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 APPLIES TO: DIRECT PURCHASER CLASS PLAINTIFFS' CASES	**:**	***FILED ELECTRONICALLY***

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

REDACTED VERSION

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INTRODUCTION

Plaintiffs' motion for class certification cannot be reconciled with the realities of selling branded chocolate candy. Defendants' businesses involve the sale of a vast array of differentiated products through individualized pricing negotiations with thousands of differently situated customers, ranging from multi-billion dollar wholesale distributors, to mass retailers and club stores, to "mom and pop" convenience stores. To untangle how pricing negotiations with all of these different customers determined the actual prices they paid for the chocolate candy products at issue — a necessary exercise in evaluating whether any given customer was economically impacted or damaged by the alleged conspiracy — will require an individualized inquiry for each putative plaintiff. It cannot be determined based on "medians," "aggregates," or assumptions.

Plaintiffs' theory for certification involves multiple conflicts with reality, but two in particular stand out. First, Plaintiffs all but ignore a central feature of how Hershey, Mars, and Nestle USA price their products: the extensive use of trade promotions and discounts that, during the relevant time period, collectively **REDACTED** . The individual application of these discounts varied by customer, and resulted in different negotiated transaction prices across the putative class. Second, Plaintiffs attempt to shoehorn chocolate candy — a highly differentiated, heavily branded consumer product — into the mold of a fungible "commodity." Each of these conflicts is a dispositive flaw in Plaintiffs' case. Accordingly, even if Plaintiffs could prove the existence of a conspiracy — which they cannot, as Plaintiffs failed to uncover even ***one*** improper

communication among any of the U.S. defendants in discovery — Plaintiffs cannot establish the other essential elements of their antitrust case through common proof.

It bears noting that Plaintiffs have now dropped their class claims with respect to purchasers of bagged, seasonal, and multipack candy. Plaintiffs subjected Defendants to millions of dollars in discovery costs under the premise that there was a conspiracy on all chocolate candy products. But the discarded products together account for a full ***two-thirds*** of the chocolate sales that were at issue at the time they filed the Consolidated Amended Complaint. In other words, the evidence in support of a conspiracy and class certification was so lacking for this majority of products that Plaintiffs did not even try to put that evidence before the Court.

All that remains now are the single and king-sized chocolate products frequently sold in the front of retail establishments or vending machines. Nevertheless, even for those products, Plaintiffs still cannot show that they can prove injury and damages on a class-wide basis and thereby certify a class. In fact,

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Because the facts and analyses supporting class certification are so lacking here, Plaintiffs simply make up different ones and argue those — an approach that has been tried and rejected in this Circuit under similar circumstances. *See, e.g., In re Plastics Additives Litig.*, 2010 WL 3431837, No. 03-CV-2038 (E.D. Pa. Aug. 31, 2010). The strategy is straightforward: re-characterize the heavily-branded, highly differentiated, and competitive chocolate business so that it sounds more like the commodity industries where classes have been certified. Those cases usually involve products like flat glass, labelstock, or linerboard, where a purchaser gets the same fungible product no matter which company it buys from, and competition is almost exclusively on price.

But chocolate candy is different. There is plenty of price competition, to be sure. As lead counsel for a group of direct purchaser plaintiffs told this Court: Hershey, Nestle USA and Mars "clearly compete on price every single day.... So clearly price competition works in the industry." Ex. 111 (May 2010 H'rg Tr. at 52:1-23). The deposition testimony from the direct purchaser plaintiffs is the same. They concede that they negotiated trade promotions and other monies that they considered discounts — the majority of which Plaintiffs' experts now ignore. But pricing is not the only way Defendants compete. These companies have spent decades advertising and building some of the strongest brands in America — famous names like Hershey's®, Snickers®, Reese's®, M&M's®, Kisses®, and Baby Ruth®. They all have different ingredients, packaging, and consumer

appeal. And the direct purchaser plaintiffs that re-sell these products know it. In fact, not a single one of them has testified that these famous brands are priced or sold like vats of chemicals, metals, or cardboard. This is not a commodity business susceptible to common proof, and Plaintiffs can make no showing that it is.

And that is where Plaintiffs' request for class certification begins and ends, with an utter lack of the factual proof required under governing law. Indeed, the law is clear — both from the Third Circuit's decision *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008), and the Supreme Court's more recent pronouncement in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011) — that this Court must engage in a "rigorous analysis" of all of the evidence to determine whether the Plaintiffs can actually prove the facts that their class certification theory is based upon. Yet Plaintiffs barely pay lip service to their obligation to "affirmatively demonstrate" their compliance with each of the four prerequisites of Rule 23(a), and they provide no evidence that the named plaintiffs are typical and adequate representatives. Nor can Plaintiffs establish that common questions "predominate" by suggesting that common evidence might prove the alleged conspiracy itself. To satisfy their burden under Rule 23(b)(3), they must show that the alleged injury to the putative class members is amenable to common proof. Plaintiffs have not done this. To the contrary, because the discovery record actually refutes the central facts and assumptions upon which Plaintiffs base their arguments, Plaintiffs' motion cannot survive the "rigorous analysis" that *Hydrogen Peroxide* demands and must be denied.

FACTUAL BACKGROUND

I. Defendants' Chocolate Candy Products

The chocolate candy products at issue in this litigation comprise a diverse assortment of more than 50 different brands, each characterized by different ingredients, flavors, packaging, advertising campaigns, and consumption experiences. Defendants manufacture these products using proprietary recipes and a variety of ingredients, employing different flavor combinations to reach different customer tastes and needs. *See, e.g.*, Ex. 112 at MARSUS0180621; Ex. 113 at MARSUS0715044; Ex. 114 at MARSUS0250324; Ex. 115 at MARSUS0308404; Ex. 193 ¶ 6; Ex. 195 ¶ 3.[1] Ingredients contributing to the uniqueness of each product include, among other things, almonds, nougat, peanuts, caramel, peanut butter, peppermint, crisped rice, wafers, toffee, coconut, pretzels, malted milk, cookies, and fruit. Ex. 195 ¶ 3. In addition, varying amounts of chocolate liquor, cocoa butter, or cocoa powder result in different types of chocolate (dark, milk, or white), with different flavor profiles within those categories. *See* Ex. 87 at 132:5-133:2; Ex. 104 at 45:22-46:12; Ex. 72 at 45:7-15. Without exception, each of Defendants' products has its own distinct flavors, sizes, shapes, textures, and colors. *See, e.g.*, Ex. 116 at MARSUS0714707; Ex. 117 at MARSUS0028705; Ex. 117 at MARSUS0028706; Ex. 118 at MARSUS0341430; Ex. 193 ¶ 6; Ex. 2 § 4.1.

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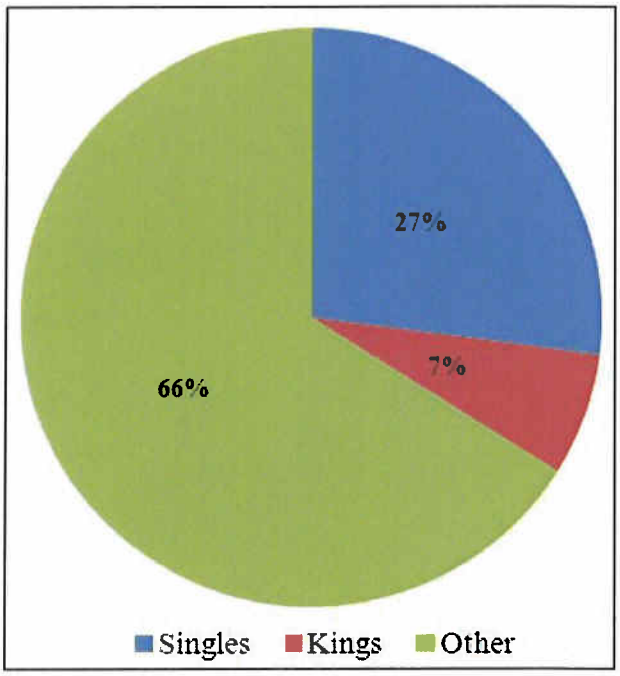
[1] All citations to exhibits contained herein ("Ex. ___") refer to the exhibits attached to the Declaration of Jonathan D. Brightbill, dated August 12, 2011, and filed contemporaneously under seal with this memorandum. Citations to the appendices contained herein ("App. ___") refer to the appendices of deposition testimony attached to this Memorandum of Law In Opposition to Direct Purchaser Class Plaintiffs' Motion for Class Certification.

Defendants also invest **REDACTED** annually to market their distinct products through advertising and promotions. These expenditures reflect Defendants' ongoing battle for brand recognition, which plays a critical role in sales: the strongest chocolate candy brands also represent the best-selling products. Ex. 8 at 34:8-35:6, 131:21-132:2, 173:9-16; Ex. 193 ¶ 11; Ex. 195 ¶ 5; Ex. 196 ¶ 5. Thus, Hershey, Mars, and Nestle USA are frequently bitter litigants over product trade dress and advertising. *See, e.g., Mars, Inc. v. The Hershey Co.*, Case No. 1:10-cv-01325 (E.D. Va. 2010). According to third-party consumer research, Hershey's Milk Chocolate was the highest rated brand in America in 2007 for one demographic, while M&M's milk chocolate, Reese's Peanut Butter Cup, and Nestle also ranked among top U.S. brands like Google, Oreo, and Sony. Ex. 119 at HSY02733919; *see also* Ex. 120.

Many consumers are so devoted to their brands that they "rarely switch brands based on price." Ex. 121 at MARSUS0637311-13; Ex. 122 at CHOCSV_N0002885; Ex. 95 at 49:24-50:25, 86:24-87:10, 88:25-89:4; Ex. 195 ¶ 5; Ex. 196 ¶ 9. Even Plaintiffs appreciate that certain brands are much preferred by consumers, and thus, more desirable to stock on their shelves. *See* App. B

(collecting Plaintiff testimony on product differentiation and chocolate candy brands).

Chocolate candy products are manufactured and marketed for different consumer needs and occasions by "packtypes." *See generally*, Ex. 1 ¶ 22. These include individually labeled "singles" and "kings" marketed for immediate consumption, as well as bags of packaged candy or "multipacks" of chocolate candy "singles" marketed for future consumption. Chocolate candy for future consumption constitutes most of the chocolate candy products sold by Defendants. *Id.* ¶ 17 & exhibit 1. While Plaintiffs originally alleged price-fixing on chocolate candy of all kinds, as the pie chart on this page illustrates, they have now been forced to concede that they cannot make out a class case for ***66 percent*** of the chocolate candy products originally at issue in the case. *Id.*



II. The List-Price Increases on Single-Serve Packtypes

Plaintiffs' more limited class case now alleges that Defendants conspired to fix the ***list*** prices of certain chocolate candy products, and that the three price increases taken by Defendants in the six years from 2002 to 2007 were "unprecedented" for these products. Consolid. Am. Compl. ¶ 100. In making these assertions, Plaintiffs' brief opens by purporting to set forth a description of

these list-price increases. Pls.' Br. 8-16. In doing so, Plaintiffs entirely ignore the long history of parallel pricing of chocolate candy singles and king-sized packtypes in the United States, as well as the detailed evidence from discovery proving that these increases consisted of a lot more than simple "leading" and "following." Indeed, each of these supposedly "parallel" list-price increases actually consisted of a series of independent moves and reactions by these companies that undercut the preferred strategies and positioning of their competitors. None of these events would have made sense if a conspiracy had been in place.

A. The Pattern of Price Increases During the 2002-2007 Period Was Not Unique

For at least the past 30 years, the pricing of chocolate candy singles and king-sized products has been characterized by occasional rapid list-price increases, followed by periods of less frequent increases. As even a cursory review of a timeline summarizing the price increases on singles back to 1979 shows, the fact that single-serve chocolate products experienced three list-price increases during a span from 2002 through 2007 (as significant inflation occurred across food and grocery products[2]) was not inconsistent with the pricing history of these products. Indeed, in a period of less than five years from September 1981 to January 1986, chocolate candy singles experienced ***three*** list-price increases of just over 3 cents each. *See* Ex. 123 at MARSUS0446457. This period of multiple list-price

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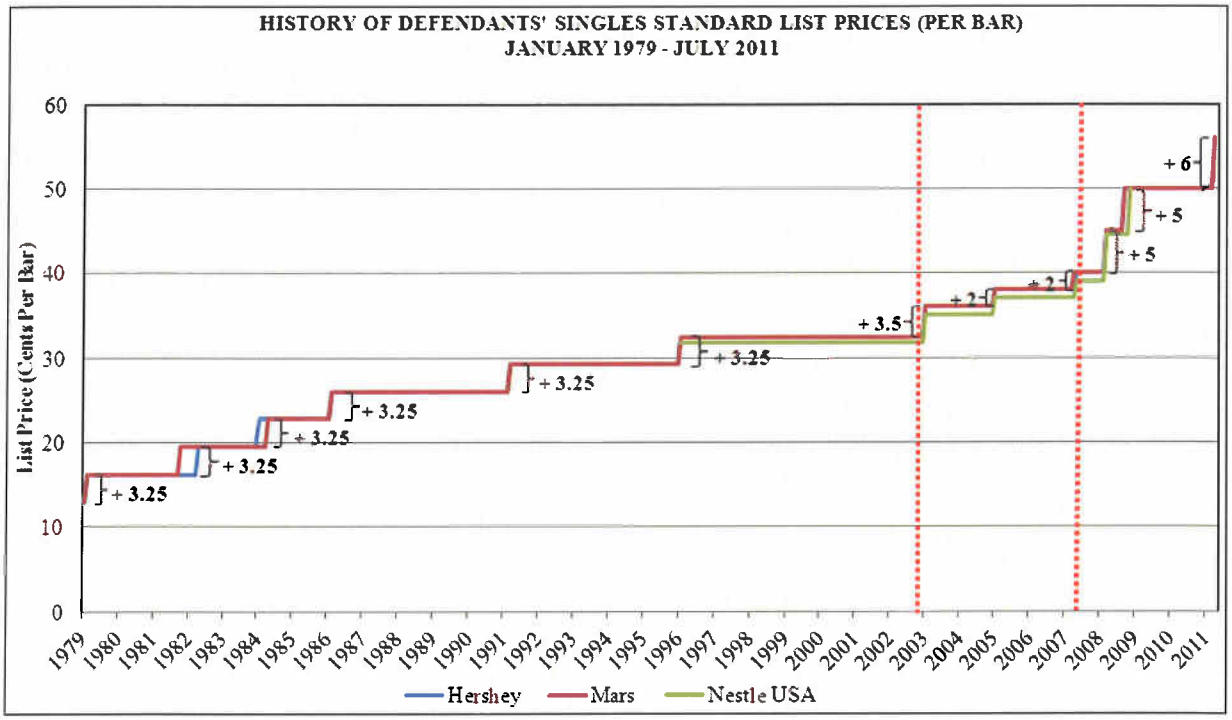
[2] Many manufacturers of other types of consumer packaged goods raised their prices during the time of the purported conspiracy as well. *See, e.g.*, Ex. 124 at HSY00000583 (listing companies that increased prices on their packaged goods).

increases was followed by an extended period of infrequent list-price increases spanning approximately five to seven years apart until December 2002. Ex. 39 at 70:15-72:21. And, in the time since the supposed conspiracy ended in 2007, there have been three additional list-price increases. Ex. 1. ¶ 111 & exhibit 19.



B. Retailers Line Price Chocolate Candy Products

The fact that Defendants quickly followed their competitors' price increases during the alleged class period reflected rational economic behavior given the pricing history of chocolate candy. Standard economic literature reflects that parallel pricing and leader/follower dynamics are common features of many industries as part of normal, legal business practices. Ex. 1 ¶ 188; *see also* Carlton & Perloff, *Modern Industrial Organization* 623-24 (3d ed. 2000). When there is competition among a few firms that has evolved over time such that they anticipate certain responses from the others, companies have an incentive — unilaterally —

to follow and match each other's price increases in order to maximize their own profits. Carlton & Perloff at 153.

This common, independent behavior of "leading" and "following" is even stronger here because of the way in which chocolate candy singles and kings are priced to the end consumer. For more than 30 years, retailers have "line priced" single-serve chocolate candy products — meaning that a given store will generally charge consumers the same everyday price for all single-serve chocolate candy products regardless of the brand, manufacturer, or purchasing cost.[3] Retailer line pricing traces back to a time without bar codes or scanners, when efficiency dictated that a single price point be used across a category.[4] Even today, certain important channels for the singles and king packtypes — such as convenience stores and the vend channel — lack the technology to vary pricing within chocolate products, while other customers have simply decided that it is in their interest to line price.[5]

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3 **REDACTED**

see also Ex. 101 at 117:18-118:10, 133:8-24, 141:18-142:2, 221:5-222:14; Ex. 70 at 189:21-190:8; Ex. 39 at 75:5-76:13, 116:4-117:3, 126:3-127:3, 174:6-175:22.

4 **REDACTED**

5 **REDACTED**

Ex. 193 at ¶ 4; Ex. 90 at 72:21-74:24, 143:12-25; Ex. 92 at 148:14-149:17; Ex. 75 at 50:19-51:15; Ex. 9 at 291:25-292:15.

Not surprisingly, REDACTED

.[6] Such strategic thinking is a perfectly appropriate, unilateral practice that lawfully results in parallel pricing. It is in the interest of a "follower" to increase its prices to match its competitors: REDACTED

REDACTED

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6 REDACTED

7 REDACTED

REDACTED .[8] Significantly, line pricing has not deterred manufacturers from trying to catch their competitors off guard with pricing actions, one of many tactics manufacturers employ to gain a competitive edge. Ex. 106 at 287:13-16, 291:5-10, 331:19-332:3, 345:21-23; Ex. 136 at MARSUS0025063 ("Our decision to lead on price appears to have taken competition by surprise and will likely prevent them from moving in Q4.").

C. 2002 Price Increase

REDACTED

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8 **REDACTED**

9 **REDACTED**

REDACTED

REDACTED

REDACTED

D. 2004 Price Increase

REDACTED

REDACTED

REDACTED

E. 2007 Price Increase

REDACTED

REDACTED

REDACTED

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12 REDACTED

III. Customer Transaction Prices Are Individually Negotiated Through Trade Promotions, Discounts and Rebates

REDACTED

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[13] Ex. 1 ¶¶ 3-6, 11, 28, 33-37, 39-46, 81-84 & exhibits 3, 6, 15-6; App. A (collecting testimony from Plaintiffs admitting their transaction price is net of promotions and other discounts).

[14] Ex. 1 ¶¶ 3, 28, 57-64 & exhibits 3, 10-12; App. A (testimony that trade spend reduces the net price of chocolate candy); Ex. 193 at ¶¶ 25-29; Ex. 195 at ¶¶ 7-9; Ex. 196 ¶¶ 13-15.

[15] **REDACTED**

REDACTED

REDACTED

REDACTED

Nor was discounting limited to trade spend programs. Defendants offered

REDACTED

Each of the putative class representatives participated in trade promotions that caused them to pay less than list price for chocolate candy products. Ex. 1 ¶¶ 85-94. By their own deposition testimony, the class representatives view

REDACTED

16 **REDACTED**

allowances and credits provided by Defendants to Lorain Novelty still lowered its net cost for chocolate candy. *Id.* at 66:1-4, 66:22-67:7, 89:19-90:5.

IV. Competition During The 2002-2007 Period Was Robust

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REDACTED

V. Whatever Happened in Canada Had No Impact on U.S. Pricing

REDACTED

REDACTED

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17 **REDACTED**

18 **REDACTED**

19 **REDACTED**

REDACTED

LEGAL STANDARDS

To obtain certification of a proposed class, the moving party must first prove that the putative class meets all four threshold requirements of Rule 23(a) — numerosity, commonality, typicality, and adequacy of representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Where, as here, the movant also seeks certification for money damages under Rule 23(b)(3), it must also prove that (1) common issues will "predominate" over individual ones, and (2) the class action represents the "superior method" for trying the case. *Newton v. Merrill, Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 181 (3d Cir. 2001). The movant bears the burden of proving each element by a preponderance of the evidence. *See Hydrogen Peroxide* , 552 F.3d at 307.

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20 **REDACTED**

The standards for evaluating a class certification motion were clarified by the Third Circuit in *Hydrogen Peroxide*, which held that a district court must engage in a "rigorous analysis" of all of the relevant evidence and testimony, and "must ***resolve*** all factual or legal disputes relevant to class certification, even if they overlap with the merits." 552 F.3d at 307, 318-19 (emphasis added). Since *Hydrogen Peroxide* was decided, district courts frequently have denied motions for class certification, and the Third Circuit has on multiple occasions vacated or reversed class certifications for failing to comply with its rigorous requirements.[21] The Supreme Court further underscored these principles with its recent decision in *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (2011), noting that ***actual*** (not presumed) conformance with Rule 23's requirements are "indispensable," and that certification is proper only if the trial court is convinced "after a rigorous analysis" that plaintiffs have satisfied the prerequisites of Rule 23. *Id.* at 2551 (internal citations and quotation marks omitted).

The law is also clear that the "rigorous analysis" requirement — and the need to resolve relevant factual and legal disputes — extends to a district court's assessment of expert opinions. As the Third Circuit observed in *Hydrogen Peroxide*, "[w]eighing conflicting expert testimony at the certification stage is not

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[21] *See, e.g., Hohider v. UPS*, 574 F.3d 169, 197, 203 (3d Cir. 2009) (reversing class certification order for failure to conduct a "thorough examination" in accord with *Hydrogen Peroxide*); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 600 n.14 (3d Cir. 2009) (vacating class certification for failure to conduct the rigorous analysis required by *Hydrogen Peroxide*; "the court should not suppress 'doubt' as to whether a Rule 23 requirement is met — no matter the area of substantive law").

only permissible; it may be ***integral*** to the rigorous analysis Rule 23 demands." *Hydrogen Peroxide*, 552 F.3d at 323 (emphasis added). Even where expert testimony should not be entirely excluded under *Daubert*, it should not be accepted "uncritically." *Id.* The district court must resolve every dispute that is relevant to class certification, including disputes that implicate the credibility of one or more of the experts. *Id.* at 323-24.

ARGUMENT

I. Plaintiffs Fail to "Affirmatively Demonstrate" Typicality and Adequacy under Rule 23(a)

Plaintiffs first bear the burden of satisfying each element of Rule 23(a): numerosity, commonality, typicality, and adequacy. *See Hydrogen Peroxide*, 552 F.3d at 320. In order to do so, as the Supreme Court recently affirmed in *Wal-Mart*, "[a] party seeking class certification must ***affirmatively demonstrate*** his compliance with the Rule — that is, [the party] must be prepared to prove that there are ***in fact*** sufficiently numerous parties, common questions of law or fact, etc." 131 S. Ct. at 2551 (emphasis added). The law is clear that "Rule 23 does not set forth a mere pleading standard." *Id.* Here, however, Plaintiffs barely pay lip service to the typicality and adequacy prongs of Rule 23(a), much less "affirmatively demonstrate" their compliance with these elements. The Court should deny class certification on this basis alone.

A. Plaintiffs Have No Evidence of "Typicality"

Rule 23(a) requires, among other things, that the claims of the representative parties be "typical" of the putative class's claims. Fed. R. Civ. P. 23(a)(3). In order to make this showing, "[a] plaintiff must ***produce evidence*** . . . that the

individual claims are typical of those brought for the class." *Jackson v. S.E. Pa. Transp. Auth.*, 260 F.R.D. 168, 188 (E.D. Pa. 2009) (emphasis added); *see also* 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 6:21 (4th ed. 2002). Plaintiffs provide none. In fact, they do not even mention the class representatives, let alone describe the nature of their respective businesses, their purchasing habits, whether they received trade spend, rebates, or other discounts on purchases, and the nature of any such discounts. **REDACTED**

REDACTED

REDACTED But such *ipse dixit* assertions are inconsistent with the requirements of *Wal-Mart* and plainly inadequate to meet Plaintiffs' burden under Rule 23(a)(3).

At bottom, Plaintiffs make generalized allegations, but they offer no evidence to "affirmatively demonstrate" that the plaintiff representatives and class members all suffered "the same antitrust injury." Pls.' Br. at 32-33. Quite to the contrary, as explained further in Section II.B.2.A., *infra*, the record is clear that prices were negotiated on a customer-by-customer basis. Given that the prices paid by any given plaintiff were not in any sense "typical" of the putative class, their alleged injuries could not have been "typical" either. *See Deiter v. Microsoft Corp.*, 436 F.3d 461, 468 (4th Cir. 2006) (no typicality in antitrust class action where the individual class members prices were "negotiated and, as a consequence, were both discounted and unique to each transaction").

B. Plaintiffs Have No Evidence of "Adequacy"

Rule 23(a) also requires that the named plaintiffs "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Here, the Third Circuit requires a determination that (1) "the putative named plaintiff has the ability and incentive to represent the claims of the class vigorously," and (2) "there is no conflict of interest between the individual's claims and those asserted on behalf of the class." *In re Cmty. Bank of N. Va. v. PNC Bank Nat'l Ass'n,* 622 F.3d 275, 291 (3d Cir. 2010). Plaintiffs fail to satisfy these standards for two reasons.

First, Plaintiffs' argument that their counsel are "experienced and able []with ample resources at their disposal" (Pls.' Br. at 34) misses the primary focus of Rule 23(a)(4), which is the adequacy of class representatives themselves, not just class counsel. *See Sheinberg v. Sorensen*, 606 F.3d at 130, 132 (3d Cir. 2010) ("[Q]uestions concerning the adequacy of class counsel ... have, since 2003, been governed by Rule 23(g)," not Rule 23(a)(4).). At no point do Plaintiffs even mention the proposed class representatives, let alone attempt to explain why those representatives will "fairly and adequately represent the interests of the class." Pls.' Br. at 32-35.

Second, the extensive price differentiation across customers and classes of trade not only prevents named plaintiffs' claims from being "typical," but also reveals how their interests are not "aligned" with the interests of every other class member. **REDACTED**

REDACTED

REDACTED

In short, the Court should deny Plaintiffs' motion for failing to satisfy two of the four threshold requirements for certification under Rule 23(a).

II. Plaintiffs Fail to Show a Predominance of Common Issues Under Rule 23(b)(3)

Even if Plaintiffs could satisfy the Rule 23(a) prerequisites, because Plaintiffs here seek certification for money damages, they must also show that "issues common to the class [] predominate over individual issues" pursuant to Rule 23(b)(3). *Hydrogen Peroxide*, 552 F.3d at 310 (internal citations and quotation marks omitted); Fed. R. Civ. P. 23(b)(3). Under Rule 23(b)(3), "'[i]f proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.'" *Hydrogen Peroxide*, 552 F.3d at 311 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir. 2001)).

Here, the "essential elements" that each putative plaintiff must prove are (1) a "violation" of section 1 of the Sherman Act; (2) "***individual*** injury resulting from that violation"; and (3) damages. *Hydrogen Peroxide*, 552 F.3d at 311 (emphasis added); *see also* 15 U.S.C. § 15; *Am. Bearing Co. v. Litton Indus., Inc.*, 729 F.2d 943, 948 (3d Cir. 1984). Class issues do not predominate where, as here, two of these three elements cannot be established for every plaintiff by common proof.

A. Common Questions on the Element of "Agreement" Are Insufficient to Establish Rule 23(b)(3) Predominance

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REDACTED That is not the law. To the contrary, "'[w]here fact of damage [*i.e.*, economic impact] cannot be established for ***every*** class member through proof common to the class, the need to establish antitrust liability for individual class members ***defeats*** Rule 23(b)(3) predominance.'" *Hydrogen Peroxide*, 552 F.3d at 311 (quoting *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003)) (emphasis added). Here, even if common issues relating to the element of conspiracy predominated over individual ones, neither the fact of impact nor amount of damages can be established through common proof. Plaintiffs cannot establish Rule 23(b)(3) predominance merely by establishing that the existence of an alleged conspiracy may be amenable to common proof.[22]

B. Common Questions Do Not Predominate On the Element of Antitrust Injury

As the Third Circuit recognizes, the element of economic injury or "impact" — what Plaintiffs refer to as "causation" (Pls.' Br. at 40) — is often "critically

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[22] It also bears noting that even the element of conspiracy may not be susceptible to common proof in an industry like this one, where the anticompetitive agreements would need to fix customer-specific actual transaction prices (as opposed to the list prices) in order to be effective. A theoretical conspiracy on "list prices" makes no sense where conspirators are otherwise reducing prices on a customer-by-customer basis.

important" for the Rule 23(b)(3) analysis in an antitrust case, because economic impact is "an element of the claim that may call for individual, as opposed to common, proof." *Hydrogen Peroxide*, 522 F.3d at 311. To establish antitrust impact, Plaintiffs cannot simply show that there was a conspiracy and, thereafter, "prices" were increased. Rather, each antitrust plaintiff must show the actual prices that it paid and then prove that those prices were higher than they would have been absent (or "but for") the conspiracy. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977) (requiring plaintiffs to prove that "free market prices ***would be lower*** than the prices paid"); *see also Newton*, 259 F.3d at 188-89) ("only those class members whose trades ***could have been*** executed at better prices sustained economic injury here") (emphasis added).

In this Circuit, "***every class member*** must prove at least some antitrust impact resulting from the alleged violation." *Hydrogen Peroxide*, 552 F.3d at 311 (emphasis added). Economic impact is a "question unique to each particular plaintiff and one that must be proved with certainty," and the burden of proving individual injury is "in no way lessened by reason of being raised in the context of a class action." *Bell Atl. Corp v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (internal quotation marks and citations omitted). Thus, courts routinely reject or vacate on appeal motions for class certification because of plaintiffs' failures to establish that "antitrust impact" can be proven with respect to ***all*** members of a

putative antitrust class by common proof. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 325.[23]

Plaintiffs here have not made — and cannot make — a showing of common proof of impact under Rule 23(b)(3). **REDACTED**

REDACTED

REDACTED Second, Plaintiffs misconstrue the significance of parallel list-price increases for chocolate candy, failing to recognize that list prices cannot provide common proof of impact because of individually negotiated transaction prices. Third, Plaintiffs erroneously assert that chocolate candy products are "commodities," and are therefore sold in a market "structure" susceptible to common proof of impact. Fourth, their expert's "confirmatory" empirical analysis uses both incorrect data and an incomplete analytical framework, ignoring the many individual inquiries that are necessary in order for every putative class member to prove antitrust injury at trial. For all of these reasons, Plaintiffs have failed to show that common questions "predominate" on the element of antitrust injury, and their motion must be denied.

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[23] *See also Blades v. Monsanto Co.*, 400 F.3d 562, 570 (8th Cir. 2005); *Plastics Additives*, No. 03-CV-2038, 2010 WL 3431837, at *4, 7, 13 (E.D. Pa. Aug. 31, 2010); *Reed v. Advocate Health Care*, 268 F.R.D. 573, 591 (N.D. Ill. 2009); *In re Agricultural Chemicals Antitrust Litig.*, No. 94-40216-MMP, 1995 WL 787538, at *6 (N.D. Fla. Oct. 23, 1995); *Dry Cleaning & Laundry Institute of Detroit, Inc. v. Flom's Corp.*, No. 91-CV-76072-DT, 1993 WL 527928, at *4 (E.D. Mich. Oct. 19, 1993).

1. Plaintiffs' Own Expert Report Demonstrates That Plaintiffs Lack Common Proof of Injury

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REDACTED This, in and of itself, disposes of Plaintiffs' motion for class certification. The Third Circuit has stated that putative class plaintiffs must offer common proof that each and ***every*** class member was injured. *Hydrogen Peroxide*, 552 F.3d at 311. But Plaintiffs' own expert effectively concedes he cannot do so.

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Plaintiffs first attempt to address this problem by citing to *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672 (7th Cir. 2009), contending that the Seventh Circuit held it was not necessary to show injury to all class members. *See* Pls.' Br. at 7 n.4, 34 n.30, 52. But their reliance on *Kohen* ignores both the governing Third Circuit precedent[25] and the holding in *Kohen* itself, which involved an issue of standing, not predominance. *Kohen,* 571 F.3d at 676. In fact, the Seventh Circuit in *Kohen* specifically recognized in dicta that, although Article III standing can be established without showing injury to every putative class member, the inquiry for Rule 23(b)(3) predominance is different, and a class should ***not*** be certified if "it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." *Id.* at 677. More than a quarter of the putative class is plainly "a great many persons," and the Third Circuit standard from *Hydrogen Peroxide* is, of course, even more stringent than this dicta.

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[24] **REDACTED**

[25] *Hydrogen Peroxide* unambiguously requires that "***every class member*** must prove at least some antitrust impact resulting from the alleged violation." *Hydrogen Peroxide*, 552 F.3d at 311 (emphasis added).

REDACTED

REDACTED But Plaintiffs cite no authority for the idea that a class can be gerrymandered around uninjured (but definitionally eligible) class members by unilaterally "identifying" them on an expert's say so. To the contrary, the Third Circuit requires that an order certifying a class include "a readily discernible, clear, and precise statement ***of the parameters defining the class*** or classes to be certified." *Hydrogen Peroxide*, 552 F.3d at 320-21 (emphasis added). Plaintiffs cannot avoid that requirement by defining a class with certain precise parameters but then unilaterally tossing out those class members they are forced to concede were not injured.

This is not a technicality. Plaintiffs offer no explanation for how — if their theory of class certification and the facts that underlie it were correct — there could possibly be customers that fall within the objective parameters of Plaintiffs' class but cannot show any injury. REDACTED

REDACTED

REDA Because Plaintiffs have admittedly failed to establish that "common proof" shows that "every" individual within the "readily discernible, clear, and precise ... parameters" of their defined class was economically impacted by the alleged conspiracy, Plaintiffs cannot satisfy Rule 23(b)(3)'s predominance requirement as a matter of law, requiring denial of their motion. *Hydrogen Peroxide*, 522 F.3d at 311, 320-321.

2. Plaintiffs' Theories of Common Proof of Economic Impact Are Each Fundamentally Flawed

Even if Plaintiffs' admission of uninjured customers were not sufficient on its own to defeat their motion, their theories for why common proof exists are inadequate to satisfy their burden. Neither the parallel list-price increases, the alleged "market structure" of chocolate candy, nor the "empirical" analysis of their expert can show that Plaintiffs will establish antitrust impact for every putative class member through common proof.

a. Evidence of Parallel List-price increases Is Not Common Proof of Impact

REDACTED

REDACTED What Plaintiffs ignore, however, is the extensive record evidence — including the admissions of their own witnesses — demonstrating that list prices, whether moved in parallel or not, were not the actual prices customers paid. **REDACTED**

REDACTED

customers did not receive discounts from list prices on the singles and kings they purchased. *Id.* ¶ 57.

In prior antitrust cases, the Supreme Court has recognized the importance of "companies invest[ing] substantial sums in promotional schemes ... in an oligopoly setting, in which price competition is most likely to take place through less observable and less regulable means than list prices." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 236 (1993). In those situations, courts have rightly focused on actual transaction prices when evaluating allegations of price-fixing, not list prices. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 314, 326-27; *Plastics Additives*, 2010 WL 3431837, at *6 (E.D. Pa. 2010).[26] Even Plaintiffs' own economist, Dr. Tollison, acknowledges **REDACTED**

REDACTED

Here, the record is unambiguous that the actual transactional prices varied from customer to customer as Mars, Hershey, and Nestle USA competed with one another through price reductions that were negotiated on an individualized basis. Counsel for several direct customers recognized as much when describing Defendants' promotional practices to this Court: "So they clearly compete on

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[26] *See also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008); *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 513 (S.D. Ill. 2004); *Holiday Wholesale Grocery Co. v. Philip Morris, Inc.*, 231 F. Supp. 2d 1253 (N.D. Ga. 2002); *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144 (N.D. Cal. 1991).

price every single day, and why do they do it? Of course they do it to increase their share, increase their sales, because they think that it's profitable.... ***So clearly price competition works in the industry***." Ex. 111 at 52:1-23.

Plaintiffs now attempt to dismiss this price competition by arguing that certain trade promotions are merely "costs" to Defendants for "services" rather than reductions in the transaction price. But the evidence is directly to the contrary. **REDACTED**

REDACTED

REDACTED

- Michael Schwartz, the corporate representative of Card and Party Mart, explained that it calculated a "dead net cost" which included "all discounts" on a "per unit" basis. Ex. 88 at 179:4-13.

REDACTED

REDACTED

REDACTED In fact, Generally Accepted Accounting Principles in the United States ***require*** both off-invoice and other trade promotions to be recognized as ***price*** reductions that thereby reduce the manufacturers' net sales, not "costs" below the net sales line. *See* Ex. 176 EITF 01-9 ("Accounting for Consideration Given by a Vendor to a Customer"), codified by FASB on 9/15/2009. Thus, while Plaintiffs' economist

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In response to this overwhelming evidence, Plaintiffs argue that the existence of "negotiated pricing" does not defeat class certification. *See* Pls.' Br. at 44 & n.36. Notably, all of the cases Plaintiffs cite for this proposition are from outside the Third Circuit, and almost all were decided before *Hydrogen Peroxide* (and, of course, *Wal-Mart*). Thus, the plaintiffs in those cases did not face the same "rigorous analysis" of evidence or burden of actually ***proving*** the factual

premises of their class certification motions as the Third Circuit has now articulated it. Moreover, unlike here, those cases actually involved fungible, commodity products — synthetic rubber, polyester staples, and sulfuric acid, among others, *see, e.g.*, *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82 (D. Conn. 2009) — where plaintiffs actually had evidence of a common relationship between list prices and negotiated prices. For example, in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, the list prices at issue set a "floor" and "range" below which the transaction prices would not go. 267 F.R.D. 291, 297 (N.D. Cal. 2010). Here, on the other hand, Defendants provided discounts in widely varying amounts through independent customer negotiations and, as explained *infra*, Plaintiffs offer no evidence of the actual prices to justify certification.

Moreover, Plaintiffs cannot meaningfully distinguish *Plastics Additives*, in which the district court in the Eastern District of Pennsylvania denied class certification after considering essentially the same arguments Plaintiffs make here. 2010 WL 3431837, at *4-6. In *Plastics Additives*, plaintiffs could not meet their burden of showing common proof of impact because "the prices actually paid by ***some customers*** for the [products] at issue ha[d] no relationship with Defendants' price increases." *Id.* at *6 (emphasis added). To the contrary, the evidence showed that "while some price increases may have increased the actual prices paid by some class members for some products for some period of time, other class members experienced no increase in price for any period of time." *Id.*

REDACTED

REDACTED The evidence provides no basis for assuming any particular relationship between list prices and negotiated prices. Nor, even if there were any such basis, is there any reason to assume that negotiated prices would exceed but-for prices on a class-wide basis.[27] Accordingly, Plaintiffs' attempts to wave away the relevance of "negotiated pricing" simply do not suffice under *Hydrogen Peroxide*.

In sum, the record proves that list prices are ***not*** the prices customers actually pay for chocolate candy. **REDACTED**

REDACTED

REDACTED Accordingly, evidence of parallel "list" prices cannot provide the common proof that Plaintiffs need to prove economic impact to every putative class member.

b. Chocolate Candy Is Not A "Commodity" Susceptible To Common Proof of Impact

Plaintiffs next claim that a "market structure" analysis suggests that there would have been "class-wide injury" that is amenable to common proof. Pls.' Br.

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27 **REDACTED**

at 45-47. A linchpin of this structural analysis, however, is that chocolate candy bars are a "commodity," and therefore subject to uniform prices and treatment across the board. **REDACTED**

REDACTED Here, this critical factual assumption not only defies common sense, but is also overwhelmingly refuted by the discovery record and expert analysis.

In a commodity market, products are "basically homogeneous or fungible … each is identical with its counterpart in a particular category or grade." *United States v. FMC Corp.*, 306 F. Supp. 1106, 1117 (E.D. Pa. 1969). The cases Plaintiffs rely on as "cartel cases involving fungible goods" are for unbranded and undifferentiated products such as polyester staples, pressure sensitive labelstock, linerboard, and ethylene propylene. *See* Pls.' Br. at 46-47 & n.40. But chocolate candy products, such as Hershey's®, Snickers®, M&M's®, Reese's®, and Baby Ruth®, far from being "fungible," compete on the basis of their ingredients, flavors, quality and brand identities. The wide range of unique products are recognized and valued by the end-user consumers, who demonstrate clear preferences for certain brands. **REDACTED**

REDACTED

Plaintiffs' putative class witnesses themselves repeatedly admitted the

REDACTED

Moreover, unlike with fungible "commodity" or "commodity-like" products, price is not the predominant basis upon which Defendants compete (although, as noted, aggressive price competition does occur). This undermines a fundamental assumption of **REDACTED**

REDACTED

REDACTED This is yet another respect in which this case parallels *Plastics*

Additives. There, the court recognized that the "products have distinct performance attributes, and price therefore is not the principal determinant in customers' purchasing decisions." 2010 WL 3431837, at *7. The court went on to note that the description of the market by Plaintiffs' expert — a market in which substantial differentiation existed even without ***branded*** products — was "inaccurate," and that "Plaintiffs cannot rely on the inaccurate description to

REDACTED

Many other plaintiff witnesses similarly admitted

REDACTED

All of this evidence regarding the highly differentiated nature of chocolate candy products also shows why Plaintiffs' invocation of the "*Bogosian* short-cut" has no applicability to this case and, indeed, invites this Court to err. Plaintiffs claim the so-called "*Bogosian* short-cut" provides a "presumption" of economic impact. Pls.' Br. at 41. But to the contrary, in vacating the district court's class certification order in *Hydrogen Peroxide*, the Third Circuit has now clarified that "actual, ***not presumed***, conformance with the Rule 23 requirements is essential." 552 F.3d at 326 (emphasis added) (internal quotation marks omitted). Thus, after *Hydrogen Peroxide*, there is no longer any question that the Third Circuit requires a "careful, fact-based approach" to establishing causation of economic impact,

regardless of the alleged market characteristics. *Id.* *Bogosian* is relevant only where a plaintiff can demonstrate specific facts that line up with the analysis in *Bogosian* itself. *Id.* at 326-327. Plaintiffs have not made that showing. Not only do Plaintiffs disregard the significant actual price variation across customers and sales channels, as discussed *supra*, but they wholly fail to prove the existence of a fungible, commodity market like the one in *Bogosian*.[28]

c. Plaintiffs' "Empirical" Analysis of Impact Is Fundamentally Flawed

REDACTED

[28] Even if Plaintiffs' facts were more analogous, *Bogosian* never stood for the proposition that a plaintiff can avoid proving antitrust impact or avoid showing common proof of such impact. To the contrary, *Bogosian* itself requires plaintiffs to prove that "free market prices ***would be lower*** than the prices paid," and that customers made purchases at the higher price — in other words, "but-for" injury. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977). Even before *Hydrogen Peroxide* undermined the very notion of a "presumption," the Third Circuit applied the *Bogosian* short-cut only "when it [was] ***clear*** the violation result[ed] in harm to the ***entire class***." *Newton*, 259 F.3d at 179 n.21 (emphasis added).

REDACTED

i. Dr. McClave Does Not Calculate Accurate "Actual" Transaction Prices

REDACTED

REDACTED

29 REDACTED

REDACTED

Given these failings, Dr. McClave's analysis is wholly inadequate to show that common proof can be used to show the ***actual transaction price*** paid by each and every plaintiff, let alone to show economic impact by common proof. Therefore, as with the flawed expert analysis in *Plastics Additives*, the practical reality is that Plaintiffs "have done ***no*** empirical analysis of the ***actual*** effect of the price increases upon which they rely." 2010 WL 3431837, at *5 (emphasis added).

REDACTED

[30] For the pre-class period, Dr. McClave only considers Hershey and Mars trade spend data for one year prior to the beginning of the class period in December 2002. Dr. McClave did not consider Nestle USA trade spend data on the grounds that no Nestle USA trade spend data was produced for the pre-class period. He is wrong. Substantial Nestle USA trade spend data was produced for the class period at NUSA-MDL-0055355-60, NUSA-MDL-0390379-92.

REDACTED

REDACTED As a result, like the similar regression that was rejected in *Plastics Additives*, Dr. McClave's regression "tell[s] us nothing about individual class member experience" and is therefore meaningless for purposes of the Rule 23(b) inquiry. 2010 WL 3431837, at *15.

ii. Dr. McClave Also Does Not Calculate A "But-For" Baseline

REDACTED

REDACTED Indeed, the law is clear that, to prove economic impact in an antitrust case, a plaintiff must demonstrate a difference between the actual price paid and what the price ***would have been*** "but for" the conspiratorial conduct. *See, e.g.*, *Blades v. Monsanto Co.*, 400 F.3d 562, 570 (8th Cir. 2008); *Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 269 (3d Cir. 1998); *see also Newton*, 259 F.3d at 188-89. But Dr. McClave,

REDACTED

First, at no time in the past 40 years have chocolate candy list prices remained unchanged for a 12-year period. *See supra*, Background § II.A. Thus, it is entirely

unrealistic to assume that there would have been ***no*** price increases between 1995 and 2008. Second, the record from discovery is replete with documents showing

REDACTED

Dr. McClave's failure to include such an analysis in his "impact" analysis is thus particularly glaring.

It also bears noting that the pattern of price increases taken during the alleged class period from 2002 to 2007 was entirely consistent with the history of pricing in the chocolate candy industry, both before and after those increases. For over thirty years, the chocolate confectionery industry has been characterized by rapid, even (at times) semi-annual list-price increases, followed by multi-year periods of fewer price increases still occurring in parallel. *Supra*, Background § II.A. In the period from January 1979 to December 1985, for example, there were four parallel list-price increases. *Id.* Thus, contrary to Plaintiffs' arguments, the only thing "unprecedented" about the 2002 price increase is that as many as seven years passed between it and the price increase that preceded it in 1995.

3. Determining Impact Will Require an Individualized Inquiry Into the Actual Prices Paid by Each Customer

REDACTED

REDACTED

REDACTED

REDACTED

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REDACTED

REDACTED Such wide variation means that the list-price changes themselves do not at all imply some uniform effect on all customers consistent with being used as proof of common impact. *See Plastics Additives*, 2010 WL 3431837, at *13-15 ("[T]he evidence shows that prices did not behave similarly for all products and customers, and the pricing structure analysis set forth by [plaintiffs' expert] therefore cannot serve as proof of impact common to the class.").

It bears further emphasis that once the individualized inquiry into actual transaction prices is completed, to prove impact, Plaintiffs would still need to compare the dead net price that each customer negotiated (after accounting for all their discounts and promotions) to the "but for" price that they ***would have paid*** in the absence of the alleged list-price conspiracy **REDACTED**

REDACTED

how it is possible to calculate economic impact for even ***one*** member of the putative class. This falls far short of establishing, as they must, that "every class member" can "prove at least some antitrust impact resulting from the alleged violation" using common proof. *Hydrogen Peroxide*, 552 F.3d at 311. Because, as with Rule 23(a), Plaintiffs have failed to meet their burden of proof on Rule 23(b)(3) "predominance," their motion must be denied.

C. Common Questions Do Not Predominate on the Element of Damages

Just as the individualized nature of trade spending precludes common proof of antitrust impact, it also precludes a class-wide approach to proving damages. As with impact, Rule 23(b)(3) requires a "rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence [common to the class] to prove damages at trial." *Chudner v. Transunion Interactive, Inc.*, No. 09-CV-433-ER, 2010 WL 5662966, at *1 (D. Del. Dec. 15, 2010). Applying this standard, class certification should be denied when plaintiffs fail to show a "reliable formula for calculating damages." *Reed v. Advocate Health Care*, 268 F.R.D. 573, 594-595 (N.D. Ill. 2009) (denying class certification because "even if one could derive a total damages pool, it could not be apportioned without reviewing information specific to each [class member]"). Likewise, "where the issue of damages 'does not lend itself to … mechanical calculation, but requires separate mini-trial[s] of an overwhelmingly large number of individual claims,' the need to calculate individual damages will defeat predominance." *Bell*

Atl. Corp. v. AT&T Corp., 339 F.3d 294, 307 (5th Cir. 2003) (quoting *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977)).[31]

REDACTED

REDACTED The individualized nature of determining actual transaction prices precludes the use of any "econometric" approach to damages in the same way that it precludes common proof of impact in the first place. *See, e.g., Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 215 F.R.D. 523, 530-31 (E.D. Tex. 2003). And individual issues aside, **REDACTED**

REDACTED

1. Econometric Analysis Here Requires an Individualized Inquiry

In building his econometric damages model, Dr. McClave has brushed aside the individual issues created by each customer's negotiation of different trade

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[31] Furthermore, individualized damages issues cannot be avoided by an aggregate award of damages. "Such a method of computing damages in a class action has been appropriately branded as 'illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.'" *Windham*, 565 F.2d at 72 (internal citations omitted); *see also Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305-06 (9th Cir. 1990) (Rule 23 does not permit "dispensing with individual proof of damages").

REDACTED

REDACTED As in *Sheet Metal Workers Local 144 Health & Welfare Plan v. Glaxosmithkline PLC*, there are "substantial variations" in the prices paid by individual class members and Plaintiffs' use of median prices "masks these individual variations." No. 04-5898, 2010 WL 3855552, at *30 (E.D. Pa. Sept. 30, 2010) (citing ABA Section of Antitrust Law, Econometrics: Legal, Practical, and Technical Issues 220 (2005)); *see also* Ex. 1 ¶¶ 172-174.

In addition, any reliable damages model not only requires the use of the actual price paid, but also an accurate tally of the actual ***quantities*** purchased. Dr. McClave's model is faulty in this regard, as well. **REDACTED**

REDACTED

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32 **REDACTED**

REDACTED

2. Dr. McClave's Damages Model Is Fatally Flawed And Meaningless

In addition to Dr. McClave's failure to address various individual issues in his model, there are other critical problems that render it completely unreliable for any purpose. REDACTED

REDACTED

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[33] REDACTED

REDACTED

REDACTED any introductory econometrics text book admonishes that "using R-squared as the main gauge of success for an

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34 **REDACTED**

35 **REDACTED**

econometric analysis can lead to trouble." Jeffery M. Wooldridge, *Introductory Econometrics: A Modern Approach* 44 (3d ed. 2006). REDACTED

REDACTED

REDACTED

REDACTED

3. Dr. McClave's Model Is Based On Other Unsupportable Assumptions

REDACTED

REDACTED

REDACTED

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36 REDACTED

In short, Dr. McClave's multiple regression analysis is meaningless. REDACTED

REDACTED Thus, Plaintiffs have not met their burden of establishing that regression analysis can be used to model individual damages on a class-wide basis, presenting the specter of thousands of "mini-trials" that also defeat Rule 23(b)(3) predominance for these claims. *Bell Atl. Corp.*, 339 F.3d at 307.[37]

D. Common Questions Do Not Predominate on the Elements of Fraudulent Concealment

Plaintiffs also fail to meet their burden of showing that they can establish key elements of fraudulent concealment predominantly through common proof. Plaintiffs seek damages and injunctive relief for claims that accrued as early as December 9, 2002 — more than five years before this litigation was initiated in any U.S. court — despite the four-year statute of limitations that the federal antitrust law imposes. *See* 15 U.S.C. § 15b. Plaintiffs assert that they are entitled to such damages because the equitable doctrine of fraudulent concealment tolled the statute of limitations. But determining whether fraudulent concealment applies

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[37] REDACTED

REDACTED That merits standard does nothing to absolve Plaintiffs of their burden at this stage to show that common proof can be used to establish damages for every plaintiff. *See, e.g., Plastics Additives*, 2010 WL 3431837, at *15-18 (rejecting plaintiffs' "market-wide regressions" on impact and damages). Plaintiffs have not met that burden.

will, like antitrust impact and damages, require individualized inquiries — specifically with regard to each customer's "due care" in discovering the alleged conspiracy — and therefore is not appropriate for class-wide treatment.

To toll the statute of limitations on the grounds of fraudulent concealment, Plaintiffs have the burden of proving: "(1) the existence of fraudulent concealment; (2) failure on the part of the plaintiff to discover his cause of action notwithstanding such concealment; and (3) that such failure to discover occurred [notwithstanding] the exercise of due care on the part of the plaintiff." *In re Aspartame Antitrust Litig.*, No. 09-1487, 2011 U.S. App. LEXIS 1882, at *9, (3d Cir. Jan. 28, 2011); *see also In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1178-79 (3d Cir. 1993). Notably, only the first element focuses on the conduct of Defendants. The second and third elements of fraudulent concealment require evidence regarding the scope of each plaintiff's knowledge at a particular point in time and each plaintiff's exercise of reasonable diligence. *Id.*[38] For this reason, courts often find that fraudulent concealment is inappropriate for class-wide treatment, recognizing:

> The Court would have to determine which plaintiffs had information about the [claims because] some plaintiffs may have known within the statutory period while other may not have.... The Court would also

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[38] *See, e.g., Klein v. O'Neil, Inc.*, 2008 U.S. Dist. LEXIS 41762, *28-29 (N.D. Tex. May 22, 2008) ("[I]ndividualized fact issues predominate with respect to the reliance and reasonable diligence inquiries"); *Township of Susquehanna v. H and M, Inc.*, 98 F.R.D. 658, 668 (M.D. Pa. 1983) ("Clearly, for Plaintiffs to prove the second and third aspects of their fraudulent concealment claim, individualized evidence by each member of Plaintiffs class will be required").

> be required to look at each plaintiff to determine which actions it took to satisfy the due diligence requirement of equitable tolling — what it knew and the level of due diligence exercised. These factors require individual inquiry and are not subject to class-wide proof. Thus, Plaintiffs here fail to show that the statute of limitations issue could be resolved on a class-wide basis.

See, e.g., Stand Energy Corp. v. Columbia Gas Transmission Corp., No. 2:04-0867, 2008 U.S. Dist. LEXIS 63913, *64-65 (S.D.W.V. Aug. 19, 2008). This case is no different.

Here, the evidence demonstrates that individualized inquiries will be required as to each plaintiff's knowledge and exercise of due diligence, which varied widely from direct plaintiff to direct plaintiff. **REDACTED**

REDACTED

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39 **REDACTED**

40 **REDACTED**

(Continued...)

Court will need to conduct these individualized inquiries not just for the class representatives, but for each and every member of the purported class.

Plaintiffs make no argument that the proposed class's diligence could be shown with common proof. **REDACTED**

REDACTED Putting aside the issue of how a supposedly "unprecedented" and publicly announced parallel price increases could be "self-concealing," this does not obviate the need for individualized inquiries. Even if Plaintiffs could prove that the conspiracy alleged in the Amended Complaint was self-concealing, that only relieves Plaintiffs of their duty to prove the ***first*** element of fraudulent concealment: the occurrence of affirmative acts of concealment. *See Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, No. 02-cv-4373, No. 02-cv-4373, 2005 U.S. Dist. LEXIS 11052, at *10 (E.D. Pa. Mar. 29, 2005) ("A self-concealing conspiracy *may* satisfy the wrongful concealment element of the fraudulent concealment doctrine.") (emphasis added). Plaintiffs still must, under ***all*** circumstances, prove due diligence to show fraudulent concealment in the antitrust context. *Lower Lake Erie Iron Ore*, 998 F.2d at 1179 (holding that plaintiffs' failure to assert any evidence of due diligence was fatal to their claim, despite factual dispute concerning their ignorance of the defendants' allegedly

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anticompetitive behavior). That inquiry requires individualized proof that is not common to all class members.

Plaintiffs' wholesale reliance on *In re Linerboard Antitrust Litigation* is therefore mistaken. 305 F.3d 145 (3d Cir. 2002). Contrary to Plaintiffs' characterization of that case, the Third Circuit held that "individualized facts of fraudulent concealment" precluded certification of a class on all issues in dispute — as Plaintiffs are attempting to do here — and held that those individual facts would need to be adjudicated ***individually*** in a later remedies phase. *Id.* at 163. Although holding that fraudulent concealment issues did not entirely bar a finding of predominance ***on those facts***, the Third Circuit did not hold that individual questions would never predominate over common questions with respect to fraudulent concealment. Rather, as the cases show, *supra*, individualized inquiries from fraudulent concealment usually do predominate, as they do here. Accordingly, common questions do not and cannot predominate on issues of fraudulent concealment. Plaintiffs' allegations of fraudulent concealment cannot proceed on a class-wide basis.

III. Plaintiffs Fail to Establish Rule 23(b)(3) Superiority

Finally, Rule 23(b)(3) requires Plaintiffs to prove that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "Commonly referred to as 'manageability,' [the superiority] consideration encompasses the whole range of

practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974).[41]

Plaintiffs cannot show Rule 23(b)(3) superiority because Plaintiffs cannot — as their conclusery trial plan assumes — use common proof to establish antitrust impact, damages, or fraudulent concealment for every customer meeting the definition of Plaintiffs' putative class. *See, e.g.*, *Reilly v. Gould, Inc.*, 965 F. Supp. 588, 605-06 (M.D. Pa. 1997) (declining to certify the plaintiffs' proposed class in part because "[i]nstead of addressing all claims in an efficient manner, [the court] would have to basically pick apart the class member by member, taking into consideration circumstances applicable only to that plaintiff"); *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 454 (E.D. Pa. 2000).

In addition, more than 20 individual direct purchasers representing some of the top customers of Mars, Hershey, and Nestle USA have prospectively opted out of the would-be class, stating: "We have over ten billion dollars of purchases made by the individual plaintiffs, and those claims will go forward regardless if you would deny the class certification altogether, those claims go forward." Ex. 110 at 24:23-25:3. Thus, to the extent that "common questions" exist — given the many issues that cannot be established by common proof — those questions can

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[41] The Third Circuit has also emphasized the Federal Rules Advisory Committee's 2003 note, which "focuses attention on a rigorous evaluation of the likely shape of a trial on the issues," and endorses the requirement of a "trial plan" at the class certification stage. *Hydrogen Peroxide*, 552 F.3d at 319 (citing Fed. R. Civ. P. 23 advisory committee's note, 2003 Amendments ("A critical need is to determine how the case will be tried.")).

more efficiently be litigated in the context of the individual opt-out plaintiffs' proceedings on a "test case" basis, with the claims of putative class plaintiffs subsequently joined to the individual cases that will still be litigated. *Windham*, 565 F.2d at 69. To establish superiority under Rule 23(b)(3), "The class device must be the 'best' way, not merely one way, to resolve claims." *Taylor v. CSX Transp., Inc.*, 264 F.R.D. 281, 295 (N.D. Ohio 2007) (citing *Johnson v. HBO Film Mgmt.*, 265 F.3d 178, 185 (3d Cir. 2001). Plaintiffs have wholly failed to present evidence to make that showing here, nor presented a meaningful trial plan for addressing complex issues.

CONCLUSION

Plaintiffs have submitted no evidence to meet their burdens under Rule 23(a). Plaintiffs have also failed to prove Rule 23(b)(3) predominance. They have not shown that common evidence can be used to establish that every member of the putative class was caused antitrust impact, what those damages were (if any), and that each plaintiff can show the requisite diligence to overcome the four-year statute of limitations through fraudulent concealment. And, Plaintiffs have failed to prove that certifying a complex class action is superior to proceeding with individual cases in light of the thousands of future "mini-trials" that a class action would require. For the foregoing reasons, the Court should deny Direct Purchaser Class Plaintiffs' motion for class certification.

Respectfully submitted,

Dated: August 12, 2011 By: /s/

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IN THE UNITED STATES DISTRICT COURT
FOR THE 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 APPLIES TO:	
ALL CASES	***FILED ELECTRONICALLY***

CERTIFICATE OF SERVICE

I hereby certify that, on August 12, 2011, I caused to be served on all counsel listed below, true and correct copies of: Defendants' Memorandum of Law in Opposition to Direct Purchaser Class Plaintiffs' Motion for Class Certification and accompanying appendices; the Declaration of Jonathan D. Brightbill in Support of Defendants' Memorandum of Law in Opposition to Direct Purchaser Class Plaintiffs' Motion for Class Certification and accompanying exhibits; and [Proposed] Order Denying Direct Purchaser Class Plaintiffs' Motion for Class Certification.

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