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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE: PACKAGED SEAFOOD PRODUCTS ANTITRUST LITIGATION	Case No. 15-MD-2670 ILS (MDD)
This Document Relates To: The Commercial Food Preparer Actions	**REPLY MEMORANDUM IN SUPPORT OF COMMERCIAL FOOD PREPARER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF LEAD COUNSEL** **(PUBLIC-REDACTED VERSION)**

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GLOSSARY

TERM	ABBREVIATION
Commercial Food Preparer Plaintiffs	CFPs or Plaintiffs
Memorandum in Support of Commercial Food Preparer Plaintiffs' Motion for Class Certification and Appointment of Lead Counsel	CFP Cert. Mot.
Declaration of Jonathan W. Cuneo in Support of CFPs' Class Certification Reply	Cuneo Reply Decl.
Defendants' Opposition to Commercial Food Preparer Plaintiffs' Motion for Class Certification	Opp.
End Payor Plaintiffs' Motion for Class Certification	EPP Cert. Mot.
Deposition Transcript of Maire Byrne	Byrne Dep.
Deposition Transcript of Joe Davis	Davis Dep.
Deposition Transcript of Sharon Ehlinger	Ehlinger Dep.
Deposition Transcript of Michael Giberson	Giberson Dep.
Deposition Transcript of Dr. Laila Haider	Haider Dep.
Deposition Transcript of Deric Rosenbaum	D. Rosenbaum Dep.
Deposition Transcript of Kevin Schippers	K. Schippers Dep.
Deposition Transcript of Peter Schippers	P. Schippers Dep.
Expert Report of Dr. Laila Haider	Haider Rpt.
Expert Report of Michael A. Williams, Ph.D.	Williams Rpt.
Expert Rebuttal Report of Michael A. Williams, Ph.D.	Williams Reb.
Federal Rule of Civil Procedure 23	Rule 23

I. INTRODUCTION.

Defendants do not contest most of the requirements for class certification: numerosity, commonality, typicality, adequacy of counsel, or superiority of proceeding on a class basis. They challenge only whether common issues predominate over individual issues and whether the named plaintiffs are adequate class representatives.

Defendants claim that the Commercial Food Preparer plaintiffs (the "CFPs" or "Plaintiffs") have not shown predominance because they allegedly have not established common impact. The CFPs supposedly have not shown they can use common evidence to attempt to demonstrate that Defendants' conduct caused widespread harm across the CFP class. That argument fails for many reasons.

First, Dr. Williams demonstrates common impact with a particularly rigorous methodology, using common evidence to show that over 99% of class members were impacted by Defendants' anticompetitive conduct. Williams Rpt. ¶¶ 99-108. Defendants concede that showing harm to 93 to 95% of a class is sufficient for common impact. Opp. 14-15. Plaintiffs explained in their opening brief that every court presented with the sort of showing the CFPs make here has found common impact and predominance. CFP Cert. Mot. 21, n. 8; 25, n.13 (citing *In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775, 2014 WL 7882100, at *55 (E.D.N.Y. Oct. 15, 2014); *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 221 (M.D. Penn. 2012); *In re Domestic Drywall Antitrust Litig.*, 322 F.R.D 188, 217 (E.D. Penn. 2017); and *In re Korean Ramen Antitrust Litig.*, No. 13-cv-04115-WHO, 2017 WL 235052, at *6 (N.D. Cal. Jan. 19, 2017)). Defendants fail to distinguish any of these cases. Defendants do level various criticisms at Dr. Williams' report. All of them are incorrect. They misunderstand Dr. Williams' analysis and conflict with established economic principles and the evidence in this case.

Second, Defendants' position on common impact, in addition to lacking any merit, raises a common issue, supporting predominance and class certification.

Defendants fail to recognize that the issue before the Court at class certification is not whether Plaintiffs should *prevail* on common impact. Rather the issue is whether Plaintiffs can *attempt* to prove impact using common evidence. *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds,* 568 U.S. 455, 459 (2013). Plaintiffs at most need to offer a method for showing common impact that is admissible, *Tyson Foods, Inc., v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016), "colorable," *In re Methionine Antitrust Litig.*, 204 F.R.D. 161, 167 (N.D. Cal. 2001), "adequate," *In re Optical Disc Drive Antitrust Litig.*, No. 3:10-md-2143 RS, 2016 WL 467444, at *7 (N.D. Cal. Feb. 8, 2016) ("*ODD II*"), or "plausible." *In re TFT-LCD (Flat Panel) Antitrust Litig.,* 267 F.R.D. 291, 311-13 (N.D. Cal. 2010) ("*TFT-LCD I*"). As explained above, Plaintiffs' position is that Dr. Williams' analysis of common impact is compelling, not just admissible, colorable, adequate, or plausible. In contrast, Defendants' position is that Dr. Williams' analysis of common impact fails *for all class members*. Ex. 4 (Haider Dep.) 94:9-23.[1] Defendants have not put forth any competing evidence of impact—that, for example, a small portion of the class was subject to an overcharge. *Id*. 140:22-141:4; 141:14-142:2. So either all members of the proposed CFP class will prevail on impact or none will. When the claims of a class rise or fall together in this way, the Supreme Court has held the issue is common and supports predominance. *Amgen*, 568 U.S. at 460 (predominance is satisfied when "the class is entirely cohesive: It will prevail or fail in unison").

Third, courts have consistently certified classes in antitrust cases with factual circumstances similar to those before this Court. Here: (1) multiple Defendants have pleaded guilty to fixing prices; (2) the product at issue is a commodity; (3) the CFPs bought the product in an unmodified form—large-sized packaged tuna—and not, for example, as a component or ingredient in a larger product; (4) the CFPs bought the product directly from six Large Distributors, not at the end of a long, complex chain of

[1] Unless otherwise specified, "Ex." and "Exs." refer to exhibits to the Cuneo Reply Declaration.

distribution; and (5) the CFPs have shown that the product was subject to an overcharge as a result of Defendants' price fixing and that the Large Distributors passed on that overcharge. None of the cases Defendants cite denying class certification involved similar facts. Plaintiffs in their opening brief cited Supreme Court, Ninth Circuit and other authorities holding that class certification is appropriate under these circumstances for various reasons: they cause common issues to predominate in the case as a whole regardless of whether impact is common; they support a presumption of common impact; and they suffice to establish common impact. CFP Cert. Mot. 12-16, 21-24. Defendants fail to distinguish these lines of authority, ignoring binding precedent.

Fourth, the CFPs have shown that California law should apply to the claims of all members of the proposed class. In arguing to the contrary, Defendants concede that applying California law would not violate their Due Process rights. They fail to carry the resulting burden—which they admit they have, Opp. 24, n.14—to show that there are material differences between California law and the laws of other relevant states, that those difference give rise to a true conflict, and that the foreign state's interests would be more significantly impaired by applying California law than *vice-versa*.

Defendants also argue that the named plaintiffs are not adequate class representatives. That argument fails because it is based on distortions of the named plaintiffs' deposition testimony and because Defendants argue for a level of knowledge and sophistication that is not required or appropriate.

For the above reasons, this Court should certify the proposed CFP class and appoint proposed class counsel.

II. DEFENDANTS CONCEDE MOST OF THE RULE 23 REQUIREMENTS.

This Court should certify a class if the CFPs satisfy the requirements of Rule 23(a) and 23(b)(3). Defendants have not contested: numerosity; commonality; typicality; or the adequacy of counsel. Rule 23(a)(1)-(4). *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 559 U.S. 393, 399-400 (2010) (certification is mandatory if the

requirements of Rule 23 are met). Nor have they denied that proceeding as a class would be superior to a large number of individual actions. Rule 23(b)(3). Instead, they have disputed only whether common issues predominate, Rule 23(b)(3), and whether the class representatives are adequate. Rule 23(a)(4).

III. THE CFPS DEMONSTRATE COMMON IMPACT.

A. Common Evidence Shows Impact to More than 99% of the Class.

Dr. Williams uses a well-established methodology to demonstrate common impact. Williams Rpt. ¶¶ 66-69. A standard way to assess impact and damages in antitrust cases is to identify time periods when the market suffered from little or no anticompetitive conduct and compare them to time periods when the market suffered from anticompetitive conduct. *Id.* A particularly rigorous way to make that comparison is using a dummy variable regression model, a regression that allows an economist to distinguish the effect of a conspiracy from other potential factors affecting prices. *Id.* Dr. Williams does that here. *Id.*; Williams Reb. ¶ 19.

One method Dr. Williams uses to demonstrate common impact involves a multiple regression analysis that determines the price that every purchaser from Sysco and U.S. Foods would have paid for each purchase of large-size packaged tuna during the damages period if there had been no conspiracy. Williams Rpt. ¶¶ 99-100. This is often called a "but for" price, as it is the amount a plaintiff would have paid "but for" the anticompetitive conduct. Dr. Williams compares that "but for" price to the one that each purchaser actually paid on each sale. He finds that more than 99.3% of Sysco customers paid at least one overcharge, *id.* ¶ 101—and thus suffered impact—and that more than 99.5% of U.S. Foods customers paid at least one overcharge, *id.* ¶ 102—and thus suffered impact. These sales account for 62% of the total class purchases and provide a conservative estimate of the percentage of impact for the other class purchases. *Id.* ¶¶ 99, 104-108. Using this method, he concludes that over 99% of the class paid at least one overcharge. *Id.* [redacted]

[redacted] They also concede that courts find common impact even when 5-7% of a proposed class is uninjured. Opp. at 14-15 (citing *In re Lidoderm Antitrust Litigation*, No. 14-md-02521, 2017 WL 679367, at *11, 20 (N.D. Cal. Feb. 21, 2017)). Dr. Williams' showing of impact to more than 99% of the class exceeds the relevant standard.

The CFPs cited numerous precedents finding common impact and predominance in antitrust cases where plaintiffs used the same methodology (often with less compelling results). *See* CFP Cert. Mot. 21, n.8; 25, n.13 (citing *Air Cargo*, 2014 WL 7882100, at *55 (using same method to show impact to 95.7% of class); *Chocolate*, 289 F.R.D. at 221 (using same method, and relying on sampling, to show impact to 98% of class); *Drywall*, 322 F.R.D at 217 (using same method to show impact to 98% of class); *Ramen*, 2017 WL 235052, at *6 (using same method to show impact to 98% of direct purchasers and sampling to show high pass-through rate and impact to indirect purchasers)). Defendants distinguish none of those cases, citing only one of them for an unrelated proposition. Opp. 24, n.14 (discussing application of California law to a multi-state class in *Ramen*).

None of the cases Defendants cite in opposing class certification reject Dr. Williams' methodology; rather they criticize plaintiffs for not making the sort of showing *that Dr. Williams does here*. *See In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA, 2010 WL 2332081, at *10 (N.D. Cal. June 9, 2010) (expert relied on an average price trend that did not show impact on particular sales to particular customers); *In re Graphic Processing Units Antitrust Litig.* ("*GPU*"), 253 F.R.D. 478, 494 (N.D. Cal. 2008) (expert relied on average price rather than using common model to account for sales of particular products to particular purchasers); *In re Optical Disk Drive Antitrust Litig.* ("*ODD I*"), 303 F.R.D. 311, 321-322 (N.D. Cal. 2014) (expert assumed the same overcharge for all class members and did not analyze overcharge in individual cases); *Methionine*, 204

F.R.D. at 164-65 (plaintiffs' expert merely suggested he *could* calculate pass-through rate to establish impact but did not actually do the analysis).

In sum, Defendants fail to distinguish the precedents endorsing Dr. Williams' methodology, do not deny that those precedents involved the same methodology that Dr. Williams uses, and fail to identify any cases rejecting his methodology.

B. Criticisms of the CFPs' Common Proof of Impact Are Incorrect.

Defendants attack the CFPs' rigorous showing of common impact by criticizing Dr. Williams' report. Their criticisms misapply the relevant legal and economic standards, mischaracterize Dr. Williams' analysis, and misconstrue the evidence.

1. Dr. Williams' Benchmark, Damages, and Contaminated Periods Have a Sound Basis in the Evidence and Economic Theory.

Defendants' first set of criticisms of Dr. Williams' common impact analysis is based on the way he divides up benchmark, damages, and contaminated periods. He appropriately relies on the documentary evidence and data that has come to light to identify three kinds of time periods. Williams Reb. ¶ 53. First, the benchmark periods are relatively free of anticompetitive conduct. They give his model a baseline for what prices would have been in a relatively competitive market. *Id.* ¶¶ 59, 64. Second, the damages period includes anticompetitive conduct. By using a regression analysis to compare the benchmark period to the damages period, Dr. Williams is able to assess the amount by which the anticompetitive conduct increased prices above competitive levels. This is standard economic practice. *Id.* ¶¶ 54, n.72; 64, 66. Third, the contaminated periods contain intermittent episodes of anticompetitive conduct and competition, so that they provide neither a reliable benchmark for competitive prices nor do they reflect consistently inflated prices. *Id.* ¶¶ 60-63, 66-68.

2. Defendants' Criticisms Suggest Dr. Williams *Underestimated* Impact.

Defendants criticize Dr. Williams' time periods because his first benchmark period includes years when the CFPs had originally alleged in their complaint that Defendants engaged in anticompetitive conduct. However, Dr. Williams acted properly by basing his opinion on the evidence—economic and econometric—rather than the CFPs' original allegations, as did the CFPs in modifying their class definition to conform to the evidence. Class definitions often change as the evidence develops. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."); *see also* Rule 23(c)(1); *Buchanan v. Tata Consultancy Servs.*, No. 15-cv-01696-YGR, 2018 WL 3537083, at *9 (N.D. Cal. July 23, 2018) ("The Ninth Circuit has similarly stated that district courts may modify a class definition as a result of developments during the course of litigation.") (citing *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504-05 (2005)).[2]

Defendants fail to address the effect on Dr. Williams' analysis if they engaged in illegal collusion during his benchmark periods. That would mean he *underestimates* impact and damages. The reason is that his baseline would be inflated by Defendants' anticompetitive conduct. If Defendants are right—and there was anticompetitive

[2] Defendants make the odd claim that Dr. Williams' analyses of impact and damages do not match the CFPs' theory of liability because they do not correspond to the now-antiquated allegations in the original CFP complaint. But his expert opinions are consistent with the class the CFPs have moved the Court to certify. No more is required. *Falcon*, 457 U.S. at 160; Rule 23(c)(1); *Buchanan*, 2018 WL 3537083, at *9. His opinions also conform to the evidence. Defendants' reliance on *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) (Opp. 10) is inapposite. *Comcast* merely held that plaintiffs' theory of liability must correspond with the damages they seek. In *Comcast*, only one of four theories of liability was certified for class treatment but plaintiffs sought the cumulative damages from all four theories and could not disaggregate the damages for the only theory available to the class. 569 U.S. at 36-37. No similar issue arises here.

conduct during Dr. Williams' benchmark—then his "but-for price estimate would be too high, causing his estimate of the overcharge (the difference between the actual prices and but-for prices) to be too low." *In re Linerboard Antitrust Litig.*, 497 F. Supp. 2d 666, 675 (E.D. Pa. 2007); *see also* Williams Reb. ¶ 69 (noting anti-competitive conduct during benchmark would cause Dr. Williams' analysis to underestimate harm from Defendants' price fixing). Underestimating damages benefits Defendants; it does not make an expert's analysis unreliable. *Linerboard*, 497 F. Supp. 2d at 675.

3. Excluding Contaminated Periods from Benchmarks Is Proper.

Defendants take two inconsistent positions in criticizing Dr. Williams' treatment of the contaminated periods. First, as noted above, they claim that the benchmark periods should include data only from the "period *in which the market was unimpeded*." Opp. 13 (quoting Justin McCrary & Daniel L. Rubinfeld, *Measuring Benchmark Damages in Antitrust Litigation*, 3 J. ECON. METH. 65 (2014)) (emphasis in original). Second, they claim that no source supports excluding contaminated years from the model and then they analyze the effect if the contaminated periods are treated as benchmark periods. But the very source Defendants quote—including the words *they* italicize and underline—undermines their suggestion that Dr. Williams must include in his benchmark those years when the market was not "unimpeded." *Id*. The same quotation reveals their treatment of the contaminated periods as benchmark periods as an improper strategy to reduce the overcharges and classwide impact. Williams Reb. ¶ 69. Including periods in which prices are artificially *inflated* as if they were a benchmark causes the model to *understate* the impact of Defendants' conduct. *Id*; *Linerboard*, 497 F. Supp. 2d at 675. Defendants' analysis merely confirms that obvious proposition and demonstrates why the source they quote rejects their approach as improper. Defendants' own expert, Dr. Haider, co-authored a chapter admitting it is appropriate not to use as benchmarks those periods subject to anticompetitive conduct. Ex. 3 (ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 277-279 (3d ed. 2017)

(with Greg Leonard and Daniel Weick) (appropriate to exclude periods affected by anti-competitive conduct from benchmarks).

C. Evidence Supports the Benchmark, Damages, and Contaminated Periods.

Defendants claim that Dr. Williams has no basis for dividing up the benchmark, damages, and contaminated periods the way he does. Untrue. Dr. Williams acted properly by defining the relevant periods based on the evidence in the case. Williams Reb. ¶¶ 59-68 (discussing evidence cited in his original report).[3]

Defendants' own analysis confirms Dr. Williams' approach. Defendants never explain why their including the contaminated periods in the benchmark periods drives down the amount of the overcharges. The obvious answer is that the contaminated periods are *contaminated*, causing Defendants' revision of Dr. Williams' model to underestimate the effects of Defendants' conspiracy. *Id.* ¶ 69; *Linerboard*, 497 F. Supp. 2d at 675. Defendants do not offer an alternative account. Their use of contaminated benchmark periods artificially decreases the estimate of the overcharge, producing results that falsely understate the widespread impact on the CFP class of their illegal price fixing. Williams Reb. ¶ 69. [redacted].

D. Dr. Williams' Analysis of Common Impact Is Sound.

1. Defendants Mistakenly Rely on an Inapplicable Pass-On Defense.

Defendants assert that a pass-on defense is available in this case under California law, although they concede that the laws of other states do not allow such a defense. Opp. at 17, n.10; 30. Defendants are wrong about California law. It allows a pass-on

[3] The Williams Rebuttal Report is attached to the Cuneo Reply Declaration as Ex. 1.

defense only if multiple tiers of *indirect* purchasers are seeking recovery on sales of the *same good* at different links along the chain of distribution. *See* Opp. 17 (citing *Methionine*); *Methionine*, 204 F.R.D. at 166 (noting proposed class included "multiple layers of middlemen" as well as end purchasers, and different levels of purchasers bought the same good, some in an unmodified form and some as incorporated in other products). Here, the CFP class includes only a single tier of indirect purchasers who bought directly from the Large Distributors and they are the only ones seeking to recover overcharges on sales of large-sized packaged tuna. CFP Cert. Mot. 2. The pass-on defense is inapplicable to the CFP class.

Under California law, much like federal law, "the presumptive measure of damages is the amount of the overcharge paid by the plaintiff." *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 787 (Cal. 2010). The California Supreme Court rejected the pass-on defense in *Clayworth*: "We therefore conclude, under the Cartwright Act as under federal law, that a pass-on defense generally may not be asserted." *Id.*

Defendants ignore this holding. They focus instead on an inapplicable exception that arises only "if damages must be allocated among the various levels of injured purchasers." Opp. 30 (quoting *Clayworth*, 49 Cal. 4th at 787).[4] They acknowledge that a pass-on defense is available only if a class includes "multiple layers of middlemen," *id.* 17 (quoting *Methionine*, 204 F.R.D. at 166), and then they incorrectly imply that the proposed CFP class does. *Id.* 17, 30.

Clayworth does not allow a pass-on defense here. Under federal law, the direct purchasers are entitled to the full overcharges they paid and no pass-on defense is available to reduce their damages. *Clayworth,* 49 Cal. 4th at 763 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481 (1968)).

[4] *Clayworth* recognized another exception for "cost-plus" contracts. *Id.* at 787. It is inapplicable here, and Defendants do not argue otherwise.

There is no possibility that the Court will have to allocate damages between the direct and indirect purchasers.

Further, the CFPs are the *only* indirect purchasers seeking damages on sales of *large-sized* packaged tuna. CFP Cert. Mot. 2-3. The EPPs seek damages only on sales of *small-sized* packaged tuna. EPP Cert. Mot. 4. And the proposed CFP class consists of *only* direct purchasers from the six Large Distributors. CFP Cert. Mot. 2.[5] There is no "risk of duplicative recovery" and no possibility that the Court will have to allocate damages among different levels of indirect purchasers. *Clayworth*, 49 Cal. 4th at 787.

When only a single tier of indirect purchasers brings claims on sales of particular goods, there is no need to allocate damages. That is why the *Clayworth* exception arises only when litigation seeks recovery for "multiple layers of middlemen." Opp. 17 (quoting *Methionine*, 204 F.R.D. at 166); *see also* Phillip Areeda and Herbert Hovenkamp, ANTITRUST LAW (2013 SUPPLEMENT) at ¶2412a (citing *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827, 2012 WL 6709621, (N.D. Cal. Dec. 26, 2012)) (*Clayworth* exception applicable only "where multiple levels of indirect purchasers raised prospect of multiple, duplicative claims"). Here, only a single layer of indirect purchasers seeks to recover damages based on the sale of large-sized packaged tuna, so the general rule from *Clayworth* governs and Defendants' argument based on a pass-on defense fails.[6]

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[5] Dr. Williams has excluded from his damages analysis sales from one Large Distributor to another, eliminating the risk of double-counting. Williams Rpt. ¶ 109 & n.105.

[6] *Methionine* (Opp. 17) is distinguishable both because the class there contained indirect purchasers who were resellers "at various levels in the distribution chain" as well as "ultimate consumers" and because the class members bought the product not only in its unmodified form but also incorporated in other products. *Methionine,* 204 F.R.D. at 162. Here, in contrast, the members of the CFP class are all at the same link in the chain of distribution and all bought the good in unmodified form. *GPU* (Opp. at 18) is also inapposite because it addressed an entirely different issue: whether intermediaries passed on overcharges to the indirect purchasers, not whether the indirect purchasers passed on the overcharges leading to a pass-on defense. *GPU*, 253 F.R.D. at 505. *Methionine* and *GPU* were also both decided before *Clayworth*.

Defendants try to confuse the issue in three ways. First, they argue that some of the purchasers from the Large Distributors were themselves small distributors who resold the large-sized packaged tuna. Opp. 17-18. But that does not matter. The purchasers from these small distributors are not members of the CFP class, they have not brought claims, and therefore they do not create any need to allocate damages along the chain of distribution. Defendants do not claim otherwise. Second, Defendants argue that this case involves three different levels of purchasers: direct purchasers, indirect purchasers, and end payer purchasers. *Id.* at 30. But the direct purchasers seek recovery under federal law, which does not allow a pass-on defense here, *Clayworth,* 49 Cal. 4th at 763, and the CFP class includes only direct purchasers from the Large Distributors and the only buyers seeking recovery for large-sized packaged tuna. The Court will not need to allocate damages along the chain of distribution. Third, Defendants assert that some of the CFPs may have passed on the overcharge to their customers—for example, by raising their prices for tuna sandwiches. Opp. 30, n.16. But, again, customers who bought tuna sandwiches did not buy directly from the Large Distributors, are not in the CFP class, have not brought claims, and create no need for allocation along the chain of distribution. *Clayworth*'s rejection of a pass-on defense governs.

2. Dr. Williams Does Not Rely on Average Overcharges.

Defendants argue that Dr. Williams relies on averages, supposedly ignoring the effect of "price limitations that would have blunted the impact of any overcharge." Opp. 18. They are wrong. His analysis *captures* the effects of any price limitations by comparing the "but for" price from his model with the actual price on each sale. Williams Reb. ¶ 79. If a class member were protected from an overcharge by a price limitation, or in any other way, the actual price would not be larger than the "but for" price Dr. Williams calculates. *Id.* Dr. Williams found that happened at times, although

complete protection from overcharges occurred rarely enough that over 99% of the class members paid at least one overcharge. *Id.*[7]

In support of Defendants' errant argument, they cite to paragraphs 78 and 79 of Dr. Williams' report for the claim that he estimates only an *average* pass-through for each intermediary. Opp. 19, lines 13-14. Those paragraphs, and Table 3 (p. 38) of his report on which they rely, do contain an analysis of the pass-through rate. They show, along with paragraphs 81 and 87, and Table 4 (p. 40) and Figure 3 (p. 46), that the pass-through rate is positive and statistically significant as assessed in a host of different ways. But paragraphs 78 and 79 do *not* contain Dr. Williams' analysis of impact on a class-member-by-class-member basis. The relevant analysis is in paragraphs 99 to 108 of his report. Williams Rpt. ¶¶ 99-108. Defendants' failure to distinguish the different analyses Dr. Williams performs may explain why they make their mistaken argument.

[redacted] That too is incorrect. While Dr. Williams' methodology establishes that over 99% of class members paid at least one overcharge, it does not establish that 100% did. Williams Rpt. ¶¶ 101-102; Williams Reb. ¶¶ 77-82.[8] It allows for the possibility of no overcharge to some class members. *Id.* The same methodology yielded lower rates of impact in other cases. *Air Cargo*, 2014 WL 7882100, at *55 (impact to 95.7% of class); *Chocolate*, 289 F.R.D. at 221 (impact to 98% of

[7] [redacted]

[8] [redacted]

class); *Drywall*, 322 F.R.D at 217 (impact to 98% of class); *Ramen*, 2017 WL 235052, at *6 (impact to 98% of class).

3. Dr. Williams Finds Overcharges Only Where They Should Exist.

Defendants criticize Dr. Williams' model for supposedly finding overcharges where none would be expected to occur. Opp. 20-21. They argue that when Dr. Williams' model is applied to purchases from *non*-Defendants, it indicates that they charged supra-competitive prices during the damages period. Defendants claim this "means that Dr. Williams' model finds 'overcharges' even where there should be none." Opp. 21. Defendants are mistaken for two reasons.

[redacted] That these sales reflect an overcharge is unsurprising and confirms Dr. Williams' model works properly.

Second, Defendants are wrong that sales of tuna manufactured by non-Defendants should be unaffected by Defendants' price fixing. When conspirators collude to raise their prices above competitive levels, non-conspirators often take advantage of the situation by raising their prices as well. A source [redacted] for which she co-authored a chapter, explains, "This phenomenon has been called the 'umbrella effect,' in that the competitive firm raises its prices under the protection of the price umbrella unfurled by the cartel." Ex. 3 (ABA PROVING ANTITRUST DAMAGES: LEGAL & ECONOMIC ISSUES 246 (3d ed. 2017)); *see also* Williams Reb. ¶¶ 37-40 (discussing extensive economic literature on umbrella effects). Defendants and Dr. Haider miss this well-known economic phenomenon.

A more accurate description is that Dr. Williams' model finds overcharges where they *would* be expected. That result confirms its reliability. Defendants' argument to the contrary conflicts with the evidence and basic economic principles.[9]

4. Dr. Williams' Model Accounts for Non-Defendant Tuna.

Defendants assert that Dr. Williams did not account for the supply of tuna from *non*-Defendants, particularly in large-sized packages. Opp. 21-22. They claim that this undermines his analysis of common impact and of market concentration. They are wrong on both counts for multiple reasons.

First, as discussed above, many of the sales that the [redacted] were of packaged tuna manufactured by the Defendants and subject to the price-fixing conspiracy.

[redacted] That confirms the non-Defendants took advantage of the price-fixing conspiracy to raise their own prices, limiting the ability of CFP class members to turn to them for negotiating leverage.

Third, Dr. Williams' class-member-by-class-member, sale-by-sale analysis captures the effects of any competition from non-Defendants. Williams Rpt. ¶¶ 77-81. If some class members used the threat of turning to non-Defendants to avoid some or all of the overcharges from the conspiracy, Dr. Williams' model would reflect that lack of

[9] Dr. Williams' model thus does not produce "false positives," that is, it does not indicate overcharges when there should not be any. The cases Defendants cite are inapposite for another reason as well: false positive do not necessarily render a model unreliable. *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 255 (D.C. Cir. 2013) (Opp. 21) (holding that trial court should *consider* false positives in evaluating expert opinion on remand, not that false positives are a fatal flaw or necessarily require denial of class certification); *Food Lion, LLC v. Dean Foods Co.* 312 F.R.D. 472, 495-96 (E.D. Tenn. 2006) (Opp. 21) (holding class certification inappropriate because analyzing impact for vast majority of class could require individualized assessment, not because false positives always render expert analysis unreliable).

impact. *Id*. That provides a possible explanation as to why his model does not indicate impact to less than 1% of the proposed CFP class. *Id*.[10]

Defendants are also wrong that Dr. Williams has failed to show the Defendants had market power, including through market concentration. Dr. Williams establishes market power through *direct* evidence, by establishing that Defendants did in fact raise prices above competitive levels. Williams Reb. ¶ 52. Under Ninth Circuit law, in horizontal price-fixing cases, direct evidence of inflated prices necessarily establishes market power, that is, the ability to inflate prices above competitive levels. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). Also, whether Defendants had market power is an issue common to the class so, to the extent Defendants contest it, that tends to cause common issues to predominate. *Amgen*, 568 U.S. at 460. Further, Dr. Williams' finding of market concentration is sound. Although the evidence of market share does not distinguish between small-sized and large-sized packaged tuna, he shows the prices of the two correlate such that separating out the sizes is not necessary to assess market concentration. Williams Reb. ¶ 52.

5. Dr. Williams' Model Establishes Class Members Paid Inflated Prices.

Defendants claim that Dr. Williams' model fails to establish common impact because he does not properly analyze whether the Large Distributors passed through the overcharges they paid to the class members. That argument is incorrect for two reasons.

First, Dr. Williams' class-member-by-class-member, sale-by-sale analysis does not rely on the pass-through rates that Defendants criticize. Opp. 23 (discussing Williams

[10] It is also possible that all class members suffered impact, as Dr. Williams opines is likely true because the few buyers who appear uninjured are small purchasers; they are the least likely to be able to negotiate away overcharges and the most likely to falsely appear uninjured because of small amounts of data and statistical noise. Williams Rpt. ¶ 101, n.99; ¶ 102, n.100; Williams Reb. ¶ 112, n.149. But Dr. Williams' model does not preordain this result and the widespread impact he finds is a product of the very strong evidence in this case.

Rpt. ¶ 80); *see also* Williams Reb. ¶¶ 22-23 [redacted] Instead, it employs a regression analysis to analyze the ultimate prices class members would have paid "but for" the conspiracy and compares them to the prices class members actually paid. Williams Rpt. ¶¶ 99-100. As part of this model, he does not—and need not—separately analyze whether the Large Distributors paid overcharges and whether they then passed them through to the CFP class members. His single regression captures the ultimate effect on the CFP class members. *Id.* That said, by comparing "but for" prices with actual prices, Dr. Williams' model would detect if one of the Large Distributors did not pass on overcharges. Williams Reb. ¶ 79. The relevant sales would then reflect a diminished overcharge or none at all. *Id.* Defendants' criticisms of Dr. Williams' pass-through analysis therefore do not address the primary way in which CFPs establish common impact.

Second, Defendants criticisms of Dr. Williams' analysis of pass-through rates—which confirm Dr. Williams' finding of common impact—are incorrect. Williams Reb. ¶¶ 84-98. [redacted] Dr. Williams' analyses of pass-through rates are sound.

[11] Defendants' reliance on *Methionine* (Opp. 23-24) in this argument is misplaced. In *Methionine*, plaintiffs' expert merely suggested he *could* calculate pass-through rates to establish impact, but he did not actually do the analysis. 204 F.R.D. at 164-65. In contrast, as discussed in the text, Dr. Williams calculates impact using his class-member-by-class-member, sale-by-sale regression, which does not require a separate analysis of pass-through rate, and he also confirms his finding of impact by actually calculating pass-through rates, not just suggesting he could do so.

E. Impact Is a Common Issue.

As the CFPs explained in their moving papers, the issue before this Court at class certification is not whether the CFPs should prevail on impact, but whether they have shown they can *attempt* to prove impact with common evidence. CFP Cert. Mot. 12 (quoting *Amgen*, 568 U.S. at 459). If they can, then the issue of impact is common to the class and supports certification. *Id.*

The cases Defendants cite are in accord. In *Tyson Foods* (Opp. 9), the Supreme Court held that to support class certification plaintiffs need merely offer evidence common to the class that: (1) if believed, could support their claims; and (2) is admissible. 136 S. Ct. at 1049 ("The District Court could have denied class certification on th[e] ground [that it agreed with Defendants' experts] only if it concluded that *no reasonable juror* could have believed that" plaintiffs' experts were right on the merits) (emphasis added). *Methionine* (Opp. 10, 17, 23) held that for common impact plaintiffs need present merely a "*colorable* method of proving injury in fact on a class-wide basis." 204 F.R.D. at 167 (emphasis added); *see also ODD II*, 2016 WL 467444, at *7 (Opp. 25, 29, 32) (holding court need not decide if plaintiffs' evidence is persuasive but merely whether plaintiffs "made an *adequate* showing of a methodology proving antitrust injury to all or nearly all [class members] on a class-wide basis") (emphasis added); *LCDs,* 267 F.R.D. at 311-13 ("Plaintiffs need only advance a *plausible* methodology to demonstrate that antitrust injury can be proven on a class-wide basis.") (emphasis added) (citations omitted).

Here, the evidence of impact is common to the CFP class. Dr. Williams shows impact to over 99% of the CFP class members. [redacted] If Dr. Williams is correct, CFPs have established

impact to all or virtually all class members. [redacted] Under *Amgen*, when the claims of the members of the class prevail or fail together in this way, the issue is common and supports a finding of predominance. *Amgen*, 558 U.S. at 460; CFP Cert. Mot. 12 (quoting *Amgen*, 568 U.S. at 459) (noting predominance "requires a showing that '*questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.'") (emphasis in original).

Defendants assert without citation that Plaintiffs "must establish through common proof not only the existence of a conspiracy, but also that the alleged conspiracy impacted all or nearly all putative class members." Opp. 1; *see also id.*, 8 (claiming "Rule 23(b)(3) requires the CFPs to establish through common proof the. . . impact to all or nearly all putative class members resulting from the alleged conspiracy."). That is wrong. The CFPs do not have to establish harm to the class to support certification. Plaintiffs satisfy common impact if they show they can *attempt* to prove impact to the class using evidence that is common and reliable. Defendants' mischaracterization of this issue—and failure to distinguish or cite *Amgen*—is fatal to their argument. They invite this Court to engage in improper "free-ranging merits inquiries at the class certification stage." *Amgen*, 568 U.S. at 466.

IV. COURTS CERTIFY CLASSES IN CIRCUMSTANCES LIKE THOSE BEFORE THIS COURT.

The facts and the evidence in this case and the nature of the proposed CFP class make certification particularly appropriate:

1. *Guilty Pleas to Price Fixing*. Defendants pleaded guilty to fixing prices, focusing the litigation on their conduct, an issue common to all class members.

2. *Commodity Products*. The products at issue are commodities, they do not vary by class member, and they are subject to intense competition over price, causing overcharges to pass down the chain of distribution. Williams Rpt. ¶¶ 24-25; 91-99.

3. *Unmodified Products*. The class members bought the products in an unmodified form, not as ingredients or components in other products, making it more likely they would pay overcharges.

4. *A Single Level of Purchasers*. The proposed class members all bought directly from the six Large Distributors, not at the end of a long chain, complex of distribution, avoiding any potential difficulties in allocating damages.

5. *Evidence of Overcharges and Pass On*. The CFPs have shown that the product at issue was subject to an overcharge as a result of Defendants' price fixing and that the Large Distributors passed on that overcharge, confirming classwide impact. *Id*. ¶¶ 83-98.

The above facts and evidence support predominance for the three reasons, ones the CFPs presented in their moving papers and Defendants fail to address:

1. Predominance in the case as a whole. Plaintiffs' opening brief cited Supreme Court, Ninth Circuit and other authorities holding that common issues need not predominate as to each element of plaintiffs' claims—such as common impact—but rather need predominate only in the *case as a whole*. CFP Cert. Mot 12-14 (citing, among other cases, *Amgen*, 568 U.S. at 469 (Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to class wide proof.") (citation omitted, emphasis in original); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) ("[w]hile [the Defendants' defense] has the effect of leaving individualized questions of reliance in the case, there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3)"); *Torres v. Mercer Canyons Inc.,* 835 F.3d 1125, 1134, 1136-37 (9th Cir. 2016) (holding the "predominance inquiry asks the court to make a global determination of whether common questions prevail over individualized ones" and certifying class because common issues predominated in the case as a whole, even though *fact of injury* was an element of plaintiffs' claims and they had not shown it was common to the class); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513–14 (9th Cir. 2013)

(holding common issues predominated in case as a whole despite individualized damages issues); *Lidoderm*, 2017 WL 679367, at *1 (certifying class treatment of direct and indirect purchaser antitrust claims even though "determining whether any particular plaintiff was injured and how to apportion damages between the plaintiffs necessarily involves individualized questions that are undeniably complex"). Plaintiffs further explained that this litigation will focus on whether Defendants conspired to fix prices, which Defendants did so, whether the conspiracy inflated prices generally, and the total resulting damages, not on which plaintiffs are entitled to participate in any recovery. CFP Cert. Mot. 15-16 (citing *Torres*, 835 F.3d at 1141 (noting a "class defendant's interest was 'only in the total amount of damages for which it will be liable,' not 'the identities of those receiving damage awards'") (quoting *Leyva*, 716 F.3d at 513-14)). Defendants fail to discuss *Amgen*, *Halliburton*, or *Torres* at all, and cite *Lidoderm* only for the unrelated proposition that common impact is consistent with injury to only 93 to 95% of a class. Opp. 14. If Defendants were right—if plaintiffs must always prove common impact to certify a class—then *Amgen*, *Halliburton*, *Torres*, and *Lidoderm* were wrongly decided.[12]

2. The presumption of common impact. CFPs' opening brief cited binding case law holding that presumptions are "substantive" under the *Erie* doctrine and govern in federal proceedings, like this one, applying state substantive law. CFP Cert. Mot. 23

[12] The cases Defendants cite are consistent with *Amgen*, *Halliburton*, *Torres*, and *Lidoderm*. In *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 349-50 (2011), plaintiffs were unable to identify any issue common to the class whereas here there are several issues that Defendants do not deny are common: whether Defendants conspired, which Defendants conspired, whether the conspiracy generally inflated prices, and the aggregate damages. *Ellis v. Costco Wholesale*, 657 F.3d 970, 983 (9th Cir. 2011), similarly required a showing of a common pattern or practice that would affect the class as a whole, just as Defendants' overarching price-fixing scheme did here. *Tourgeman v. Collins Fin. Servs., Inc.*, No. 08–CV–1392 JLS (NLS), 2011 WL 5025152, at *14 (S.D. Cal. Oct. 21, 2011), recognized that common issues in a case must predominate over individual issues on the whole, that individual issues related to damages will not defeat certification, and that a court should not resolve at the class certification stage merits issues that will have the same outcome for all class members.

(citing *Johnston v. Pierce Packing Co.*, 550 F.2d 474, 476 n.1 (9th Cir. 1977); *LCDs*, 267 F.R.D. at 600; *In re Static Random Access Memory Antitrust Litigation*, 264 F.R.D. 603, 612 (N.D. Cal. 2009) ("*SRAM II*"); *Computer Econ., Inc. v. Gartner Group, Inc.*, 50 F. Supp. 2d 980, 990 (S.D. Cal. 1999)). Plaintiffs also cited case law imposing a presumption of common impact under California law in price-fixing cases when indirect purchasers bought the product in unmodified form, as the CFPs did here. *Id.* at 23 & n.12 (citing *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1351-53 (1987); *LCDs*, 267 F.R.D. at 600-01; *SRAM II*, 264 F.R.D. at 612; *In re Cipro Cases I and II*, 121 Cal. App. 4th 402, 418 (2004); *see also Dow Chem. Co. v. Seegott Holdings, Inc.*, 768 F.3d 1245, 1254 (10th Cir. 2014) (under "the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated.")). Defendants ignore this case law.

3. Confirmation and alternative proof of common impact. In addition to proof of common impact on a class-member-by-class-member and sale-by-sale analysis, Dr. Williams also offers alternative evidence that courts have found sufficient by itself. Williams Rpt. ¶¶ 83-98. That evidence confirms common impact as well as providing an independent basis for finding common impact. [redacted]

Defendants' expert, Dr. Haider, admits that such regressions can be used to establish impact and damages in antitrust cases. *See* Laila Haider & Muneeza Alam, *Sub-Regressions: A Rigorous Test for Antitrust Class Cert.*, Law360 (Dec. 5, 2014) ("In the context of a price-fixing case, regression analysis may be used to determine whether a

customer (or customers) paid a supra-competitive price due to the alleged collusive conduct and also to determine the extent to which the price was elevated by the conduct at issue.")). She also advocates for the use of "sub-regressions" to confirm impact and damages. *Id.* In other words, she claims that regressions should be done on subsets of the data. This can be an effective strategy for defendants, who slice and dice the data looking for some subset of the class that appears unharmed, if only because of statistical noise rather than an actual lack of impact. What is extraordinary is that Dr. Haider *could not find* a subset of the class for which she could demonstrate a lack of impact. [redacted][13] Numerous courts have certified classes based on this sort of showing. CFP Cert. Mot. 6-7 (citing *Nitsch v. DreamWorks Animation SKG Inc.*, 315 F.R.D. 270, 317 (N.D. Cal. 2016); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 630 (N.D. Cal. 2015); *In re High-Tech Employee Antitrust Litigation*, 985 F. Supp. 2d 1167, 1229 (N.D. Cal. 2013); *TFT-LCD I*, 267 F.R.D. at 608-09; *In re Apple iPod iTunes Antitrust Litig.*, No. C 05-00037 JW, 2011 WL 5864036 at *4 (N.D. Cal. Nov. 22, 2011); *In re Online DVD Rental Antitrust Litig.*, No. M 09-2029 PJH, 2010 WL 5396064 at *12 (N.D. Cal. Dec. 23, 2010); *Pecover v. Elec. Arts Inc.*, No. C 08-2820 VRW, 2010 WL 8742757, at *26 (N.D. Cal. Dec. 21, 2010); *In re Apple iPod iTunes Antitrust Litig.*, No. C 05-00037 JW, 2008 WL 5574487, at *8-9 (N.D. Cal. Dec. 22, 2008) *amended by*, No. C 05-00037 JW, 2009 WL 249234, at *1 (N.D. Cal. Jan. 15,

13 [redacted]

2009); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. C 07-01819 CW, 2008 WL 4447592, at *7 (N.D. Cal. Sept. 29, 2008)).

Defendants' only apparent response to these three lines of authority is that they would allegedly render the "predominance requirement a dead letter" and Defendants imply that this Court should not follow the above binding case law because doing so would lead to certification in all price-fixing cases. Opp. 9. Both points are untrue. Few antitrust cases involve: (1) price-fixing conspiracies for (2) commodities sold in (3) unmodified form to customers (4) who bought high in the chain of distribution directly from a small set of distributors. Fewer yet are susceptible to (5) regression analyses showing impact no matter how the data is divided up.

The small number of cases Defendants cite for their argument to the contrary were decided before *Torres* and *Lidoderm* and all but one before *Amgen*. None of them involve the circumstances and evidence supporting certification here. Opp. 9 ((citing *ODD I*, 303 F.R.D. at 322) (denying class certification because of complexities for purchasers who bought the products at issue, optical disk drives, after they were incorporated in computers); *Flash Memory*, 2010 WL 2332081, at *10 (plaintiffs bought from hundreds of different retailers and plaintiffs had not shown pass-through for each one); *GPU*, 253 F.R.D. at 496 (plaintiffs' expert's regression model omitted essential variables); *Methionine*, 204 F.R.D. at 164-65 (plaintiffs' expert merely suggested he *could* calculate pass-through rates, but did not actually do the analysis)).

V. CALIFORNIA LAW SHOULD APPLY TO ALL MEMBERS OF THE PROPOSED CFP CLASS.

The Court should certify the CFP class under California's Cartwright Act because (1) doing so does not violate Defendants' Due Process rights and (2) Defendants have not met their burden to demonstrate that foreign law, rather than California law, should apply to class claims. *See AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1113 (9th Cir. 2013) (setting forth due process requirements); *Mazza v. Am. Honda Motor Co.*,

666 F.3d 581, 590 (9th Cir. 2012) (setting forth choice of law framework).

"Under California's choice of law rules, the class action proponent bears the initial burden to show that California has significant contact or significant aggregation of contacts to the claims of each class member." *Mazza*, 666 F.3d at 589 (internal citations and quotation marks omitted). [redacted] "Anticompetitive conduct by a defendant within a state that is related to a plaintiff's alleged injuries and is not 'slight and casual' establishes a 'significant aggregation of contacts, creating state interests.'" *AT & T Mobility*, 707 F.3d at 1113. Thus, "application of California law here poses no constitutional concerns." *In re Qualcomm Antitrust Litig.*, No. 17-MD-02773-LHK, 2018 WL 4680214, at *27 (N.D. Cal. Sept. 27, 2018).[14]

Defendants concede that applying California law would not violate their Due Process rights. They also concede that to prevent the application of California law to matters arising from events in California, it is their burden to show: 1) material differences between California and foreign law; 2) that the differences create true conflicts; and 3) that the foreign state's interests would be more significantly impaired by the application of California law than *vice versa*. Opp. 25; *see also Mazza*, 666 F.3d at 590. Defendants cannot show a material difference that would render California law inapplicable to the CFP class, and offer only conclusory statements against California's paramount interests. They have not met their burden.

[14] *See also In re Yahoo Mail Litig.*, 308 F.R.D. 577, 602 (N.D. Cal. 2015) (application of California law constitutionally permissible where defendant's headquarters and most of its executive decision-makers were in California, and processes at issue were developed and directed in California).

A. Defendants Show No Interstate Differences in the Law that Apply Here.

The Defendants fail to carry their burden of identifying material differences between California law and the law of other states as applied to this case.

1. Purported Material Difference: Application of *AGC*.

Defendants attempt to identify a conflict involving the prudential standing test known as *Associated General Contractors* ("*AGC*"). They claim some states have adopted the *AGC* test but not California.[15] Opp. 26-28. Defendants do not meet their burden to show a conflict because they do not show that the CFPs would ever fail the *AGC* test. Nor could they. As one court put it, "*AGC* was obviously never intended to apply to the instant situation involving claims of price-fixing down a chain of distribution." *In re Aftermarket Filters Antitrust Litig.*, MDL No. 1957, 2009 WL 3754041, at *7 (N.D. Ill. Nov. 5, 2009).

The *AGC* test was developed to screen out antitrust claims based on economic effects that are too remote from anticompetitive conduct. Each case cited by Defendants involved plaintiffs who (1) were not in the chain of distribution[16] or (2) purchased

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[15] The test was developed in the case *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 535 (1983).

[16] Defendants rely on several Visa/Mastercard decisions where state courts found no antitrust standing based on the same fact pattern and legal theory. There, plaintiffs alleged that defendants imposed on merchants an unlawful tying arrangement related to credit and debit cards. Plaintiffs did not directly or indirectly purchase the debit processing services at issue. Rather they bought goods from merchants who were subject to the tying arrangement and sought to represent *all* consumers who bought *any* good sold by the merchants, regardless of the form of the payment used. *See, e.g.*, *Southard v. Visa U.S.A., Inc.*, 734 N.W. 2d 192, 194 (Iowa 2007); *Kanne v. Visa U.S.A. Inc.*, 723 N.W. 2d 293, 296 (Neb. 2006); *Nass-Romero v. Visa U.S.A., Inc.*, 279 P.3d 772, 775 (N.M. Ct. App. 2012); *Peterson v. Visa U.S.A., Inc.*, No. Civ. A. 03-8080, 2005 WL 1403761, at *2 (D.C. Super. Ct. Apr. 22, 2005); *Strang v. Visa U.S.A., Inc.*, Civ. No. 03-011323, 2005 WL 1403769, at *3 (Wis. Cir. Ct. Feb. 8, 2005); *Fucile v. Visa U.S.A. Inc.*, No. S1560-03, 2004 WL 3030037, at *1 (Vt. Super. Ct. Dec. 27, 2004); *Crouch v. Crompton Corp.*, Nos. 02 CVS 4375, 03 CVS 2514, 2004 WL 2414027, at *8 (N.C. Super. Ct. Oct. 28, 2004); *Knowles v. Visa U.S.A., Inc.*, Civ. No. 03-707, 2004 WL 2475284, at *5 (Me. Sup. Ct. Oct. 20, 2004).

finished products incorporating the good at issue as a component or ingredient.[17] Even in one of the latter cases (involving a price-fixed component), the court found that "all five factors tilt in favor of the IPPs having antitrust standing" and rejected the defendants' *AGC* arguments. *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-2420-YGR, 2014 WL 4955377, at *15 (N.D. Cal. Oct. 2, 2014).[18] Here, in contrast to Defendants' authorities, the CFPs bought the unmodified product directly from the six Large Distributors in the chain of distribution. *See In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 816 (N.D. Ill. 2017) (finding antitrust standing and noting that defendants "have not identified authority from any of the states at issue in this case supporting dismissal of claims made by plaintiffs down a distribution chain").

Defendants also do not attempt to apply any of the *AGC* factors to this case. Despite Defendants' failure to show a *material* difference in state law, CFPs address the *AGC* factors below. They confirm antitrust standing.

a. The nature of plaintiffs' alleged injury.

Defendants fixed the prices for packaged tuna and the CFPs paid inflated prices when they purchased packaged tuna. The CFPs are therefore the prototypical example of participants in the relevant market who suffered antitrust injury. *See Batteries*, 2014 U.S. WL 4955377, at *12 ("Consumers and competitors in the allegedly restrained

[17] *See Supreme Auto Transp. LLC v. Arcelor*, 238 F. Supp. 3d 1032, 1037 (N.D. Ill. 2017) (plaintiffs alleged a conspiracy to reduce steel production but purchased "a panoply of consumer products *containing* steel" rather than purchasing steel) (emphasis added); *Los Gatos Mercantile, Inc. v. E.I. Dupont de Nemours & Co.*, No. 13-cv-01180-BLF, 2014 WL 4755335, at *14 (N.D. Cal. Aug. 11, 2015) (plaintiffs alleged a price-fixing conspiracy among titanium dioxide manufacturers but purchased architectural coatings *containing* titanium dioxide).

[18] And in *ODD II*—the only case cited by Defendants ruling at the class certification stage rather than the pleading stage—the court certified an indirect purchaser class under California law consisting of consumers from 24 jurisdictions. 2016 WL 467444, at *14. The court rejected the defendants' claim of a material conflict of law based on differences in antitrust standing requirements, finding that "the record does not support a conclusion that the outcome in those [*AGC*] jurisdictions would be materially different under local law than under California law." *Id.* at *14, n.14.

markets exemplify the sort of market participants who may suffer the requisite injury.") (citations omitted).

b. The directness of the injury.

"To assess the directness of [t]he injury, [the court] look[s] to the chain of causation between [the] injury and the alleged restraint in the market." *Am. Ad Mgmt., Inc. v. General Tel. Co.*, 190 F. Supp. 2d 1051, 1058 (9th Cir. 1999). "[D]iscrete injuries traceable through a distribution chain tilt this factor in favor of antitrust standing." *Batteries*, 2014 WL 4955377, at *14 (citations omitted). The chain of *causation* between the CFPs' injuries—paying inflated prices for packaged tuna—is just as short as the chain of distribution. The CFPs bought directly from the Large Distributors and have shown that the CFP class members virtually all paid overcharges.

c. The speculative nature of harm.

Dr. Williams shows the harm to the CFP class members is demonstrable and not speculative. This is not a case where "the price-fixed product or service is but one among many factors used in determining the price paid by plaintiff." *Batteries*, 2014 WL 4955377, at *15; *see also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1092-93 (N.D. Cal. 2007).

d. The risk of duplicative recovery and complexity in apportioning damages.

These factors "can be condensed and considered alongside each other." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL 1917, 2013 WL 4505701, at *11 (N.D. Cal. Aug. 21, 2013). Recovery by both direct purchasers under federal law and indirect purchasers under state law is the natural result of states allowing indirect purchasers to seek damages and provides "no bar against standing" and "does not weigh against standing"—it is not "duplicative recovery" in the legal sense. *Batteries*, 2014 WL 4955377, at *16, n.16 (citing *DRAM*, 516 F. Supp. 2d at 1093; *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1155-56 (N.D. Cal. 2009); *In re Auto. Parts*

Antitrust Litig., 12-MD-02311, 2013 WL 2456612, at *8 (E.D. Mich. June 6, 2013)). As explained above, for apportioning damages, there is also no overlap between the purchases for which the CFPs seek to recover—large-sized packaged tuna—and those for which the EPPs seek to recover—small-sized packaged tuna. There is no risk of duplicative recovery or need to apportion the damages along the chain of distribution for the CFP class.

In sum, Defendants have failed to meet their burden to show that there are any material differences in state law concerning antitrust standing.

2. Purported material difference: Rhode Island 2011-2013.

Defendants also argue for a conflict between California and Rhode Island because Rhode Island's statute permitting suits by indirect purchasers was not effective until 2013. Opp. 29-30. CFPs seek to certify a class period beginning in 2011. Any resulting conflict is minor and partial and could be addressed by limiting the recovery of Rhode Island class members to 2013 and later, Williams Reb. ¶ 31 [redacted] an issue that relates to apportioning damages, which is insufficient to defeat class certification in the Ninth Circuit. *Leyva*, 716 F.3d at 513–14. Defendants also provide only conclusory analyses of the second and third steps of the *Mazza* conflict framework, and provide no reason why Rhode Island, which has aligned its indirect purchaser laws with those of California and other states, would have an interest in shortchanging its residents to protect out-of-state corporations.

3. Purported material difference: Pass-on.

Defendants claim a conflict because some states "do not allow a pass-on defense at all" whereas California law allows a pass-on defense in narrow circumstances that they incorrectly suggest apply here. Opp. 30-31. As explained above, the CFP class includes the only indirect purchasers seeking recovery for overcharges on large-sized package tuna and the only direct purchasers from the Large Distributors. As a result, there is no

risk of duplicative recovery, there will be no need for this Court to allocate damages, and the general rule from *Clayworth* rejecting a pass-on defense applies. *Clayworth*, 49 Cal. 4th at 787. There is no conflict between California law and the laws of other states as applied to this case.

B. No "true conflicts" and no reason to subordinate California's interests.

In addition to failing to show any material differences in the law as it applies to the proposed CFP class, Defendants also fail to show any "true conflicts" or that California's interests should be subordinated to the interests of other states. Defendants assert that each state has an interest in "setting the appropriate level of liability for companies conducting business within its territory." Opp. 31. But Bumble Bee and COSI are headquartered in California, and StarKist's home state of Pennsylvania is not one of the jurisdictions alleged to have a conflict here. Under these circumstances, courts have held that California has an interest in applying its law while other states have no similar interest. *See Qualcomm*, 2018 WL 4680214, at *28.

When the state "has no defendant residents to protect," the state also "has no interest in denying full recovery to its residents injured by [out-of-state] defendants." *Hurtado v. Superior Court*, 522 P.2d 666, 670 (Cal. 1974); *see also Pecover*, 2010 WL 8742757, at *20 ("[I]n cases involving [California] resident defendants, foreign states do not have a legitimate interest in limiting the amount of recovery for nonresident plaintiffs under California law.").

"[A]pplying other states' laws to bar recovery here would paradoxically disadvantage the other states' own citizens for injuries caused by a California defendant's unlawful activities that took place primarily in California. In such a circumstance, 'California's more favorable laws may properly apply to benefit nonresident plaintiffs.'" *Qualcomm*, 2018 WL 4680214, at *28 (citing *Clothesrigger Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 616 (Cal. App. 1987)).

In any event, the party opposing application of foreign law must satisfy *all* three steps of the choice-of-law analysis and courts reach steps two and three only if there are material differences in state law, as recognized by Defendants' authorities. *See* Mazza, 666 F.3d at 590-91; *Conde v. Sensa*, Civ. No. 14-51-JLS, 2018 WL 4297056, at *12 (S.D. Cal. Sept. 10, 2018); *Optical Disk Drive*, 2016 WL 467444, at *14. Defendants have not shown material differences here.

VI. THE NAMED PLAINTIFFS ARE ADEQUATE CLASS REPRESENTATIVES.

Defendants' argument that the named plaintiffs lack the requisite litigation knowledge is wrong in two key respects. The adequacy inquiry focuses not on plaintiff awareness but on "an absence of antagonism between representatives and absentees." *Lidoderm*, 2017 WL 679367, at *14 (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011)). Defendants have not purported to show any antagonism: all class members have the same interest in proving the conspiracy and its effects.

Further, each named plaintiff has shown the requisite level of involvement and familiarity with the case. Because the class action mechanism requires ordinary plaintiffs to band together and class counsel are ethically required to pursue the interests of the class rather than any specific plaintiff, "courts are reluctant. . . to deny class certification on the basis that the class representatives lack sophistication." *In re Northrop Grumman Corp. ERISA Litig.*, No. 06-CV-6213, 2011 WL 3505264, at *14 (C.D. Cal. Mar. 29, 2011) (citing *Surowitz v. Hilton Hotels Corp.,* 383 U.S. 363, 376 (1966)); *see SRAM II*, 264 F.R.D. at 610 ("A class representative will be deemed inadequate only if she is startlingly unfamiliar with the case.") (citation omitted). Similarly, class representatives are not expected to articulate the complexities or legal theories of the case. *Fernandez v. K-M Indus. Holding Co., Inc.*, No. C 06-7339, 2008 WL 2625874, at *3 (N.D. Cal. June 26, 2008) ("it is neither fair nor realistic to expect non-attorney class representatives to be able to articulate the precise legal theories underlying their claims").

Rather, "general knowledge of what is involved is sufficient" to demonstrate adequacy of representation. 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1766 (3d ed. 2018). The deposition testimony of the CFP plaintiffs shows that each understands the nature of the claims: Defendants' admitted price-fixing conspiracy caused purchasers of foodservice products to pay more for packaged tuna than they would have paid in a free market. "This is sufficient for purposes of adequacy under Rule 23(a)(4), particularly in a legally complex case such as this one." *Northrop*, 2011 WL 3505264, at *14. For example, CFP class representatives testified as follows:

> Michael Giberson (A-1 Diner): Ex. 8 at 60:4-23; 62:23-3; 65:3; 69:1-9 ("I thought I had a responsibility to … my business and the other business owners in the State of Maine that serve canned tuna… [b]ecause someone had to represent them, and I chose to … be the plaintiff in this suit," which is filed "in the Southern District of California," a "federal court," and the case concerns "price fixing involved between these companies" related to tuna in "packages larger than 40 ounces.");
>
> Maire Byrne (Thyme Market): Ex. 5 at 177:3-11 ("We are defending a class of people that have been impacted by major corporations colluding to raise prices… on tuna fish … me and all service restaurants.");
>
> Peter Schippers (Erbert's & Gerbert's): Ex. 11 at 160: 1-8; 168:2-4 ("I was paying more for tuna and the… people I'm representing, because they were price-fixing. And so we were paying more than market-driven prices … And my bottom line was affected by it.")
>
> Kevin Schippers (Erbert's & Gerbert's): Ex. 10 at 175:13-19; 191:24-192:6 ("[I]t appears that some conspiratorial behavior was taking place between the manufacturers to fix the prices and … to kind of skirt around the free market. But I'm trusting my attorneys to sort through all of that … A class representative is someone who represents a class of plaintiffs who need—who have been harmed. And my role is basically to represent them and to kind of oversee the attorneys and so forth … I will be involved, if and when there is some sort of settlement, on reviewing that and approving it.");
>
> Deric Rosenbaum (Groucho's Five Points Deli): Ex. 9 at 120:7-12 (My "working

knowledge of the case is that there was a motion to dismiss. It was denied. And now everyone is in – I don't know the technical legal term, but in their due diligence and – process, and a class certification has been filed. Outside of that, I rely on my counsel.");

Joe Davis (Rushin' Gold): Ex. 6 at 95:11-15; 109:21-24 ("I know – I know they have been found guilty of this, a couple or some guys have." and, regarding his duty to represent the interests of the class and not merely his own, "You know, if there is a settlement, it is the whole group is divided just like any other class action suit. So I am just representing them.");

Sharon Ehlinger (Maquoketa Care Center): Ex. 7 at 127:22-128:7 (testified that "any manufacturer that sets the price of products high affects us as providers of food," and that Defendants "predetermine[d] a rate collectively.").

As demonstrated above, CFPs possess the requisite knowledge of the claims in this case. Defendants' cherry-picked testimony does not render the named plaintiffs inadequate representatives.[19]

Defendants' other criticisms of the CFP class representatives—for example, that they "had not previously suspected any conspiracy existed" and "did not have any

[19] Defendants' out-of-circuit cases regarding adequacy are inapposite. In *In re Monster Worldwide Sec. Litig.*, 251 F.R.D. 132, 135 (S.D.N.Y. 2008), the court found one class representative inadequate after testifying that he did not know the name of the stock at issue in the case, did not know the name of either defendant, did not know whether the plaintiff ever owned the relevant stock, and had no knowledge concerning key pleadings in the case. The court nevertheless granted class certification. *Id.* at 139. In *Danielson v. DBM, Inc.*, Civ. No. 1:05-2091-WSD, 2007 WL 9701055, at *6 (N.D. Ga. Mar. 15, 2007), the plaintiffs were unaware of both the legal and factual issues of their claims, did not understand that they had duties to the class or know the class of persons they purportedly represented, and also had potential conflicts of interests with other class members. In *Jones v. CBE Group, Inc.*, 215 F.R.D. 558, 568-69 (D. Minn. 2003), there was only one named plaintiff and he had "no incentive to pursue the matter as a class action," testified that he filed suit for a reason unrelated to the allegations in the lawsuit, and did not know critical elements of the action, including the parties and the basis for the lawsuit. In *In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. 133, 146-47 (N.D. Tex. 2014), the only named plaintiff submitted a declaration with boilerplate assertions—not subject to cross-examination—and did not sit for deposition. These cases are outliers involving plaintiffs (or sometimes a single plaintiff) who presented serious adequacy concerns that are not present in this case.

suspicions about alleged conspiracy before being contacted by an attorney"—are misplaced. A single plaintiff should not be expected to uncover a price-fixing conspiracy. *See Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008) ("[E]ven if Plaintiffs did not have reason to suspect that there were problems with the Plan before contacting counsel, that is simply the nature of a claim of this type. The average person would have no reason to believe that the administrator of his 401(k) plan was acting imprudently"). Indeed, Bumble Bee and Starkist spent over two years in internal investigations before finally admitting to the DOJ that they had engaged in price fixing.[20]

Finally, Defendants dispute Thyme Market and Café's adequacy because its 30(b)(6) deponent "learned of the litigation through her cousin who represents her in this matter," Opp. at 37, but the attorney-cousin is not serving as class counsel, has no financial interest in the case, and volunteered to appear at a deposition for his cousin personally, not for the CFP class. *See* Ex. 5 (Byrne Dep.) at 3. Defendants provide no authority that this relationship disqualifies Thyme Market and Café from serving as a class representative. In *In re Cavanaugh*, 306 F.3d 726, 733 (9th Cir. 2002), while the Ninth Circuit noted merely that a lead plaintiffs' selection of a family member as counsel may bear on that plaintiff's adequacy, the court clarified that "the choice of counsel is only an indicator—and a relatively weak one at that—of plaintiffs' fitness. That another plaintiff has chosen more wisely . . . will not support a finding that the presumptive lead plaintiff is inadequate to serve in that position." Here, Defendants have offered no

[20] Defendants argue that some of the CFP class representatives have produced "deficient" discovery. Opp. 36. The CFPs decline to engage in an unripe discovery dispute in the context of class certification, given that Defendants have never moved to compel the CFPs and do not explain why "alleged discovery violations" by class representatives "rise to the level necessary to support a finding of inadequacy." *Koss v. Wackenhut Corp.*, No. 03 CIV. 7679 (SCR), 2009 WL 928087, at *8 (S.D.N.Y. Mar. 30, 2009); *see also In re AST Research Sec. Litig.*, No. CV 94-1370 SVW, 1994 WL 722888, at *3 (C.D. Cal. Nov. 8, 1994) ("Assuming *arguendo* that plaintiffs may be denied representative status for failure to cooperate in discovery" but still certifying a class where "plaintiffs have adequately cooperated.").

evidence that the familial relationship creates a conflict of interest, and there is not only a single lead plaintiff.[21]

In *Zlotnick v. TIE Communications, Inc.*, 123 F.R.D. 189, 193 (E.D. Pa. 1998), the court recognized that there may be a "potential conflict of interest" when there is a "close familial relationship between a class representative and class counsel." There, the lead plaintiff was represented by his son and demonstrated very little knowledge of and involvement in the lawsuit. *Id.* at 193-94. Similarly, in *Langendorf v. Skinnygirl Cocktails, LLC*, 306 F.R.D. 574, 581 (N.D. Ill. 2014), the lead plaintiff joined the litigation through his father, who had a long-running professional relationship with class counsel—lawyers who brought several class actions with the same family serving as named plaintiffs. And in *Cavanaugh*, 306 F.3d at 733, while the Ninth Circuit noted merely that a lead plaintiffs' selection of a family member as counsel may bear on that plaintiff's adequacy, the court clarified that "the choice of counsel is only an indicator—and a relatively weak one at that—of plaintiffs' fitness."

The named plaintiffs adequately represent the CFP class. In any case, one class representative is sufficient, so as long as one of the named plaintiffs is adequate, the class should be certified under California law.

VII. CONCLUSION.

For the foregoing reasons, the CFP plaintiffs respectfully submit that this Court should certify the CFP class and appoint proposed class counsel.

[21] Defendants' other authorities are inapposite. In *Zlotnick*, 123 F.R.D. at 193, the lead plaintiff was represented by his *son* and demonstrated very little knowledge of and involvement in the lawsuit. *Id.* at 193-94. That Thyme Market and Café's founder learned about the case through a cousin does not call that plaintiffs' adequacy into question.

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Respectfully Submitted,

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