 23(a)(4) and the Due Process Clause. Procedural deficiencies produced substantive shortcomings in this class action

and the settlement. As a result, this class action was improperly certified and the settlement was unreasonable and inadequate.

I

Under Rule 23(a)(4), "[a]dequacy is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." Denney v. Deutsche Bank AG, 443 F.3d 253, 268 (2d Cir. 2006); see also Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 170 (2d Cir. 2001) ("Two factors generally inform whether class representatives satisfy the Rule 23(a)(4) requirement: '(1) absence of conflict and (2) assurance of vigorous prosecution.'") To assure vigorous prosecution, courts consider whether the class representative has adequate incentive to pursue the class's claim, and whether some difference between the class representative and some class members might undermine that incentive. Id. at 171. To avoid antagonistic interests, any "fundamental" conflict that goes "to the very heart of the litigation," Charron, 731 F.3d at 249-50 (internal citations omitted), must be addressed with a "structural assurance of fair and adequate representation for the diverse groups and individuals" among the plaintiffs. Amchem, 521 U.S. at 627. One common

structural protection is division of the class into "homogenous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel." Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999).

"Adequacy must be determined independently of the general fairness review of the settlement; the fact that the settlement may have overall benefits for all class members is not the 'focus' in 'the determination whether proposed classes are sufficiently cohesive to warrant adjudication.'" Denney, 443 F.3d at 268 (quoting Ortiz, 527 U.S. at 858). The focus of the Rule 23(a) inquiry remains on "inequity and potential inequity at the precertification stage." Ortiz, 527 U.S. at 858. So when (as here) the district court certifies the class at the same time it approves a settlement, the requirements of Rule 23(a) "demand undiluted, even heightened, attention." Amchem, 521 U.S. at 620.

A

The Supreme Court wrote the ground rules for adequate representation in the settlement-only class context in Amchem and Ortiz, two asbestos cases. Our recent decision in Literary Works contributed a gloss on the subject.

The single-class proposed settlement in Amchem potentially encompassed millions of plaintiffs who had been exposed to asbestos, without distinction

between those who had already manifested asbestos-related injuries and sought "generous immediate payments," and those who had not manifested injury and sought "an ample, inflation-protected fund for the future." Amchem, 521 U.S. at 626. A single class representative could not adequately represent both interests. The two subgroups had "competing interests in the distribution of a settlement whose terms reflected 'essential allocation decisions designed to confine compensation and to limit defendants' liability.'" Literary Works, 654 F.3d at 250 (quoting Amchem, 521 U.S. at 627). The antagonistic interests were so pronounced, on an issue so crucial, that the settlement required a "structural assurance of fair and adequate representation for the diverse groups and individuals." Amchem, 521 U.S. at 627.

Two years later, the Supreme Court again considered a settlement-only class action that joined present and future claimants in a single class, and emphasized: "it is obvious after Amchem that a class divided between holders of present and future claims . . . requires division into homogenous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel." Ortiz, 527 U.S. at 856. A second fatal deficiency in the Ortiz settlement was that all present claimants were treated equally,

notwithstanding that some had claims that were more valuable. "It is no answer to say . . . that these conflicts may be ignored because the settlement makes no disparate allocation of resources as between the conflicting classes" for the "very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that [the disparate claimants] would have chosen." Id. at 857. These fault lines between present and future plaintiffs, and among plaintiffs with differently valued claims, were so fundamental that they required "structural protection" in the form of subclasses with separate counsel. Id.

Literary Works contained the same "ingredients of conflict identified in Amchem and Ortiz." Literary Works, 654 F.3d at 251. The settlement divided class claims into three categories, capped defendants' overall liability at $18 million, and used a formula for splitting this amount. The settlement was less generous to the third category, and required the holders of those claims to exclusively bear the risk of over-subscription, i.e., their recovery alone would be reduced to bring the total payout down to $18 million. The class representatives of the single class included individuals with claims in each category; nevertheless, we held that (at a minimum) class members with claims only in the third category

required separate representation because their interests were antagonistic to the others on a matter of critical importance – how the money would be distributed. Id. at 254.

Since some named representatives held claims across all three categories, the class did not encompass mutually exclusive groups as in Amchem; still, each impermissibly "served generally as representative for the whole, not for a separate constituency." Id. at 251 (quoting Amchem, 521 U.S. at 627). Class representatives with claims in all three categories naturally would want to maximize their overall recovery regardless of allotment across categories, whereas class members with claims only in the third category would want to maximize the compensation for that category in particular. A great risk thus arose that class representatives would sell out the third category of claims for terms that would tilt toward the others. As it transpired, the resulting settlement awarded the third category less, and taxed that lesser recovery with all the risk that claim would exceed the liability cap.

We did not conclude that the third category's "inferior recovery [w]as determinative evidence of inadequate representation." Id. at 253. The claims in third category were objectively the weakest. "The problem, of course, [wa]s that

we ha[d] no basis for assessing whether the discount applied to Category C's recovery appropriately reflect[ed] that weakness." Id. We could not know the right value of the category C claims "without independent counsel pressing its most compelling case." Id. While the settlement "was the product of an intense, protected, adversarial mediation, involving multiple parties," including "highly respected and capable" mediators and associational plaintiffs, these features of the negotiation could not "compensate for the absence of independent representation" because there could be no assurance that anyone "advanced the strongest arguments in favor" of the disfavored claims. Id. at 252-53. The eventual settlement proved that "[o]nly the creation of subclasses, and the advocacy of an attorney representing each subclass, can ensure that the interests of that particular subgroup are in fact adequately represented." Id. at 252. Divided loyalties are rarely divided down the middle.

B

Like the settlement-only classes in Amchem, Ortiz, and Literary Works, the unitary representation of these plaintiffs was inadequate. Class representatives had interests antagonistic to those of some of the class members they were representing. The fault lines were glaring as to matters of fundamental

importance. Such conflicts and absence of incentive required a sufficient "structural assurance of fair and adequate representation," Amchem, 521 U.S. at 627, but none was provided.

The conflict is clear between merchants of the (b)(3) class, which are pursuing solely monetary relief, and merchants in the (b)(2) class, defined as those seeking only injunctive relief. The former would want to maximize cash compensation for past harm, and the latter would want to maximize restraints on network rules to prevent harm in the future. Amchem tells us that such divergent interests require separate counsel when it impacts the "essential allocation decisions" of plaintiffs' compensation and defendants' liability. Amchem, 521 U.S. at 627. The Settlement Agreement does manifest tension on an "essential allocation decision": merchants in the (b)(3) class would share in up to $7.25 billion of damages, while merchants in the (b)(2) class would enjoy the benefit of some temporary changes to the defendants' network rules. The same counsel represented both the (b)(3) and the (b)(2) classes. The class counsel and class representatives who negotiated and entered into the Settlement Agreement were in the position to trade diminution of (b)(2) relief for increase of (b)(3) relief. However, "it is obvious after Amchem that a class divided between holders of

present and future claims . . . requires division into homogenous subclasses . . . with separate representation." Ortiz, 527 U.S. at 856.

Moreover, many members of the (b)(3) class have little to no interest in the efficacy of the injunctive relief because they no longer operate, or no longer accept Visa or MasterCard, or have declining credit card sales. By the same token, many members of the (b)(2) class have little to no interest in the size of the damages award because they did not operate or accept Visa or MasterCard before November 28, 2012, or have growing credit card sales. Unitary representation of separate classes that claim distinct, competing, and conflicting relief create unacceptable incentives for counsel to trade benefits to one class for benefits to the other in order somehow to reach a settlement.

Class counsel stood to gain enormously if they got the deal done. The (up to) $7.25 billion in relief for the (b)(3) class was the "largest-ever cash settlement in an antitrust class action." Payment Card I, 986 F. Supp. 2d at 229. For their services, the district court granted class counsel $544.8 million in fees. In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig. ("Payment Card II"), 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014). The district court calculated these fees based on a graduated percentage cut of the (b)(3) class's

recovery; thus counsel got more money for each additional dollar they secured for the (b)(3) class. But the district court's calculation of fees explicitly did not rely on any benefit that would accrue to the (b)(2) class, id. at 442 n.4, and class counsel did not even ask to be compensated based on the size or significance of the injunctive relief. Id. The resulting dynamic is the same as in Ortiz. As the Supreme Court recognized in that case: when "the potential for gigantic fees" is within counsel's grasp for representation of one group of plaintiffs, but only if counsel resolves another group of plaintiffs' claims, a court cannot assume class counsel adequately represented the latter group's interests. Ortiz, 527 U.S. at 852. We expressly do not impugn the motives or acts of class counsel. Nonetheless, class counsel was charged with an inequitable task.

The trouble with unitary representation here is exacerbated because the members of the worse-off (b)(2) class could not opt out. The (b)(2) merchants are stuck with this deal and this representation. We do not decide whether providing these class members with opt out rights would be a sufficient "structural assurance of fair and adequate representation," Amchem, 521 U.S. at 627, to overcome the lack of separate class counsel and representative. Cf. Visa

Check, 280 F.3d at 147. It is enough to say that this feature of the Settlement Agreement compounded the problem.

One aspect of the Settlement Agreement that emphatically cannot remedy the inadequate representation is the assistance of judges and mediators in the bargaining process. True, "a court-appointed mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure." D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001). But even "an intense, protected, adversarial mediation, involving multiple parties," including "highly respected and capable" mediators and associational plaintiffs, does not "compensate for the absence of independent representation." Literary Works, 654 F.3d at 252-53. The mission of mediators is to bring together the parties and interests that come to them. It is not their role to advance the strongest arguments in favor of each subset of class members entitled to separate representation, or to voice the interests of a group for which no one else is speaking.

Nor is the problem cured by the partial overlap of merchants who get cash as members of the (b)(3) class and become members of the (b)(2) class as they continue to accept Visa or MasterCard. The force of Amchem and Ortiz does not

depend on the mutually exclusivity of the classes; it was enough that the classes did not perfectly overlap. We held as much in Literary Works, reasoning that named plaintiffs with claims in multiple subgroups cannot adequately represent the interests of any one subgroup because their incentive is to maximize their own total recovery, rather than the recovery for any single subgroup. Amchem observed that "where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement . . . on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups." Amchem, 521 U.S. at 627 (quoting In re Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721, 742-43 (2d Cir. 1992), modified on reh'g, 993 F.2d 7 (2d Cir. 1993)).

Moreover, whatever overlap presently exists is partial and shrinking with time. As of the September 12, 2013 fairness hearing, class counsel reported that the class was composed of about 12 million merchants. That figure of course does not include merchants that have come into being since then, or those that will come into being in the future, all of whom will be members of only the (b)(2) class. The membership of the (b)(3) class, on the other hand, is fixed and finite.

Over time, the initial overlap will be reduced, and the gap between the interests of the (b)(3) and (b)(2) classes will continue to widen.

None of this is to say that (b)(3) and (b)(2) classes cannot be combined in a single case, or that (b)(3) and (b)(2) classes necessarily and always require separate representation. Problems arise when the (b)(2) and (b)(3) classes do not have independent counsel, seek distinct relief, have non-overlapping membership, and (importantly) are certified as settlement-only. The requirements of Rule 23(a) are applied with added solicitude in the settlement-only class context because "the certification of a mandatory settlement class 'effectively concludes the proceeding save for the final fairness hearing,' and there is thus a heightened risk of conflating the fairness requirements of Rule 23(e) with the independent requirement of 'rigorous adherence to those provisions of the Rule designed to protect absentees,' such as Rules 23(a) and (b)." Charron, 731 F.3d at 250 (quoting Ortiz, 527 U.S. at 849). As in Amchem, Ortiz, and Literary Works, settlements that are approved simultaneously with class certification are especially vulnerable to conflicts of interest because the imperatives of the settlement process, which come to bear on the defendants, the class counsel, and even the mediators and the court itself, can influence the

definition of the classes and the allocation of relief. For this reason, we scrutinize such settlements more closely.

Of course we have blessed multi-class settlements that were the product of unitary representation, but those were entered into *after* class certification. For example, we approved a settlement negotiated by unitary counsel in Charron; but before doing so, we "note[d] that unlike the situation in Amchem, Ortiz, and Literary Works, the settlement here was not being approved at the same time that the class was being certified." Charron, 731 F.3d at 250. Accordingly, we were more skeptical of allegations that subclass conflicts required separate representation. Id. True, Charron observed "[a]ll class settlements value some claims more highly than others, based on their perceived merits, and strike compromises based on probabilistic assessments," id., but that observation has less force in the settlement-only context. Charron also spoke of counsel trading one *claim* for another (which may be permissible); in the settlement-only class action, we are concerned that counsel will trade the interests of one *class* for another (which is not).

We have reason to think that that occurred here. Structural defects in this class action created a fundamental conflict between the (b)(3) and (b)(2) classes

and sapped class counsel of the incentive to zealously represent the latter. Apparently, the only unified interests served by herding these competing claims into one class are the interests served by settlement: (i) the interest of class counsel in fees, and (ii) the interest of defendants in a bundled group of all possible claimants who can be precluded by a single payment. This latter interest highlights the next problem with the Settlement Agreement.

II

This opinion already concludes that class plaintiffs were inadequately represented. Accordingly, the settlement and release that resulted from this representation are nullities. See Stephenson v. Dow Chem. Co., 273 F.3d 249, 260 (2d Cir. 2001), aff'd in part by an equally divided court and vacated in part, 539 U.S. 111 (2003) ("Res judicata generally applies to bind absent class members except where to do so would violate due process" and "[d]ue process requires adequate representation at all times throughout the litigation."). This outcome is confirmed by the substance of the deal that was struck. Like the Supreme Court in Amchem, we "examine a settlement's substance for evidence of prejudice to the interests of a subset of plaintiffs" when "assessing the adequacy of representation." Literary Works, 654 F.3d at 252. Here, the bargain that was

struck between relief and release on behalf of absent class members is so unreasonable that it evidences inadequate representation.

"It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are *in fact adequately represented* by parties who are present" consistent with "the requirements of due process and full faith and credit." Hansberry, 311 U.S. at 42-43 (emphasis added); see also Stephenson, 273 F.3d at 261 ("Part of the due process inquiry (and part of the Rule 23(a) class certification requirements) involves assessing adequacy of representation and intra-class conflicts."). Similarly, "[p]laintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief"; but this authority "is limited by the 'identical factual predicate' and 'adequacy of representation' doctrines." Wal-Mart Stores, 396 F.3d at 106. "[W]here class plaintiffs have not adequately represented the interests of class members," any "[c]laims arising from a shared set of facts will not be precluded." Id. at 108.

A

As discussed above, Literary Works concluded that inadequate representation was demonstrated by the relief afforded to a subset of the class.

Similarly, the release in Stephenson was itself proof of inadequate representation, wheras the release in Wal-Mart Stores did not impugn the class's representation. Considered together, these cases illustrate when the tradeoff between relief and release as applied to a class member can violate due process.

Literary Works held that class members with claims in one of the categories were inadequately represented not only because they did not receive separate representation, but also because they solely bore the risk that the total amount claimed would exceed a preset liability cap. We observed that this feature of the settlement could not be justified by the relative weakness of those claims because that fact was already accounted for. Literary Works, 654 F.3d at 253. We could discern no reason for subjecting the single category of claims to the whole risk of over-subscription; nor could the settlement's proponents. Id. at 254. When "one category [of class members are] targeted for [worse treatment] without credible justification" it "strongly suggests a lack of adequate representation for those class members who hold only claims in this category." Id.

In Stephenson, we considered a collateral attack on a class action that had established a settlement fund for individuals injured by exposure to Agent Orange. The underlying litigation provided compensation only for those who

discovered their injury *before* 1994, yet released all future claims. Two individuals who fell within the class definition of individuals injured by Agent Orange, but who learned of their injury *after* 1994, challenged the release as applied to them. Analogizing the case to Amchem and Ortiz, we concluded that the two individuals were inadequately represented in the prior litigation because the settlement purported to resolve all future claims but "the settlement fund was permitted to terminate in 1994" and "[n]o provision was made for post-1994 claimants." Stephenson, 273 F.3d at 260-61. The two challengers could not have been adequately represented if their class representative negotiated a settlement and release that extinguished their claims without affording them any recovery. The result violated due process; the plaintiffs could not be bound by the settlement release. Id. at 261.

A similar challenge was raised to the settlement release in Wal-Mart Stores, which foreclosed all claims arising from the same factual predicate as that alleged in the complaint. Objectors argued that they were inadequately represented because class representatives did not pursue certain claims as vigorously as others. We rejected this basis for objection because "adequate representation of a particular claim is determined by the alignment of interests of class members, not

proof of vigorous pursuit of that claim." Wal-Mart Stores, 396 F.3d at 113. Stephenson was "not directly on point" because in the Agent Orange settlement (as in the Amchem and Ortiz settlements) "future claims had not been considered separately from claims involving current injury" despite these two groups having clearly divergent interests. Id. at 110. The objectors in Wal-Mart Stores did not allege divergent interests; they had disagreements about which claims were most valuable and what relief was adequate. Moreover, the settlement in Wal-Mart Stores covered only a past, finite period and did not preclude future suits over conduct post-dating the settlement. Id. No future claimants or claims were covered by the Wal-Mart Stores settlement or release. Finally, every claimant from the objecting groups benefitted from the settlement. Id. at 112.

B

Merchants in the (b)(2) class that accept American Express or operate in states that prohibit surcharging gain no appreciable benefit from the settlement, and merchants that begin business after July 20, 2021 gain no benefit at all. In exchange, class counsel forced these merchants to release virtually any claims they would ever have against the defendants. Those class members that

effectively cannot surcharge and those that begin operation after July 20, 2021 were thus denied due process.

No one disputes that the most valuable relief the Settlement Agreement secures for the (b)(2) class is the ability to surcharge at the point of sale. To the extent that the injunctive relief has any meaningful value, it comes from surcharging, not from the buying-group provision, or the all-outlets provision, or the locking-in of the Durbin Amendment and DOJ consent decree. For this reason, it is imperative that the (b)(2) class in fact benefit from the right to surcharge. But that relief is less valuable for any merchant that operates in New York, California, or Texas (among other states that ban surcharging), or accepts American Express (whose network rules prohibit surcharging and include a most-favored nation clause). Merchants in New York and merchants that accept American Express can get no advantage from the principal relief their counsel bargained for them.

It may be argued that the claims of the (b)(2) class are weak and can command no benefit in settlement. However, that argument would seem to be foreclosed because other members of the same class with the same claims – those that do not take American Express and operate in states that permit surcharging –

derive a potentially substantial benefit. There is no basis for this unequal intra-class treatment: the more valuable the right to surcharge (a point the parties vigorously dispute), the more unfair the treatment of merchants that cannot avail themselves of surcharging.

This is not a case of some plaintiffs forgoing settlement relief. A significant proportion of merchants in the (b)(2) class are either legally or commercially unable to obtain incremental benefit from the primary relief negotiated for them by their counsel, and class counsel knew at the time the Settlement Agreement was entered into that this relief was virtually worthless to vast numbers of class members. Alternative forms of relief might have conferred a real and palpable benefit, such as remedies that affected the default interchange fee or honor-all-cards rule. This is not a matter of certain merchants (e.g., those based in New York and those that accept American Express) arguing that class counsel did not bargain for their preferred form of relief, did not press certain claims more forcefully, or did not seek certain changes to the network rule books more zealously. This is a matter of class counsel trading the claims of many merchants for relief they cannot use: they actually received nothing.

Another fault line within the (b)(2) class runs between merchants that will have accepted Visa or MasterCard before July 20, 2021, and those that will come into being thereafter. The former are at least guaranteed some form of relief, while the latter are at the mercy of the defendants to receive relief because the Settlement Agreement explicitly states that the defendants' obligation to provide any injunctive relief terminates on July 20, 2021. Like the servicemen with latent injury in Stephenson, the post-July 20, 2021 merchants are future claimants who had their claims settled for nothing. There is no evidence to suggest that merchants operating after July 20, 2021 would have weaker claims than those operating before July 20, 2021; yet, the Settlement Agreement consigns the former to an unambiguously inferior position. As in Literary Works, we conclude that such arbitrary harsher treatment of class members is indicative of inadequate representation.

Merchants that cannot surcharge, and those that open their doors after July 20, 2021, are also bound to an exceptionally broad release. The Settlement Agreement releases virtually any claim that (b)(2) class members would have had against the defendants for any of the defendants' thousands of network rules. And unlike the relief, which expires on July 20, 2021, the release operates

indefinitely. Therefore, after July 20, 2021, the (b)(2) class remains bound to the release but is guaranteed nothing. This release permanently immunizes the defendants from any claims that any plaintiff may have now, or will have in the future, that arise out of, e.g., the honor-all-cards and default interchange rules. Even if the defendants revert back to all their pre-Settlement Agreement practices, the release continues to preclude any claim based on any rule that was not altered by the Settlement Agreement. The defendants never have to worry about future antitrust litigation based on their honor-all-cards rules and their default interchange rules.

That is because the *only* claims that merchants post-July 20, 2021 *may* have are ones relating to those network rules that are explicitly changed by the injunctive relief in the Settlement Agreement. Those claims will become actionable only if the defendants elect to revert to their pre-Settlement Agreement rules. Of course, it remains to be seen how much the mandated rules will cost the defendants or benefit the merchants, but either way, the defendants win. If the defendants see that permitting surcharging had little effect on their business, they can decide to maintain the rules changes provided for in the injunctive relief so that only merchants that do not accept American Express and do not operate in

states like New York, California, and Texas will be able to avail themselves of that limited relief. On the other hand, if the defendants observe that surcharging took a significant toll on their business, they can revert to prohibiting surcharging and expose themselves to lawsuits that are limited to challenging the surcharging ban. In all events, merchants that cannot surcharge receive valueless relief while releasing a host of claims of unknown value.

This bargain is particularly unreasonable for merchants that begin accepting Visa or MasterCard after July 20, 2021. They will be deemed to have released all of their claims pertaining to a whole book of rules, including (perhaps most importantly) the honor-all-cards and default interchange rules, and in return have the *chance* that the defendants will permit surcharging. In substance and effect, merchants operating after July 20, 2021 give up claims of potential value and receive nothing that they would not otherwise have gotten. Since there was no independent representation vigorously asserting these merchants' interests, we have no way to ascertain the value of the claims forgone. See Literary Works, 654 F.3d at 253.

In sum, this release has much in common with the releases in Stephenson, Amchem, and Ortiz. Like those, this release applies to future claims and

claimants, and disadvantaged class members are bound to it. The Settlement Agreement waives any claim any (b)(2) merchant would have against any defendant arising out of any of the current network rules, or those imposed in the future that are substantially similar thereto. The (b)(2) class had no notice and no opportunity to opt out of this deal. (At least the authors in Literary Works could opt out from their inadequate representation.) This Settlement Agreement is also distinguishable from releases that have passed muster. For example, the settlement release in Wal-Mart Stores (another merchant class action against Visa and MasterCard) did not bind future claimants and did not preclude new suits for similar conduct in the future. Wal-Mart Stores, 396 F.3d at 110, 113. And our approval of the Charron settlement release explicitly distinguished it from those in Amchem, Ortiz, and Literary Works on the ground that it did not extinguish claims other than those that were the subject of relief in the settlement. Charron, 731 F.3d at 252.

Merchants that cannot surcharge (by reason of state law or rules of American Express) and those that begin operating after July 20, 2021 suffer an unreasonable tradeoff between relief and release that demonstrates their representation did not comply with due process. We of course acknowledge that

"[b]road class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country." Wal-Mart Stores, 396 F.3d at 106. And it is true that "[p]arties often reach broad settlement agreements encompassing claims not presented in the complaint in order to achieve comprehensive settlement of class actions, particularly when a defendant's ability to limit his future liability is an important factor in his willingness to settle." Literary Works, 654 F.3d at 247-48. But the benefits of litigation peace do not outweigh class members' due process right to adequate representation.

CONCLUSION

For the foregoing reasons, we vacate the district court's certification of the class, reverse approval of the settlement, and remand for further proceedings not inconsistent with this opinion.

LEVAL, Circuit Judge, concurring:

I concur in Judge Jacobs's thoughtful opinion. I write separately, however, to note another, perhaps deeper, problem with the settlement. Under its terms, one class of Plaintiffs accepts substantial payments from the Defendants, in return for which they compel Plaintiffs in another class, who receive no part of the Defendants' payments, to give up forever their potentially valid claims, without ever having an opportunity to reject the settlement by opting out of the class. Opinions of the Supreme Court directly hold that this arrangement violates the due process rights of those compelled to surrender their claims for money damages.

Representatives brought this class action on behalf of approximately 12 million merchants against Visa and MasterCard, alleging that a number of the Defendants' practices violate the antitrust laws, and seeking both damages for past injury and an injunction barring future violations. Eventually, the Defendants reached a proposed settlement with the Representatives. The settlement provides that the Defendants would pay approximately $ 7.25 billion to compensate merchants for damages suffered up to November 28, 2012 (when the district court granted preliminary approval of the settlement). The settlement

also entails a commitment by the Defendants, enforced by injunction, to abandon some (not all) of their challenged practices for nine years—until July 20, 2021. The Defendants would be free after that date to resume the practices they temporarily abandoned and would also be free from the outset to continue forever the challenged practices they did not agree to abandon. In return for what the Defendants gave up, a class consisting of all merchants that would ever in the future accept Visa and MasterCard is compelled to release *forever* the Defendants from any and all claims for past or future conduct (other than the conduct enjoined) that relate in any way to any of Defendants' practices that are alleged or could have been alleged in the suit. While I do not speculate on the merits of the Plaintiffs' claims, the fact that the Defendants were willing to pay $7.25 billion, apparently the largest antitrust cash settlement in history, suggests that the claims were not entirely devoid of merit.

What is particularly troublesome is that the broad release of the Defendants binds not only members of the Plaintiff class who receive compensation as part of the deal, but also binds in perpetuity, without opportunity to reject the settlement, all merchants who in the future will accept Visa and MasterCard, including those not yet in existence, who will never receive any part of the

money. This is not a settlement; it is a confiscation. No merchants operating from November 28, 2012, until the end of time will ever be allowed to sue the Defendants, either for damages or for an injunction, complaining of any conduct (other than that enjoined) that could have been alleged in the present suit. The future merchants are barred by the court's adoption of the terms of the settlement from suing for relief from allegedly illegal conduct, although they have no ability to elect not to be bound by it. One class of Plaintiffs receives money as compensation for the Defendants' arguable past violations, and in return gives up the future rights of *others*. The Supreme Court has addressed such circumstances and ruled that an adjudication coming to this result is impermissible.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court reasoned that a claim for money damages—a "chose in action"— is "a constitutionally recognized property interest possessed by each of the plaintiffs" whose claims are represented in a class action. *Id.* at 807. In order for a court "to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. . . . [D]ue process requires at a minimum that an absent plaintiff be provided with an

opportunity to remove himself from the class . . . ." *Id.* at 811–12. That opportunity was lacking here.

Following *Shutts*, the Court unanimously held in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011), that claims for monetary relief cannot be certified under Rule 23(b)(2), as here, because of the possibility that "individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from." *Id.* at 2559 (emphasis added). *Dukes* did not involve a settlement agreement, but that does not make its precedent any less applicable to this case. If a class may not even be certified because of the risk that adjudication of its rights might violate the due process rights of its members by forcibly depriving them of claims, then necessarily an adjudication of a class's rights that in fact forcibly deprives the members of their claims is also unacceptable. Because the terms of this settlement preclude all future merchants that will accept the Defendants' cards (the (b)(2) class) from bringing claims without their having had an opportunity to opt out (or even object), the Supreme Court's rulings in *Shutts* and *Dukes* make clear that a court cannot accept it.

The practical effects of this settlement underscore why this is so. Although no court will ever have ruled that the Defendants' practices are lawful, no person or entity will ever have the legal right to sue to challenge those practices, and no person or entity, past, present, or future has had or will have the opportunity to refuse to be a part of the class so bound. For this reason, as well as those noted in Judge Jacobs's opinion, we must reject the settlement.

Award of Attorneys' Fees

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE NYC BUS TOUR ANTITRUST LITIGATION	Master Case File No. 13-CV-0711 (ALC)(GWG) **RELATED TO ALL CASES** **ECF Case** **JURY TRIAL DEMANDED**

[redacted] **ORDER AND JUDGMENT AWARDING FEES AND EXPENSES**

WHEREAS, Class Plaintiffs Natasha Bhandari and Tracey L. Nobel ("Class Plaintiffs," or "Plaintiffs"), individually and on behalf of the Class of purchasers in this action (the "Settlement Class," or "Class"), entered into an agreement (the "Settlement") with defendants Twin America, LLC, Coach USA, Inc., International Bus Services, Inc., CitySights LLC and City Sights Twin, LLC ("Defendants");

WHEREAS, On June 16, 2014 the Court entered its Order granting preliminary approval of the proposed settlement ("Preliminary Approval Order") (Dkt. # 107). Among other things, the Preliminary Order authorized Class Plaintiffs to disseminate notice of the Settlement, the fairness hearing, and related matters to the Class. Notice was provided to the Class pursuant to the Preliminary Approval Order and the Court held a fairness hearing on October 20, 2014 at 10 a.m.;

WHEREAS, Class Plaintiffs filed a fee application, seeking counsel fees, expenses and service awards;

Having considered Class Plaintiffs' Motion for an Award of Fees and Expenses, oral argument presented at the fairness hearing, and the complete records and files in this matter,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The capitalized terms used herein shall have the meanings set forth in the Agreement.

2. Class Plaintiffs' Counsel shall receive $6,270,000 in attorneys' fees, representing a third of the fund recovered, to be paid out of the Gross Settlement Fund created by the Settlement.

3. Plaintiffs' Counsel shall be reimbursed $863,629.46 in costs and expenses reasonably incurred in the presentation and settlement of this litigation, to be paid out of the Gross Settlement Fund created by the Settlement.

4. The Notice and Administrative Costs incurred to date are $1,069,158.54. Under the terms of the Settlement, those costs are payable as they become due out of the Gross Settlement Fund to those that incurred the costs.

5. Notice and Administrative Costs, Taxes and Tax Expenses, Escrow Agent Costs, other expenses, and future expenses of Class Counsel, may be paid out of the Gross Settlement Fund as permitted in the Settlement, including ¶¶ 15-16 thereof.

6. A service award of $20,000, to be paid out of the Gross Settlement Fund created by the Settlement, shall be paid to each of the Class Plaintiffs.

7. This Order and Judgment shall become effective immediately.

ENTERED this 21 day October of 2014.

Hon. Andrew L. Carter, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FOR PUBLICATION

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

MEMORANDUM AND ORDER

05-MD-1720 (JG) (JO)

JOHN GLEESON, United States District Judge:

This is an antitrust class action brought by merchants against Visa, MasterCard, and a number of banks, alleging that the defendants conspired to fix certain credit card fees and rules. In a December 13, 2013 memorandum and order, DE 6124 ("Approval Order"), I approved a settlement, *see* DE 2111. The settlement has two principal components: a fund of about $7.25 billion (before reductions for opt-outs, which reduced the fund to about $5.7 billion), against which merchants who did not opt out of a Rule 23(b)(3) class may make damages claims; and injunctive relief in the form of various credit card network rules changes, which apply to all members of a Rule 23(b)(2) class. The Approval Order deferred resolution of the Class Plaintiffs'[1] simultaneous motion for attorneys' fees and costs, *see* DE 2113, which I address now.

Although every case is unique, this case stands out in size, duration, complexity, and in the nature of the relief afforded to both the injunctive relief and damages classes. Class

[1] "Class Plaintiffs" refers to proposed class representative merchants Photos Etc. Corp.; Traditions, Ltd.; Capital Audio Electronics, Inc.; CHS Inc.; Crystal Rock LLC; Discount Optics, Inc.; Leon's Transmission Service, Inc.; Parkway Corp.; and Payless ShoeSource, Inc.

Counsel[2] took on serious risks in prosecuting the case. They now represent that, taking together all of the hours that they and other plaintiffs' counsel billed on this case, the lodestar figure for attorneys' fees is approximately $160 million, reflecting almost 500,000 hours of attorney and paralegal work conducted through November 30, 2012. They request a fee of $570 million, equal to approximately ten percent of the fund after opt-out reductions.[3]

For the reasons given below, I grant attorneys' fees in the amount of $544.8 million. I also approve Class Counsel's request for expenses in the amount of $27,037,716.97. The request for incentive payments to the Class Plaintiffs is denied without prejudice to renewal.

DISCUSSION

A. *Attorneys' Fees*

I assume familiarity here with the facts and case history set forth in the Approval Order.

Class action fee awards are evaluated based on the six-factor standard set forth in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). Under that standard, I must weigh "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.*

I may award attorneys' fees using either a percentage of the fund or a lodestar calculation. *Id.*; *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). The trend in this Circuit, and the method I adopt here, is a percentage of the fund. The

[2] "Class Counsel" refers to the three firms appointed co-lead counsel for Class Plaintiffs: Robbins Geller Rudman & Dowd LLP; Robins, Kaplan, Miller & Ciresi L.L.P; and Berger & Montague, P.C.

[3] Class Counsel initially requested $720 million, which represented 10% of the fund *before* reductions for opt-outs, but in their reply they revised the request to equal 10% of the fund net of those reductions. Though they reserve the right to seek additional fees from opt-outs on the theory that they benefited from Class Counsel's efforts, *see, e.g.*, *In re Diet Drugs*, 582 F.3d 524, 546 (3d Cir. 2009) (approving district court's award of fees from opt-outs), that issue is not before me now.

percentage method better aligns the incentives of plaintiffs' counsel with those of the class members because it bases the attorneys' fees on the results they achieve for their clients, rather than on the number of motions they file, documents they review, or hours they work. *See Wal-Mart*, 396 F.3d at 121 ("In contrast [to the percentage method], the lodestar creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits.") (internal quotation marks, citations, and alterations omitted). The percentage method also accords with the overwhelming prevalence of contingency fees in the market for plaintiffs' counsel: when potential clients and lawyers bargain freely for representation, most contracts award the lawyer a percentage (commonly, about one third) of the client's recovery. As Professor Charles Silver points out, the contingency fee model covers all sorts of plaintiffs' litigation, including cases where sophisticated individual clients have high-stakes, complex claims worth hundreds of millions of dollars. *See* Declaration of Professor Charles Silver Concerning the Reasonableness of Class Counsel's Request for an Award of Attorneys' Fees 25-34 ("Silver Decl."), DE 2113-5. Although I cannot hope to reconstruct what a hypothetical arm's-length negotiation of fee rates between the class and Class Counsel might have yielded, it is essentially unheard of for sophisticated lawyers to take on a case of this magnitude and type on any basis other than a contingency fee, expressed as a percentage of the relief obtained.

Nonetheless, I will also use the lodestar figure as a "cross-check" to assure that the percentage-based fee is reasonable. *See Goldberger*, 209 F.3d at 50 (noting that "where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court," and instead "the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case").

Evaluation of the six *Goldberger* factors is not a mechanical process, and some of them present perplexing issues in this case, as discussed below.

1. *Risk; Complexity of Litigation*

The most important *Goldberger* factor is often the case's risk. *See, e.g.*, *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 424 (2d Cir. 2010); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 479 (S.D.N.Y. 2013); *In re KeySpan Corp. Sec. Litig.*, 01 CV 5852(ARR), 2005 WL 3093399, at *5 (E.D.N.Y. Sept. 30, 2005). This case was unusually risky for a number of reasons:

- When the litigation began in 2005, only one court had ruled on an antitrust challenge to the manner in which interchange rates are set, and it had found in favor of the defendant. *See NaBanco Bancard Corp. (NaBANCO) v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986).

- As in the first Visa/MasterCard antitrust case I presided over, the plaintiffs did not piggyback on previous government action – indeed, the government piggybacked on their efforts. *See Wal-Mart*, 396 F.3d at 122.

- Once the case was initiated, the plaintiffs' legal theories faced many risks, as I discussed in the Approval Order. In brief, the plaintiffs: could have lost on antitrust standing grounds under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); had to deal with the networks' restructuring as independent companies, which occurred after the case had been filed; would have had to overcome the indisputable procompetitive effects of the challenged network rules; would have had serious obstacles in proving damages; and would have had to win class certification and maintain that status through the end of trial. *See* Approval Order 20-29.

Those risks could have meant the end of the litigation with no recovery for class members and no fee for counsel. Counsel should be rewarded for undertaking them and for achieving substantial value for the class. If not for the attorneys' willingness to endure for many years the risk that their extraordinary efforts would go uncompensated, the settlement would not exist.

In *Goldberger*, the Second Circuit – correctly, I believe – doubted that substantial contingency risk inheres in every common fund case. *See* 209 F.3d at 52 (citing Janet Cooper

Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L.Rev. 497, 578 (1991)). When a court finds that, in fact, there was relatively little risk of failure, the fee award should reflect that finding. But given the existential threats to this litigation discussed in the Approval Order, I conclude that the risk in this case was enormous. My award of attorneys' fees must recognize that, from an *ex ante* perspective, counsel no doubt had serious doubts about taking on such a risky and expensive litigation.

As for complexity, no one can reasonably dispute the fact that this case was enormously complex, both factually and legally.

2. *Quality of Representation; Time Spent by Counsel*

In light of that serious risk and the complexity of the case, the quality of representation in this case may be measured in large part by the results that counsel achieved for the classes. I discussed the merits and demerits of the settlement in detail in the Approval Order, but I reiterate here that the settlement constitutes a significant step toward remedying the merchants' complaints about interchange rates in Visa and MasterCard credit card transactions. Even standing alone (that is, without considering the other rules changes created or locked in by the settlement), the merchants' newly acquired ability to surcharge the use of credit cards at the product level has great value. The networks and the banks fiercely resisted such a change in the rules throughout the long and hard-fought settlement discussions. Class Plaintiffs' expert estimates that it could save merchants between $26.4 and $62.8 billion over the next decade. Frankel Decl., ¶¶ 67-73, DE 2111-5. Plaintiffs' counsel also worked toward the passage of the Durbin Amendment, which removed discounting restrictions at the network level. And this case also helped precipitate the networks' consent decree with the Department of Justice after plaintiffs' counsel shared their work with government attorneys several years into the litigation.

For these and other reasons, the settlement cannot be reduced to the damages alone; it encompasses real programmatic reforms that enable merchants to stimulate network and bank competition on interchange rates by taking action at the point of sale. When the rules changes are combined with the massive damages fund, the settlement must be labeled a significant success. That assessment reinforces my judgment that plaintiffs' counsel litigated the case with skill and tenacity, as would be expected to achieve such a result. *See Goldberger*, 209 F.3d at 55 ("[T]he quality of representation is best measured by results.").

The amount of time and energy that counsel spent on the case is clear from the reported number of hours – nearly 500,000 – and from even a cursory review of the docket sheet.

3. *Fee in Relation to Fund; Public Policy Considerations*

This brings me to the final two factors: the requested fee in relation to the size of the settlement fund, and public policy considerations. Class Counsel have requested a fee of $570 million, which represents about 10% of the fund (after reductions for opt-outs).[4] Relying

[4] Although I have little doubt that the injunctive relief in this case will eventually have great value to the merchants, I have not relied on its value in a strict mathematical sense – that is, I will not award a percentage of that additional value as fees. (I should note that, in contrast to the first Visa/MasterCard case, Class Counsel here make no such request.) As the Ninth Circuit wrote in *Staton v. Boeing Co.*,

> Precisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund. We hold, therefore, that only in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees. When this is not the case, courts should consider the value of the injunctive relief obtained as a "relevant circumstance" in determining what percentage of the common fund class counsel should receive as attorneys' fees, rather than as part of the fund itself.

327 F.3d 938, 974 (9th Cir. 2003) (internal citation and footnote omitted). The value of the rules changes accomplished by the settlement (which may be enhanced by the recent, not-yet-approved settlement in separate litigation against American Express, *see* Hilary Stout, "An Easing of Rules on Charges by Amex," *The New York Times*, December 20, 2013, at B1 (also available at http://www.nytimes.com/2013/12/20/business/an-easing-of-rules-on-charges-by-amex.html)), is too uncertain at this point to be anything other than the kind of "relevant circumstance" described by the court in *Staton*.

on counsel's representation of a lodestar value of about $160 million, the requested fee would amount to a multiplier of 3.54.

Even with the aid of the *Goldberger* factors, I have struggled to find a strong normative basis by which to evaluate the requested fee or to generate my own figure. The law sets only minimal constraints on fee awards. Within the boundaries of those constraints, it offers no concrete guideposts. And this case is so large and complex that it has few comparators to guide my judgment. More precise guidance would be useful, not so much for the district judges making the fee awards, who generally welcome broad discretion, but for the lawyers who do this kind of work. Bearing the risk of failure on the merits comes with the territory, but it seems anomalous that counsel must also bear the additional financial risk that inheres in such broad discretion even when they succeed. In any event, I elaborate below on my thought process in awarding fees in this case for the benefit of the parties and any reviewing courts.

As mentioned above, unlike more routine class cases – for example, wage and hour settlements with values of about a million dollars, for which countless comparators could be found – comparison to similar cases is difficult here given the singular size and complexity of this case. And unlike (for example) securities cases under the PSLRA, I am afforded no guidance by the parties' negotiations. In PSLRA litigation, a lead plaintiff may bargain with lead counsel over fees, though in this Circuit a district court need not defer to such a bargain when actually making the award at the end of litigation. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) (reserving the question of whether a negotiated fee is presumptively reasonable, which is the rule under cases such as *In re Cendant Corp. Litig.*, 264 F.3d 201, 282-83 (3d Cir. 2001)). It would be helpful to have a negotiated benchmark from which to work, and in a future case, I will consider employing my authority under Rule 23(d) to

require such negotiation – perhaps with court-appointed counsel to represent a cross-section of the plaintiffs for the purposes of the fee negotiation.[5]

In theory, even in the absence of a negotiated rate here, I could look to other, comparable cases in which counsel and class members bargained over fees. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d at 134 (noting that fee awards should, where possible, approximate market rates, and citing cases). But there is little information about how sophisticated plaintiffs and lawyers behave in cases with recoveries this large, because there are very few cases of comparable size, and none include a fee arrived at through private bargaining.

For these reasons, my starting point for assessing the requested fee in relation to the settlement fund is large class cases with court-set fees. The closest comparator case I know is the Visa/MasterCard settlement I presided over ten years ago. In that case, I approved a fee award of about $220.3 million, about 6.5% of the value of the fund, for a multiplier of 3.5, *see In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003), which the Second Circuit upheld, *see Wal-Mart*, 396 F.3d at 121-23. The two cases are in some ways similar: both are antitrust cases involving the two largest networks and banks, with merchants as plaintiffs; both involve novel and complex legal questions; in their history, both encompassed many years of litigation involving many thousands of hours of lawyering; and in their results, both ended in huge settlement funds accompanied by programmatic reforms of (possibly) even greater monetary value. In one meaningful respect, however, they are different: This case was more challenging. The impediments to the tying allegation in the *Wal-Mart* case were not as

[5] The need for representation of a *cross-section* of the putative class is important. In the *Wal-Mart* case, class counsel had negotiated with five merchants a fee arrangement that, they claimed, would produce attorneys' fees far in excess of the amount awarded by the district judge. They urged the Second Circuit to hold that the negotiated fee had been improperly ignored below. The court rejected the argument. The five merchants were among "the nation's largest merchants," and the Second Circuit found no abuse of discretion in disregarding a fee negotiated with those five merchants "when settlement payments to approximately five million merchants are at stake." 396 F.3d at 123.

ominous as the obstacles faced by the plaintiffs here, which are discussed in the Approval Order. The more progress the merchants make – through private lawsuits, government cases, and legislation – the more difficult it becomes to establish an antitrust violation.

Despite the absence of concrete guideposts, there are some legal principles that help me evaluate the requested fee in relation to the fund. One is that the percentage of the fund awarded should scale back as the size of the fund increases. I recently observed that "[t]o avoid routine windfalls where the recovered fund runs into the multi-millions, courts typically decrease the percentage of the fee as the size of the fund increases." *Precision Associates, Inc. v. Panalpina World Transp. (Holding) Ltd.*, 08-CV-42 JG VVP, 2013 WL 4525323, at *16 (E.D.N.Y. Aug. 27, 2013) (internal quotation marks and citation omitted). That seems to be the practice of judges nationwide. For example, a recent study found that for federal class action settlements in the years 2006 and 2007, the percentage awarded "tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent," though that last category covered only eleven settlements. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 838 (2010). Another study, by Theodore Eisenberg and Geoffrey P. Miller, also showed decreasing percentages as the size of the fund increased. *See* Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 265 (2010).

As my formulation in *Precision Associates* makes clear, I believe the main reason courts adopt the downward-scaling percentage method is to prevent a windfall for class counsel. But what is a windfall? Lawyers for a class receive a windfall only if their compensation

exceeds the value of their services.[6] Comparison to private fee arrangements shows that sophisticated clients often require counsel to accept a smaller percentage of a recovery as the size of the recovery increases. Thus, some scaling back seems appropriate here as well.

4. *Graduated Schedule and Fee Award*

I have employed a percentage calculation, but as many large individual clients in high-stakes patent cases or institutional investors in securities cases under the PSLRA do, I have scaled the marginal percentage down as the amount of the recovery increased. *See, e.g., In re Interpublic Sec. Litig.*, 02 CIV.6527(DLC), 2004 WL 2397190, at *12 n.4 (S.D.N.Y. Oct. 26, 2004) (discussing graduated fee schedule for *In re WorldCom Securities Litigation*). Other courts have adopted graduated schedules in class cases. *See In re Oracle Sec. Litig.*, 132 F.R.D. 538 (N.D. Cal. 1990) (holding an auction for counsel in securities case, and accepting a winning fee with a graduated, declining schedule). Obviously, the same resulting fee could be reached by picking a single percentage (noted as the average in the table set forth below) and applying it to the entire fund. But the graduated fee schedule has a number of advantages.

First, a graduated schedule permits a more reasoned and transparent calculation of the lawyers' fee based on comparison to other cases. For example, it is very common to see 33% contingency fees in cases with funds of less than $10 million, and 30% contingency fees in cases

[6] Imagine, for example, a case in which a $500 million settlement fund was achieved against considerable *ex ante* odds of success (due to novel legal issues, intense opposition, difficult discovery, appeals, and so forth), so that the settlement required not only superior legal skill but massive investment of lawyers' time, and the lodestar value of counsel's time was $150 million. In that circumstance, would it be a "windfall" to award class counsel 30% of the fund, *i.e.*, the lodestar value? Or would a 10% award be required by the value of the fund alone? In analogous circumstances, at least one judge did not think strict adherence to the diminishing percentage principle was appropriate. In *In re Initial Pub. Offering Sec. Litig*., 671 F. Supp. 2d 467, 505 (S.D.N.Y. 2009), counsel claimed a lodestar of $278 million; after reducing the hourly rate in order to account for factors such as the economic downturn and the heavy use of paralegal time, reaching a figure of about $200 million, the court awarded one third of the $510 million settlement as fees. The settlement was huge, but so was the lawyers' effort, justifying a high-percentage fee that, in that court's judgment, was not a windfall.

with funds between $10 million and $50 million. As mentioned above, it is also common to see a graduated schedule in cases where sophisticated clients negotiate fees in advance.

Second, a graduated schedule implicitly acknowledges and addresses a worry that many courts, including the *Goldberger* court, have expressed, *i.e.*, that "it is not ten times as difficult to prepare, and try or settle a 10 million dollar case as it is to try a 1 million dollar case." *Goldberger*, 209 F.3d at 52 (quoting *In re Union Carbide Corp. Consumer Products Bus. Sec. Litig.*, 724 F. Supp. 160, 166 (S.D.N.Y. 1989)).

The following table lays out the fee schedule I have chosen to adopt.

Bracket	**Fee percentage**	**Marginal fee**
0–$10 million	33%	$3.3 million
$10 million–$50 million	30%	$12 million
$50 million–$100 million	25%	$12.5 million
$100 million–$500 million	20%	$80 million
$500 million–$1 billion	15%	$75 million
$1 billion–$2 billion	10%	$100 million
$2 billion–$4 billion	8%	$160 million
$4 billion–$5.7 billion	6%	$102 million
TOTALS	(average) 9.56%	$544.8 million

Thus, counsel are awarded 33% of the fund up to $10 million, or $3.3 million, which reflects a common contingency fee arrangement in less complex class cases; 30% of the next $40 million (reaching $50 million); 25% of the next $50 million (reaching $100 million); 20% of the next

$400 million; 15% of the following $500 million; 10% of the following $1 billion; 8% of the following $2 billion; and 6% of the remainder, up to the final value of $5.7 billion.[7] The result is a total fee of $544.8 million, or 9.56% of the total fund.

I acknowledge an irreducible minimum of arbitrariness in the cutoff amounts and the percentages in any such schedule, including this one, but I take some inspiration from the empirical studies cited above.[8] I have also examined the Silver Declaration, which catalogs fee awards in many "megafund" cases with values exceeding $100 million. And I have also tried to adhere to what I believe to be norms of the profession.

In picking these specific brackets and percentages, I am especially mindful of two facts. First, this case settled only after many years of hard-fought litigation. Privately negotiated fees in complex cases (including PSLRA cases) often include a higher fee for cases that proceed past a motion to dismiss, discovery, summary judgment, or other benchmarks;[9] the *Goldberger* factors also dictate a smaller fee for less work. An earlier settlement reached through less work would surely warrant a smaller fee. Second, as I mentioned in footnote 4, although it is impossible to know with certainty the ultimate value of the injunctive relief, it may very likely exceed the value of the monetary relief in the long run. The injunctive relief is therefore a "relevant circumstance," to say the least. *See Staton*, 327 F.3d at 974.

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[7] Because the value of this case is "only" $5.7 billion, I have not filled in the chart past that value, though there will eventually be settlements that exceed that amount. One approach would be to create additional brackets with even lower marginal percentages. It would also be possible, and probably wiser, to index the bracket values to inflation.

[8] For the twelve settlements in 2006 and 2007 between $72.5 and $100 million, the median fee was 24.3%; for the 14 settlements between $100 and $250 million, the median was 16.9%; for the eight settlements between $250 and $500 million, the median was 19.5%; for the two settlements between $500 million and $1 billion, the median was 12.9%; and for the nine settlements between $1 and $6.6 billion, it was 9.5%. *See* Fitzpatrick, *Empirical Study*, at 839.

[9] *See, e.g., In re Oracle Sec. Litig.*, 132 F.R.D. at 540-41 (proposed fee schedules from three bidders in securities case tied both to amount of recovery and to stage at which litigation settles or duration of litigation).

A final reason to employ the schedule methodology advanced here is for the benefit of counsel in future cases. If plaintiffs' lawyers know in advance (that is, at the start of a case) that such a schedule will be used, it will alter their thinking for the better. A graduated schedule ensures that the greater the settlement, the greater the fee, and it therefore avoids certain incentive problems that come from simply scaling an overall percentage down as the size of the fund increases.[10] *See In re Synthroid Mktg. Litig.*, 264 F.3d 712, 721 (7th Cir. 2001) (citing cases, and noting that the graduated schedule ensures that "attorneys' fees never [go] down for securing a larger kitty, and counsel always [have] an incentive to seek more for their clients"). Using such a schedule as a guideline for future cases – from which departures based on case-specific circumstances may of course be warranted – will permit counsel to make reasonable decisions *ex ante* in those future cases.

In my view, a guidepost is sorely needed. We know from other contexts that the conferral of broad discretion on district judges without providing sufficient guidance for the exercise of that discretion produces unwarranted disparities in outcomes, which undermine justice and the appearance of justice. Broad discretion in this context is certainly appropriate; as *Goldberger* acknowledges, each case is unique, and district judges should be empowered to set a fee that recognizes those unique circumstances.[11]

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[10] Imagine, for example, how counsel will behave if a court adopts the following non-graduated rule instead: 30% of the (total) fund if it's up to $100 million, or 20% of the (total) fund if it's between $100 million and $500 million. Counsel will prefer to settle a case for $100 million, yielding a $30 million fee, than for $140 million, yielding a fee of $28 million. *See also In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (describing similar problem in actual case). That incentive is contrary to the best interests of the class.

[11] Even in large-value cases, courts have sometimes awarded contingency fees exceeding 30% of the overall fund. In addition to *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009), awarding one third of a fund that slightly exceeded $500 million, there is *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011), which awarded 30% of $410 settlement in consumer litigation, and cases it cites: *In re Vitamins Antitrust Litig.*, 2001 WL 34312839 (D.D.C. July 16, 2001) (34.6% of $365 million) and *Allapattah Servs. Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185 (S.D. Fla. 2006) (31.33% of $1.075 billion). Likewise, even in mega-fund cases, courts have sometimes awarded contingency fees of under 6% of the total fund. *E.g. In re AOL Time Warner, Inc. Sec.*, 02 CIV. 5575 (SWK), 2006 WL 3057232 (S.D.N.Y. Oct. 25, 2006) (5.9% of $2.65 billion); *In re Worldcom, Inc. Sec. Litig.*, 388 F.Supp.2d 319, 353, 360 (S.D.N.Y. 2005) (5.6% of $3.5 billion).

Still, a starting point, from which explained departures in either direction would be permissible, and perhaps even frequent, might reduce both those unwarranted disparities and the extent to which class counsel, *ex ante*, regard future attorneys' fee proceedings as a crapshoot in large cases. I expect no deference to the particular schedule I have found useful here; I have tailored it to the unique facts and circumstances of the settlement I have approved here, which combine to produce a generous but well-deserved fee. I believe that the adoption of something like this schedule – or indeed a different sort of benchmarking mechanism, such as a PSLRA-like mechanism for a negotiated rate – by a higher court or a coordinate branch would be beneficial. In any event, it is my considered judgment that, in this case, the cutoff amounts and percentages I have used above result in a fair overall figure.

5. *Lodestar Cross-Check*

There are at least two reasons that judges are comfortable assessing hourly rates when awarding fees. First, the billable hour is common in our profession, especially in certain types of cases and for certain types of clients. Second, many federal fee-shifting civil rights statutes that permit court-awarded attorneys' fees incorporate a lodestar value or a close cousin. *See generally Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany & Albany Cnty. Bd. of Elections*, 522 F.3d 182, 186-90 (2d Cir. 2008). However, the fact that statutes dictate such a measure for some cases does not mean that the billable hour represents the "true" value of attorney time in general. Nor does the fact that many firms bill by the hour for many types of cases compel that conclusion. Many defense firms are now facing pressure to change their billing models to flat fees or to incorporate incentives to avoid inflation of hours. Their clients evidently do not believe that the value of a firm's services is necessarily related to the number of hours billed. On the plaintiffs' side, where it is often easier to measure the value that

lawyers produce for their clients, the contingency fee – that is, a cut of the proceeds – rules. That fact would be unremarkable to bankers, real estate brokers, sports agents, and other professionals who are used to being paid based on the value they obtain for their clients rather on the number of hours they have worked.

These concerns diminish the value of the lodestar crosscheck, but they do not eliminate it. Critically, the lodestar multiplier is one metric that permits comparison across a wide range of case types and fund sizes. Here, with a fee award of $544.8 million, and a lodestar of about $160 million, the multiplier is about 3.41. That multiplier is comparable to (indeed, nearly identical to) the one I awarded in the *Wal*-Mart case ten years ago, and it is also comparable to multipliers in other large, complex cases. Without engaging in a "gimlet-eyed review" of the fee application, I am nonetheless confident that this is a reasonable multiplier and a reasonable overall fee. *See, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 354-59 (S.D.N.Y. 2005) (approving $194.6 million fee award, for multiplier of 4.0, or 5.5% of the fund, in complex securities case with value of approximately $3.5 billion, and citing cases).

B. *Expenses*

Counsel have also sought reimbursement of expenses slightly in excess of $27 million. As a general rule, counsel are entitled to reimbursement for reasonable out-of-pocket expenses incurred over the course of litigating the case. *See, e.g., In re Vitamin C Antitrust Litig.*, 06-MD-1738 BMC JO, 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004). Finding these expenses reasonable, I approve them here in the full amount requested: $27,037,716.97.

C. *Incentive Payments*

Finally, Class Counsel have also sought incentive payments totaling $1.8 million for the nine Class Plaintiffs. Along with their motion for attorneys' fees, Class Counsel submitted declarations of corporate officers for each of the nine Class Plaintiffs. In various levels of detail, these declarations document the work that the named plaintiffs undertook to support the case, as well as the expenses they incurred in doing so.

It is true that $1.8 million constitutes only about .03% of the $5.7 billion fund. Nonetheless, the average incentive award proposed – $200,000 for each plaintiff – will no doubt dwarf the average monetary recovery per class member.[12]

Class representatives will certainly be permitted to recover their (properly documented) *expenses*. Just as the lawyers worked on behalf of the entire class, so too did the class representatives in producing documents, attending depositions, and so on. It is thus only fair for the absent class members to reimburse the named plaintiffs' reasonable expenses. *See, e.g., In re Marsh & McLennan Companies, Inc. Sec. Litig.*, 04 CIV. 8144 (CM), 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009). To this point, however, only some of the Class Plaintiffs have even attempted to document those expenses. Before I approve any reimbursements, counsel for those representatives will need to provide better evidence of the amount of each named plaintiff's expenses.

As to the incentive awards, while I am mindful of the risks that the named plaintiffs may have undertaken, to this point, Class Counsel have not come close to justifying such large awards. In an admittedly much smaller case, I declined to approve a settlement in which the proposed incentive payments were four times the mean anticipated payment and over

[12] In their brief in support of the motion for settlement approval, Class Counsel estimated that the class contains at least 12 million members. *See* DE 2111 at 33 n.36. The history of the *Wal-Mart* settlement suggests that the number of actual claims filed will be lower.

thirteen times the median anticipated payment. *Gulino v. Symbol Technologies, Inc.*, 06 CV 2810 (JG) (AKT), 2007 WL 3036890, at *3 (E.D.N.Y. Oct. 17, 2007). Here, the ratio of the average incentive award to the average payment is much higher. Class Counsel are expected to provide, at a minimum, documentation setting forth the approximate value of each Class Plaintiff's claim and each one's proposed incentive award. They are also expected to provide any relevant authority, factual and legal, for the requested awards.

CONCLUSION

For the reasons stated above, I award Class Counsel fees of $544.8 million and costs and expenses of $27,037,716.97. The application for incentive payments to class representatives is denied without prejudice to renewal in a properly-supported motion.

So ordered.

John Gleeson, U.S.D.J.

Dated: January 10, 2014
Brooklyn, New York

Partial Settlements and Awards of Expenses

In re Korean Ramen Antitrust Litigation
Civ. A. No. C-13-04115-WHO (N.D. Cal. Aug. 22, 2016)

Excerpts of Motion and Order

Facts: Indirect Purchaser Plaintiffs reached a settlement with defendant Samyang Foods Co. Ltd., one of a number of defendants in the action, that provided for a settlement fund of $500,000. The litigation would continue with the non-settling defendants. In their motion for final approval of the partial settlement, plaintiffs asked the court to permit them to use 50 percent of the settlement funds (after deducting expenses for notice and administration costs) to reimburse class counsel for past and future litigation expenses.

Indirect Purchaser Plaintiffs' Notice of Motion and Motion for Final Approval of Settlement with Defendant Samyang Foods Co. Ltd., and Reimbursement of Expenses; Memorandum in Support Thereof

. . .

IV. Plaintiffs Request for Partial Reimbursement of Expenses Is Reasonable and Should Be Approved

In the Notice, Plaintiffs provided that "they intend to ask the Court to permit them to use up to 50% of the Settlement Fund remaining after the payment of notice and administration costs to reimburse past and future expenses incurred in prosecuting the lawsuit against the Non-Settling Defendants." See Plutzik Decl at ¶ 7. This amount, totaling $216,673,[5] will help offset expenses already incurred by Plaintiffs in paying expert fees, translation fees, and travel expenses, among other things, incurred in the prosecution of this litigation. *Id.*

Similar litigation funds have been approved in other class actions. See, e.g., *In re Transpacific Passenger Air Transportation Antitrust Litig.*, 3:07-CV-05634-CRB, [Dkt. No. 1009], (N.D. Cal. May 26, 2015) (Judge Breyer approved a settlement that included a litigation fund); *Newby v. Enron Corp*., 394 F.3d 296, 303 (5th Cir. 2004) (affirming approval of Settlement with $15 million of settlement proceeds going to a litigation expense fund); *In re Cal. Micro Devices Sec. Litig.*, 965 F. Supp. 1327, 1337 (N.D. Cal. 1997) (approving a $1.5 million litigation fund "[b]ecause the remainder of the case appears to have potential value for the class").

Here, Plaintiffs have incurred significant costs in translating documents and taking depositions (with both a court reporter and videographer present) in a foreign country with a translator attending each deposition. The funds therefore will be used to help offset the unusually high costs of litigating this case involving foreign

5 This amount is calculated by subtracting 1/3 of the notice costs ($66, 653) from the total settlement amount ($500,000) which equals $433, 347. IPPS seek half of this amount to offset such costs.

defendants as well as the payment of the expert retained in connection with Plaintiffs' motion for class certification. See Plutzik Decl. at ¶ 7.

. . .

Order Granting Final Approval to Settlement and Final Judgment

. . .

11. The Escrow Account, into which Samyang Korea has deposited a total of $500,000 as the Settlement Amount for the Indirect Settlement Class, plus accrued interest thereon, is approved as a Qualified Settlement Fund pursuant to Internal Revenue Code Section 468B and the Treasury Regulations promulgated thereunder. Counsel for the Indirect Purchaser Plaintiffs are entitled to the payment of $216,673 as partial reimbursement of costs incurred in the prosecution of this litigation.

. . .

More on Conflicts of Interest and Attorneys' Fee Awards

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN RODRIGUEZ, on behalf of himself and all others similarly situated; REENA B. FRAILICH, on behalf of herself and all others similarly situated; JENNIFER BRAZEAL; LISA GINTZ; LOREDANA NESCI; LORRAINE RIMSON; KARI BREWER, *Plaintiffs-Appellees,* v. SANDRA DISNER, Executor of the Estate of Eliot G. Disner, as successor-in-interest to Eliot G. Disner and Disner Law Corporation, Class Counsel, *Appellant.*	No. 10-55309 D.C. No. 2:05-cv-03222-R-Mc

RYAN RODRIGUEZ, on behalf of himself and all others similarly situated; REENA B. FRAILICH, on behalf of herself and all others similarly situated; JENNIFER BRAZEAL; LISA GINTZ; LOREDANA NESCI; LORRAINE RIMSON; KARI BREWER,

Plaintiffs-Appellees,

v.

MCGUIREWOODS LLP,

Appellant.

No. 10-55342
No. 10-56730
D.C. No.
2:05-cv-03222-
R-Mc

RYAN RODRIGUEZ, on behalf of himself and all others similarly situated; REENA B. FRAILICH, on behalf of herself and all others similarly situated; JENNIFER BRAZEAL; LISA GINTZ; LOREDANA NESCI; LORRAINE RIMSON; KARI BREWER,

Plaintiffs-Appellees,

v.

DAVID FELDMAN; CAMERON GHARABIKLOU; EMILY GRANT; JEFF LANG; SARAH MCDONALD; CARA PATTON; RACHEL SCHWARTZ; GREG THOMAS,

Objectors-Appellants.

No. 10-56700
D.C. No.
2:05-cv-03222-
R-Mc

RYAN RODRIGUEZ, on behalf of himself and all others similarly situated; REENA B. FRAILICH, on behalf of herself and all others similarly situated; JENNIFER BRAZEAL; LISA GINTZ; LOREDANA NESCI; LORRAINE RIMSON; KARI BREWER,

Plaintiffs-Appellees,

v.

JAMES JURANEK, Unnamed Class Member; AUDREY JURANEK, Unnamed Class Member; RICHARD P. LE BLANC, III,

Objectors-Appellants.

No. 10-56703

D.C. No. 2:05-cv-03222-R-Mc

RYAN RODRIGUEZ, on behalf of himself and all others similarly situated; REENA B. FRAILICH, on behalf of herself and all others similarly situated; JENNIFER BRAZEAL; LISA GINTZ; LOREDANA NESCI; LORRAINE RIMSON; KARI BREWER,

Plaintiffs-Appellees,

v.

GEORGE SCHNEIDER, Class Member; JONATHAN M. SLOMBA, Class Member; JAMES PUNTUMAPANITCH, Class Member; JUSTIN HEAD; RYAN HELFRICH,

Objectors-Appellants.

No. 10-56724

D.C. No. 2:05-cv-03222-R-Mc

RYAN RODRIGUEZ, on behalf of himself and all others similarly situated; REENA B. FRAILICH, on behalf of herself and all others similarly situated; JENNIFER BRAZEAL; LISA GINTZ; LOREDANA NESCI; LORRAINE RIMSON; KARI BREWER,

Plaintiffs-Appellees,

v.

AARON LUKOFF; JOHN PRENDERGAST; DAVID ORANGE,

Objectors-Appellants.

No. 10-56737

D.C. No. 2:05-cv-03222-R-Mc

RYAN RODRIGUEZ, on behalf of himself and all others similarly situated; REENA B. FRAILICH, on behalf of herself and all others similarly situated; JENNIFER BRAZEAL; LISA GINTZ; LOREDANA NESCI; LORRAINE RIMSON; KARI BREWER,

Plaintiffs-Appellees,

v.

DAVID ORIOL, Unamed Classmembers; JASON TINGLE; JENNIFER BROWN MCELROY; DANIEL M. SCHAFER; SARAH SIEGEL; EVANS & MULLINIX, P.A.,

Objectors-Appellants.

No. 10-56803

D.C. No. 2:05-cv-03222-R-Mc

RYAN RODRIGUEZ, on behalf of himself and all others similarly situated; REENA B. FRAILICH, on behalf of herself and all others similarly situated; JENNIFER BRAZEAL; LISA GINTZ; LOREDANA NESCI; LORRAINE RIMSON; KARI BREWER,

Plaintiffs-Appellees,

v.

ROBERT GAUDET, JR.; SANDEEP GOPALAN,

Objectors-Appellants.

No. 10-57037

D.C. No. 2:05-cv-03222-R-Mc

OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
March 5, 2012*—Pasadena, California

Filed August 10, 2012

Before: Jerome Farris, Richard R. Clifton, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Ikuta

*The panel unanimously concludes that Appeal Nos. 10-56700, 10-56703, 10-56737, 10-56803, and 10-57037 are suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

COUNSEL

Margaret A. Grignon, Reed Smith LLP, Los Angeles, California, for appellant Sandra Disner (Appeal No. 10-55309).

Terry W. Bird and Thomas R. Freeman (argued), Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, P.C., Los Angeles, California, and Sidney Kanazawa, McGuireWoods LLP, Los Angeles, California, for appellant McGuireWoods LLP (Appeal Nos. 10-55342, 10-56770).

John W. Davis, Law Office of John W. Davis, San Diego, California, and Steven F. Helfand, Helfand Law Offices, San Francisco, California, for objectors-appellants David Feldman, Cameron Gharabiklou, Emily Grant, Jeff Lang, Sarah McDonald, Cara Patton, Rachel Schwartz, and Greg Thomas (Appeal No. 10-56700).

Charles A. Sturm, Steele Sturm PLLC, Houston, Texas, for objectors-appellants James Juranek, Audrey Juranek, and Richard P. Le Blanc (Appeal No. 10-56703).

J. Garrett Kendrick and C. Benjamin Nutley (argued), Kendrick & Nutley, Pasadena, California, and John Pentz, Maynard, Massachusetts, for objectors-appellants George Schneider, Jonathan M. Slomba, James Puntumapanitch, Justin Head, and Ryan Helfrich (Appeal No. 10-56724).

Joshua R. Furman (argued), Joshua R. Furman Law Corp., Beverly Hills, California, and John M. Zimmerman, Law Offices of John M. Zimmerman, Seattle, Washington, for objectors-appellants Aaron Lukoff, John Prendergast, and David Orange (Appeal No. 10-56737).

J. Darrell Plamer, Law Offices of Darrell Plamer PC, Solana Beach, California, for objectors-appellants Evans & Mullinix, P.A., David Oriol, Sarah Siegel, Jennifer Brown McElroy, Daniel Schafer, and Jason Tingle (Appeal No. 10-56803).

Robert J. Gaudet, Jr., The Hague, The Netherlands, and Sandeep Gopalan, Maynooth, Ireland, appearing pro se (Appeal No. 10-57037).

OPINION

IKUTA, Circuit Judge:

These thirteen consolidated appeals brought by class counsel[1] and six groups of objectors (collectively, "Objectors")[2] challenge the district court's decisions regarding attorney fee awards after the settlement of an antitrust class action against West Publishing Corp. and Kaplan, Inc. In this opinion, we address nine separate appeals, which challenge the propriety of the district court's decision to deny attorneys' fees to class counsel McGuireWoods on account of a conflict of interest and to deny fees to objectors for their efforts in securing that decision.[3] Because the district court's decisions were not legally erroneous, and in light of the deference we give to such determinations, we affirm the respective fee orders with the exception of the order denying fees to the Schneider Objectors, which we vacate and remand for further proceedings consistent with this decision.

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[1]McGuireWoods LLP and Zwerling Schachter & Zwerling LLP. Sandra Disner, as successor in interest to Eliot Disner, a former partner of McGuireWoods, joins in and adopts class counsel McGuireWoods's briefing.

[2]David Feldman, Cameron Gharabiklou, Emily Grant, Jeff Lang, Sarah McDonald, Cara Patton, Rachel Schwartz, and Greg Thomas (collectively, the "Feldman Objectors"); James Juranek, Audrey Juranek, and Richard P. Le Blanc (collectively, the "Juranek Objectors"); George Schneider, Jonathan M. Slomba, James Puntumapanitch, Justin Head, and Ryan Helfrich (collectively, the "Schneider Objectors"); Aaron Lukoff, John Prendergast, and David Orange (collectively, the "Lukoff Objectors"); Evans & Mullinix, P.A., David Oriol, Sarah Siegel, Jennifer Brown McElroy, Daniel Schafer, and Jason Tingle (collectively, the "Oriol Objectors"); and Robert J. Gaudet Jr. and Sandeep Gopalan. We have considered all arguments raised by the objectors, and any argument not specifically mentioned here is rejected.

[3]We address the remaining four appeals in concurrently filed memorandum dispositions.

I

This case is before us for the second time. See *Rodriguez v. W. Publ'g Corp.* (*Rodriguez I*), 563 F.3d 948 (9th Cir. 2009). Because the facts are laid out at length in that opinion, we describe them only briefly.

A

At the onset of litigation, the law firm of Van Etten Suzumoto & Becket LLP (which later merged with McGuireWoods LLC) entered into "incentive agreements" with five plaintiffs, Ryan Rodriguez, Reena Frailich, Loredana Nesci, Jennifer Brazeal, and Lisa Gintz, in connection with a potential antitrust class action against West Publishing. *Id.* at 957. In these agreements, each of these clients authorized Van Etten to apply to the court for a fee award based on recovery against West Publishing, and Van Etten agreed to seek incentive compensation for each client in an amount equal to between $10,000 and $75,000, depending on the value of the settlement or verdict. *Id.* Specifically, the incentive agreements provided that, if the settlement amount was greater than or equal to $500,000, class counsel would seek a $10,000 award for each client who signed an agreement; if the settlement amount were $1.5 million or more, counsel would seek a $25,000 award; if it were $5 million or more, counsel would seek $50,000; and if it were $10 million or more, counsel would seek $75,000. *Id.*

Plaintiffs brought federal antitrust claims against BAR/BRI (a subsidiary of West Publishing at that time) and Kaplan, for their activities in the market for bar preparation courses. *Id.* at 955. The operative complaint alleged that West Publishing illegally acquired the assets of its direct competitor West Bar Review in violation of Section 7 of the Clayton Act, unlawfully conspired with Kaplan to prevent competition in the market for full-service bar review courses in violation of Section 1 of the Sherman Act, and wrongfully monopolized the

full-service bar review course market in violation of Section 2 of the Sherman Act. *Id.* at 955-56.

The district court certified a nationwide class comprised of all persons who purchased a bar review course from BAR/BRI between August 1, 1997 and July 31, 2006. *Id.* at 956. Plaintiffs Rodriguez, Frailich, Nesci, Brazeal, and Gintz, who had signed incentive agreements, were designated as class representatives, and McGuireWoods was appointed class counsel. *Id.* at 955. Two other class representatives, Kari Brewer and Lorraine Rimson, did not enter into incentive agreements, and were separately represented by the law firms Zwerling Schachter and Finkelstein Thompson LLP. *Id.* at 957-58.

The parties settled shortly before trial. Under the settlement agreement, West Publishing and Kaplan agreed to pay $49 million into a settlement fund that would be allocated pro rata to class members, with 25 percent of the fund set aside for attorneys' fees. *Id.* at 956-57. Before the final fairness hearing, class counsel filed motions seeking $325,000 in incentive awards for the class representatives and seeking fees for their representation of the class. *Id*. at 957, 963.

Multiple nonnamed members of the class challenged the fairness, reasonableness, and adequacy of the settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and objected to the applications for $325,000 in incentive awards for the class representatives and to class counsel's fee request. These class members, organized into groups of objectors, were also represented by counsel. *Id.* at 957-58. The Schneider Objectors argued that the court should reduce McGuireWoods's fee award because the incentive agreements created a conflict of interest between class counsel and the five representatives who had entered into the agreements, on

the one hand, and the remaining members of the class, on the other.[4]

On September 10, 2007, the district court approved the parties' settlement agreement, holding that the settlement was fair, adequate, and reasonable despite the conflict of interest between class representatives and class members. *Id.* at 958. The court awarded McGuireWoods over $7 million (subject to further increases for post-settlement work), the full amount of the requested fees. In a separate order, the district court declined to approve incentive awards totaling $325,000 to the class representatives, finding that the incentive agreements created an appearance of impropriety, violated the ethics rule against fee-sharing with non-lawyers, and created conflicts of interest between the class representatives and unnamed class members. *Id.* at 959. The court also denied fees to the objectors' counsel because they "did not add anything to the court's order denying" the motion for incentive awards. *Id.* at 958. Several groups of objectors appealed.

B

The respective appeals came before this court in *Rodriguez I*. There, we affirmed the class action settlement as fair and adequate, but reversed and remanded the district court's orders granting class counsel attorneys' fees and denying fees to objectors' counsel. *Id.* at 968-69. The incentive agreements between McGuireWoods and five class representatives played a central role in our decision.

We first considered the incentive agreements in the context of determining whether the settlement agreement "should

[4]The Feldman Objectors argued that the incentive awards requested on behalf of the class representatives should be denied, but did not argue that the incentive agreements affected class counsel's entitlement to fees. None of the other objectors challenged the incentive agreements during the settlement hearings or before this court in *Rodriguez I*.

have been rejected because the incentive agreements prevented the class representatives from providing adequate representation," *id.* at 958, as required to certify a class. *See* Fed. R. Civ. P. 23(a)(4) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if: . . . the representative parties will fairly and adequately protect the interests of the class."). We expressed disapproval of these incentive agreements, and stated that they "created an unacceptable disconnect between the interests of the contracting representatives and class counsel, on the one hand, and members of the class on the other." *Rodriguez I*, 563 F.3d at 960. We noted that class counsel's agreement to request incentive awards based on the amount of recovery "put class counsel and the contracting class representatives into a conflict position from day one," and that the effect of the incentive agreements "was to make the contracting class representatives' interests actually different from the class's interests in settling a case instead of trying it to verdict, seeking injunctive relief, and insisting on compensation greater than $10 million." *Id.* at 959.

Notwithstanding these serious concerns, we affirmed the district court's approval of the class action settlement. We held that even though "the ex ante incentive agreements created conflicts among the five contracting class representatives, their counsel [McGuireWoods], and the rest of the class," the adequacy of representation was not a basis to reject the settlement because "there were two other class representatives who had no incentive agreements and whose separate counsel [Zwerling Schachter and Finkelstein Thompson] were not conflicted." *Id.* at 955.

We next considered the incentive agreements in the context of evaluating objectors' challenge to the award of attorneys' fees to class counsel. We expressed concern that "the district court nowhere appears to have considered the effect on the award of attorney's fees of the conflict of interest that resulted from the incentive agreements." *Id.* at 967. We explained that

" '[s]imultaneous representation of clients with conflicting interests (and without written informed consent) is an automatic ethics violation in California and grounds for disqualification,' " and that " '[a]n attorney cannot recover fees for such conflicting representation.' " *Id.* at 967-68 (quoting *Image Technical Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1358 (9th Cir. 1998)). Although we did not express an opinion "on the impact of these principles on the fees request in this case," we stated that it was "appropriate for the district court to consider whether counsel could represent both the class representatives with whom there was an incentive agreement, and absentee class members, without affecting the entitlement to fees." *Id.* at 968. Accordingly, we reversed the award of attorneys' fees to McGuireWoods and remanded for the district court "to consider in the first instance the effect, if any, of the conflict arising out of the incentive agreements on the request by class counsel for an attorney's fee award." *Id.*

Finally, we considered certain objectors' argument that the district court improperly denied them fees attributable to their successful challenge to the $325,000 in incentive awards to class representatives. We held that the district court's rejection of objectors' fee requests on the ground that the objectors "did not add anything" to the court's decision to deny incentive awards was "clearly erroneous," because the district court did not consider the impropriety of the incentive agreements until the objectors raised this argument; only then did the district court reject the incentive awards. *Id.* at 963. "The net effect was to leave $325,000 in the settlement fund—for distribution to the class as a whole—that otherwise would have gone to the class representatives." *Id.* Accordingly, we remanded for the district court "to reconsider the extent to which Objectors added value that increased the fund or substantially benefitted the class members, and to award attorney's fees accordingly." *Id.*

C

On remand, the district court first considered the objectors' challenge to the award of attorneys' fees to class counsel McGuireWoods.[5] Relying on our decision in *Rodriguez I* and *Image Technical* (which *Rodriguez I* had cited with approval), the court concluded that the incentive agreements gave rise to a conflict of interest between the class representatives and the other members of the class that "tainted McGuireWoods's representation," and that, under California law, such a conflict "constitutes an automatic ethics violation that results in the forfeiture of attorneys' fees." Accordingly, the district court held that McGuireWoods was not entitled to any attorneys' fees for its representation of the class.

In response to McGuireWoods's motion to reconsider, the district court reaffirmed its ruling, stating that the "conflict of interest constituted an egregious breach of McGuireWoods' ethical duties, and thus further justif[ied] the forfeiture of McGuireWoods' fees for the period this conflict was in effect." The district court awarded McGuireWoods the costs and expenses it incurred in bringing the action, and a quantum meruit award of $500,000 for services provided after the court's rejection of the incentive awards, at which point the conflict of interest had come to an end. McGuireWoods timely appealed.

Following this decision denying fees to McGuireWoods, several objectors' counsel filed additional fee applications. The objectors reasoned that the elimination of fees to McGuireWoods meant class members would receive more from the settlement fund, and thus the objectors' efforts benefited the class. The district court denied all objectors' fee

[5]The district court also ruled on certain objectors' motions for attorneys' fees for their efforts in challenging the class representatives' requests for $325,000 in incentive awards. We address the appeals from this ruling in a concurrently filed memorandum disposition.

requests, reasoning that it had relied on its own analysis of the applicable case law in reaching its determination that McGuireWoods was not entitled to fees due to the conflict of interest, and that "the work performed by the objectors' counsel conferred no benefit on the class" and "was merely cumulative." Six groups of objectors timely appealed.

II

We review a district court's decision to grant or deny attorneys' fees for abuse of discretion, *Class Plaintiffs v. Jaffe & Schlesinger, P.A.*, 19 F.3d 1306, 1308 (9th Cir. 1994), and must affirm unless the district court applied the wrong legal standard or its findings of fact were illogical, implausible, or without support in the record, *see United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). We generally give broad deference to the district court's determinations on fee awards because of its "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

III

We turn first to McGuireWoods's challenge to the denial of its fees on account of an ethical violation.

A

[1] In class action litigation, a district court "may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). If there is no contractual or statutory basis to award attorneys' fees in a class action case, a court may rely on the "common fund doctrine," a traditional equitable doctrine "rooted in concepts of quasi-contract and restitution." *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 770 (9th Cir. 1977). Federal courts award attorneys' fees under the common fund

doctrine as a matter of federal common law, based on "the historic equity jurisdiction of the federal courts." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939).[6] Under the common fund doctrine, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The guiding principle is that attorneys' fees "be reasonable under the circumstances." *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990).

[2] In determining what fees are reasonable, a district court may consider a lawyer's misconduct, which affects the value of the lawyer's services. *See, e.g.*, *Image Technical*, 136 F.3d at 1358. A court has broad equitable power to deny attorneys' fees (or to require an attorney to disgorge fees already received) when an attorney represents clients with conflicting interests. *See, e.g.*, *Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917, 920 (2d Cir. 1950) ("Certainly by the beginning of the Seventeenth Century it had become a common-place that an attorney must not represent opposed interests; and the usual consequence has been that he is debarred from receiving any fee from either [client], no matter how successful his labors.").

[3] For example, we have held that a law firm's representation of antitrust plaintiffs against a defendant whom the law firm represented in an unrelated matter constituted a "clear violation of the applicable ethical rules," *Image Technical*,

[6]Therefore, we disagree with McGuireWoods's assumption that the district court's decision regarding the award of attorneys' fees is controlled by California law. Because the litigation in this case alleged violation of federal antitrust law, the award of attorneys' fees is governed by federal equitable doctrines, and state decisions are merely persuasive authority. If, on the other hand, we were exercising our diversity jurisdiction, state law would control whether an attorney is entitled to fees and the method of calculating such fees. *See Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478-79 (9th Cir. 1995).

*136 F.3d a*t 1359, and that "an attorney cannot recover fees for such conflicting representation . . . . even where, as here, the matters in which the firm represents the clients with conflicting interests are unrelated," *id.* at 1358. We reasoned that "payment is not due for services not properly performed," *id.* (quoting *Cal Pak Delivery, Inc. v. United Parcel Serv.*, 60 Cal. Rptr. 2d 207, 215 n.2 (1997)), and that it "compounds injustice" to allow the attorney to recover fees from the very party injured by the ethical violation, *id.* at 1359. *Similarly, in United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574 (9th Cir. 1996), a qui tam action under the False Claims Act, we noted that a reasonable fee for an attorney who represents clients with conflicting interests is "zero" at least "when the violation is one that pervades the whole relationship." *Id.* at 579.

Our sister circuits are in accord. *See Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156 (8th Cir. 1999) (affirming the district court's decision to deny attorneys' fees and costs to a firm that had been disqualified for a conflict of interest, reasoning that the district court "could properly deny the firm any recovery for services rendered prior to the disqualification, even if those services conferred some benefit on the class"); *see also So v. Suchanek*, 670 F.3d 1304, 1310-11 (D.C. Cir. 2012) (holding that the district court has broad equitable power to require counsel who represented clients with conflicting interests to disgorge fees); *In re E. Sugar Antitrust Litig.*, 697 F.2d 524, 533 (3d Cir. 1982) (upholding the disgorgement of attorneys' fees where "breach of professional ethics is so egregious that the need for attorney discipline and deterrence of future improprieties of that type outweighs" the concerns of providing "the client with a windfall" and depriving the "attorney of fees earned while acting ethically").

[4] Although the application of the common fund doctrine is a matter of federal courts' equitable powers, *see Van Gemert*, 444 U.S. at 478; *Wininger v. SI Mgmt. L.P.*, 301 F.3d

1115, 1120-21 (9th Cir. 2002), we have frequently looked to state law for guidance in determining when an ethical violation affects an attorney's entitlement to fees, *see Rodriguez I*, 563 F.3d at 967-68 (citing California cases for the proposition that an attorney cannot recover fees for services provided after a conflict of interest arose); *Image Technical*, 136 F.3d at 1358 (same). California courts have affirmed a trial court's decision to deny fees to attorneys laboring under an actual conflict of interest, such as where an attorney represented two entities with adverse interests entering a business deal without informed consent, *Fair v. Bakhtiari*, 125 Cal. Rptr. 3d 765, 792 (Ct. App. 2011), a law firm represented both wife and husband in marital dissolution proceedings, *Jeffry v. Pounds*, 136 Cal. Rptr. 373, 377 (Ct. App. 1977), and an attorney undertook to represent a client in a proxy fight with a corporation for which the attorney had been general counsel, *Goldstein v. Lees*, 120 Cal. Rptr. 253, 254-55 (Ct. App. 1975). By contrast, where the ethical violation is less severe, for example where the attorney represented clients with only a potential conflict of interest, California courts have affirmed decisions to award attorneys some fees depending on the equities. *See Pringle v. La Chapelle*, 87 Cal. Rptr. 2d 90, 94 (1999). In *Pringle*, the state court held that a trial court may consider " 'the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies' " in determining whether and to what extent fee forfeiture is appropriate. *Id.* at 94 n.5 (quoting Restatement (Third) of Law Governing Lawyers § 49 (Tentative Draft No. 1, 1996)). The egregiousness of the violation is often the critical factor. *See Mardirossian & Assocs., Inc. v. Ersoff*, 62 Cal. Rptr. 3d 665, 682 (Ct. App. 2007); *see also Paul W. Vapnek et al., California Practice Guide: Professional Responsibility*, ch. 4 ¶ 4:238; ch. 5 ¶¶ 5:1026, 5:1026.3 (2011). We are not aware, however, of any California case that has overturned a trial court's decision to deny attorneys' fees to an attorney engaged in dual representation of clients

with actual conflicts of interest, rather than a potential one as in *Pringle*.

We apply these equitable principles even more assiduously in common fund class action cases, such as this one, because "the district court has a special duty to protect the interests of the class," *Staton v. Boeing Co.*, 327 F.3d 938, 970 (9th Cir 2003), and must "act with a jealous regard to the rights of those who are interested in the fund in determining what a proper fee award is," *In re Wash. Pub. Power Supply Sys. Sec. Litig.* (*WPPSS*), 19 F.3d 1291, 1302 (9th Cir. 1994) (internal quotation marks omitted); *see also In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). In serving this "fiduciary role for the class," the district court must consider whether class counsel has properly discharged its duty of loyalty to absent class members. *Rodriguez I*, 563 F.3d at 968. As we noted in *Rodriguez I*, " '[t]he responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel.' " *Id.* (quoting *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir. 1995)). This general principle has exceptions; we have acknowledged that "conflicts of interest among class members are not uncommon and arise for many different reasons," *id.*, and a court may tolerate certain technical conflicts in order to permit attorneys who are familiar with the litigation to continue to represent the class, *see, e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14, 18-19 (2d Cir. 1986). But a court may appropriately determine that a conflict of interest affects class counsel's entitlement to fees where the conflict was not one "that developed beyond the control or perception of class counsel," and where the conflict was never disclosed to the district court "so that it could take steps to protect the interests of absentee class members." *Rodriguez I*, 563 F.3d at 958; *cf. In Re Agent Orange*, 800 F.2d at 18 (observing that " 'when a potential conflict arises between the named plaintiffs and the rest of the class, ... the attorney's duty to the class requires him to point out conflicts to the

court so that the court may take appropriate steps to protect the interests of absentee class members' " (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978)).

[5] In sum, under long-standing equitable principles, a district court has broad discretion to deny fees to an attorney who commits an ethical violation. In making such a ruling, the district court may consider the extent of the misconduct, including its gravity, timing, willfulness, and effect on the various services performed by the lawyer, and other threatened or actual harm to the client. *See* Restatement (Third) of Law Governing Lawyers § 37 (2000). The representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete denial of fees. *See Image Technical*, 136 F.3d at 1358-59; *see also Petrovic*, 200 F.3d at 1156. A district court has a special obligation to consider these equitable principles at the fee-setting stage in common fund class action cases, given the district court's fiduciary role to protect absent class members. *Rodriguez I*, 563 F.3d at 968.

B

Applying these principles here, we first confirm the district court's conclusion that McGuireWoods committed an ethical violation. Indeed, McGuireWoods does not dispute that its representation of conflicting interests constituted an ethical violation. Nor could it.

[6] Under the district court's local rules, California law governs a district court's determination whether an ethical violation has occurred.[7] Rule 3-310(C) of the California Rules

[7]Central District Local Rule 83-3.1.2 provides that:

> "the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and

of Professional Conduct generally prohibits the representation of clients with actual or potential conflicts of interest absent an express waiver.[8] The interests of clients "actually conflict" for purposes of Rule 3-310 "whenever a lawyer's representation of one of two clients is rendered less effective because of his representation of the other." *Gilbert v. Nat'l Corp. for Housing P'ships*, 84 Cal. Rptr. 2d 204, 212 (Ct. App. 1999). "The primary value at stake in cases of simultaneous or dual representation is the attorney's duty—and the client's legitimate expectation—of loyalty." *Flatt v. Super. Ct.*, 885 P.2d 950, 955 (Cal. 1994). A potential conflict exists whenever a lawyer's representation of one client might, in the future, become less effective by reason of his representation of the other. *See id.* at 954.

[7] In *Rodriguez I* we indicated that the incentive agreements created an actual conflict of interest between the named members and class counsel, on the one hand, and the other members of the class, on the other. We explained that the

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> the decisions of any court applicable thereto . . . . are hereby adopted as the standards of professional conduct, and any breach or violation thereof may be the basis for the imposition of discipline. The Model Rules of Professional Conduct of the American Bar Association may be considered as guidance."

However, the decision whether to sanction or impose other discipline is a question of federal law. *See, e.g.*, C.D. Cal. R. 83-3.1.3.

[8]Rule 3-310(C) of the California Rules of Professional Conduct states:

> A member shall not, without the informed written consent of each client:
>
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
>
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
>
> (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

incentive agreements "put class counsel and the contracting class representatives into a conflict position from day one" because "[b]y tying their compensation—in advance—to a sliding scale based on the amount recovered, the incentive agreements disjoined the contingency financial interests of the contracting representatives from the class." *Rodriguez I*, 563 F.3d at 959. This meant that "once the threshold cash settlement was met, the agreements created a disincentive to go to trial; going to trial would put their $75,000 at risk in return for only a marginal individual gain even if the verdict were significantly greater than the settlement." *Id.* at 959-60. We then noted that under California law, "[s]imultaneous representation of clients with conflicting interests (and without written informed consent) is an automatic ethics violation in California and grounds for disqualification," *id.* at 960 (quoting *Image Technical*, 136 F.3d at 1358), and faulted the district court for not considering "the effect on the award of attorney's fees of the conflict of interest that resulted from the incentive agreements," *id.* at 967.

[8] We are bound by our decision in *Rodriguez I*, both as law of the case and law of the circuit, *see Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc), and therefore conclude that the district court could reasonably have found that, by entering into the incentive agreements without informed consent, McGuireWoods engaged in conflicted representation, as defined in Rule 3-310. Therefore, the district court did not err in determining that McGuireWoods had committed an ethical violation under its local rules.

C

We next consider whether the district court abused its discretion in concluding that McGuireWoods was not entitled to any fees as a result of this ethical violation. McGuireWoods argues that the district court erred in concluding that a conflict of interest resulted in an automatic forfeiture of legal fees. Relying on *Pringle*, McGuireWoods asserts that a court may

not deny counsel fees where the client suffered no injury as a result of an ethical violation, unless counsel engaged in egregious conduct by knowingly or willfully violating an ethical rule. *Pringle*, 87 Cal. Rptr. 2d at 94. *Under the Pringle* standard, McGuireWoods argues, it was improper for the district court to deny all fees, because the class suffered no hardship as a result of the conflict of interest and the record provided no basis for holding that McGuireWoods had knowingly or willfully disregarded established ethical rules.

We disagree with McGuireWoods's analysis. As explained above, although a federal court may consider California cases as persuasive authority, the district court's award of attorneys' fees in this case is guided by "the historic equity jurisdiction of the federal courts," *Sprague*, 307 U.S. at 164, and the district court was not bound by *Pringle* or other state law. In light of federal equitable principles, we cannot say the district court abused its discretion in denying McGuireWoods all fees.

[9] First, the district court here could reasonably determine that by entering into the incentive agreements that created a conflict of interest "from day one," *Rodriguez I*, 563 F.3d at 959, McGuireWoods did not properly discharge its duty of loyalty to absent class members. As *Rodriguez I* explained, this was not a case where the conflict of interest developed during the course of litigation, or that developed "beyond the control or perception of class counsel"; rather, it was a conflict that "was inserted into the retainer agreement." *Id.* at 968. A knowing and willful creation of a conflict of interest is egregious conduct even under the standard for fee forfeiture under the test enunciated in *Pringle*, which McGuireWoods urges us to adopt. 87 Cal. Rptr. 2d at 94 (explaining that the denial of attorneys' fees may be appropriate where "the purported violation of the rules was serious, if any act was inconsistent with the character of the profession, or if there was an irreconcilable conflict"). Moreover, McGuireWoods took no steps "to disclose their agreement to the court, and to the

class," in violation of its "fiduciary duties to the class and duty of candor to the court." *Rodriguez I*, 563 F.3d at 959. Accordingly, the district court could reasonably conclude that because McGuireWoods knowingly and willfully represented conflicting interests, its services were "not properly performed," *Image Technical*, 136 F.3d at 1358, and therefore it was not entitled to fees.

[10] McGuireWoods argues that fee forfeiture was improper here because the incentive agreements did not lead to an actual injury to the class: the class representatives did not settle for just $10 million (which would have given the class representatives the maximum amount of incentive award), but achieved a $49 million settlement. The district court could have considered this factor, among others, in exercising its equitable discretion, and could have reasonably concluded that McGuireWoods was entitled to some attorneys' fees for its efforts and notable success in this case. But our conclusion that the district court could have reasonably taken this approach does not make its failure to do so an abuse of discretion. A district court has the primary responsibility for determining a reasonable fee award and must weigh any benefits McGuireWoods conferred on the class against the pervasive conflict of interest caused by the incentive agreements with class representatives. Given our deferential review of the district court's fee determinations, and in light of *Image Technical* and *Rodriguez I*, we cannot say the district court abused its discretion in denying all fees. We therefore affirm the district court's decision.[9]

IV

We next consider the objectors' applications for fees based on their contributions to the district court's decision to award no fees to McGuireWoods. Because we uphold the district

[9]Because Sarah Disner joins in and adopts all parts of McGuireWoods's Brief, we also dismiss her appeal.

court's decision on forfeiture, we must consider the objectors' challenge to the district court's denial of their fee applications.

A

Under certain circumstances, attorneys for objectors may be entitled to attorneys' fees from the fund created by class action litigation. Nonnamed members of a certified class have the authority to object to the fairness of a settlement at the fairness hearing required by Rule 23(e) of the Federal Rules of Civil Procedure, as well as appeal the court's decision to ignore their objections. *See Devlin v. Scardelletti*, 536 U.S. 1, 8-9, 14 (2002).

[11] If these objections result in an increase to the common fund, the objectors may claim entitlement to fees on the same equitable principles as class counsel. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051-52 (9th Cir. 2002). Conversely, objectors who do "not increase the fund or otherwise substantially benefit the class members" are not entitled to fees, even if they bring "about minor procedural changes in the settlement agreement." *Id.* at 1051; *see also Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002) (explaining that "[t]he principles of restitution that authorize" the award of fees to objectors "also require, however, that the objectors produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class"). Nor is it error to deny fees to objectors whose work is duplicative, or who merely echo each others' arguments and confer no unique benefit to the class. *See Reynolds*, 288 F.3d at 288-89; *see also WPPSS*, 19 F.3d at 1298.

B

[12] The district court did not abuse its discretion in denying attorneys' fees to the Feldman, Juranek, Lukoff, Oriol, or

Gaudet objectors. These objectors did not confer any material benefit on the class though their appeals in *Rodriguez I*. To the contrary, in *Rodriguez I* we rejected the Feldman Objectors' challenges to the inadequacy of the class notice and class counsel, the Juranek Objectors' argument regarding the inadequacy of the settlement and the use of the cy pres doctrine, the Oriol Objectors' contention that the attorney fee award was excessive, and Gaudet and Gopalan's argument that the district court should have considered treble damages. *See Rodriguez I*, 563 F.3d at 962-68. The Lukoff Objectors did not participate in the *Rodriguez I* appeal, and therefore did not render any ascertainable benefit to the class on this basis. On remand, the Feldman, Juranek, Lukoff, Oriol, and Gaudet objectors filed briefs capitalizing on arguments already made by the Schneider Objectors regarding why class counsel's fees should be reduced. With respect to these efforts, we agree with the district court that, where objectors do not add any new legal argument or expertise, and do not participate constructively in the litigation or confer a benefit on the class, they are not entitled to an award premised on equitable principles. *See Vizcaino*, 290 F.3d at 1051-52.

C

[13] Finally, we turn to the arguments of the attorneys for the Schneider Objectors, who claim their efforts were instrumental in causing the district court to deny fees to class counsel. The record shows that the Schneider Objectors first brought the incentive agreements to the district court's attention. These objectors argued in *Rodriguez I* that the incentive agreements implicated McGuireWoods's entitlement to fees, and briefed the same issue on remand to both the district court and to us. Our decision in *Rodriguez I* acknowledged the serious implications of McGuireWoods's conflict of interest, and remanded to the district court with instructions to consider the effect of the incentive agreements on McGuireWoods's entitlement to fees. 563 F.3d at 969. Consistent with the Schneider Objectors' arguments, the district court determined on

remand that McGuireWoods was not entitled to fees, a decision we now affirm, resulting in direct savings to the class in the amount McGuireWoods would have otherwise received.

The district court concluded that the Schneider Objectors did not add anything because the district court relied on "its own analysis of the case law laid out by the Ninth Circuit" in *Rodriguez I*. Based on our review of the record, this finding is a clear error. Although we do not doubt that the district court made its own interpretation of our decision in *Rodriguez I* and applied that interpretation to the facts before it, the district court failed to consider that our ruling in *Rodriguez I* was a response to the Schneider Objectors' arguments on appeal. Accordingly, we remand for the district court to calculate the appropriate amount of attorneys' fees that should be awarded to counsel for the Schneider Objectors in light of the benefit they conferred on the class.[10]

Our determination that the district court clearly erred in denying fees to the Schneider Objectors is consistent with our similar ruling in *Rodriguez I*. In that case, we considered the district court's decision to deny fees to the objectors who had first challenged the $325,000 in incentive awards to the class representatives, a challenge which directly led to the district court's rejection of the $325,000 award. *See Rodriguez I*, 563 F.3d at 963. We held that the district court clearly erred in ruling that the objectors' actions "did not add anything" to its decision to deny incentive awards, given that the court had not focused on the incentive agreements before the objectors raised the issue. *Id.* The same analysis applies here.

[14] Because the district court abused its discretion by

[10]Relying on *In re Synthroid Marketing Litigation*, 325 F.3d 974, 980 (7th Cir. 2003), the Schneider Objectors ask us to calculate the appropriate award of attorneys' fees, rather than remanding this determination to the district court. Because the district court is in the best position to make such equitable determinations in the first instance, we decline to do so.

denying attorneys' fees to the Schneider Objectors on the ground that the court relied on "its own analysis of the case law," we vacate that fee order and remand for further proceedings consistent with this opinion.[11]

V

In awarding attorneys' fees from the common fund generated by litigation, courts are bound by traditional principles of equity and we must review awards to class counsel and objectors in that light. *See Van Gemert*, 444 U.S. at 478. We conclude that the district court did not abuse its discretion in declining to award fees to McGuireWoods from the common fund on the ground that its representation of conflicting interests made it undeserving of such compensation. Therefore, we affirm the district court's decision. We conclude the district court abused its discretion in not awarding attorneys' fees to the Schneider Objectors for their work leading to the forfeiture of McGuireWoods's fees, and therefore vacate the district court's determination and remand for further

[11]We grant the Schneider Objectors' requests for judicial notice of briefs filed in *Rodriguez I*. *See Corder v. Gates*, 104 F.3d 247, 248 n.1 (9th Cir. 1996).

We reject class counsel's argument that the Schneider Objectors lack standing to appeal the order denying their request for fees because they did not file a claim to receive a share of the settlement proceeds. Even assuming that none of the Schneider Objectors submitted a claim, this argument fails because an attorney who confers a benefit on the class is entitled to fees based on equitable principles of unjust enrichment, and has standing to challenge the denial of such fees, regardless whether the attorney's client will receive any of the savings. *See Class Plaintiffs*, 19 F.3d at 1307-08 (addressing whether attorneys in related state action were entitled to fees for services benefiting the class in federal action). While it is true that objectors who do not participate in a settlement lack standing to challenge class counsel's (as opposed to objectors') fee award because, without a stake in the common fund pot, a favorable outcome would not redress their injury, *see Knisley v. Network Assocs., Inc.*, 312 F.3d 1123, 1128 (9th Cir. 2002), class counsel does not make this argument.

consideration in light of this decision. We affirm the district court on its denial of fees to the other objectors.[12]

AFFIRMED (Nos. 10-55309, 10-55342, 10-56700, 10-56703, 10-56730, 10-56737, 10-56803, 10-57037). VACATED AND REMANDED (No. 10-56724).

[12]We reject the argument raised by the Lukoff Objectors that the district court abused its discretion by awarding $500,000 to McGuireWoods for work performed after July 2007, the date on which the district court refused to honor the incentive agreements and denied the class representatives' requests for incentive awards. The district court properly determined that its rejection of the incentive awards cured any conflict of interest and that McGuireWoods's services thereafter were properly performed and conferred a benefit on the class. *See, e.g.*, *Jeffry*, 136 Cal. Rptr. at 377.

Appointment of Class Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE PARKING HEATERS ANTITRUST LITIGATION	MEMORANDUM AND ORDER
This Document Relates To: ALL ACTIONS	15-MC-0940 (JG) (JO)

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James Orenstein, Magistrate Judge:

The plaintiffs in these eleven consolidated actions, each acting on behalf of a putative class of direct or indirect purchasers of parking heaters, have all asserted claims relating to the alleged existence of a price fixing conspiracy in the sale of parking heaters for commercial vehicles in the aftermarket. *See* Docket Entry ("DE") 1 (consolidation order).[1] Several parties now seek to appoint interim lead class counsel for the putative classes of direct and indirect purchasers, respectively.[2] For the reasons set forth below, I now appoint the firms of Hausfeld LLP ("Hausfeld") and Roberts Law Firm P.A. ("Roberts") as co-lead interim counsel for the putative class of direct purchasers and the Law Offices of Francis O. Scarpulla and Cooper & Kirkham (collectively, "Scarpulla and Cooper") as co-lead interim counsel for the putative class of indirect purchasers; I accordingly deny the remaining motions seeking the appointment of others as interim lead class counsel.

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[1] The direct purchaser actions include *Triple Cities Acquisition LLC v. Espar Inc.*, 15-CV-1343 (JG) (JO); *Nat'l Trucking Reclamation Fin. Svcs. v. Espar Inc.*, 15-CV-2310 (JG) (JO); *Trailer Craft Inc. v. Espar Inc.*, 15-CV-2411 (JG) (JO); *Guay Bros. Co. v. Espar Inc.*, 15-CV-3225 (JG) (JO); *Advance Diesel Svc. v. Espar Inc.*, 15-CV-4350 (JG) (JO); and *Myers Equip. Corp. v. Espar Inc.*, 15-CV-3872 (JG) (JO). The indirect purchaser actions include *Reg'l Int'l Corp. v. Espar Inc.*, 15-CV-1798 (JG) (JO); *Raccoon Valley Transp. Inc. v. Espar Inc.*, 15-CV-1338 (JG) (JO); *Johnson v. Espar Inc.*, 15-CV-3174 (JG) (JO); *Davidson Transfer, LLC v. Espar Inc.*, 15-CV-3005 (JG) (JO); and *N. Jersey Truck Ctr., Inc. v. Espar Inc.*, 15-CV-3290 (JG) (JO). Unless otherwise noted, all docket citations refer to the consolidated docket.

[2] *See* 15-CV-1343 (JG) (JO), DE 14 (Hausfeld's motion for appointment as interim lead class counsel for direct purchasers); 15-CV-2310 (JG) (JO), DE 10 (Roberts' motion of for same); 15-CV-2411 (JG) (JO), DE 9 (motion of Cera LLP ("Cera") for same); 15-CV-3225, DE 8 (motion of Kaplan Fox & Kilsheimer LLP ("Kaplan") for same); 15-CV-1338 (JG) (JO), DE 17 (motion of Hagens Berman Sobol Shapiro LLP ("Hagens Berman") for appointment as interim lead class counsel for indirect purchasers); 15-CV-1798 (JG) (JO), DE 17 (Scarpulla and Cooper's motion for same).

I. Background

On March 16, 2015, Triple Cities Acquisition LLC ("Triple Cities") (a direct purchaser of parking heaters, represented by Hausfeld) and Raccoon Valley Transport, Inc. ("Raccoon Valley") (an indirect purchaser, represented by Hagens Berman) separately filed the first two of eleven class action lawsuits brought to date accusing an array of defendants of participating in a conspiracy to suppress and eliminate competition in the sale of parking heaters for commercial vehicles in the aftermarket. The defendants in the various actions include Espar Inc. ("Espar"), two of its executives, and its related companies; Webasto Products North America, Inc. ("Webasto"), along with its related companies; Proheat Mechanical Systems Inc. and its related companies; Marine Canada Acquisition Inc.; and other as-yet unidentified co-conspirators.

Several motions for appointment as interim lead class counsel were filed between April 15 and May 18, 2015. At a conference on May 22, 2015, I encouraged the parties to confer further about the motions in an attempt to resolve the matter consensually. 15-CV-1343 (JG) (JO), DE 27 (minute entry).

On June 5, 2015, the direct purchaser plaintiffs reported that they had agreed on an executive committee consisting of four firms, one of which would later be appointed as its chair: Hausfeld, Roberts, Cera and Kaplan. DE 9. That proposal collapsed over disagreements about which firm should lead the committee. The four firms then made separate proposals: Kaplan moved to be appointed sole or co-lead counsel, Hausfeld and Roberts proposed to be co-leaders together, and Cera renewed its application for a four-firm committee, with the chair to be selected by the court. DE 25; DE 28; DE 30. In addition to the support of their own clients, Hausfeld and Roberts also have the support of plaintiff Myers Equipment Corp., represented by the firm of Steyer Lowenthal Boodrookas Alvarez & Smith LLP. DE 35.

The indirect purchaser plaintiffs similarly could not reach any agreement. *See* DE 6. Accordingly, Scarpulla and Cooper reinstated their request to serve as co-lead counsel, now supported by all of the other indirect purchaser plaintiffs in the consolidated cases except Raccoon Valley, and added a request that Steven Williams of Cochett, Pitre & McCarthy be appointed as liaison counsel for the group to coordinate administrative matters with the court. *See* DE 26; *see also* Federal Judicial Center, *Manual For Complex Litigation* (the "*Manual*") § 10.221 (4th ed. 2004). Hagens Berman likewise renewed its motion to serve as lead counsel for the indirect purchasers.

II. Discussion

A court "may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." Fed. R. Civ. P. 23(g)(3). The role of such counsel is to "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). Appointing lead counsel helps to promote efficiency and avoid unruly proceedings. *See Farber v. Riker-Maxson Corp.*, 442 F.2d 457, 459 (2d. Cir. 1971); *MacAlister v. Guterma*, 263 F.2d 65, 68-69 (2d Cir. 1958). An interim appointment at this stage, while not required, can help "clarif[y] responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement." *Manual* § 21.11.

A court considering the appointment of interim lead class counsel should consider the same factors that a court appointing lead counsel for a certified class must consider, including the candidates' qualifications and competence, their ability to fairly represent diverse interests, and their attorneys' ability "to command the respect of their colleagues and work cooperatively with opposing counsel and the court." *Manual* § 10.224; *see* Fed. R. Civ. P. Rule 23(g)(1)(C). Also appropriate for consideration is anything else that is "pertinent to counsel's ability to fairly and adequately represent

the interests of the class," Fed. R. Civ. P. 23(g)(1)(B), including "(1) the quality of the pleadings; (2) the vigorousness of the prosecution of the lawsuits; and (3) the capabilities of counsel." *In re Comverse Tech., Inc. Derivative Litig.*, 2006 WL 3761986, at *2-3 (E.D.N.Y. Sept. 22, 2006). Ultimately, the court's task in deciding these motions is "to protect the interests of the plaintiffs, not their lawyers." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* ("*Interchange*"), 2006 WL 2038650, at *4 (E.D.N.Y. Feb. 24, 2006).

At the outset, I note that the factors relating to the qualifications and competence of counsel and the quality of their work are in equipoise: all of the movants appear eminently qualified and I am confident that each candidate would serve the putative classes quite ably in the litigation of these consolidated actions. Thus, while the matter is unquestionably an important one for all concerned, I have no doubt that in a very important sense any resolution of the instant motions could easily be seen as serving each putative class's best interests. But in the absence of agreement, I must necessarily try to discern, at this early stage of the litigation, which of several very good choices will be the best for the putative classes. In attempting to make that decision, I offer no view of the merits of the parties' substantive legal and factual disputes, which are irrelevant to the analysis of the instant motions.

A. Direct Purchasers

I conclude that Hausfeld and Roberts are in the best position to represent the interests of the direct purchaser class. Both firms have already demonstrated their ability to work cooperatively with each other, with the court, and most importantly, with the other attorneys representing plaintiffs with significant interests in this litigation. They have ample resources to conduct the litigation and a wealth of experience in this district. Hausfeld has also already demonstrated its leadership by filing the first direct purchaser complaint. Both firms have conducted thorough and extensive pre-filing

investigations and have shown their legal work to be detailed and high quality, and their joint application has the support of another plaintiff.[3]

The choice between the two competing candidates for lead counsel is a close one. To be sure, Kaplan has likewise performed a thorough investigation. It learned that the Justice Department had granted conditional leniency to Webasto and was the first plaintiff to name two former Espar officers as individual defendants. I conclude that the more widespread support for Hausfeld and Roberts makes their leadership preferable for sophisticated plaintiffs who presumably are in the best position to assess their best interests.

I also conclude that appointing Hausfeld and Roberts is preferable to the four-firm committee that Cera proposes. The parties themselves were unable to reach a consensus about how to make such a leadership structure work, and I doubt that judicial fiat will succeed in creating a workable committee where the parties themselves did not. Moreover, particularly in light of the extent to which prior proceedings may have clarified some of the issues in dispute in these consolidated cases, there seems no need for the inevitable redundancies and inefficiencies attendant to a four-firm leadership structure.[4] While I am confident that Hausfeld and Roberts will welcome the input and participation of all of the plaintiffs' attorneys in deciding how best to advance the interests of the putative class, I conclude there is no need for all of them to be included in the putative class's interim leadership.

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[3] In the parties' written submissions, Hausfeld noted that its client, Triple Cities, was the only plaintiff to whom the United States Department of Justice had thus far provided notice that it was a victim of the alleged anticompetitive conduct. *See* DE 28 at 3. While that would provide it with an advantage that other named plaintiffs lack in terms of positioning itself as an adequate class representative, I have assumed that advantage would be a transient one. At oral argument on August 7, 2015 (the proceedings of which have yet to be transcribed), Cera reported that its client Trailer Craft had received a similar notification.

[4] For example, at least one of the defendants has admitted the existence of the alleged conspiracy. *See, e.g.*, 15-CV-1343 (JG) (JO) DE 1 ¶ 5 (Triple Cities' Complaint) (citing *United States of America v. Espar Inc.*, 15-CR-0028 (JG), DE 16 ¶ 2 (E.D.N.Y. Mar. 12, 2015) (Espar's Plea Agreement, admitting to participation in criminal antitrust conspiracy)).

B. Indirect Purchasers

I conclude for similar reasons that Scarpulla and Cooper are in the best position to represent the interests of the indirect purchase plaintiff class. Scarpulla and Cooper have the support of all of the other named indirect purchaser plaintiffs other than Hagens Berman's clients. They have already demonstrated their ability to work cooperatively with the court and with the other non-lead counsel, they have the support of a larger and more diverse group of clients, and those clients collectively advance a broader array of the legal theories at issue in this litigation.

Hagens Berman offers several arguments in opposition to the Scarpulla and Cooper proposal. First, it contends that only one lead counsel is necessary and that a joint leadership structure would be "overkill, inefficient and promote attorney lodestar over maximizing class member recovery." DE 31 at 3. They are of course correct that, as noted above, there are features of this case that render it less complex than it might otherwise be. But the difference between one law firm and two as leaders seems ultimately a minor one – in either case, multiple attorneys (either in one firm or in more) would necessarily perform litigation tasks and make tactical and strategic decisions for the class. A variety of voices is beneficial for the class, so long as it produces neither paralysis nor inefficiency. The fact that all of the other plaintiffs favor the appointment of Scarpulla and Cooper over Hagens Berman persuades me that those who are best informed and have the greatest incentive to keep attorney fees in check have decided that the risk of inefficiency attendant to the proposed two-firm leadership is an acceptable one.

Second, Hagens Berman notes that it was the first firm to file any case against Espar, the first firm to move for interim lead counsel, the first firm to propose case management procedures and the first firm to propose document production and confidentiality orders. DE 31 at 5. Those are all factors in the firm's favor, but only to a point. They certainly show that Hagens Berman can be a valuable

member of any team of lawyers representing the putative class. But the fact that the firm would consider withholding its expertise from the class leadership if it is not appointed by itself to that role – a threat Hagens Berman made explicit at oral argument – raises some doubts about how well the firm would represent the interests of class members other than its own clients if given such exclusive authority. While the efficiency of a sole leader may have its advantages, they appear in this case to be outweighed by the risk of internal strife within the putative class if Hagens Berman is appointed interim lead counsel, and alleviated by the explicit commitment made by Scarpulla and Cooper at oral argument to solicit the views of other putative class members.

Finally, Hagens Berman asserts that no firm should be appointed as interim lead counsel for a putative class of all indirect purchasers, on the ground that the mix of resellers and end users within that group will necessarily create a disabling conflict of interest. *See* 15-CV-1798, DE 22 at 4; DE 31 at 2. I disagree. As Scarpulla and Cooper argue in opposition, it may well be preferable, and entirely proper, for a putative class of indirect purchasers to try to maximize its collective recovery and then divvy up the spoils among themselves pursuant to judicially supervised procedures. DE 29 at 2-3. Indeed, in articulating the factors to consider in appointing interim lead class counsel, the *Manual* notes the inevitability that some class members will have interests that may ultimately diverge in some ways from those of other members, and cites as a positive attribute a lawyer's ability to fairly represent such diverse interests. *See Manual* § 10.224.

In any event, whichever side is correct about the significance of the existence of different types of indirect purchasers in that putative class, I am satisfied that the record does not yet establish that any actual conflict exists, or that any potential conflict cannot be waived. I therefore conclude that the instant motions can and should be decided without first fully determining the nature and extent of any such conflict. That issue can be addressed, if it ripens, in the context of a motion to disqualify interim

lead class counsel, or in the context of a motion to certify a class defined to include both end users and resellers of parking heaters.

III. Conclusion

For the reasons set forth above, I appoint the Hausfeld and Roberts firms as co-lead interim counsel for the putative class of direct purchasers, the Scarpulla and Cooper firms as co-lead interim counsel for the putative class of indirect purchasers, and Steven Williams as liaison counsel for the indirect purchasers; I accordingly deny the remaining motions seeking the appointment of others as interim lead class counsel.

SO ORDERED.

Dated: Brooklyn, New York
August 11, 2015

/s/
JAMES ORENSTEIN
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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IN RE PARKING HEATERS ANTITRUST LITIGATION — ORDER

This Document Relates To: ALL ACTIONS — 15-MC-0940 (JG) (JO)
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James Orenstein, Magistrate Judge:

I. Designation of Counsel

A. Co-Lead Plaintiffs' Counsel

For the reasons set forth in a Memorandum and Order dated August 11, 2015, docket entry 49, I appoint the firms of Hausfeld LLP and Roberts Law Firm P.A. as co-lead interim counsel for the putative class of direct purchasers of aftermarket parking heaters for commercial vehicles (the "Direct Purchaser Class"), and the Law Offices of Francis O. Scarpulla and Cooper & Kirkham as co-lead interim counsel for the putative class of indirect purchasers of aftermarket parking heaters for commercial vehicles (the "Indirect Purchaser Class").[1] Each team of co-lead counsel shall generally be responsible for coordinating the activities of their respective class plaintiffs during pretrial proceedings and shall:

> determine (after consultation with co-plaintiffs' counsel) and present (in briefs, oral argument, or such other fashion as may be appropriate, personally or by a designee) to the court and opposing parties the position of the class plaintiffs on all matters arising during pretrial proceedings;

[1] The Direct Purchaser Class consists of the named plaintiffs, and member of the putative class each purports to represent, in each of the following pending actions: *Triple Cities Acquisition LLC v. Espar Inc.*, 15-CV-1343 (JG) (JO); *Nat'l Trucking Reclamation Fin. Svcs. v. Espar Inc.*, 15-CV-2310 (JG) (JO); *Trailer Craft Inc. v. Espar Inc.*, 15-CV-2411 (JG) (JO); *Guay Bros. Co. v. Espar Inc.*, 15-CV-3225 (JG) (JO); *Advance Diesel Svc. v. Espar Inc.*, 15-CV-4350 (JG) (JO); and *Myers Equip. Corp. v. Espar Inc.*, 15-CV-3872. The Indirect Purchaser Class consists of the named plaintiffs, and member of the putative class each purports to represent, in each of the following pending actions: *Reg'l Int'l Corp. v. Espar Inc.*, 15-CV-1798 (JG) (JO); *Raccoon Valley Transp. Inc. v. Espar Inc.*, 15-CV-1338 (JG) (JO); *Johnson v. Espar Inc.*, 15-CV-3174 (JG) (JO); *Davidson Transfer, LLC v. Espar Inc.*, 15-CV-3005 (JG) (JO); and *N. Jersey Truck Ctr., Inc. v. Espar Inc.*, 15-CV-3290.

coordinate the initiation and conduct of discovery on behalf of class plaintiffs' consistent with the requirements of Fed. R. Civ. P. 26(b)(1), 26(2), and 26(g), including the preparation of joint interrogatories and requests for production of documents and the examination of witnesses in depositions;

conduct settlement negotiations on behalf of class plaintiffs, but not enter into binding agreements except to the extent expressly authorized;

delegate specific tasks to other counsel or committees of counsel in a manner to ensure that pretrial preparation for the class plaintiffs is conducted efficiently and effectively;

enter into stipulations with opposing counsel as necessary for the conduct of the litigation;

prepare and distribute periodic status reports to the parties;

maintain adequate time and disbursement records covering services as lead counsel;

monitor the activities of co-counsel to ensure that schedules are met and unnecessary expenditures of time and funds are avoided; and

perform such other duties as may be incidental to proper coordination of class plaintiffs' pretrial activities or authorized by further order of the court.

This order does not limit the right of other counsel for class plaintiffs to be heard on matters not susceptible to joint or common action, or when a genuine and substantial divergence of opinion exists among counsel. However, the parties and their counsel are encouraged to avoid presentations of cumulative views, or submissions that differ from those of co-lead counsel in only minor ways.

B. Liaison Counsel

I appoint Steven Williams of the law firm Cochett, Pitre & McCarthy LLP to be liaison counsel for the putative class of Indirect Purchaser Class, and in that capacity to be responsible for facilitating and expediting communications with and among co-lead plaintiffs' counsel for that class.

II. Submission of Time Records

All class plaintiffs' counsel in these class action cases shall submit on a periodic basis a record of the time expended on these matters, in a manner set forth by co-lead counsel.

III. Status Conferences and Status Reports

As discussed at the status conference on August 7, 2015, I will conduct regular status conferences with representatives of parties to this action. Absent a court order or agreement among plaintiffs' counsel to the contrary, all co-lead and liaison counsel for the plaintiffs shall participate in these status conferences.

Prior to each scheduled status conference, the parties' counsel are directed to meet and confer and file a joint report on the progress of the case, any disputes requiring court intervention, and other issues to be discussed at the conference. The status report shall be submitted at least one week prior to the scheduled conference. If warranted, I will entertain a timely application to cancel or adjourn any such conference.

SO ORDERED.

Dated: Brooklyn, New York
August 11, 2015

/s/
JAMES ORENSTEIN
U.S. Magistrate Judge

MAGISTRATE JUDGES

The decision to appoint interim class counsel in *Parking Heaters* was made by a *magistrate judge*. Congress has authorized the judges of each district court to appoint full-time magistrate judges for a term of eight years and part-time magistrate judges for a term of four years.[1] Magistrate judges have a variety of powers prescribed by statute,[2] but for our purposes the most important is that a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court (except a motion for injunctive relief), for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.[3] The resolution of discovery disputes is a prime function for magistrate judges under this provision. More generally, without the consent of the parties, a district court may designate a magistrate judge to hear and decide pretrial matter that, with some important additions, are not dispositive or a party's claim or defense.[4] For these nondispositive pretrial matters, a party may serve and file objections to a magistrate judge's order within fourteen days of being served, and the district judge may modify or set aside the order only to the extent the factual findings are clearly erroneous or the legal conclusions are contrary to law.[5]

The district court judge also may designate a magistrate judge to conduct hearings (including evidentiary hearings) and to submit to the judge proposed findings of fact and recommendations of any excepted pretrial motions.[6] These are often called "dispositive" matters, although they include motions for injunctive relief and class certification, may be referred to a magistrate judge only for recommendations, not decision.[7] The magistrate judge's proposed findings of fact and recommendations, which is submitted to the court with a copy provided to the parties, is usually styled a

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1 28 U.S.C. §§ 631(a), (e).

2 *See id*. § 636.

3 *Id*. § 636(b)(1)(A); *see* FED. R. CIV. P. 72(a).

4 FED. R. CIV. P. 72(a); *see* Arista Records, LLC v. Doe 3, 604 F.3d 110, 116 (2d Cir. 2010).

5 28 U.S.C. § 636(b)(1)(C); *see* FED. R. CIV. P. 72(a); Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1414 (9th Cir. 1991); Moore v. Publicis Groupe SA, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 517207, at *1 (S.D.N.Y. Feb. 14, 2012); *In re* Urethane Antitrust Litig., No. 04-MD-1616-JWL, 2006 WL 3000763, at *2 (D. Kan. Oct. 18, 2006); *In re* Terazosin Hydrochloride Antitrust Litig., No. 99-MDL-1317-SEITZ, 2001 WL 34050474, at *1 (S.D. Fla. Dec. 19, 2001); *but cf.* Park West Radiology v. CareCore Nat. LLC, 547 F. Supp. 2d 320, 322 (S.D.N.Y. 2008) (suggesting that district court may reconsider a magistrate judge's order on a nondispositive matter even if not clearly erroneous or contrary to law).

6 28 U.S.C. § 636(b)(1)(B); *see* FED. R. CIV. P. 72(b).

7 Arista Records, LLC v. Doe 3, 604 F.3d 110, 116 (2d Cir. 2010).

"Report and Recommendation."[8] When the magistrate judge issues a Report and Recommendation, a party may serve and file objections to the order within fourteen days of being served, and the district court judge must make a de novo determination of those portions of the Report and Recommendation that are the subject of the objections.[9] In considering any objections, the district judge has discretion to receive further evidence,[10] although there is authority that the judge does not have to consider newly proffered evidence where the presenting party had a full opportunity to present the evidence to the magistrate judge.[11] The district judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge, or the judge may recommit the matter to the magistrate judge with instructions.[12]

Finally, with the consent of the parties, a magistrate judge may conduct any or all excepted motions and to trying the case and ordering the entry of judgment.[13] The consent of the parties allows a magistrate judge to direct the entry of a judgment of the district court, and an aggrieved party may appeal the judgment directly to the appropriate United States court of appeals in the same manner as an appeal from any other judgment of a district court.[14] In a multiparty action where some but not parties consent to a trial before a magistrate judge, the magistrate judge may enter a judgment as to the consenting parties and a report and recommendation as to the nonconsenting parties.[15]

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8 *See, e.g., In re* Air Cargo Shipping Services Antitrust Litig., No. MD 06-1775(JG)(VVP), 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008) (report and recommendation regarding motions to dismiss); *In re* Payment Card Interchange Fee and Merchant Discount Antitrust Litig., 562 F. Supp. 2d 392 (E.D.N.Y. 2008) (adopting report and recommendation regarding motions to dismiss).

9 28 U.S.C. § 636(b)(1)(C).

10 *Id*.; FED. R. CIV. P. 72(b)(3); *see* United States v. Raddatz, 447 U.S. 667, 673-74 (1980); Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 70 (3d Cir. 2000).

11 *Carpet Group*, 227 F.3d at 70.

12 *Id*.; *see, e.g., In re* Payment Card Interchange Fee & Merchant Discount Antitrust Litig., 562 F. Supp. 2d 392 (E.D.N.Y. 2008) (adopting in full report and recommendation regarding motions to dismiss).

13 28 U.S.C. § 636(c). For examples of antitrust cases tired to a magistrate judge, see, for example, King v. Idaho Funeral Service Ass'n, 862 F.2d 744 (9th Cir. 1988); Eastern Auto Distribs., Inc. v. Peugeot Motors of Am., 795 F.2d 329, 334 (4th Cir. 1986); Conoco Inc. v. Inman Oil Co., 774 F.2d 895, 897 n.1 (8th Cir. 1985); Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1386 n.1 (5th Cir. 1983); St. Francis Med. Ctr. v. C.R. Bard, Inc., 657 F. Supp. 2d 1069 (E.D. Mo. 2009), *aff'd*, 642 F.3d 608 (8th Cir. 2011); Ticket Ctr., Inc. v. Banco Popular de Puerto Rico, 613 F. Supp. 2d 162, 169 (D.P.R. 2008); Miles Distribs., Inc. v. Specialty Constr. Brands, Inc., 417 F. Supp. 2d 1030, 1033 (N.D. Ind. 2006); Jones v. Deja Vu, Inc., 419 F. Supp. 2d 1146, 1148 n.1 (N.D. Cal. 2005).

14 *Id*. § 636(c)(3).

15 *See* United States v. American Soc'y of Composers, Authors and Publishers, 902 F. Supp. 411, 417 n.6 (S.D.N.Y. 1995)