UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

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

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

REDACTED VERSION FILED AS PUBLIC RECORD

UNREDACTED VERSION ALSO FILED UNDER SEAL PURSUANT TO CASE MANAGEMENT ORDER NO. 7 DATED DECEMBER 19, 2008

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I. INTRODUCTION

Direct Purchaser Plaintiffs ("Plaintiffs") allege a nationwide conspiracy among Defendants to fix the price of chocolate candy products sold in the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. *See* Direct Purchaser Consolidated Complaint ("Complaint"), Doc. No. 418 ¶ 1. Plaintiffs further allege, *inter alia,* that during the relevant time frame the market structure of the U.S. chocolate market was conducive to collusion, *id.* ¶ 58; *see also id.* ¶¶ 47, 55-57, Defendants' price increases could not be explained by cost increases (as they misleadingly justified them at the time), *id.* ¶¶ 59-71, 74, 75-80, Defendants' U.S. and Canadian operations were closely intertwined, *id.* ¶¶ 82-88, Defendants' U.S. price increases occurred contemporaneously with extensive, documented, improper communications by their senior Canadian executives in Canada, *id.* ¶¶ 72, 99-104, and that Defendants frequently met and communicated privately, *id.* ¶¶ 89-97. Plaintiffs allege that, as a result of Defendants' collusion, the conspiracy injured direct purchasers of chocolate candy by causing them to pay higher prices than they would have paid in a competitive market. *Id.* ¶ 3.

Discovery has corroborated these allegations.

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see, e.g.,

Declaration of Matthew P. McCahill in Support of Direct Purchaser Class Plaintiffs' Motion for Class Certification, Exhibit 2, Expert Report of Dr. James T. McClave ("McClave Rep.") **REDACTED**

Exhibit 1, Declaration of Robert Tollison, Ph.D.,

REDACTED ("Tollison Decl.").[1]

Ultimately, a jury will determine whether Defendants in fact colluded to fix chocolate candy prices in the United States, and if so, the measure of Plaintiffs' injuries from that collusion. With this motion, Plaintiffs establish that they will present their case to the jury proving common class-wide issues *using common evidence*. Accordingly, Plaintiffs respectfully request that the Court certify a class of all persons and entities who directly purchased single serving standard and King size chocolate candy (hereinafter referred to as "singles" and "Kings"), for re-sale, directly from Defendants between December 9, 2002 and December 20, 2007.[2]

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[1] Hereafter all such exhibits are referred to as "Ex. [No.]".

[2] Plaintiffs are seeking to certify a narrower class than was initially proposed in Plaintiffs' Complaint. As discussed below, *see infra* Part III.C,

The elements of a claim under Section 1 of the Sherman Act are: (1) a conspiracy in violation of the antitrust laws, (2) antitrust injury resulting from that violation, and (3) measurable damages. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008). Plaintiffs' burden at the class certification stage is not to prove that they will prevail on the merits of their Sherman Act claim, but instead to demonstrate that the elements of their claim are common and "capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id.* at 311-12; *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 86-87 (D. Conn. 2009). In other words, the Court must ascertain how – not whether – Plaintiffs will prove their case to the jury. As in numerous other horizontal collusion cases, the elements of conspiracy, impact

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Plaintiffs have narrowed the class definition to include only Defendants' single-serving standard ("singles") and King sized ("Kings") chocolate candy products that were purchased for re-sale. Modification of the class definition between the time of the filing of the Complaint and certification of the class is not unusual and reflects the progress of discovery under the Federal Rules of Civil Procedure and an assessment of satisfying Rule 23(a) and 23(b)(3). *See, e.g., Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 300 n.5 (D.D.C. 2007) (revising class definition at class certification); *In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 444-46 (D. Kan. 2006) (same); *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 683 n.5 (N.D. Ga. 1991) ("The act of refining a class definition is a natural outcome of federal class action practice. . . . It is not surprising that plaintiffs have revised the class definition to reflect the progress of discovery.").

throughout the class, and damages in this case are amenable to common proof at trial.

First, this case presents a number of common, core issues that by themselves weigh strongly in favor of class certification, namely: (1) the scope of the alleged conspiracy in the U.S., (2) the fact that the structure of the chocolate candy industry in the United States was conducive to collusion, and (3) the alleged conspiracy occurred during a period of extensive, documented, improper communications by senior executives of their Canadian subsidiaries (or in the case of Nestlé, its affiliate Nestlé Canada) (*see* footnote 7). *See, e.g.*, *In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 3:03-MDL-1556, 2007 U.S. Dist. LEXIS 85466, at *40-41 (M.D. Pa. Nov. 19, 2007) ("[C]ourts consistently hold that proof of the existence and scope of an antitrust conspiracy entails common proof because the inquiry necessarily focuses on the defendants' conduct.").[3] Defendants cannot dispute that the existence and scope of the alleged conspiracy is a central common issue in this litigation that would be a primary focus at trial.

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[3] *See also In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 345 (E.D. Pa. 1976) ("[I]t is the allegedly unlawful horizontal price-fixing arrangement among defendants that, in its broad outlines, comprises the predominating, unifying common interest as to these purported plaintiff representatives and all possible class members."); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008) ("proof of the conspiracy is a common question that is thought to predominate") (citation omitted).

Second, the element of impact – also known as antitrust injury – as in many price-fixing class actions, is amenable to common proof at trial. Antitrust impact is properly viewed as a causation inquiry: did the alleged conspiracy cause higher prices in the marketplace? *See, e.g.*, *In re Urethane [Polyether Polyols] Antitrust Litig.*, 251 F.R.D. 629, 634-36 (D. Kan. 2008) (antitrust impact "can be likened to the causation element in a negligence cause of action," and the "pertinent legal inquiry is whether, as a result of defendants' alleged price-fixing conspiracy, the putative class plaintiffs paid a price that was artificially high"); *Pressure Sensitive Labelstock*, 2007 U.S. Dist. LEXIS 85466 at *45 ("Antitrust impact, or the fact of damage, requires proof of some damage flowing from the unlawful conspiracy.").

Plaintiffs' theory of causation is straightforward. Plaintiffs have alleged that Defendants' executives, pursuant to a collusive agreement, implemented three parallel price increases that succeeded in raising market prices throughout the United States and thereby caused injury to direct purchasers of chocolate. Plaintiffs will present both economic and statistical evidence, all common to the class, that these price increases injured all or nearly all class members. *See* Compl. ¶ 108; Ex. 1, Tollison Decl. ; Ex. 2, McClave Rep. **REDACTED**

This allegation of common impact is consistent not only with economic theory and with the numerous cases cited herein in which antitrust class actions were certified, but also, and more fundamentally, with the record developed to

date. For example, Plaintiffs intend to introduce several categories of common evidence to meet their burden at trial on the element of causation and impact, including:

- ***Parallel Pricing Across Products and Customers.***

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- ***Admissions.***

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- ***Economic Evidence.***

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- ***Statistical Evidence.***

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Each of these categories represents common and probative evidence on the element of causation. Again, the issue at this stage is not whether such evidence *proves* antitrust impact for all class members; that is a merits issue for the jury. Rather, the question on class certification is whether the proof can be accomplished on a

class-wide basis. Because the foregoing categories of evidence can be used to show causation and injury with evidence common to the class, that standard is met. That standard is clearly set forth in *In re Hydrogen Peroxide*, 552 F.3d at 311-12 ("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.").[4]

Third, it is well-settled that the element of antitrust damages can be established on a class-wide basis using econometric modeling. *See, e.g., In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153-54 (3d Cir. 2002); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 532-34 (6th Cir. 2008); *see generally Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 490-93 (7th Cir. 2002). To this end, Plaintiffs have retained Dr. James McClave, an experienced antitrust econometrician, to study the chocolate candy market and to develop a statistical model to estimate damages.

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[4] *See also Kohen v. Pacific Investment Management Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009) (rejecting defendants' argument that class certification requires proof of injury for every class member and cautioning against "putting the cart before the horse" at class certification).

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Dr. McClave's statistical analyses and econometric models furnish common, empirical evidence on the elements of antitrust impact *and* damages, showing that these elements can also be proved by common class-wide evidence.

For all of these reasons – the overwhelming predominance of the common conspiracy issues and the common nature of proof available on the elements of impact and damages – Plaintiffs respectfully move for class certification.

II. FACTUAL BACKGROUND

Plaintiffs' central contention is that Defendants – the dominant chocolate candy manufacturers in the United States – after no price increases for an extended period, conspired to implement three nationwide price increases for chocolate candy between the end of 2002 and the first quarter of 2007. Each price increase

included all Defendants and was close in time and amount. Each round of price increases was approximately two years apart, whereas, prior to 2002, the last industry-wide price increase was in 1996 (almost seven years earlier). The Defendants' public justifications for the price increases were pretexts. The U.S. price increases occurred during a period of extensive, documented, improper communications by senior executives of Defendants' Canadian subsidiaries or affiliate.

As detailed in Plaintiffs' Complaint and confirmed through discovery, the Canadian and U.S. chocolate candy markets are closely related, characterized by similar market structure, high concentration, and the same dominant players (*i.e.*, Defendants);[5] and Defendants have intertwined U.S. and Canadian operations.[6]

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The question in this litigation has never been whether improper communications occurred in Canada.[7] The question, rather, is whether the Canadian collusion

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existed in a vacuum, isolated and unrelated to the U.S. market (as argued at various

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points by Defendants), or, whether the Canadian collusion was merely the tip of the iceberg, indicative of the collusive practices by Defendants that occurred in the U.S. as well. Plaintiffs will offer common evidence to prove the latter. *See* Ex. 1, Tollison Decl.

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After having successfully quelled competitive activity in Canada, and after nearly seven years of price stability in the United States in their core singles and King products, Defendants increased prices on their chocolate candy products in the United States on three separate occasions, in parallel fashion. On December 7, 2002, when Mars announced a 10.7% increase on standard sized bars and six-packs in the U.S., Hershey followed almost immediately, announcing on December 9th an increase on standard bars, six-packs and king sized bars.[8] Nestlé announced similar increases on December 11.[9] And on December 12, Mars joined its

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competitors in announcing an increase on Kings as well.[10] This pattern repeated in December 2004, when all Defendants raised their U.S. prices in the in the span of one week,[11] and again in Spring 2007, when all Defendants raised their U.S. prices in the span of 13 days.[12] (For a concise summary of Defendants' parallel price increases, *see* Exhibit A, Singles and Kings Price Announcements.)

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As described more fully below, all of the evidence discussed herein is common to the class and is representative of what Plaintiffs will offer to carry their burden at trial.

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One reason to maintain excess capacity is to protect against the dissolution of a cartel. *See, e.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 657 (7th Cir. 2002) ("a lot of excess capacity [is] a condition that makes price competition more than usually risky and collusion more than usually attractive").

III. ARGUMENT

A. HORIZONTAL ANTITRUST CONSPIRACY CLAIMS ARE PARTICULARLY APPROPRIATE FOR CLASS TREATMENT

Class certification is particularly appropriate in nationwide, horizontal price-fixing cases. In *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), the Supreme Court explained:

> Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. . . . Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of recovery of three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'. . . *Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.*

Id. at 262, 266 (emphasis added) (citation omitted).[19]

In the decades since *Hawaii v. Standard Oil*, courts have certified scores of horizontal conspiracy cases involving various products and industries. These decisions reflect the collective wisdom that cartel litigation is "particularly well

[19] *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.").

suited" to class resolution. *Urethane*, 251 F.R.D. at 635; *see also In re Pressure Sensitive Labelstock Antitrust Litig.*, 2007 WL 4150666, at *12 (M.D. Pa. Nov. 19, 2007) ("[S]ome courts and commentators suggest that 'whether a conspiracy exists is a common question that is thought to predominate over other issues in the case and has the effect of satisfying the first prerequisite in Rule 23(b)(3).'") (internal citations omitted).[20] Notwithstanding the efforts of antitrust defendants to muddy

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[20] *See In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 484-485 (W.D. Pa. 1999) (finding predominance met on conspiracy element despite "defendants' arguments regarding diverse products, markets and pricing," and observing that "'[c]ontentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected. Courts have found the conspiracy issue the overriding predominant question.'") (quoting *In re Folding Carton Antitrust Litig.*, 75 F.R.D. 727, 734 (N.D. Ill. 1977)); *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 214 (E.D. Pa. 2001) ("'The courts have repeatedly focused on the liability issues, in contrast to damage questions, and, if they found issues were common to the class, have held that Rule 23(b)(3) was satisfied.'") (quoting 4 Hubert Newberg and Alba Conte, Newberg on Class Actions, § 18-26 (3d ed. 1992)), *aff'd*, 305 F.3d 145 (3d Cir. 2002); *In re Plastic Cutlery Antitrust Litig.*, No. CIV. A. 96-CV-728, 1998 WL 135703 (E.D. Pa. Mar. 20, 1998) (noting "'[s]everal courts have held that when a defendant is alleged to have participated in a nationwide price-fixing conspiracy, impact will [be] presumed as a matter of law, and the predominance requirement of Fed.R.Civ.P. 23(b)(3) will be satisfied.'") (quoting *Lumco Indus., Inc. v. Jeld-Wen Inc.*, 171 F.R.D. 168, 173 (E.D. Pa. 1997) (text as amended); *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005) ("Courts have stressed that price-fixing cases are appropriate for class certification because a class-action lawsuit is the most fair and efficient means of enforcing the law where antitrust violations have been continuous, widespread, and detrimental to as yet unidentified consumers.") (quotations and citations omitted); *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 238-39 (E.D.N.Y. 1998) ("class actions are particularly appropriate for antitrust litigation concerning price-fixing schemes because price-fixing subjects purchasers in the market to a common harm"). *See also In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 258 (D.D.C.

the waters – by striving, for example, to turn class certification into a technical battle of experts – trials in cartel cases *necessarily* focus on a core set of common questions: Did defendants conspire? Did their conspiracy cause higher prices? What is the economic measure of class-wide damages? Decades-worth of authority holds that class certification is the most appropriate and efficient means of resolving these questions.

2002)) ("[I]t has long been recognized that class actions play an important role in the private enforcement of antitrust actions."); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1039 (N.D. Miss. 1993) ("As a rule of thumb, a price fixing antitrust conspiracy model is generally regarded as well suited for class treatment."). Other pertinent certification decisions include *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291 (N.D. Cal. 2010); *In re EPDM*, 256 F.R.D. 82; *In re Scrap Metal*, 527 F.3d at 517; *In re Urethane*, 251 F.R.D. at 629; *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393 (S.D. Ohio 2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 1530166 (N.D. Cal. June 5, 2006); *In re Bulk (Extruded) Graphite Prods. Antitrust Litig.*, 2006 WL 891362 (D.N.J. Apr. 4, 2006); *In re Carbon Black Antitrust Litig.*, 2005 WL 102966 (D. Mass. Jan. 18, 2005); *In re Currency Conversion Fee Antitrust Litig.*, 2004 WL 2327938 (S.D.N.Y. Oct. 15, 2004); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661 (D. Kan. 2004); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003); *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180 (D.N.J. 2003); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159 (C.D. Cal. 2002); *DeLoach v. Philip Morris*, 206 F.R.D. 551 (M.D.N.C. 2002); *In re Magnetic Audiotape Antitrust Litig.*, 2001 WL 619305 (S.D.N.Y. June 6, 2001); *In re Bromine Antitrust Litig.*, 203 F.R.D. 403 (S.D. Ind. 2001); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326 (E.D. Mich. 2001); *In re Monosodium Glutamate Antitrust Litig.*, 205 F.R.D. 229 (D. Minn. 2001); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12 (D.D.C. 2001); *In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162 (S.D.N.Y. 2000); *Paper Sys., Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601 (E.D. Wisc. 2000).

This case is no different. The proposed class is sufficiently definite and reasonably ascertainable; Plaintiffs meet the requirements of Rule 23(a) (numerosity, commonality, typicality and adequacy); and the requirements of Rule 23(b)(3) (predominance of common issues and superiority of the class action vehicle) are met. In short, nothing distinguishes this case from the long line of cases holding that horizontal price-fixing conspiracy claims are appropriate for class certification. Although common issues do not *always* predominate in price-fixing cases (*see In re Hydrogen Peroxide*, 552 F.3d at 321-22),[21] "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625 (1997). As the evidence reviewed below demonstrates, the predominance requirement is clearly met here.

B. THE RULE 23 STANDARD

For a class action to be certified, the four requirements of Rule 23(a) of the Federal Rules of Civil Procedure must be met, along with one of the requirements of Rule 23(b). "Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the

[21] Even in *Hydrogen Peroxide*, however, the Third Circuit recognized that it was possible that certifiable subclasses could have been pleaded. 552 F.3d at 325 n.26.

district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." *Hydrogen Peroxide*, 552 F.3d at 320. The Supreme Court has emphasized that class certification requires a "rigorous analysis" under Rule 23. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). In performing that inquiry, the Court is permitted to "probe behind the pleadings" and scrutinize the record – including the parties' expert reports – to answer a simple question: are Plaintiffs' claims amenable to common proof? *Id.* at 160. The Court, however, is not tasked with resolving the merits of Plaintiffs' claim, but simply to determine whether the requirements of Rule 23 are met. *See Hydrogen Peroxide*, 552 F.3d at 317 n.17 ("When a district court properly considers an issue overlapping the merits in the course of determining whether a Rule 23 requirement is met, it does not do so in order to predict which party will prevail on the merits. Rather, the court 'determine[s] whether the alleged claims can be properly resolved as a class action.'") (quoting *Newton*, 259 F.3d at 168).

C. THE CLASS IS ASCERTAINABLE AND THE REQUIREMENTS OF RULE 23(A) ARE READILY MET

1. The class is ascertainable

As an initial prerequisite of class certification, the proposed class definition must be precise, objective, and ascertainable. *See* Fed. R. Civ. P. 23(c)(1)(B) ("An order certifying a class action must define the class[.]"); *Manual for Complex*

Litigation § 21.222, at 270 (4th ed. 2005) ("The definition must be precise, objective, and presently ascertainable."). The Third Circuit "require[s] that each class certification order contain (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *In re Constar Int'l Inc. Securities Litig.*, 585 F.3d 774, 782 (3rd Cir. 2009).

After completion of discovery, Plaintiffs determined to modify the class definition, as to both the scope of the products included and the class membership. In both instances, the class is narrower than as defined in the Complaint. It is perfectly proper for this class redefinition to occur after discovery concludes. In *In re Neurontin Antitrust Litig.*, 2011 U.S. Dist. LEXIS 7453 (D.N.J. Jan. 25, 2011), in certifying a class, the court permitted the plaintiffs to narrow the class definition. *See id.* at *6-7, n.4 ("Because 'Plaintiffs are entitled to define the class period as broadly as their evidence supports,' for purposes of this Motion, the Court will consider Plaintiffs' amended class definition.") (internal citations omitted).[22]

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[22] *See also* 7 Newberg on Class Actions § 22:76 (4th ed.) ("Courts either have redefined the classes themselves or permitted the plaintiffs to redefine the classes."). *Cf. In re FleetBoston Fin. Corp. Litig.*, No. 02-4561, 2007 WL 4225832,*13 (D.N.J. Nov. 28, 2007) (allowing plaintiffs to alter the class definition even after the entry of a class certification order). *See also supra* n.2.

The two ways in which the class has been refined are as follows:

(a) As to product: the claims have been limited to Defendants' immediate consumption products; *i.e.*, singles and Kings (candy bars and single serve bags and boxes such as M&Ms, Kisses and Goobers).

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Moreover, consistent with their duties to the Class as a whole, Class counsel determined to adopt this limitation as there is overwhelming statistical and economic evidence that all or nearly all Class members were impacted by the allegedly collusive price increases as to these products.

(b) As to class membership: Direct purchasers for personal consumption and/or gifts are not included in the revised class definition. These purchases, an extremely small percentage of the total market, were made either from a Defendant's company store, over the internet, or from catalogs.

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Accordingly, Plaintiffs propose the following class definition for the Direct Purchaser Class:

> All persons and entities who directly purchased standard ("singles") and King size ("Kings") single serve chocolate for re-sale from any defendant or any predecessor, controlled subsidiary affiliates or division of any defendant, in the United States or for delivery into the United States at any time from December 9, 2002 through December 20, 2007.
>
> Excluded from the class are governmental entities, Defendants, or any present or former parent, subsidiary or affiliate thereof.[25]

Plaintiffs have defined the class with ample precision. The class products are defined with reference to product categories that are widely recognized within the industry. Indeed, the enumerated product groups are based on categories recognized and used by Defendants[26] . **REDACTED**

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[25] Also excluded from the class are the "opt-out" or Individual Plaintiffs: Meijer, Inc., Meijer Distribution, Inc., Publix Supermarkets, Inc., CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs Corp., Longs Drug Stores California, Inc., The Kroger Co., Safeway, Inc., Walgreen Co., Hy-Vee, Inc., Giant Eagle, Inc., Affiliated Foods, Inc., Food Lion, LLC, Hannaford Bros. Co., and Kash N' Karry Food Stores, Inc.

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Beyond the requisite specificity regarding products, the proposed class period has a clear beginning and ending date, and the status of class members is confined to persons who directly purchased the products from Defendants in the United States or for delivery in the United States. As such, class members are easily identifiable using sales records of Defendants, *see Saltzman v. Pella Corp.*, 257 F.R.D. 471, 476 (N.D. Ill. 2009), and the class is properly defined. *See also Urethane*, 251 F.R.D. at 632 (approving similar class definition); *Foundry Resins*, 2007 WL 1299211, at *9 (same).

Rule 23 also requires a clear and complete summary of the claims, issues, and defenses subject to class treatment. *See* Fed. R. Civ. P. 23(c)(1)(B). Here, the common issues are clear and include:

- whether Defendants engaged in a combination or conspiracy to manipulate, fix, raise, maintain, or stabilize prices of chocolate sold in the United States;
- the identity of the participants of the alleged conspiracy;
- whether Defendants' collusive conduct in Canada supports the existence of Defendants' conspiracy in the United States;

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- the duration of the alleged conspiracy and the acts carried out by Defendants in furtherance of the conspiracy;
- whether the conspiracy violated Section 1 of the Sherman Act;
- whether the conduct of Defendants resulted in supra-competitive prices, thereby causing injury in the form of overcharges to Plaintiffs and the other members of the Class;
- whether Defendants fraudulently concealed the conspiracy's existence; and
- the appropriate measure of class-wide damages.

See Compl. ¶ 43. The defenses subject to class treatment are those raised in Defendants' answers, such as failure to state a claim on which relief can be granted. *See, e.g.,* Doc. Nos. 676 (Nestlé Answer), 684 (Hershey Answer), 663 (Mars Answer) (asserting, *inter alia*, affirmative defenses of statute of limitations and lack of injury, which will be addressed with common evidence by all class members).

2. The proposed class satisfies the requirements of Rule 23(a)

Rule 23(a) provides: "One or more members of a class may sue or be sued as representative parties on behalf of all 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." Courts have described

these four prerequisites to class certification as "numerosity," "commonality," "typicality," and "adequacy." The requirements of Rule 23(a) are "designed to assure that courts will identify the common interests of class members and evaluate the named plaintiff's and counsel's ability to fairly and adequately protect class interests." *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 308 (3d Cir. 1998) (internal quotation marks omitted). Each of the requirements of Rule 23(a) is met.

a. Numerosity is satisfied

The first requirement under Rule 23(a) is that the class must be so numerous that joinder is "impracticable." Fed. R. Civ. P. 23(a)(1). "In general, sufficient numerosity exists 'if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40.'" *McDonough v. Toys "R" Us, Inc.*, 638 F. Supp. 2d 461, 474 (E.D. Pa. 2009) (quoting *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001)).[28] Numerosity is easily satisfied here,

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[28] *See also Am. Sales Co. v. SmithKline Beecham Corp.*, 2010 U.S. Dist. LEXIS 120177 at *13 (E.D. Pa. Nov. 12, 2010) ("This Court and others have found numerosity established in cases with 30 or more plaintiffs."); *Johnston v. HBO Film Mgmt, Inc.*, 265 F.3d 178, 184 (3d Cir. 2001) ("[I]nasmuch are there are thousands of potential class members, joinder would be impracticable, thereby satisfying [the numerosity] criteria.").

b. Commonality is satisfied

The second requirement under Rule 23(a) is the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "A finding of commonality does not require that all class members share identical claims, and indeed factual differences among the claims of the putative class members do not defeat certification." *Prudential*, 148 F.3d at 310 (internal quotation marks omitted). Instead, "the commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 264 (3d Cir. 2009) (internal quotation marks omitted). "Antitrust price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy." *Sugar*, 73 F.R.D. at 335. This Court has observed that "[w]here . . . plaintiffs allege an antitrust conspiracy, the commonality prerequisite is invariably satisfied because the conspiracy is the central issue." *Pressure Sensitive Labelstock*, 2007 U.S. Dist. LEXIS 85466, at *35.

c. Typicality is satisfied

The third requirement of Rule 23(a) is that the claims of the class representatives must be "typical" of the claims of the class. Fed. R. Civ. P. 23(a)(3). "The typicality inquiry asks 'whether the named plaintiffs' claims are

typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class.'" *McDonough*, 638 F. Supp. 2d at 475 (quoting *Beck v. Maximus, Inc.*, 457 F.3d 291, 295-96 (3d Cir. 2006)). "Typicality entails an inquiry whether the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Hassine v. Jeffes*, 846 F.2d 169, 177 (3d Cir. 1988) (internal quotation marks omitted).

In an antitrust class action, "[s]ince the representative parties need prove a conspiracy, its effectuation, and damages therefrom – precisely what the absentees must prove to recover – the representative claims can hardly be considered atypical." *Sugar*, 73 F.R.D. at 336; *see also McDonough*, 638 F. Supp. 2d at 476 (finding typicality requirement met in antitrust consumer class action where "plaintiffs who bought different models at different times nonetheless complain of identical misconduct based on the same legal theory."). Courts repeatedly have held that typicality is satisfied where "plaintiffs and all class members alleg[e] the same antitrust violations by defendants." *Rubber Chemicals*, 232 F.R.D. at 351 (quotation marks omitted).[29]

[29] In general, "[c]ommentators have noted that cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class

Here, the named plaintiffs and all other members of the proposed class purchased singles and Kings directly from Defendants during the alleged conspiracy period. As such, all class member claims arise from the same events or course of conduct, are based on the same legal theory, claim the same antitrust injury ("overcharge") and therefore satisfy the typicality standard of Rule 23(a).

d. Adequacy is satisfied

The final requirement of Rule 23(a) is that the representative party will fairly and adequately represent the class. Fed. R. Civ. P. 23(a)(4). Rule 23(a)(4) "encompasses two distinct inquiries designed to protect the interests of absentee class members. First, the adequacy of representation inquiry tests the qualifications of the counsel to represent the class. Second, it serves to uncover conflicts of interest between named parties and the class they seek to represent." *Prudential*, 148 F.3d at 312 (citations and quotation marks omitted).

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usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." *In re Prudential*, 148 F.3d at 311 (internal quotation marks omitted). "Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct." *Id.* (internal quotation marks omitted); *see also id.* at 312 ("[T]he named plaintiffs . . . have . . . alleged that they suffered harm as the result of the same company-wide conduct that injured the absentee class members. The various forms which their injuries may take do not negate a finding of typicality, provided the cause of those injuries is some common wrong."). Here, the "forms which their injuries may take" are common – *i.e.*, overcharges.

i. Class Counsel are well-qualified to represent the class

Plaintiffs are represented by experienced and able counsel with ample resources at their disposal. *See* Dkt. No. 387, Case Management Order No. 5, Order Appointing Interim Lead and Local Counsel. Accordingly, "there is no ground for supposing that plaintiffs will not adequately represent the class." *In re Glassine and Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302, 306 (E.D. Pa. 1980).

ii. There are no conflicts of interest between the named plaintiffs and other class members

Courts have found the adequacy requirement to be met where "the named plaintiffs and the absent class members have claims that arise from the same course of conduct by the defendants and they seek the same remedies." *In re Am. Investors Life Ins. Co. Annuity Mktg. and Sales Practices Litig.*, 263 F.R.D. 226, 235 (E.D. Pa. 2009). Differences across class members' claims are not enough to defeat class certification under Rule 23(a)(4) unless such differences give rise to an actual conflict of interest within the class. *See In re Pet Food Prods. Liability Litig.*, 629 F.3d 333, 348 (3d Cir. 2010).[30]

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[30] *See also Kohen*, 571 F.3d at 680 ("To deny class certification now, because of a potential conflict of interest that may not become actual, would be premature."); *Stanford v. Foamex, L.P.*, 263 F.R.D. 156, 171 (E.D. Pa. 2009) ("Because Stanford is challenging the same course of conduct and seeking the same relief as the rest of the absent class members, the court finds that Stanford's

Here, the interests of the named Plaintiffs do not conflict with those of the absent class members. Rather, their interests are aligned because all class members have been injured in the same way by the same anticompetitive conduct. *See Pet Food*, 629 F.3d at 348; *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 150-51 (E.D. Pa. 1979).

D. THIS ACTION MEETS THE PREDOMINANCE REQUIREMENT OF RULE 23(B)(3)

Once Rule 23(a) is satisfied, Rule 23(b)(3) requires the Court to find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

"'[P]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. . . ." *In re Prudential*, 148 F.3d at 314 (quoting *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625 (1997)). Even where "certain determinations . . . will require individualized proof, which might

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interests are sufficiently aligned with the those of the class."); *McDonough*, 638 F. Supp. 2d at 477 (adequacy requirement met in antitrust consumer class action, despite argument that "subclass members who bought different models or made purchases at different times have mutually antagonistic interests," because "subclass members would complain of identical misconduct based on the same legal theory").

vary" among class members, "most courts have refused to deny class certification simply because there will be some individual questions raised during the proceedings." *Linerboard*, 305 F.3d at 162-63; *see also id.* ("[W]e reject any *per se* rule that treats the presence of [individualized] issues as an automatic disqualifier. . . . [T]he mere fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones.").

In conducting its predominance inquiry, "a district 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 (internal quotation marks omitted). As a rule, however, "defendants seeking to defeat class certification in horizontal price-fixing cases . . . face an uphill battle," as "it is widely recognized that the very nature of horizontal price-fixing claims are [sic] particularly well suited to class-wide treatment because of the predominance of common questions." *In re Urethane Antitrust Litig.*, 251 F.RD. 629, 635 (D. Kan. 2008).[31]

[31] Where class certification is denied, it is often because the class is defined too broadly, the characteristics or properties of the products of defendants are highly customized rather than fungible, or the prices paid by customers are determined by individualized negotiations and bear no relationship to the list price. An example of this is *In re Plastic Additives Antitrust Litig.*, 2010 U.S. Dist. LEXIS 90135, *24-26 (E.D. Pa. 2010), where the evidence showed the actual

Although the requirement of Rule 23(b)(3) that common issues predominate is, by definition, "more demanding" than the Rule 23(a)(2) requirement that common issues exist, *In re Hydrogen Peroxide*, 552 F.3d at 311, "[c]onsiderable overlap exists between the court's determination of commonality and a finding of predominance," and "[a] finding of commonality will likely satisfy a finding of predominance because, like commonality, predominance is found where there exists a common nucleus of operative facts." *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 484 (N.D. Ill. 2009).

This Court has made clear that "[t]he mere existence of individual issues will not of itself defeat class certification," because it is enough to satisfy the predominance requirement that "there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis," and thus "obviates the need to examine each class members' individual position." *Pressure Sensitive Labelstock*, 2007 U.S. Dist. LEXIS 85466 at *40-41 (internal quotation marks omitted); *accord Vitamins*, 209 F.R.D. at 262. Predominance does not require that each issue in the case be common to all class members, but only that substantial common issues predominate.[32] As stated in *Hydrogen Peroxide*, 552 F.3d at 310-

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prices paid by customers were did not change at all in response to announced increases in list prices.

[32] *See, e.g.*, *Lorazepam*, 202 F.R.D. at 29; *Cardizem*, 200 F.R.D. at 339;

11, the predominance requirement "tests whether proposed classes are sufficient cohesive to warrant adjudication by representation."

As discussed above, courts repeatedly have granted class certification in price-fixing cases. That is because the three elements of the claim – (1) conspiracy, (2) causation (impact), and (3) damages – are typically proven through common evidence. *See Amchem*, 521 U.S. at 625; *McDonough*, 638 F. Supp. 2d at 480 (citing various authorities for the proposition that concerted action is a common question); *id.* at 483 (causation and damages are common questions (citing *Linerboard*, 305 F.3d at 151)); *Bulk (Extruded) Graphite*, 2006 WL 891362, at *9. This case is no exception.

1. The alleged conspiracy is the predominating common issue

Conspiracy is a common issue and any trial in this matter will focus overwhelmingly on common evidence relevant to the conspiracy. Such evidence will include, *inter alia*, witness testimony (live or by deposition), documents, email, economic evidence of conspiracy, expert testimony, and other evidence relating to *Defendants'* pricing and conduct. At bottom, that is what this case is about. And that is precisely why the issue of conspiracy "is a common question

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Flat Glass, 191 F.R.D. at 484; *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693 (D. Minn. 1995); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 517 (S.D.N.Y. 1996) (predominance is met unless "it is clear that individual issues will overwhelm the common questions").

that is thought to predominate over other issues in the case and has the effect of satisfying the first prerequisite in Rule 23(b)(3)." *Sugar*, 73 F.R.D. at 345; 7 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 1781 at 228 (3d ed. 2005).[33]

At trial, class plaintiffs will introduce the same evidence of Defendants' unlawful conduct that every absent class member would introduce if proceeding independently, including, for example, the following types of common evidence:

- The circumstances in the industry leading up to the conspiracy period, including a long period of stable prices with no increases;

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[33] *See also* 6 Newberg on Class Actions § 18.28 at 102 (4th ed. 2002) ("As a rule, the allegation of a price-fixing conspiracy is sufficient to establish predominance of common questions."); *Scrap Metal* (same)*; Currency Conversion* (same); *In re Rubber Chemicals Antitrust Litig.*, 2005 WL 2649292, at *5 (N.D. Cal. Oct. 6, 2005); *Carbon Black*, 2005 WL 102966, at *15; *NASDAQ*, 169 F.R.D. at 517; *In re Citric Acid Antitrust Litig.*, 1996 WL 655791, at *6 (N.D. Cal. Oct. 2, 1996); *Potash*, 159 F.R.D. at 693; *Catfish*, 826 F. Supp. at 1039 ("If proven, evidence of any meetings . . . , telephone conversations, or other electronic communications in pursuit and furtherance of the alleged conspiracy would be the most relevant evidence that could be introduced in proving the allegations of plaintiffs' complaint of price fixing. The court does not perceive that evidence of this type would be particular or isolated as to any individual plaintiff. Rather, such evidence would be pertinent and common to all plaintiffs."); *In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244, 250 (S.D. Tex. 1978) ("The court is persuaded that the conspiracy issue – whether price information was exchanged; if it was, with what intent; whether action was taken by the defendants based upon such exchanges; etc. – is susceptible of generalized proof, since it deals primarily with what the defendants themselves did and said.").

- Three nationwide, parallel price increases on Defendants' core products in the U.S. in a little more than four years, nearly seven years after the last price increase;

- Defendants' virtually identical pre-textual explanations for their price increases;

- Defendants' documents, analyses and testimony relating to their price increases;

- Evidence from which Defendants' conspiracy may be inferred, including, *inter alia*, contacts and communications between Defendants, market structure, product characteristics, and market conditions;

- the collusion in Canada and its probative support for the U.S. conspiracy; and

- expert testimony and documentary evidence concerning what made characteristics of the U.S. chocolate market "ripe" for collusion and made it likely that any collusion would be successful.

In short, all of the evidence that any one plaintiff would use to prove the existence of Defendants' conspiracy will be equally applicable to the claims of every other class member.

2. Plaintiffs will prove causation on a common basis

The second element of Plaintiffs' claim – causation, also known as antitrust "impact" or "injury" – is likewise susceptible of common proof. *See Hydrogen Peroxide*, 552 F.3d at 311-12:

> 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."

In substance, the issue of impact turns on whether the alleged collusion caused higher than competitive prices for singles and Kings paid by class members.

In terms of common proof, the starting point for the analysis is the accepted economic principle that, in a market structurally prone to collusion, cartels typically cause higher prices and injury to consumers. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977). This is a recognized presumption known as the Bogosian short-cut. *See, e.g., In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79, 87-93 (E.D. Pa. 2003).

Based on this economic reality, courts do not require an onerous showing on the element of impact. Nonetheless, Plaintiffs have developed a substantial and detailed record, comprised of multiple, independent categories of common evidence on the element of causation and impact, including: (1) testimony and documents from Defendants; (2) expert testimony showing common impact based on an economic investigation; (3) evidence of parallel nationwide list price increases that had broad effect in the marketplace; and (4) analysis through expert testimony of empirical transactional evidence showing that class members did, in fact, pay higher prices as a result of the price increases.

a. Evidence of parallel price increases can be used to show widespread impact at trial

Discovery shows that Defendants imposed a series of strikingly parallel, nationwide price increases during the conspiracy period for chocolate candy, including singles and Kings. These price increases were broadly applicable in the marketplace,

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Such evidence of parallel and generally-applicable pricing announcements serves as common proof of impact.[34]

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[34] *See In re EPDM Antitrust Litig.*, 256 F.R.D. at 88; *Linerboard*, 305 F.3d at 153 (crediting expert's price analysis); *In re Polyester Staple Antitrust Litig.*, MDL No. 3:03-CV-1516, 2007 WL 2111380, *15 (W.D.N.C. July 19, 2007) ("the price increase announcements themselves, as well as the timing and surrounding circumstances, provide common evidence of the coordination amongst the Defendant manufacturers, as well as the intended scope of the conspiracy") & *id.* at *25-26 (crediting evidence that prices increased similarly over time and across customers as common proof of impact); *In re OSB Antitrust Litig.*, 2007 WL 2253418, at *5-7 (E.D. Pa. Aug. 3, 2007) (same).

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The fact that Defendants' collusive price increases affected two classes of products is no obstacle to common proof of impact. Courts routinely find that common issues predominate where a single conspiracy allegedly manipulated the market for multiple related products – often many more products than the two types (singles and Kings) at issue here.[35]

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[35] *See, e.g., In re Bulk [Extruded] Graphite Antitrust Litig.*, 2006 WL 891362, at *11 (D.N.J. Apr. 4, 2006) ("Antitrust defendants resisting class certification routinely argue that the complexity of their particular industry makes it impossible for common proofs to predominate on the issue of antitrust impact . . . but the argument is usually rejected."); *Flat Glass*, 191 F.R.D. at 484 ("Contentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected"); *Urethane*, 251 F.R.D. 629 (certifying class in which single industry conspiracy fixed prices for several distinct product groups); *EPDM*, 256 F.R.D. 82 (certifying class alleging price-fixing of two broad categories of synthetic rubber products that encompassed multiple grades of product); *In re TFT-LCD Antitrust Litig.*, 267 F.R.D. 291, 312 (N.D. Cal. 2010) (certifying class despite defendants' argument that "there are a

Additionally, the fact that certain customers may have negotiated pricing or terms individually does not defeat certification.[36]

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virtually infinite number of distinct markets for every type of panel and type of product, and corresponding different type of purchaser."); *Polyester Staple*, 2007 WL 2111380, at *22 (rejecting defendants' argument that "there is no single product market" for polyester stable fiber and certifying class encompassing goods with "different physical properties and characteristics" and a variety of end-uses); *Rubber Chems.*, 232 F.R.D. at 349 (certifying claims under umbrella term "Rubber Chemicals," with product categories including "primary, secondary, or ultra accelerators; activators; vulcanizing agents; antioxidants; and anti-ozonants"); *Labelstock*, 2007 WL 4150666, at *2 (certifying claims involving product market in which "there are fifteen product categories").

[36] *See, e.g., TFT-LCD*, 267 F.R.D. at 313 (certifying class where plaintiffs presented evidence that negotiated prices moved along a "price ladder" that affected the baseline for price negotiations); *EPDM*, 256 F.R.D. at 89 (certifying class where negotiated prices were based on a price list); *NASDAQ*, 169 F.R.D. at 523 ("[n]either a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that, as here, the price range was affected generally."); *Polyester Staple*, 2007 WL 2111380, at *22-23 (rejecting argument that different transaction prices defeat common proof of impact); *In re Sulfuric Acid Antitrust Litig.*, 2007 WL 898600, at *7 (N.D. Ill. Mar. 21, 2007) (same); *Urethane*, 237 F.R.D. at 450-52 (same); *DRAM*, 2006 WL 1530166, at *9 (certification appropriate "regardless whether some members of the class negotiated prices individually"); *Carbon Black*, 2005 WL 102966, at *16-19 (same); *Rubber Chemicals*, 232 F.R.D. at 352-53 (same); *Vitamins*, 209 F.R.D. at 266 ("courts have found common impact in cases alleging price-fixing despite individual negotiations, varied purchase methods and different amounts, prices, and types of products purchased"); *In re Bromine Antitrust Litig.*, 203 F.R.D. 403, 415 (S.D. Ind. 2001) (notwithstanding "individual price negotiations, plaintiffs may succeed in showing class-wide impact by showing that the minimum baseline for beginning negotiations, or the range of prices which resulted from negotiation, was artificially raised (or slowed in its descent)").

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b. The market structure was ripe for a successful conspiracy causing class-wide antitrust injury

Beyond Defendants' contemporaneous statements regarding the market impact of price increases, the expert testimony of Dr. Tollison supports the Plaintiffs' motion that antitrust impact is subject to common proof and that the alleged conspiracy would (and did) cause class-wide injury.[37]

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[37] *See, e.g. Linerboard*, 305 F.3d at 153 (deeming expert report "significant" in affirming class certification); *EPDM; Urethane; TFT-LCD; OSB*, 2007 WL 2253418, at *5-7 (expert report "has probative value."); *Labelstock*, 2007 WL 4150666, at *16-19 (expert's "economic analysis is a plausible method of showing class-wide impact, and his approach is grounded in evidence of record."); *Polyester Staple*, 2007 WL 2111380, at *26 (same); *Universal Serv. Fund*, 219 F.R.D. at 676 (expert "declaration provides a reasonable basis and a feasible means for plaintiffs to prove impact on a class-wide basis.").

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First, the market structure of the chocolate industry is such that the alleged conspiracy was both economically feasible and likely to affect all class members.[38] For example:

> **Single serving chocolate is a commodity product.** Single serving chocolates are interchangeable commodity products.[39] It is well-settled that

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[38] *See, e.g., EPDM* (class-wide impact was a common issue where expert opined that market structure was ripe for effective collusion); *TFT-LCD* (same); *Urethane* (same); *Linerboard* (same); *Bulk (Extruded) Graphite*, 2006 WL 891362, at *12-14 (same); *Carbon Black*, 2005 WL 102966, at *15-19 (same) *Magnetic Audiotape*, 2001 WL 619305, at *5-7 (same); *Auction Houses*, 193 F.R.D. at 167 (same); *DeLoach*, 206 F.R.D. at 563 (same). *See generally In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361-62 (3d Cir. 2004) (surveying structural economic indicators of a collusion-prone market); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (same); Richard A. Posner, *Antitrust Law* (2d ed. 2001), at 69-93 (same).

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antitrust impact is a common issue in cartel cases involving fungible goods.[40] "Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437 (3d Cir. 1997) (quoting *Allen-Myland, Inc. v. Int'l Bus. Machs. Corp.*, 33 F.3d 194, 206 (3d Cir. 1994))

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High market concentration. Chocolate production is concentrated among the Defendants, which means that Defendants possessed the market power necessary to manipulate prices.

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Significant barriers deter new entry to the market. High barriers to entry make collusion particularly appealing because they ensure that cartel members will be able to capture supra-competitive prices without being undercut by new entrants into the market.

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Mature and slow-growing market. Mature commodity markets characterized by slow growth typically have slim profit margins, which provides motivation to collude.

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[40] *See, e.g, In re Polyester Staple Antitrust Litig.*, 2007 WL 2111380, at *21 (W.D.N.C. July 19, 2007) (emphasizing interchangeable nature of products); *Linerboard*, 305 F.3d at 153 (affirming certification where expert emphasized the "fungible nature of the products"); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 2007 WL 4150666, at *12-13 (M.D. Pa. Nov. 19, 2007) (crediting expert opinion on commodity issue); *Urethane*, 237 F.R.D. at 450-51 (certifying class where expert opined that "the products are fungible commodity products"); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 1530166, at *8 (N.D. Cal. June 5, 2006) (finding common proof of impact is possible because "DRAM is a commodity"); *Graphite*, 2006 WL 891362, at *12 (certifying class where expert found "that extruded graphite products can be considered undifferentiated commodities with a high degree of product interchangeability").

It is widely accepted that structural conditions such as these facilitate collusion, rendering common impact likely and certification appropriate.

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Second,

Frequent contacts between Defendants.

Such opportunities for "information sharing" can be used to monitor the conspiracy, deter and punish cheating, and thereby facilitate a more successful cartel – one likely to result in higher prices and common impact. *See, e.g., United States v. Container Corp.*, 393 U.S. 333, 334-35 (1969); *In re Coordinated Pretrial Proceedings in Petroleum Antitrust Litig.*, 906 F.2d 432, 445-47 (9th Cir. 1990).

Actions against interest.

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See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) ("[C]utting

prices in order to increase business often is the very essence of competition.").

Third,

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In sum, Dr. Tollison's economic analysis provides reliable and common evidence on the element of causation and impact.

c. Empirical evidence shows that class members were injured

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[41] *See Scrap Metal*, 527 F.3d at 532-34 (approving use of multiple regression models); *Foundry Resins*, 242 F.R.D. at 410 (characterizing multiple regression models as "reasonable damage methodologies"); *DRAM*, 2006 WL 1530166, at *10 ("[W]ith respect to plaintiffs' methodologies and the before/after and yardstick methodologies in particular, other courts have already upheld them as valid means for proving damages on a class-wide basis, and this court has found no reason to reject them at this stage of the proceedings.") (collecting cases); *Bulk (Extruded) Graphite*, 2006 WL 891362, at *15 (approving multiple regression analyses to estimate damages, and noting that "these methods are widely accepted"); *Flat Glass*, 191 F.R.D. at 485-87 ("[t]here is no dispute that when used properly multiple regression analysis is one of the mainstream tools in economic study and it is an accepted method of determining damages in antitrust litigation"); *Urethane*, 237 F.R.D. at 452 ("damages are also likely susceptible to class-wide proof" where plaintiffs' expert "opined in his initial report that several widely accepted and feasible methods may be used to estimate damages on a class-wide basis, including the 'before and after' approach [and] multiple regression analysis"); 6 Alba Conte & Herbert Newberg, Newberg on Class Actions § 18:53 at 177 (4th ed. 2002).

d. Defendants' own statements and documents can be used to establish causation and impact

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.[42] *See also* Ex. 2, McClave Rep.

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Based on the foregoing categories of common evidence, Plaintiffs respectfully submit that the element of antitrust causation is amenable to common proof, consistent with the requirements of Rule 23. *See Kohen*, 571 F.3d at 677 (class certification does not require proof on the merits for every class member).

3. Plaintiffs will prove class-wide damages on a common basis

As outlined above,

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. *See Scrap Metal*, 527 F.3d at 532-34.[43]

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[43] *See supra* n. 41 (collecting cases).

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It is likewise important to note the standard governing proof of damages under the Sherman Act. To advance the goals of antitrust enforcement, the

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Supreme Court has long held that antitrust plaintiffs are subject to a relaxed burden on the element of damages.[45] As the Seventh Circuit has explained:

> It is certainly acceptable through expert economic testimony to make a reasonable estimation of actual damages through probability and inferences.... Since the days of *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927), it has been established that in complicated antitrust cases plaintiffs are permitted to use estimates and analysis to calculate a *reasonable approximation* of their damages.

Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 491-93 (7th Cir. 2002) (emphasis added).

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4. Fraudulent concealment, which relates only to purchases made during the first year of the Class Period, will be proved with common evidence

As with the conspiracy, impact and damages questions addressed above, common issues will predominate with respect to whether fraudulent concealment tolls the statute of limitations. In *Linerboard*, the Third Circuit held that common issues predominated with respect to fraudulent concealment because "'the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than

[45] *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 263-66 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created"); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561-64 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927).

what plaintiffs did.'" 305 F.3d at 163 (citation omitted). The Third Circuit explained: "It is the fact of *concealment* that is the polestar in an analysis of fraudulent concealment. It is the camouflage that demands attention, the cover up, the acts of obscuring or masking. These allegations of proof are all common to the defendants, not the plaintiffs." *Id.* at 163 (citation, internal quotation marks, and footnote omitted).

Conspiracies, by their very nature, are self-concealing. *See Labelstock*, 2006 U.S. Dist. LEXIS 9827 at *15 ("[A] claim of fraudulent concealment in the context of an antitrust action may be premised upon a self-concealing conspiracy without additional averments of active concealment. . . . "'[R]egardless of whether concealment is an essential element of price-fixing, secrecy is its natural lair.'") (citation omitted). In addition, Defendants' pretextual announcements providing reasons other than their secret conspiracy for the price increases constitute predominating common evidence of fraudulent concealment.[46]

While defendants sometimes argue that differences may arise concerning individual plaintiffs' discovery and due diligence because not every class member received the same price increase announcements (either because they purchased different products or purchased from different defendants), the Third Circuit has

[46] *See Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 833 n.11 (11th Cir. 1999) (pretextual price increase statements to customers were effective acts of concealment).

made clear that individualized issues as to discovery and due diligence do not defeat a finding that common issues predominate with respect to fraudulent concealment.[47]

E. A CLASS ACTION IS THE SUPERIOR AND MOST EFFICIENT METHOD FOR ADJUDICATING THIS ACTION

Rule 23(b)(3) provides that certification is appropriate if class treatment "is superior to other available methods for the fair and efficient adjudication of the controversy." "The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." *In re Prudential*, 148 F.3d at 316.

1. Plaintiffs' trial plan

In cases where the plaintiffs "attack the same course of defendants' conduct, proceeding as a class action is far superior to allowing piecemeal litigation of the exact same claims in countless lawsuits potentially occurring throughout the country." *Foamex*, 263 F.R.D. at 174 n.22. Here, as described above, common evidence will be used by Plaintiffs to address predominating common issues that

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[47] *See Labelstock*, 2007 U.S. Dist. LEXIS 85466 at *69-*70 ("Whether Defendants concealed their unlawful conspiracy will require common proof, *i.e.*, evidence of Defendants' conduct. And individual issues concerning Plaintiffs' and class members' discovery and due diligence can be litigated at the damages phase of this proceeding.").

are presented to the jury at trial.[48] For example, in establishing the existence, operation and scope of Defendants' conspiracy, Plaintiffs overwhelmingly will rely on documents and testimony from Defendants, as well as Dr. Tollison's economic analysis and opinions – all evidence common to the class. Plaintiffs will offer the testimony of Dr. Tollison and Dr. McClave as common evidence showing the impact of Defendants' conspiracy and will present Dr. McClave's multiple regression model and statistical analyses to measure the damages arising from the conspiracy. In other words, Plaintiffs' affirmative case at trial will look largely the same whether it proceeds as a class case or as thousands of individual cases. Attached as Exhibit B is a more detailed presentation of Plaintiffs' trial plan.

2. Proceeding as a class action promotes efficiency and fairness

The class action device is far superior to, and more efficient than, any other procedure available for resolving the factual and legal issues raised by Plaintiffs' claims. The core issues in the case – Defendants' conduct and its impact on the market – are common. Denying certification, moreover, would result in duplicative and wasteful litigation on the part of many putative class members. See, e.g., Universal Serv. Fund, 219 F.R.D. at 679 (recognizing that individual

[48] *See Wachtel v. Guardian Life Ins. Co.*, 453 F.3d 179, 186 (3rd Cir. 2006) (recognizing that the trial plan for a class case "describes the issues likely to be presented at trial and tests whether they are susceptible to class-wide proof") (quoting Advisory Committee Note to Rule 23(c)(1)(A)).

litigation "would be grossly inefficient, costly, and time consuming").[49]

Moreover, as this Court has observed in another price-fixing class action, "[t]he cost to most class members to prosecute individual claims against Defendants would be disproportionately large relative to the amount of damages claimed by each class member." *Pressure Sensitive Labelstock*, 2007 U.S. Dist. LEXIS 85466 at *70. "Most class members, therefore, would be deterred from bringing individual actions to redress the harm caused by Defendants' alleged unlawful conduct." *Id.* The Court further noted that where plaintiffs had "presented common questions of law and fact regarding whether Defendants violated federal antitrust law," individual questions concerning damages and other issues "will not render the class action unmanageable." *Id.* at *71; *see also id.* ("Additionally, resolving the common questions in a single judicial forum is the most efficient use of judicial and litigant resources.").

The same reasoning applies here. Class treatment is the fairest and most efficient way for this case to proceed.

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[49] *See also Urethane*, 237 F.R.D. at 453; *Carbon Black*, 2005 WL 102966, at *21; *Bromine*, 203 F.R.D. at 416; *Paper Sys.*, 193 F.R.D. at 616; *Auction Houses*, 193 F.R.D. at 168; *NASDAQ*, 169 F.R.D. at 527; *Corrugated Container*, 80 F.R.D. at 252.

F. INTERIM CO-LEAD COUNSEL SHOULD BE APPOINTED AS PERMANENT CLASS COUNSEL

This Court already has considered the Rule 23(g) factors in appointing Berger & Montague, P.C. and Hausfeld, LLP and as interim co-lead counsel. *See* Doc. No. 387 (appointing interim co-lead counsel). Counsel respectfully suggest that in addition to the reasons underlying the Court's decision to appoint these two firms as interim counsel, the firms' conduct in this litigation to date confirms the wisdom of that decision and justifies their appointment as class counsel.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that their Motion for Class Certification be granted.

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Respectfully submitted,

/s/ H. Laddie Montague, Jr.
H. Laddie Montague, Jr.
Ruthanne Gordon
Matthew P. McCahill
Molly Tack-Hooper
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

/s/ Michael D. Hausfeld
Michael D. Hausfeld
Hilary K. Scherrer
HAUSFELD, LLP
1700 K Street, N.W.
Suite 650
Washington, DC 20006
(202) 540-7200

Bruce J. Wecker
HAUSFELD, LLP
44 Montgomery Street
Suite 3400
San Francisco, CA 94104
(415) 633-1908

Lead Counsel for Direct Purchaser Class Plaintiffs

Walter W. Cohen
Kevin J. Kehner
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
200 Locust Street, Suite 400
Harrisburg, PA 17101
(717) 234-9730

Local Counsel for the Direct Purchaser Class Plaintiffs

On the brief:

Roberta D. Liebenberg
Adam J. Pessin
FINE, KAPLAN AND BLACK, R.P.C.
1835 Market Street
28th Floor
Philadelphia, PA 19103
(215) 567-6565

Gregory P. Hansel
Randall B. Weill
Jonathan G. Mermin
Joshua R. Carver
PRETI FLAHERTY BELIVEAU AND PACHIOS
One City Center
Portland, ME 04101
(207) 791-3000

kal698050