UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE DIGITAL MUSIC ANTITRUST LITIGATION	:	MDL Docket No. 1780 (LAP)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23(b)(2) and (b)(3)

This document relates to: All Indirect Purchaser Actions

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I. INTRODUCTION

The Indirect Purchaser Plaintiffs ("Plaintiffs") respectfully submit this memorandum and the accompanying declarations of Professor Roger Noll, Craig Essenmacher, Esq. and Alexandra Bernay, Esq. in order to demonstrate that this Court should

(a) certify, pursuant to Federal Rules of Civil Procedure Rule 23(b)(2), a nationwide class for injunctive relief on Plaintiffs' federal antitrust claims[1], and

(b) certify, pursuant to FRCP Rule 23(b)(3), nine (9) classes for damages on Plaintiffs' claims under the laws, respectively, of the District of Columbia, Arizona, California, Florida, Iowa, Michigan, Minnesota, Nevada, and South Dakota (the foregoing nine jurisdictions are sometimes referred to herein as the "Nine States").

For example, Plaintiffs' proposed class on the California claims is defined as follows:

> All persons and entities in California who, from December 4, 2001 to January 1, 2013, (Class Period) purchased in or as residents Of California Digital Music indirectly from any defendant or subsidiary thereof, or any named affiliate or any named co-conspirator, for their own use and not for resale. Specifically excluded from this Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and coconspirators. Also excluded are any federal, state, or local governmental entities, any judicial

[1] All persons and entities residing in the United States who, from December 4, 2001 to January 1, 2013, purchased Digital Music indirectly from any defendant or subsidiary thereof, or any named affiliate or any named co-conspirator, for their own use and not for resale. Specifically excluded from this Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and coconspirators. Also excluded are any federal, state, or local governmental entities, any judicial officers presiding over this action, members of their immediate families and judicial staffs, and any juror assigned to this action.

> officers presiding over this action, members of their immediate families and judicial staffs, and any juror assigned to this action.

See Proposed Order annexed to Notice of Motion.

This Court and the Court of Appeals earlier upheld against motions to dismiss Plaintiffs' foregoing federal and non-federal claims for which class certification is now sought. *Compare Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 324 (2d Cir. 2010) (order remanding); *with In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 398 (S.D.N.Y. 2011) (these two decisions are sometimes collectively referred to herein as the "Decisions").

The Decisions held that Plaintiffs plausibly alleged that Defendants combined, conspired, or agreed to fix, maintain and inflate prices paid by class members for Digital Music in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1, and the antitrust and other laws of the Nine States.

Based upon the fact discovery since the Decisions, Plaintiffs have developed evidence indicating that a *prima facie* case[2] on the elements of the Sherman Act claim may be presented for each and every class member through the self-same body of very extensive evidence. *Compare,* Professor Noll Decl. ¶¶5-8 *with* pp. *passim infra.*

Where, as here, the Defendants deny the allegations (ECF 134-137, 165-166, 168 Defendants' Answers), this Court and the jury will have to consider this extremely large body of evidence as a whole in order to determine whether a conspiracy has been proved.[3]

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[2] The elements of a Section 1 claim under the Sherman Act are, in essence, (a) that a conspiracy or agreement existed, and (b) that it inflated the prices paid by Plaintiffs. *See American Needle, Inc. v. National Football League*, 560 U.S. 183, 189-90, 202 (2010).

[3] *Compare Continental Ore Co. v. Union Carbide and Carbon Corp*., 370 U.S. 690, 699 (1962) ("plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each....[T]he character and effect of a conspiracy are not to be judged by

That same laborious presentation and consideration will be required to prove and determine the outcome of the conspiracy claims of all class members under the laws of the Nine States. This is because the *prima facie* elements of a claim for violation of, and the considerations regarding the proof of a conspiracy under, each of the Nine State's laws is the same as under Section 1 of the Sherman Act.[4] Therefore, the common questions relating to the conspiracy will be the dominant issue in this litigation.

Moreover, Plaintiffs have also demonstrated that one common class wide economic methodology may be used in this case to show impact and damages from the alleged conspiracy *as to all class members*. *Compare* Professor Noll Decl. pp. 5-8. Where, as here, the same extensive evidence of liability and the same impact evidence establish the claims of all class members, it more than satisfies the requirement of FRCP Rule 23(b)(3) that common questions predominate over individual questions. Indeed, all that Plaintiffs need to show is that common questions predominate on liability, not damages.[5]

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dismembering it and viewing its separate parts, but only by looking at it as a whole"); *with In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 665-66 (7th Cir. 2002)(consider factual and expert evidence); *Spirit Airlines, Inc. v. NW Airlines, Inc.*, 431 F.3d 917, 925, 948 (6th Cir 2005)(reversible error to fail to consider plaintiffs' expert report on summary judgment motion against Plaintiffs).

[4] See Ariz. Rev. Stat. §44-1412; *Vinci v. Waste Mgmt., Inc.*, 36 Cal.App.4th 1811, 1814 n. 1 (1995)(holding that the Cartwright Act has "objectives identical to the federal antitrust acts"); *Cel-Tech Commc'ns, Inc v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999)(finding that California's Unfair Competition Law "borrows violations from other laws and treats them as unlawful practices that the unfair competition law makes independently actionable"); D.C. CODE §28-4515; *Mack v. Bristol-Meyers Squibb Co*, 673 So.2d 100, 104 (Fla.Dist.App. 1996)(holding that antitrust violations constitute violations of Florida's Deceptive and Unfair Trade Practices Act); Iowa Code §553.2; MICH. COMP. LAWS ANN. §445.784; *Minnesota Twins Partnership v. State*, 592 N.W.2d 847, 851-52 (Minn. 1999); NEV. REV. STAT. ANN. §598A.050; S.D. CODIFIED LAWS §37-1-22.

[5] It is broadly recognized that individual damages calculations do not preclude class certification under Rule 23(b)(3). *See* 2 W. Rubenstein, *Newberg on Class Actions* § 4:54, p. 205 (5th ed. 2012) (hereinafter "Rubenstein") (ordinarily, "individual damage[s]

Plaintiffs' evidence supports the contentions (a) that, for over a decade, Defendants have agreed to refuse to compete on the basis of price through the use of "seller-side" most favored nation terms in sale contracts and, thereby, eliminated any price competition among Defendants; and (b) class members were damaged in their property, including by overpaying the difference between what they would have paid in a competitive market for Defendants' products and what they did pay due to such unlawful agreement. Given the long term nature of the Defendants' violation, the structure of the industry, and the likelihood of continued violation, equitable relief enjoining further violative conduct is appropriate and necessary.

II. ISSUES TO BE DECIDED

This class action is pending before this Court based on diversity jurisdiction mandated by the Class Action Fairness Act ("CAFA"). Because the state classes are before this Court on diversity jurisdiction, the rule long ago enunciated by the Supreme Court in *Erie R.R. Company v. Tompkins*, 304 U.S. 64 (1938), and its progeny, must be followed.

"Indirect-Purchaser State" refers to the following jurisdictions, separately: Arizona, California, District of Columbia, Florida, Iowa, Michigan, Minnesota, Nevada,

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calculations should not scuttle class certification under Rule 23(b)(3)"). Antitrust cases, which typically involve common allegations of antitrust violation, antitrust impact, and the fact of damages, are classic examples. *See In re Visa Check/MasterMoney Antitrust Litig*., 280 F.3d 124, 139-40 (2d Cir. 2001). *See also* 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, *Antitrust Law* ¶ 331, p. 56 (3d ed. 2007). The Supreme Court has aptly observed that "[p]redominance is a test readily met" in actions alleging "violations of the antitrust laws." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). It is therefore the "black letter rule" that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members. 2 Rubenstein §4:54 at 208. Here, Professor Noll has gone further, and presented a common evidentiary method of showing damages.

and South Dakota. As detailed in Appendix A, Plaintiffs move for appointment as class representatives from those states where they purchased Digital Music. Plaintiffs move for class certification for each of the Nine States based upon their State Antitrust or consumer protection statutes as alleged in the Third Consolidated Complaint in Counts I, II, or IV. Plaintiffs are not seeking certification for unjust enrichment claims for any State under Count III of the Complaint. Plaintiff will move to dismiss Count III at a later date.

III. FACTUAL ALLEGATIONS

Defendants produce, license and distribute Digital Music, including Internet Music and CDs, to retailers for sale throughout the United States and in some circumstances sell Internet Music directly to consumers. 3rd CAC §51. Defendants control over 80% of the Digital Music sold in the United States. 3rd CAC §35.

A. Overview of Antitrust Claims and Nature of the Conspiracy

The Defendants and their co-conspirators have engaged in a continuing conspiracy to fix and maintain at artificially high and non-competitive levels the prices at which they sell Internet Music and impose unreasonable restrictive terms in the purchase and use of such music thus restraining distribution. 3rd CAC §60.

The conspiracy has had several aspects and stages. At the outset, WMG, EMI Group and Bertelsmann, Inc. agreed to launch a service called "MusicNet" and UMG and Sony agreed to launch a service called "Duet," which was later renamed "pressplay." 3rd CAC §61. All Defendants signed distribution agreements with MusicNet and pressplay. 3rd CAC §61. These joint ventures maintained prices at artificially high levels, eliminated competition among the Defendants in the pricing and terms of Internet Music sales and provided one of several forums in which the Defendants could discuss

their general desires to restrain trade in Internet Music and come to agreement on the specifics. 3rd CAC §61.

In addition to the joint ventures above, Defendants agreed among each other to use "Seller-Side" "Most Favored Nation" clauses (MFNs). These anticompetitive agreements served and were intended to severely limit competition among the Defendants. 3rd CAC §62. Also, Defendants, after the joint ventures were no longer used, sold Internet Music directly to retailers who they did not control. 3rd CAC §63. Instead of competing against one another, Defendants agreed to fix the terms of sale, digital rights management ("DRM") and the prices charged to retailers. 3rd CAC §63.

B. History of the Conspiracy and Its Constituent Agreements

Internet Music increases the selection of music that can be distributed while dramatically reducing costs associated with production, distribution and sale of CDs. 3rd CAC §64. The pricing of CDs have many costs that are not present in Internet Music. These costs include producing master discs; producing copies of the disc; the CD case; labels and anti-shoplifting packaging; shipping CDs to distribution warehouses and then to record stores; labor to unpack and shelve the CDs, staff cash registers, and other retail overhead costs; and returning and destroying damaged and unsold inventory. 3rd CAC §65.

Defendants, via exchange of pricing information, terms of sale information, revenue sharing agreements, MFN's and other anticompetitive conduct conspired to fix the prices and terms under which Internet Music would be sold. 3rd CAC §67. Defendants were paid shares of the total revenue generated by a joint venture licensee rather than by receiving money on a per song basis. Each Defendants' financial interest in the joint ventures was therefore linked to the total sales of all the labels rather than its

own market share. By doing so Defendants agreed to structure and did in fact structure the joint ventures such that their economic incentives were to charge monopoly prices for Internet Music rather than compete with one another on price. 3rd CAC §82.

As a general rule in competitive markets, dramatic cost reductions such as those associated with Internet Music distribution are accompanied by dramatic price reductions and output expansion. Absent Defendants' anticompetitive conduct, Internet Music would be dramatically less expensive than CDs. Instead, despite lower costs, Defendants conspired to charge supra-competitive prices for Internet Music. 3rd CAC §68.

Such high prices would not occur after the introduction of a *lower cost distribution* system absent an agreement to restrain trade and keep prices high. In an industry free of collusion, an innovation that lowers a company's variable costs, which include distribution costs, will result in a company lowering its prices and passing on a part of the savings to the consumer. This partial pass on allows the company to increase its market share while increasing its profit margin because not all of the decreased cost is passed on. Instead, rather than pursue their individual interests by competing with each other, the new method of distribution was used as a pretext for Defendants to meet and conspire. 3rd CAC §72.

Eventually Defendants and their joint ventures sold Internet Music to consumers through entities they did not own or control. However, they could only do so if they contracted with MusicNet to provide Internet Music for the same prices and with the same restrictions as MusicNet itself and other MusicNet licensees. This conduct restrained trade in the Internet Music business and forestalled the time by which Internet Music would emerge as a reasonable consumer substitute for CDs. 3rd CAC §73.

The failure and inefficiency of these Internet Music distribution services was a direct result of the high prices and unfavorable terms the Defendants colluded to impose on purchasers of Internet Music. Defendants collectively refused to utilize or license a system that was convenient, not burdened with use restrictions and competitively priced. 3rd CAC §75. Defendants' collusion in setting high prices for Internet Music, as well as their collusion in imposing unfair and one-sided terms on its use, made Internet Music less attractive to consumers, allowing Defendants to sell CDs at supra-competitive prices. 3rd CAC §76.

Acting alone, no defendant could sustain the supra-competitive prices for CDs prevailing in the CD market. This inability to charge high CD prices, as market factors made consumer demand for CDs more elastic over time at the prices charged by Defendants during the conspiracy, gave Defendants motive to conspire. 3rd CAC §77.

Edgar Bronfman, Jr., who was CEO of WMG until 2011, in his prior capacity as Executive Vice Chairman of Vivendi Universal and the UMG executive in charge of his company's role in pressplay reportedly described pressplay as follows:

> "Pressplay has what we call an affiliate model where *we determine the price*, and we offer a percentage of that price to the retailing partner, in this case either Microsoft or Yahoo or MP3. The reason we've chosen that, frankly, *is because we are concerned that the continuing devaluation of music will proceed unabated unless we do something about it*. If you allow an AOL or RealNetworks or Microsoft or others, who have very different business models, to use music to promote their own business model and simply pay the artists and record companies the minimums, they can advantage themselves on the back of the music industry in a way which continues to devalue music."

3rd CAC §80.

In addition, the main industry trade association, the RIAA, which is controlled by the Defendants, provides another forum and means through which Defendants can

communicate about the pricing, terms and use restrictions they collectively agree upon with respect to Internet Music. 3rd CAC §81.

In addition to sharing information that violated the purported independence of these joint ventures, Defendants conspired to mask their anticompetitive conduct by pretextually establishing rules to prevent antitrust violations, ignoring them, and then using these sham rules to convince the United States Department of Justice ("DOJ") to drop the investigation it launched in 2001. 3rd CAC §83. In "White Papers" presented to the DOJ, Defendants claimed they had instituted firewalls, communication guidelines, safeguards, and other supposed protections to prevent exchanges of information, or other conduct, that could negatively affect competition. 3rd CAC §84.

Defendants also had and have a common practice of using MFNs in their licenses that had the effect of guaranteeing that the licensor would receive terms that were no less favorable than the terms offered to other licensors. 3rd CAC §85. Defendants attempted to hide the MFNs and communications between the joint ventures and their label owners because they knew they would attract antitrust scrutiny by DOJ and others. 3rd CAC §86. For example, EMI Group and MusicNet had a "side letter" agreement which assured that EMI's Group core economic terms would be no less favorable than Bertelsmann's and WMG's. 3rd CAC §87. MusicNet CEO Rob Glaser decided to put the MFN in a secret side letter because "there are legal/antitrust reasons why it would be bad idea to have MFN clauses in any, or certainly all, of these agreements." 3rd CAC §88. UMG also made use of MFN clauses in its license agreements. 3rd CAC §89. When Defendants use MFN clauses, the result is that Defendants gets the benefit of any one negotiation by a competitor.

In sum, MusicNet and pressplay were vehicles through which the Defendants effectively exchanged price information, policed their cartel and imposed restrictive licensing arrangements that retarded the growth of Internet Music. Defendants have maintained a price floor for Internet Music throughout the period of their collusion, even as the prices of other products and Defendants' own variable costs have varied. 3rd CAC §91. Defendants continued to engage in anticompetitive acts designed to inhibit competition after services other than their joint ventures began to distribute Internet Music. In this vein, Defendants have agreed to a wholesale price floor whereby they sell Internet Music to retailers at or about 70 cents per song. 3rd CAC §92(a).

By early 2005, Defendants Sony BMG's, Capitol-EMI Music's, UMG's and WMG's direct costs had gone down substantially because each of these Defendants' digitization costs of the initial cataloging had been completed, technological improvements (including increased computer processing power and speed) had reduced the remaining costs of digitizing new releases and other costs remained at virtually zero despite substantially higher sales volumes. Nonetheless, certain Defendants then engaged in or about May 2005 in the highly unusual behavior of raising prices from the 65 cents per song level to at or about 70 cents per song. 3rd CAC §92(b).

Defendants enforce their uniform pricing and price floor, in part, by forcing Internet Music retailers to sign MFN agreements that specify that the retailers must pay each of the Defendants the same amount. These parallel, highly unusual increases in prices when direct costs had substantially decreased, enforced by MFNs, were similar to Defendants' causing the joint ventures, via MFNs and other means, to increase the prices of Internet Music during 2002 to 2003 to unreasonably high levels despite substantial

reductions in the direct costs of Internet Music relative to CDs. 3rd CAC §92(c). By conspiring to restrain the growth of Internet Music through the imposition of restrictive terms of use and to set a price floor for Internet Music at supra-competitive levels, Defendants have protected their ability to maintain sales of CDs at prices higher than they would be but for Defendants' anticompetitive conduct. 3rd CAC §98.

To date, Plaintiffs have only received [redacted] Even with limited discovery however, [redacted] Defendants' documents referenced below are attached in Exhibit 2.

[redacted] See Essenmacher Declaration, ¶¶7-14.

IV. CLASS CERTIFICATION IS APPROPRIATE IN THIS CASE

A. The Standards For Class Certification

As the Supreme Court has recognized, antitrust class actions play an important role in the enforcement of the antitrust laws. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972). Though the Court is obliged to undertake a careful analysis of Rule 23 in considering class certification, "the Second Circuit has emphasized that Rule 23 should be 'given liberal rather than restrictive construction' and has shown a 'general preference' for granting rather than denying class certification." *In re Vitamin C Antitrust Litigation*, 279 F.R.D. 90, 98-99 (E.D.N.Y. 2012)

(citing *Gortat v. Capala Bros.*, 257 F.R.D. 353, 361 (E.D.N.Y.2009) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir.1997). *See Spencer v. No Parking Today, Inc.*, 2013 WL 1040052, *10 (S.D.N.Y. 2013) ("The Second Circuit requires a liberal, rather than restrictive, interpretation of Rule 23 of the Federal Rules of Civil Procedure.") (*citing Marisol v. Giuliani at 377); See also In re Beacon Associates Litigation*, 2012 WL 1569827, (S.D.N.Y. 2012) ("In the Second Circuit, 'Rule 23 is given liberal rather than restrictive construction' when assessing motions for class certification.") (*citing Marisol v. Giuliani* at 377)

To meet their burden for class certification, Plaintiffs must satisfy the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and, show that the class action fits within at least one of the three types of class actions described in Rule 23(b). Here, Plaintiffs meet the threshold requirements of Rule 23(a)(1)–(4), and the Indirect-Purchaser State Classes for damages are appropriate, and should be certified, under Rule 23(b)(3). As the Second Circuit has recognized, a district judge may certify a class after determining each of the requirements of Rule 23 have been met "based on the relevant facts and the applicable legal standard." *Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F. 3d 234, 251-252 (2nd Cir. 2011) (*citing In re Initial Public Offerings Securities Litigation*, 471 F.3d 24, 41 (2nd Cir. 2006)).

Even so, the Second Circuit empowers its Courts with "ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class

certification motion does not become a pretext for a partial trial of the merits." *In re IPO Secs. Litig.*, 471 F.3d at 41.

As the Supreme Court noted in *Dukes*, Rule 23 authorizes a limited inquiry into the merits only for the purpose of determining if certification is proper. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2552, n.6 (2011). Courts have expounded this point by noting that the court should not undertake analysis of the merits to the extent the merits are unrelated to determination of class certification. *See e.g. Stinson v. City of New York*, 282 F.R.D. 360, 368 (S.D.N.Y. 2012) *(citing In re IPO Secs. Litig.*, 471 F.3d at 41).

B. The Classes Satisfy The Rule 23(a) Requirements

1. Class Members Are Sufficiently Numerous

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Impracticable" does not mean impossible. *In re Amaranth Natural Gas Commodities Litig*, 269 F.R.D. 366, 375 (S.D.N.Y. 2010).

Plaintiffs satisfy the numerosity requirement of Rule 23(a)(1) because joinder of all members of the Classes—consumers who purchased Digital Music—would be impracticable. Though this Court has found the numerosity requirement to be satisfied with as low a threshold as forty class members (*see Consolidated Rail Corp. v. Town of Hyde Park*, 27 F.3d 473, 483 (2nd Cir. 1995) the proposed Classes include "thousands" of members in the Indirect-Purchaser State Classes, with all members geographically dispersed throughout the United States. *See MacNamara v. City of New York*, 275 F.R.D. 125, 137-138 (S.D.N.Y. 2011) ("the geographic dispersion of the proposed class members" noted as a factor in determining numerosity). Therefore, the class is sufficiently numerous.

2. Common Questions of Law and Fact Exist

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). Rule 23(a)(2)'s common questions requirement has been characterized as a "low hurdle." *In re Sumitomo Copper Litig.*, 194 F.R.D. 480, 482 (S.D.N.Y. 2000) (Pollack, J.) *citing In re Prudential Securities Litigation,* 163 F.R.D. 200, 206 n. 8 (S.D.N.Y.1995). Indeed, Courts have held that even one common question of law will clear this low hurdle. *Brown v. Kelly*, 244 F.R.D. 222, 230 n. 57 (S.D.N.Y. 2007).

Plaintiffs meet the requirements of Rule 23(a)(2) because there are questions of both law and fact common to the Classes in this antitrust conspiracy action. *In re NASDAQ Market-Makers Antitrust Litigation,* 169 F.R.D. 493, 509-510 (S.D.N.Y. 1996) ("Numerous courts have held that allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement of Rule 23(a)(2)… Proof of the alleged conspiracy is the heart of this case, and is crucial to the claims of all members of the class. Each of the putative class members has a common interest in proving the existence, scope, effectiveness and impact of that conspiracy, as well as the appropriate injunctive and monetary relief to remedy the injury caused by the conspiracy."). *See also In re Stock Exchanges Options Trading Antitrust Litigation,* 2006 WL 3498590 at *5 (S.D.N.Y. Dec. 4, 2006). (Ruling class allegations of defendants engaging in an antitrust conspiracy met the commonality requirement.)

Here, the common questions include, but are not limited to: whether Defendants formed and operated a conspiracy to fix, raise, maintain, or stabilize the prices of Digital

Music; whether Defendants' conspiracy resulted in an unlawful overcharge on the price of Digital Music; whether the unlawful overcharge on the price of Digital Music was passed-through to the indirect purchasers; and whether the overcharge to indirect purchasers can be calculated using a common, formulaic method. "Rule 23(a)(2) does not require all questions of law or fact to be common. Indeed even a single common question will suffice." *Sykes v. Mel Harris and Associates*, LLC 285 F.R.D. 279, 286-287 (S.D.N.Y. 2012) (citing *Dukes*, 131 S.Ct. at 2556.)

3. The Named Plaintiffs Have Claims Typical of the Classes

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). This requirement is "not demanding." *Fogarazzo v. Lehman Bros., Inc.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005).

Plaintiffs, each of whom are members of one of the Indirect-Purchaser State Classes, fulfill the typicality requirement of Rule 23(a)(3). Courts have merged this element of Rule 23 alongside the commonality requirement. "As a practical matter, the two requirements tend to merge in the Second Circuit's class certification inquiry." *Iglesias–Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 370 (S.D.N.Y.2007) (citing *Caridad v. Metro–North Commuter R.R.*, 191 F.3d 283, 291 (2nd Cir.1999)). (The typicality requirement "is satisfied when class members' claims arise from the same course of events and reflect the same legal theories." *Allen v. Dairy Farmers of America, Inc.*, 2012 WL 5844871 (D.Vt. 2012) *citing In re Flag Telecom Holdings, Ltd. Secs. Litig*, 574 F.3d 29, 35 (2d Cir.2009);. *See also In re Currency Conversion Fee Antitrust Litig.*, 264

F.R.D. 100, 111 (S.D.N.Y. 2010) ("In this case, the named Plaintiffs' claims are typical because Plaintiffs must prove a conspiracy, its effectuation, and damages therefrom – precisely what the absent class members must prove to recover.")

Here, all members of the Classes, including Plaintiffs, purchased Digital Music and allege that they were overcharged as a result of Defendants' collusive conduct. All members of the Indirect-Purchaser State Classes will prove the existence of a conspiracy and their damages in the same way: first, by establishing the conspiracy existed through evidence that is common to each class member, and second, by establishing the amount of the illegal overcharge on Digital Music, and, third, by demonstrating the amount of the illegal overcharge that was passed on to class members. The expert report establishes that this can be done on a common basis. See Noll Decl. pp. 5-8. Thus, the proof does not depend on any class member's individual circumstances, and in fact, the proof offered would be the same regardless of the number or location of class members. All members of each of the state classes will base their claims on the same facts and same laws for each of those states.

4. Plaintiffs and Counsel Will Adequately Represent the Classes

Plaintiffs and Interim Co-Lead Counsel Lovell Stewart Halebian and Jacobson LLP and Robbins Geller Rudman & Dowd LLP satisfy the Rule 23(a)(4) "adequacy" requirements because: (1) the proposed representatives do not have conflicts of interest with the proposed Classes; and (2) the representatives are represented by qualified counsel. *See Currency Conversion*, 264 F.R.D. at 112-113. Courts note "the great weight of authority in price-fixing conspiracy cases, absent special circumstances such as arbitration, holds that the victim of one alleged co-conspirator is adequate to prove

liability for victims of all co-conspirators." *Id.* *See also In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 381 (S.D.N.Y.1996) ("Where the plaintiffs have alleged a single conspiracy to artificially inflate prices, a representative plaintiff may satisfy the adequacy requirement without having purchased products from all of the defendants.... The crucial inquiry is not how many of defendants' products each plaintiff purchased, but rather whether each plaintiff has sufficient incentive to present evidence that will establish the existence of the alleged conspiracy and its effect on the prices of the products purchased by the putative class members.") Plaintiffs here are individuals from around the country who seek to serve as representatives for the Classes. All of them are willing to fulfill their responsibilities as representatives of the Classes. These plaintiffs have already produced documents, answered interrogatories and will sit for depositions. Information about each of the proposed representatives is set forth in Appendix A. There are no conflicts among members of the Classes, and certification of the Classes is appropriate.

Plaintiffs have been well represented by Interim Co-Lead Counsel Lovell Stewart Halebian and Jacobson LLP and Robbins Geller Rudman & Dowd LLP. The law firms of Lovell Stewart Halebian and Jacobson LLP and Robbins Geller Rudman & Dowd LLP, are ably assisted by numerous other firms representing Plaintiffs, have devoted considerable time and resources to prosecuting this action vigorously since its inception, and are committed to continuing to do so through the course of this litigation.

C. Certification Of A Nationwide Class For Injunctive Relief Under Rule 23(b)(2) Is Appropriate

1. Injunctive Relief Is Necessary To Prevent Further Injury

Pursuant to Section 16 of the Clayton Act (15 U.S.C. § 26), Plaintiffs seek to enjoin Defendants' collusive practices and policies that violate Section 1 of the Sherman

Act (15 U.S.C. § 1), and operate to artificially maintain/inflate Digital music prices in the U.S. Indirect purchasers may sue for injunctive relief under the Clayton Act. *See In re Public Offering Antitrust Litigation*, 2004 WL 350696 at *8 (S.D.N.Y. Feb. 25, 2004) (holding "'indirect-purchaser' status does not bar the plaintiffs from seeking injunctive relief under Section 16 of the Clayton Act") *citing Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1172 (8th Cir. 1998); *James v. Triborough Bridge and Tunnel Authority*, 2011 WL10885430 at *5 (S.D.N.Y. Oct. 5, 2011) ("Rule 23(b)(2) provides for class actions where 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole'.") (*citing* Fed.R.Civ.P. 23(b((2)). Here, Defendants have acted on grounds generally applicable to the class. As described in the Statement of Facts, the Defendants' collusive conduct was market wide and not specific to individual consumers. As a result, injunctive relief is appropriate with respect to the Nationwide Class as a whole.

Defendants' anticompetitive conduct has enabled them to overcharge for their Digital Music, resulting in inflated prices for Digital Music products. Plaintiffs believe that this conduct is ongoing, and members of the Nationwide Class continue to purchase Digital Music. An injunction that forces Defendants to cease any anticompetitive conduct will ultimately result in lower-priced Digital Music purchased by Nationwide Class members in the future. The relief sought by Plaintiffs would, therefore, benefit the Nationwide Class.

2. The Court Should Certify The Nationwide Class For Equitable Relief

It is neither inconsistent nor unusual for courts to certify both an equitable relief class under Rule 23(b)(2) and a damages class under Rule 23(b)(3). As Courts have reasoned, the U.S. Supreme Court's holding in *Dukes* does not alter the concept of certifying these two classes by way of undertaking the analysis appropriate for each class. ("*Dukes*, like *Robinson*, was concerned with Rule 23(b)(2) classes that sought both injunctive and monetary relief. In this case, by contrast, I have certified a class both under Rule 23(b)(2) and under Rule 23(b)(3), after finding that the additional requirements of (b)(3)—'predominance' of common questions over individualized questions and 'superiority' of class resolution —are satisfied here.") *Jermyn v. Best Buy Stores*, L.P., 276 F.R.D. 167, 173-174(S.D.N.Y. 2011). See *Stinson*, 282 F.R.D. at 380-381 ("So long as the Court here engages in the analysis necessary under Rule 23(b)(2) and Rule 23(b)(3), just as Judge McMahon did in *Jermyn*, the *Dukes* decision does not preclude certification of a class under Rule 23(b)(2) for purposes of injunctive relief and under Rule 23(b)(3) for purposes of money damages."); *Ackerman v. Coca-Cola Co.*, 2013 WL 7044866 at *6, n. 12 (E.D.N.Y. July 18, 2013) ("A plaintiff class can be certified seeking both injunctive relief and money damages.") (citing *Stinson*, 282 F.R.D. at 379 and *Jermyn*, 276 F.R.D.at 173-174); *Maziarz v. Housing Authority of the Town of Vernon*, 281 F.R.D. 71, 83 (D.Conn. 2013) ("Accordingly, it is consistent with Wal-Mart for the court, in an appropriate situation, to certify an 'injunction class' under Rule 23(b)(2) and a 'damages class' under Rule 23(b)(3)."); *Sykes*, 285 F.R.D. at 293 ("That plaintiffs are seeking substantial monetary damages is of no concern given the Court's certification of separate Rule 23(b)(2) and (b)(3) classes addressing equitable relief and damages, respectively.")

The Nationwide Class includes all persons and entities who indirectly purchased Digital Music. The Indirect Purchaser State Classes comprise only a subset of states. Thus, the plain language of the Complaint—and the number of class members and the anticipated impact upon them—dictate that the Nationwide Class is "primary." Not only is the Nationwide Class broader than the Indirect-Purchaser State Classes in terms of numerosity and geography, but the longlasting effect of an injunction would far eclipse the effects of damages awards. *See Sykes*, 285 F.R.D. at 293 (certifying Rule 23(b)(2) class finding "injunctive and declaratory relief with respect to the class as a whole would be appropriate" on basis of allegations "that apply generally to the class."). Unless Defendants are enjoined from perpetuating their price-fixing scheme, these class members will continue to spend more for Digital Music than they would have spent in a competitive market.

Whether the members of the Indirect-Purchaser State Classes are awarded monetary relief or not, injunctive and declaratory relief will still be reasonable and appropriate. Defendants' activities as alleged in the complaint are, and have been, *per se* illegal under § 1 of the Sherman Act, 15 U.S.C. § 1. When the participants in a conspiracy will continue to reap anticompetitive benefits to the detriment of a class, certification under Rule 23(b)(2) is warranted. *See Madanat v. First Data Corp.*, 282 F.R.D. 304, 314--315 (E.D.N.Y. 2012). (Certifying a 23 (b)(2) class for declaratory and injunctive relief based on plaintiff allegations that the class was harmed by a uniform boilerplate contract clause irrespective of how the clause was purportedly enforced). Monetary relief covers only past damages. Without equitable relief, Defendants could simply continue to sell their products at *supra*-competitive prices, forcing Plaintiffs to bring repetitious litigation.

Accordingly, the Court should certify the Nationwide Class under Rule 23(b)(2) to ensure efficiency and deterrence.

D. Certification Of State Classes Under State Substantive Laws For Damages Is Appropriate

The Court should certify the 9 Indirect-Purchaser State Classes using the appropriate procedure of Rule 23(b)(3). Upon meeting the Rule 23(b)(3) requirements that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," all of the state-law damage claims should be certified for individual state classes under each state's substantive class action precedent. As demonstrated in Appendix C, such state classes are regularly certified in both state and federal courts. Although the "predominance" and "superiority" considerations are interrelated, it is appropriate to address them separately. *See, e.g., Vitamin C*, at 279 F.R.D. at 109-110.

1. A Class Action is Superior to Other Available Methods of Adjudication

Rule 23(b)(3)'s "superiority" requirement is frequently satisfied when it would be prohibitively expensive for class members with small claims to proceed individually." *In re Vitamin C*, 279 F.R.D. at 109 (*citing Seijas v. Republic of Argentina*, 606 F.3d 53, 58 (2d Cir.2010)). The Supreme Court has explained that the main purpose of Rule 23(b)(3)-type class actions is to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all," such as those whose individual recoveries would be too small to warrant an individual suit. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997). In determining whether a class action is the

superior method, the court must consider the four nonexclusive factors identified in Rule 23(b)(3):

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Analysis of these factors demonstrates that this class action is a superior method to adjudicate the matter.

a. There is No Realistic Alternative to a Class Action for Class Members to Recover the Damages Caused by Defendants

Where the damages suffered by each putative class member are not large, the first factor weighs in favor of certifying a class action. *See Bank of America Corp. Securities, Derivative, and Employee Retirement Income Security Act (ERISA) Litig.*, 281 F.R.D. 134, 146 (S.D.N.Y. 2012) ("Certain of class members' claims will be too small to pursue individually."); *Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 671 (C.D. Cal. 2009). Here, the damages suffered by members of the Indirect- Purchaser State Classes will be measured in relation to the purchase price paid for Digital Music. In the aggregate, these purchases are significant. But, each member's individual purchase of a Digital Music, costing at most a few dollars, cannot sustain the costs associated with an antitrust conspiracy action against large multinational corporations.

As the court recognized in *Hanlon*, this disparity between claims and the costs of complex litigation creates several disadvantages for individual plaintiffs, including "less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998); *see also Seijas*, 606 F.3d at 58 ("[T]he district court correctly determined that proceeding individually would be prohibitive for class members with small claims. In such circumstances, the class action device is frequently superior to individual actions."). Permitting the members of the Indirect Purchaser State Classes, who individually would be unable to vindicate their rights, to collectively assert their causes of action is consistent with the primary purpose of a Rule 23(b)(3)-type class action. *See Amchem*, 521 U.S. at 617. Accordingly, the first factor here weighs heavily in favor of the superiority of certifying the Indirect-Purchaser State Classes.

b. This Court is the Only Available Forum

Because of diversity jurisdiction created by CAFA, indirect-purchaser cases formerly litigated in state courts now must be litigated in federal courts. Thus, the answer to the second and third factor of the superiority inquiry—existence of collateral litigation, and desirability of concentrating litigation in the particular forum, respectively—has already been provided by CAFA's mandates and the Judicial Panel on Multidistrict Litigation. This Court is the only available forum. Plaintiffs here also have standing to bring claims on behalf of end-users of Digital Music. This case, therefore, represents U.S. consumers' best opportunity to recover the overcharges they paid as a result of Defendants' unlawful price-fixing conspiracy.

c. Class Certification is More Manageable Than Any Other Procedure Available

The fourth element, manageability, weighs in Plaintiffs' favor because certification of the Indirect-Purchaser State Classes would be far superior to, and more manageable than, any other procedure available for the treatment of the factual and legal issues raised by Plaintiffs' claims. *See Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 189 (N.D. Ill. 1992) ("What would be unmanageable is the institution of numerous individual lawsuits."); *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 700 (S.D. Fla. 2004) ("Multiple lawsuits brought by thousands of consumers and third-party payors in seventeen different states would be costly, inefficient, and would burden the court system.").

Courts frequently certify classes under the laws of multiple jurisdictions, recognizing the substantial similarity among the antitrust and consumer protection laws of various states. *See, e.g., In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 237 (E.D. Pa. 2012) (certifying a class as to four indirect purchaser states, Arizona, Florida, Massachusetts and Wisconsin); *In re Wellbutrin XL Antitrust Litig.*, 282 F.R.D. 126, 145 (E.D. Pa. 2011) (certifying classes of indirect purchasers in California, Florida, Nevada, New York, Tennessee and Wisconsin). *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 608 (N.D. Cal. 2010) (certifying a nationwide injunctive class and twenty-three statewide classes.), *amended in part*, M 07-1827 SI, 2011 WL 3268649 (N.D. Cal. July 28, 2011); *In re Static Random Access memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 617 (N.D. Cal. 2009) (certifying a nationwide injunctive class and twenty-seven statewide classes.); *In re OSB Antitrust Litig.*, 68 Fed. R. Serv. 3d 1008 (E.D. Pa. 2007) (certifying under Rule 23(b)(3) a multistate class with eight state subclasses-Iowa, Kansas, Maine, Michigan, Mississippi, North Carolina, North Dakota, and Tennessee.); *In re*

Pharm. Indus. Average Wholesale Price Litig., 233 F.R.D. 229, 230-31 (D. Mass. 2006) (certifying multi-state defendant subclasses under the consumer protection laws of 39 states).

What is required in certifying multiple state-law classes is that state law variances do "not present insuperable obstacles." *See Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67 (E.D.N.Y. 2004) (certifying nationwide breach of contract case on grounds that the "applicable principles of contract law do not drastically differ from state to state and that the variances in the state laws can be categorized and easily managed for effective adjudication of [the] claim."); *see also In re Checking Account Overdraft Litig.*, 275 F.R.D. 666, 679 (S.D. Fl. 2011) (certifying four multi-state subclasses to address variations in state law where variations among applicable state laws are not material and can be managed).

Here, the Indirect-Purchaser State Classes are easily managed due to the substantial similarity of the laws at issue. The nine classes with state law antitrust and/or consumer protection claims all share substantially the same cause of action elements. All the State laws at issue are to be construed in harmony with federal antitrust laws.[6] Any variations in state law can be readily managed by grouping the Indirect-Purchaser States in

[6] See Ariz. Rev. Stat. §44-1412; *Vinci v. Waste Mgmt., Inc.*, 36 Cal.App.4th 1811, 1814 n. 1 (1995)(holding that the Cartwright Act has "objectives identical to the federal antitrust acts"); *Cel-Tech Commc'ns, Inc v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999)(finding that California's Unfair Competition Law "borrows violations from other laws and treats them as unlawful practices that the unfair competition law makes independently actionable"); D.C. CODE §28-4515; *Mack v. Bristol-Meyers Squibb Co*, 673 So.2d 100, 104 (Fla.Dist.App. 1996)(holding that antitrust violations constitute violations of Florida's Deceptive and Unfair Trade Practices Act); Iowa Code §553.2; MICH. COMP. LAWS ANN. §445.784; *Minnesota Twins Partnership v. State*, 592 N.W.2d 847, 851-52 (Minn. 1999); NEV. REV. STAT. ANN. §598A.050; S.D. CODIFIED LAWS §37-1-22.

accordance with common requirements for antitrust and consumer protection claims. Therefore, class resolution of Plaintiffs' state law claims is superior to other available methods in order to offer those with small claims the opportunity for meaningful redress. *In re Abbott Labs Norvir Anti-Trust Litig.*, 2007 WL 1689899 at *10 (N.D. Cal. June 11, 2007). Accordingly, all elements of the "superiority" inquiry weigh in favor of certification. Each of the 9 proposed state classes is separately manageable, as are the classes as a whole.

2. Common Questions of Law and Fact Predominate

a. Predominance is Readily Met in Antitrust Cases

"Predominance," under Rule 23(b)(3), "is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem*, 521 U.S. at 625. In price-fixing cases, the existence of the conspiracy is the predominant issue and is often sufficient to establish a predominance of common questions. *See In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 245 (E.D.N.Y. 1998).

"The very definition of the requirement of the predominance of common questions contemplates that individual issues will remain after the common issues are adjudicated." 1 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS, § 4:25 at 4-82 (4th ed. 2005). Class certification does not require that common questions be "completely dispositive of a litigation as to all potential members of the class" nor "dispositive of the entire litigation." *In re Sugar Industry Antitrust Litig.*, 73 F.R.D. 322, 344 (E.D. Pa. 1976); *see also Dura-Bilt Corp. v. Chase Manhatten Corp.*, 89 F.R.D. 87, 98 (S.D.N.Y. 1981) ("[C]ommon issues need not be dispositive of the entire litigation. Rule 23(b)(3) only requires that common questions predominate….").

"The predominance requirement is satisfied unless it is clear that individual issues will overwhelm the common questions to render the class action valueless." *Playmobil*, 35 F. Supp. 2d at 245; *Nasdaq Market-Makers*, 169 F.R.D. at 517. Where the claims are "uniformly premised" on a "shared factual predicate" which gives rise to common legal issues, the predominance requirement is satisfied. *In re Napster, Inc. Copyright Litig*., 2005 WL 1287611, at *7 (N.D. Cal. June 1, 2005). Furthermore, predominance requires only a showing of common questions, not a showing of common answers. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 819 (7th Cir. 2012), *reh'g denied* (Feb. 28, 2012).

Here, Plaintiffs' claims are based on a "shared factual predicate"—Defendants' undeniable conspiracy. All will be resolved by presentation of an overwhelming corpus of evidence including documents and economic analysis. Such common proof will demonstrate liability and impact on a class-wide basis, and a reasonable method for ascertaining damages.

b. Common Questions of Liability in This Conspiracy Predominate

Predominant questions of law and fact exist because of class members' common interest in proving the existence and scope of the alleged conspiracy. Courts routinely hold that common proof exists as to the existence of a conspiracy. *Blood Regents Antitrust Litigation*, 283 F.R.D. 222, 234 (E.D.Pa. 2012) *citing Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105 (2d Cir.2007). Common issues predominate in proving an antitrust violation when the focus is on the defendants' conduct and not on the conduct of the individual class members. *See, e.g., Nasdaq Market-Makers,* 169 F.R.D. at 518 ("Court repeatedly have held that the existence of a conspiracy

is the predominating issue in price fixing cases, warranting certification of the class even where significant issues are present."); *In re Telik, Inc., Securities Litig.*, 576 F.Supp.2d 570, 583 (S.D.N.Y. 2008) ("Because the central and predominant focus of the action is Defendants' alleged fraudulent conduct, each Class Member is similarly situated, and common questions predominate over individual questions."); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 275 (D. Mass. 2004) ("The alleged antitrust violation relates solely to SmithKline's conduct, and as such, constitutes a common issue subject to common proof.").

Plaintiffs here allege and show liability evidence common to all class members that [redacted]

See Factual Allegations *supra*; Essenmacher Declaration, ¶¶7-14..

"The predominance requirement is satisfied unless it is clear that individual issues will overwhelm the common questions and render the class action valueless." *Nasdaq Market-Makers*, 169 F.R.D. at 517. The differences among class members regarding the

manner of purchase and payment, the design specifications of the Digital Music they purchased, and the amounts they paid relate solely to the amount of damages and are not relevant to determining Plaintiffs' underlying liability claims. Thus, the overriding need to prove antitrust conspiracy in the digital music market is alone sufficient to satisfy the Rule 23(b)(3) "predominance" requirement.

c. Common Questions Also Predominate With Respect to Economic Impact and Plaintiffs Have a Reliable Quantitative Method to Show Impact

Plaintiffs have offered qualitative expert opinion supporting commonality of impact. [redacted] Noll Decl. pp. 6, 30.. [redacted] Noll Decl. pp. 40-44. [redacted] Noll Decl. pp. 6, 32-37. [redacted] Noll Decl. pp. 44-47. Common evidence of impact includes characteristics of the Digital Music industry, Defendants' systematic collusive communications with one another, Defendants' resulting pricing behavior, and other facts. *See In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 103 (D. Conn. 2009) (holding that, "regardless of the efficacy of the plaintiffs' economic modeling, the

plaintiffs have presented factual evidence" that would predominate concerning the proof of harm to class members).

1. Common Questions Also Predominate Regarding Proof of Impact And The Amount of Damages

Professor Noll's Declaration provides evidence that Plaintiffs will be able to prove impact and damages for all class members through the same common economic evidence. Professor Noll presents an economic model which calculates the amount of overcharge or damages for each class member based on the difference between the CD benchmark price and the actual digital download price. Noll Decl. pp.49-56.

Professor Noll's Declaration shows that Plaintiffs will at the merits stage be able to present common class wide evidence that indicates (A) that CDs and Digital Music are substitutes but would be in separate submarkets if digital downloads were priced competitively; (B) that the structure of the industry is such that Defendants possess sufficient market power to exercise monopoly power if they act collusively; (C) that Defendants had the incentive to collude; (D) [redacted] (E) that Defendants' market power is substantially higher in digital downloads as a result; (F) that Defendants have opportunities to collude through trade associations, sell products that are commodity-like, exchanged pricing and other information, and [redacted]; and (G) that common evidence of impact includes characteristics of the Digital Music industry, Defendants' systematic communications with one another, Defendants' resulting pricing behavior, and other facts. *See In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 103 (D. Conn. 2009) (holding that, "regardless of the efficacy of the plaintiffs' economic

modeling, the plaintiffs have presented factual evidence" that would predominate concerning the proof of harm to class members).

Professor Noll used CDs as a benchmark to compare to digital downloads to show that each member of the class has been harmed or "impacted" by Defendants' anti-competitive behavior. Noll Decl. p.49-56. A "yardstick" method compares costs or prices for one product to that for another product in order to discern impact and any overcharge charged to purchasers. *Linerboard Antitrust Litig.*, 203 F.R.D. 197, 219 (E.D.Pa. 2001)

Professor Noll estimates damages by constructing a structural model of competition in the sale of digital downloads. [redacted] Noll Decl. pp. 49-56. It then applies the same structural model to digital downloads. Separately, Dr. Noll calculates the effect on a change in wholesale prices on retail prices through a regression analysis. Noll Decl. pp.49-56. This common economic evidence may be applied to show impact as to each class member. Noll Decl. pp.49-56.

Importantly, the inquiry with respect to the expert method of showing common impact is a very limited one at this stage. In assessing predominance of injury-in-fact, the Court at the class certification stage "need only determine whether the element of injury-in-fact can be proven by evidence common to the class." *See Currency Conversion*, 264 F.R.D. at 115; *EPDM*, 256 F.R.D. at 90.[7]

[7] The inquiry is whether the plaintiffs' method of proof is a form of common evidence. *See Currency Conversion*, 264 F.R.D. at 115; *EPDM.*, 256 F.R.D. at 90 (certifying class because plaintiffs have shown "that these six national price lists *could* have had the effect of affecting the base price for EPDM, from which all negotiations started, on a class wide basis); *In re Amaranth Nat. Gas Comm. Litig.*, 269 F.R.D. 366 (S.D.N.Y. 2010) ("Because [the

Individual damages issues as to some class members will not bar class certification. *See Bank of America*, 281 F.R.D. at 148 ("Common issues may predominate when liability can be determined on a class wide basis, even when there are some individualized damage issues"); *In re Playmobil*, 35 F. Supp. 2d at 246-7 ("If members of the class suffered varying amounts in damages, this does not interfere with establishing a class action"). The burden to prove damages at the class certification stage is a modest one. *See Currency Conversion*, 264 F.R.D. at 116 ("Indeed, the antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections") *citing In re Scrap metal Antitrust Litig.*, 527 F.3d 517, 534 (6th Cir. 2008).[8] Here, Plaintiffs easily meet this burden by presenting common class wide evidence that is consistent with the requirements of *Comcast*.

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elements of artificiality and causation in a commodities manipulation case] can only be efficiently proven on a class-wide basis by applying various econometric and statistical models, plaintiffs are required to propose a workable methodology for proving these elements before a class action may be certified."). Additionally, both the overcharge from the Defendants to direct purchasers of Digital Music and the pass-through rate of that overcharge to indirect purchasers (members of the Classes) can be measured on a common, formulaic basis. This economic and factual showing more than suffices to establish that impact can be demonstrated on a class-wide basis under any standard.

[8] *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 354 (N.D. Cal. 2005) ("Plaintiffs do not need to supply a precise damage formula at the certification stage of an antitrust action. . . . [Rather, Plaintiffs need only] . . . have proffered a method that is not so insubstantial or unreasonable as to amount to no method at all."); *Comcast v. Behrand*, 133 S. Ct. 1426, 1433 (2013) ("Calculations need not be exact… but at the class-certification… any model supporting a plaintiff's damages case must be consistent with its liability case")("*Comcast*").

Dr. Noll bases his models on the actual data produced by Defendants in this matter. Noll Dec. pp. 33-36.. While Defendants did not produce complete data sets (and this Court rejected Plaintiffs' efforts to compel further productions, *see* ECF # 179), Dr. Noll's models more than suffice to support class certification. Courts commonly permit class certification premised on limited data sets, particularly when (as here) Defendants' "sought bifurcated discovery which resulted in a limited record at the class certification stage." *See, e.g. In re Zurn Pex Plumbing Products Liab. Litig*., 644 F.3d 604, 612-13 (8th Cir. 2011) ("While there is little doubt that bifurcated discovery may increase efficiency in a complex case such as this, it also means there may be gaps in the available evidence."). In such circumstances, courts finding "gaps" in the expert's data set grant certification, anticipating further discovery may fill any necessary gaps. *See, e.g. id.* ("Expert opinions may have to adapt as such gaps are filled by merits discovery."); *Daniel v. Am. Bd. of Emergency Med*., 269 F. Supp. 2d 159, 199 (W.D.N.Y. 2003) (certifying class when methodology contemplated "[e]mploying relevant data ***to be collected*** from the class during merit based discovery") (emphasis added).

Thus, even where an expert's methodology "would have been even more reliable had he been provided with [additional data], 'it is important not to let a quest for perfect evidence become the enemy of good evidence.'" *In re Flonase Antitrust Litig*., 284 F.R.D. 207, 233 (E.D. Pa. 2012) (citations omitted) (certifying class based on limited data). Rather, this Court should reject arguments based on an "alleged paucity of data," recognizing Dr. Noll utilized all data available to him, and follow the traditional path of permitting certification based on such data. *Allen v. Dairy Farmers of Am., Inc*., 5:09-CV-230, 2012 WL 5844871, at *15 (D. Vt. Nov. 19, 2012) (certifying class); *see also In re*

Winstar Commc'ns Sec. Litig., 290 F.R.D. 437, 448 (S.D.N.Y. 2013) (certifying class when "[p]laintiff's expert . . . was unable to complete a formal event study for Winstar's bonds because she did not have trading data for each day of the class period."); *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 213 (M.D. Pa. 2012) (certifying class and noting "because list prices are not available for all Defendants for the entire period in question, Dr. McClave utilizes price data from a "typical" customer—Walgreens, which is one of the largest purchasers of relevant product."); *In re Blood Reagents Antitrust Litig.*, 283 F.R.D. 222, 242 (E.D. Pa. 2012) (granting certification when expert used defendant "Immucor's standard costs for both defendants because [defendant] Ortho has represented that its cost data is unreliable. Because both defendants manufactured the same products from similar raw materials and were subject to the same regulations, Immucor's costs are a reasonable proxy for Ortho's costs. At the very least, using Immucor's standard costs is sufficient to "give 'a reasonable estimate' of damages. And nothing more is required."); *In re High-Tech Employee Antitrust Litig.*, 86 Fed. R. Serv. 3d 1459 (N.D. Cal. 2013) (""Dr. Leamer's decision to use a single variable in his Conduct Regression was understandable because "the available [compensation] data regarding Defendants' compensation practices [is] 'limited.'") (citations omitted).

3. The Indirect-Purchaser State Classes Should be Certified

As described above, the Indirect-Purchaser State Classes should be certified because the predominance requirement is satisfied under Rule 23(b)(3). Federal courts determining certification of state classes routinely apply substantive state-law standards as part of their Rule 23 analyses. For each Class, the applicable legal standards for class certification are set forth below. The question of whether Defendants' conspiracy harmed

indirect purchasers is similarly a question in which common questions of law and fact predominate. Injury and damages do not present predominately individual issues because the individual state laws permit an inference of classwide injury or classwide proof of damages.

For example, in *Relafen*, the court granted in part the plaintiffs' motion for class certification of state law antitrust claims. *In re Relafen*, 221 F.R.D. at 260. The court held: "the Court must examine the end payer plaintiffs' claims under governing state law . . . state law defines the elements of the end payor plaintiffs' claims and in turn, proves relevant to determining the demonstration of common injury necessary for certification." *Id.* at 276; *In re New Motor Vehicles Canadian Export Antitrust Litig*., 235 F.R.D. 127, 132-36 (D. Maine), *rev'd on other grounds*, 522 F.3d 6 (1st Cir. 2008). Moreover, for purposes of substantive issues such as burdens of proof and inferences, a federal court must rely on the substantive law in question when determining if the procedural requirements of Rule 23 are satisfied. Since CAFA was enacted, state antitrust claims are now litigated almost exclusively in federal courts. This procedural change must not eviscerate consumers' substantive antitrust rights and the state's legislative intent to retain the availability of indirect-purchaser suits as a viable and effective means of enforcing state antitrust laws.

The applicable State law for each State is shown in Appendix B. State law cases certifying a class action for each State class are shown in Appendix C.

a. California

The California Supreme Court has specifically identified "price-fixing" as among the business practices "which because of their pernicious effect on competition and lack of

any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Corwin v. Los Angeles Newspaper Service Bureau, Inc*., 4 Cal. 3d 842, 853 (1971) (*quoting Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958)).

When the legislature enacted the Cartwright Act, it delivered "a mandate to avoid unnecessary procedural barriers to indirect purchasers' prosecution of California antitrust suits" and "to retain the availability of indirect-purchaser suits as a viable and effective of means of enforcing California's anti-trust laws." *Union Carbide Corp. v. Super. Ct.*, 36 Cal. 3d 15, 21-22 (1984). Courts regularly certify classes of indirect purchasers on Cartwright Act claims. See Appendix C.

California's well-established law permits an inference of antitrust impact to indirect purchasers by horizontal *per se* illegal price-fixing conspiracies. *Rosack v. Volvo of Am. Corp.*, 131 Cal. App. 3d 741, 760 (Cal. Ct. App. 1982), *cert. denied*, 460 U.S. 1012 (1983) ("contentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected. Courts have consistently found the conspiracy issue the overriding, predominant question"); *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1352 (1987) (holding presumption of injury appropriate in indirect-purchaser class action, noting "courts have assumed consumers were injured when they purchased products in an anticompetitive market"). Applying California precedent on the issue of impact does not interfere with Rule 23 as there is no contrary substantive element in the Federal Rules. Rather, California's presumption of impact is entirely consistent with them and with federal precedent. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977) ("proof of impact [may] be made on a common basis so long

as the common proof adequately demonstrates some damage to each individual."). California courts apply this presumption in the context of California's own class certification requirements, which have a "predominance" requirement identical to Rule 23. In fact, California courts have consistently recognized that this presumption of impact is entirely consistent with federal law. This burden of proof with respect to impact derives from recognition that class actions protect consumers, prevent repetitive claims, and deter irresponsible corporate behavior. To achieve these salutary purposes, California courts embrace class actions. *See, e.g., Discover Bank v. Super. Ct.*, 36 Cal. 4th 148, 156 (2005), *abrogated on other grounds by AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Richmond v. Dart Indus*., Inc., 29 Cal.3d 462 (1981). "The right to seek classwide redress is more than a mere procedural device in California;" rather, California's express public policy is to encourage the class action as an "essential tool for the protection of consumers against exploitative business practices." *Klussman v. Cross Country Bank*, 134 Cal. App. 4th 1283, 1296 (2005); *State of California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 471 (1986). "The problems which arise in the management of a class action involving numerous small claims do not justify a judicial policy that would permit the defendant to retain the benefits of its wrongful conduct and to continue that conduct with impunity." *Discover Bank*, 36 Cal. 4th at 156 (citation omitted).

In light of the foregoing principles, it is clear that under California law, the issues of whether Defendants engaged in a price-fixing conspiracy, whether class members were injured, and the amount of those damages, are subject to generalized proof, not individualized proof. The Court should do the same here.

b. Arizona

The Arizona Indirect-Purchaser State Class asserts causes of action under the Arizona Uniform Antitrust Act, Ariz. Rev. Stat. §§ 44-1401, *et seq.* An indirect purchaser of goods has standing to bring an action under the Act to recover damages resulting from the alleged price-fixing by the manufacturers of those goods. *Bunker's Glass Co. v. Pilkington PLC,* 75 P.3d 99, 102 (Ariz. 2003); *Friedman v. Microsoft Corp*., 141 P.3d 824, 828 (Ariz. App. 2006) The Arizona Supreme Court recognized that indirect-purchaser damages could be proven with classwide evidence and that expert testimony regarding proof of class-wide pass-on damages is sufficient to uphold class certification of indirect-purchaser claims. *Bunker's Glass Co.,* 75 P.3d at 108-09.

Here, whether a Digital Music price-fixing conspiracy exists under Arizona antitrust law, and whether the class members were injured can be shown with predominantly generalized evidence. Plaintiffs also put forward a methodology for calculating damages on a class-wide basis. Numerous courts have certified claims under the Arizona Antitrust Act in cases brought by indirect purchasers. See Appendix C. The same result is appropriate here.

c. District of Columbia

The District of Columbia Indirect-Purchaser State Class alleges violations of the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code §§ 28-3901, *et seq.*, and the District of Columbia Antitrust Act, D.C. Code §§ 28-4501, *et seq.* ("DCAA"). Indeed, the District of Columbia legislators "deliberately chose to reject the gloss put on the Clayton Act by *Illinois Brick* and to provide a contrasting antitrust scheme for the District of Columbia." *Holder v. Archer Daniels Midland Co.,* 1998 WL 1469620, at *3 (D.C. Super. Ct. Nov. 4, 1998). In addition to injunctive or equitable relief, a private

plaintiff can also recover treble damages and attorneys' fees. D.C. Code Ann. § 28-4508(a).

The issue of whether there was a conspiracy to fix the prices of Digital Music in violation of the DCAA or CCPA, is subject to generalized proof, not individualized proof. Also, the other elements of the claims, injury and damages, are also subject to generalized proof, and the DCAA expressly provides for such class-wide proof. Indeed, District of Columbia courts addressing impact recognize that "[a]t the class certification stage, plaintiffs need only demonstrate that they intend to use generalized evidence which is common to the class and will predominate over individualized issues with respect to proving impact." *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 266 (D.D.C. 2002). A number of courts have certified classes of indirect purchasers under District of Columbia law, and for the reasons set forth above, this Court should do so here.

d. Florida

The Florida Indirect-Purchaser State Class asserts a cause of action under the Florida Deceptive and Unfair Trade Practices Act ("DTPA"), F.S.A. §§ 501.201, *et seq.*

In *In re Florida Microsoft Antitrust Litig.*, the Florida court recognized and applied an inference of antitrust impact despite pricing diversity. 2002 WL 31423620 at *14 (Fla.Cir.Ct. Aug. 26, 2002).

Here, like in *Florida Microsoft*, Plaintiffs' expert has proffered viable economic theories and methodologies to prove fact of injury and damages on a class-wide basis. A number of courts have certified classes of indirect purchasers under Florida law (See Appendix C), and for the reasons set forth above, this Court should certify the Florida Indirect-Purchaser State Class here.

e. Iowa

The proposed Iowa Indirect-Purchaser State Class asserts a cause of action under the Iowa Competition Law ("ICL"), I.C.A. § 553.4. In *Comes v. Microsoft*, 646 N.W. 2d 440, 447 (Iowa 2002), the Iowa Supreme Court held that indirect purchasers may recover damages under the ICL.

All of the elements of the statutory claim (*i.e.*, conspiracy, impact and the amount of damages) can be established through common proof. Indeed, not only has the Iowa Supreme Court held that class treatment is appropriate in indirect purchaser actions based on antitrust misconduct, but it has also held that common issues on liability would predominate even without a finding of commonality as to impact and damages. *See Comes v. Microsoft*, 696 N.W.2d 318, 323 (Iowa 2005). The Court also found that plaintiffs' expert's opinion as to common impact and damages based on economic theory was more than sufficient to support certification. *Id.* at 324-25. A number of other courts have certified claims under the ICL in cases brought by indirect purchasers, lending further support to certification here.

f. Michigan

The proposed Michigan Indirect-Purchaser State Class asserts causes of action under the Michigan Antitrust Reform Act ("MARA"), MCLS §§ 445.771, *et seq.* The issues of whether there was a conspiracy to fix Digital Music prices in violation of MARA, whether the Michigan Indirect-Purchaser State Class members were injured, and proof of the damages sustained on a class-wide basis are subject to generalized proof, not individualized proof. A number of courts have certified classes of Michigan indirect purchasers in similar contexts. See Appendix C.

g. Minnesota

The proposed Minnesota Indirect-Purchaser State Class asserts causes of action under the Minnesota Antitrust Law, Minn. Stat. §§ 325D.49, *et seq*. "Minnesota antitrust law expressly provides damages for indirect purchasers injured by antitrust violations." *Gordon v. Microsoft Corp*., 2001 WL 366432, at *2 (Minn. Dist. Ct. Mar. 30, 2001); *see also Lorix v. Crompton Corp*., 736 N.W.2d 619 (Minn. 2007).

In antitrust cases, damage issues "are rarely susceptible of the kind of detailed proof of injury which is available in other contexts ... [I]n the absence of more precise proof, the fact finder may conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure ... that defendants' wrongful acts had caused damage to the plaintiffs. *Gordan*, 2001 WL 366432 at *11 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 123-24 (1969)). In finding certification to be superior to other methods of adjudication, the court stated that "based on Plaintiffs' proposed methods of determining an overcharge to direct purchasers and a percentage pass through to individual consumers, the court does not find manageability problems sufficient to deny certification of the class." *Gordan*, 2001 WL 366432 at *12.

h. Nevada

The proposed Nevada Indirect-Purchaser State Class alleges violations of Nevada Revised Statute §§ 598A, *et seq.* (the "UTPA"). The Nevada UTPA specifically prohibits price-fixing conspiracies, and provides that indirect purchasers may sue for such violations. *See* N.R.S. 598A.060; N.R.S. 598A.210(2).

The Nevada Indirect-Purchaser State Class satisfies the predominance requirement because all of the elements of the Nevada UTPA claim (*i.e.*, conspiracy, impact and damages) can be established through common proof. Other courts have certified claims in cases brought by indirect purchasers under the Nevada UTPA, and this Court should do so here.

i. South Dakota

The South Dakota Indirect-Purchaser State Class asserts causes of action under the South Dakota antitrust statute. S.D. Codified Laws, §§ 37-1-3.1, *et. seq.*

The South Dakota Indirect-Purchaser State Class satisfies the predominance requirement of Rule 23(b)(3). Whether the Defendants engaged in a conspiracy in restraint of trade is clearly subject to common proof on behalf of the South Dakota Indirect-Purchaser Class. Proof of such conduct would establish a violation of Section 37-1-3.1 on a class-wide basis for the South Dakota Indirect-Purchaser Class.

In certifying indirect- purchaser classes, South Dakota courts have addressed the amount and type of proof required to show common proof of impact. *See e.g., In re South Dakota Microsoft Antitrust Litig*., 657 N.W. 2d 668, 670 (S.D. 2003). There, the court noted that plaintiffs did not need to prove the merits of the case at the class certification stage. *Id.* at 673. Impact and damages for the South Dakota Indirect-Purchaser State Class can be determined on a class-wide basis, so Rule 23(b)(3) is therefore satisfied. In addition to the *South Dakota Microsoft* decision discussed above, indirect purchaser claims under the South Dakota statute have been certified for class treatment in several other cases.

V. THE COURT SHOULD APPOINT CLASS COUNSEL

In appointing counsel for the Classes, the Court should apply the same standard as it did in appointing interim lead counsel. In addition, the Court may consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(C)(ii); *see also In re Cree Inc. Sec. Litig.*, 219 F.R.D. 369, 373 (M.D.N.C. 2003) (designating a firm as lead counsel after finding that the firm had "extensive experience" with the particular area of litigation (class actions) and that "the firm ha[d] sufficient resources to prosecute this action in a thorough and expeditious manner.").

As noted in section IV.B.4., *supra*, Plaintiffs have been ably represented by the Interim Co-Lead Counsel of Lovell Stewart Halebian and Jacobson LLP and Robbins Geller Rudman & Dowd LLP. The Interim Co-Lead Counsel, along with many other indirect-purchaser counsel, has devoted considerable time and resources to prosecuting this action vigorously since its inception. The firms have overseen the briefing and argument of motions, the coordination and review of millions of pages of document discovery from Defendants and third parties, the taking and defending of dozens of depositions, and the retention of experts. It is prepared to serve, and should be appointed, as counsel to the Classes.

VI. CONCLUSION

For the foregoing reasons, the proposed classes meet the requirements of Rule 23(a) and (b)(3). Plaintiffs' Motion to certify the 9 Indirect Purchaser State Classes and to appoint Lovell Stewart Halebian and Jacobson LLP and Robbins Geller Rudman & Dowd LLP as Co-Lead Counsel for the Classes should be granted.

DATED: 3/14/2014

/s/ Christopher Lovell

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APPENDIX A

***In re Digital Music Antitrust Litigation*, MDL Docket No. 1780 (S.D.N.Y.)**
Proposed Indirect-Purchaser Plaintiff Class Representatives

STATE	PLAINTIFF
Arizona	Shawn Sellers
California	Matthew Putman
California	Cynthia Seley
California	Lisa Owens
District of Columbia	Kathryn E. Kelly
Florida	Michael J. Newton
Illinois	Alexandra Nordlinger[1]
Iowa	Randal Schaffer
Michigan	David Paschkett
Minnesota	Richard Benham
Nevada	Cynthia Walker
South Dakota	Ronald Donahue

[1] Representative for Nationwide Class.

APPENDIX B

***In re Digital Music Antitrust Litigation*, MDL Docket No. 1780 (S.D.N.Y.)**

***Illinois Brick* Repealer Statutes, California Unfair Competition Law and District of Columbia Consumer Protection Act**

STATE	LAW
Arizona	***Bunker's Glass Co. v. Pilkington PLC*, 75 P.3d 99(Ariz. 2003) Under Ariz. Rev. Stat. §44-1408** Indirect purchasers may sue under the state antitrust act. Generally, the best indicator of the meaning of a statute is its plain language. *Powers v. Carpenter*, 51 P.3d 338, 340 (Ariz. 2002). The Act defines "person" as including "an individual, corporation, . . . or any other legal entity." Ariz. Rev. Stat. §44-1401. Nothing in this language restricts the right of action to direct purchasers injured by violations of the Arizona Antitrust Act or precludes indirect purchasers from suing. Indeed the Court of Appeals reasoned, and we agree, that by defining the term "person" to include an "individual," the legislature signaled its intent to allow indirect purchasers to sue, because individuals are rarely direct purchasers. *Bunker's Glass Co. v. Pilkington PLC*, 47 P.3d 1119, 1123 (Ariz. Ct. App. 2002).
California	**CAL. BUS. & PROF. CODE §16750** (a) Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him or her, interest on his or her actual damages pursuant to Section 16761, and preliminary or permanent injunctive relief when and under the same conditions and principles as injunctive relief is granted by courts generally under the laws of this state and the rules governing these proceedings, and shall be awarded a reasonable attorneys' fee together with the costs of the suit. This action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant. **CAL. BUS. & PROF. CODE §17200** As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

STATE	LAW
District of Columbia	**D.C. CODE §28-4509** Indirect purchasers (a) Any indirect purchaser in the chain of manufacture, production, or distribution of goods or services, upon proof of payment of all or any part of any overcharge for such goods or services, shall be deemed to be injured within the meaning of this chapter. (b) In actions where both direct and indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages. (c) In any case in which claims are asserted by both direct purchasers and indirect purchasers, the court may transfer and consolidate cases, apportion damages and delay disbursement of damages to avoid multiplicity of suits and duplication of recovery of damages, and to obtain substantial fairness. **D.C. CODE §28-3901** (a) As used in this chapter, the term – (1) "person" means an individual, firm, corporation, partnership, cooperative, association, or any other organization, legal entity, or group of individuals however organized; (2) "consumer" means: (A) When used as a noun, a person who, other than for purposes of resale, does or would purchase, lease (as lessee), or receive consumer goods or services, including as a co-obligor or surety, or does or would otherwise provide the economic demand for a trade practice; (B) When used as an adjective, describes anything, without exception, that: (i) A person does or would purchase, lease (as lessee), or receive and normally use for personal, household, or family purposes; or (ii) A person described in § 28-3905(k)(1)(B) or (C) purchases or receives in order to test or evaluate qualities pertaining to use for personal, household, or family purposes. (3) "merchant" means a person, whether organized or operating for profit or for a nonprofit purpose, who in the ordinary course of business does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services, or a person who in the ordinary course of business does or would supply the goods or services which are or would be the subject matter of a trade practice; (4) "complainant" means one or more consumers who took part in a trade practice, or one or more persons acting on behalf of (not the legal representative

STATE	LAW
	or other counsel of) such consumers, or the successors or assigns of such consumers or persons, once such consumers or persons complain to the Department about the trade practice; (5) "respondent" means one or more merchants alleged by a complainant to have taken part in or carried out a trade practice, or the successors or assigns of such merchants, and includes other persons who may be deemed legally responsible for the trade practice; (6) "trade practice" means any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services; (7) "goods and services" means any and all parts of the economic output of society, at any stage or related or necessary point in the economic process, and includes consumer credit, franchises, business opportunities, real estate transactions, and consumer services of all types; (8) "Department" means the Department of Consumer and Regulatory Affairs; (9) "Director" means the Director of the Department of Consumer and Regulatory Affairs; (10) "Chief of the Office of Compliance" means the senior administrative officer of the Department's Office of Compliance who is delegated the responsibility of carrying out certain duties specified under section 28-3905; (11) "Office of Adjudication" means the Department's Office of Adjudication which is responsible for carrying out certain duties specified under section 28-3905; (12) "Office of Consumer Protection" means the Department's Office of Consumer Protection which is responsible for carrying out the statutory requirements set forth in § 28-3906; and (13) "Committee" means the Advisory Committee on Consumer Protection which is responsible for carrying out the statutory requirements set forth in section 28-3907. (14) "nonprofit organization" means a person who: (A) Is not an individual; and (B) Is neither organized nor operating, in whole or in significant part, for profit. (15) "public interest organization" means a nonprofit organization that is organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers.

STATE	LAW
	(b) The purposes of this chapter are to: (1) assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices; (2) promote, through effective enforcement, fair business practices throughout the community; and (3) educate consumers to demand high standards and seek proper redress of grievances. (c) This chapter shall be construed and applied liberally to promote its purpose. This chapter establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia.
Florida	**FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT ("DTPA"), Fla. Stat.Ann. §§501.201, *et seq.*** The Florida DTPA expresses a primary policy "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." Fla. Stat. Ann. §501.202(2). Additionally, the DTPA provides that "unfair methods of competition, and unconscionable, deceptive, and unfair trade practices . . . shall be construed liberally to promote [such] policies." Fla. Stat. Ann. §501.202. Florida courts have expressly held that an indirect-purchaser action alleging a price-fixing conspiracy is actionable under the Florida DTPA. *See Mack v. Bristol Myers Squibb Co.*, 673 So. 2d 100, 108 (Fla. Dist. Ct. App. 1996) ("[W]e read subsections 501.202(2), 501.211(2) and 501.204(1) of the Florida DPTA as a clear statement of legislative policy to protect consumers through the authorization of such indirect purchaser actions."). A consumer who has suffered a loss as a result of a DTPA violation may bring an action for actual damages, attorney fees and costs. Fla. Stat. Ann. §501.211(2).
Iowa	**IOWA COMPETITION LAW ("ICL"), Iowa Code §553.4.** The ICL provides that "a person shall not attempt to establish or establish, maintain, or use a monopoly of trade or commerce in a relevant market for the purpose of excluding competition or of controlling, fixing or maintaining prices." Iowa Code §553.5. Under the ICL, private parties who are "injured or threatened with injury by conduct prohibited [by the ICL]" may seek equitable relief and recover actual damages, including costs and attorneys' fees. Iowa Code §553.12
Michigan	**MICH. COMP. LAWS ANN. §445.778** Action by state, political subdivision, public agency, or other person for injunctive or other equitable relief, actual damages, interest, costs and attorney's fees; effect of flagrant violation.

STATE	LAW
	Sec. 8. (1) The state, a political subdivision, or any public agency threatened with injury or injured directly or indirectly in its business or property by a violation of this act may bring an action for appropriate injunctive or other equitable relief, actual damages sustained by reason of a violation of this act, and, as determined by the court, interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees. (2) Any other person threatened with injury or injured directly or indirectly in his or her business or property by a violation of this act may bring an action for appropriate injunctive or other equitable relief against immediate irreparable harm, actual damages sustained by reason of a violation of this act, and, as determined by the court, interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees. If the trier of fact finds that the violation is flagrant, it may increase recovery to an amount not in excess of 3 times the actual damages sustained by reason of a violation of this act.
Minnesota	**MINN. STAT. ANN. §325D.57** Any person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies, injured directly or indirectly by a violation of sections 325D.49 to 325D.66, shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees. In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.
Nevada	**NEV. REV. STAT. ANN. §598A.210** Private action for injury to business or property: Injunctive relief; treble damages; attorney's fees and costs; copy of complaint mailed to Attorney General. 1. Any person threatened with injury or damage to his or her business or property by reason of a violation of any provision of this chapter, may institute a civil action or proceeding for injunctive relief. If the court issues a permanent injunction, the plaintiff shall recover reasonable attorney fees, together with costs, as determined by the court. 2. Any person injured or damaged directly or indirectly in his or her business or property by reason of a violation of the provisions of this chapter may institute a civil action and shall recover treble damages, together with reasonable attorney fees and costs. 3. Any person commencing an action for any violation of the provisions of this chapter shall, simultaneously with the filing of the complaint with the court, mail a copy of the complaint to the Attorney General.

STATE	LAW
South Dakota	**S.D. CODIFIED LAWS §37-1-33** No provision of this chapter may deny any person who is injured directly or indirectly in his business or property by a violation of this chapter the right to sue for and obtain any relief afforded under § 37-1-14.3. In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.

APPENDIX C

***In re Digital Music Antitrust Litigation*, MDL Docket No. 1780 (S.D.N.Y.)**

Indirect-Purchaser Litigated (Non-Settlement) Antitrust Class Certification Decisions

STATE	CASE AUTHORITY	PRODUCT INVOLVED	RULING
Arizona	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004).[1] Exhibit 1.	Estrogen replacement products	Arizona class certified
	Ferrell v. Wyeth-Ayerst Labs., No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005). Exhibit 2.	Estrogen replacement products	Arizona class certified
	In re Relafen Antitrust Litig., 221 F.R.D. 260, 278-84, 288 (D. Mass. 2004)	Drugs	Arizona among exemplar classes certified
	In re Static Random Access Memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 617-22 (N.D. Cal. 2009)	Memory chips	Multi-state classes certified, including Arizona
	In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 608-13 (N.D. Cal. 2010), *amended in part*, 2011 WL 3268649 (N.D. Cal. July 28, 2011)	LCD panels	Multi-state classes certified, including Arizona

[1] All references to "Exhibit," are to the exhibits attached to the Declaration of Alexandra S. Bernay in Support of Plaintiffs' Motion for Class Certification Pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3), filed concurrently.

STATE	CASE AUTHORITY	PRODUCT INVOLVED	RULING
California	*Aguilar v. Atlantic Richfield Corp.*, No. 700810, 1998-1 Trade Cas. (CCH) ¶72,080, Order Granting Motion for Class Certification, ¶¶81,495, 81,497 (Cal. Super. Ct., San Diego Cnty. May 1, 1997). Exhibit 3.	Gasoline	California class certified
	B.W.I. Custom Kitchen, Inc. v. Owens-Illinois, 191 Cal. App. 3d 1341, 1355 (Cal. Ct. App. 1987)	Glass containers	Reversed decision denying certification of California class
	In re Automotive Refinishing Paint Cases, No. J.C.C.P. 4199, Order Granting Motion of Plaintiffs for Class Certification at 1, 2 (Cal. Super. Ct., Alameda Cnty. June 17, 2004). Exhibit 4.	Automobile refinishing paint	California end-user, reseller classes certified
	In re Cipro Cases I and II, 121 Cal. App. 4th 402, 418 (Cal. Ct. App. 2004)	Drugs	Certification of California class affirmed
	In re Reformulated Gasoline (RFG) Antitrust & Patent Litig., No. CV-05-01671 (VBKx), Order Granting Plaintiffs' Motion for Class Certification at 25 (C.D. Cal. Mar. 27, 2007). Exhibit 5.	Gasoline	California certified class
	In re Relafen Antitrust Litig., 221 F.R.D. 260, 288 (D. Mass. 2004)	Drugs	California among exemplar classes certified
	In re Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	California class certified

STATE	CASE AUTHORITY	PRODUCT INVOLVED	RULING
	Lethbridge v. Johnson & Johnson, No. B105754, Order at 24 (Cal. Ct. App. Nov. 10, 1997) (unpublished). Exhibit 6.	Disposable contact lenses	Reversed decision denying certification to California class
	Microsoft I-V Cases, J.C.C.P. No. 4106, 2002-2 Trade Cas. (CCH) ¶73,013, Order re Class Certification, ¶¶88,555, 88,565 (Cal. Super. Ct., San Francisco Cnty. Aug. 29, 2000). Exhibit 7.	Computer software	California class certified
	Pharmaceutical Cases I, II and III, J.C.C.P. Nos. 2969, 2971 & 2972, Order Certifying Retail Pharmacy and Pharmacist Class at 1-3 (Cal. Super. Ct., San Francisco Cnty. June 26, 1995); *Pharmaceutical Cases I, II and III*, J.C.C.P. Nos. 2969, 2971 & 2972, Order Certifying Consumer Class at 1-4 (Cal. Super. Ct. San Francisco Cnty. Aug. 16, 1995). Exhibit 8.	Drugs	California class certified
	Robinson v. EMI Music Dist., Inc., No. L-10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including California
	Rosack v. Volvo of Am. Corp., 131 Cal. App. 3d 741, 763 (Cal. Ct. App. 1982), *cert. denied*, 460 U.S. 1012 (1983)	Automobiles	Reversed decision denying certification of California class
	Smokeless Tobacco Cases I-IV, J.C.C.P. Nos. 4250, 4258, 4259 & 4262, Order Granting Motion for Class Certification at 2 (Cal. Super. Ct., San Francisco Cnty. Jan. 29, 2004). Exhibit 9.	Moist snuff products	California class certified

STATE	CASE AUTHORITY	PRODUCT INVOLVED	RULING
	In re Static Random Access Memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 617-22 (N.D. Cal. 2009)	Memory chips	Multi-state classes certified, including California
	In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 608-13 (N.D. Cal. 2010), *amended in part*, 2011 WL 3268649 (N.D. Cal. July 28, 2011)	LCD panels	Multi-state classes certified, including California
District of Columbia	*Goda v. Abbott Labs.*, No. 01445-96, 1997 WL 156541, at *10 (D.C. Super. Ct. Feb. 3, 1977)	Prescription drugs	District of Columbia class certified
	Robinson v. EMI Music Dist., Inc., No. L-10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including District of Columbia
	In re Static Random Access Memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 617-22 (N.D. Cal. 2009)	Memory chips	Multi-state classes certified, including District of Columbia
	In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 608-13 (N.D. Cal. 2010), *amended in part*, 2011 WL 3268649 (N.D. Cal. July 28, 2011)	LCD panels	Multi-state classes certified, including District of Columbia
Florida	*In re Fla. Microsoft Antitrust Litig.*, No. 99-27340, 2002 WL 31423620, at *19 (Fla. Cir. Ct. Aug. 26, 2002)	Computer software	Florida class certified
	In re Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	Florida class certified

STATE	CASE AUTHORITY	PRODUCT INVOLVED	RULING
	Robinson v. EMI Music Dist., Inc., No. L-10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including Florida
Iowa	*Anderson Contracting Inc. v. Bayer AG*, No. CL 95959, Ruling on Plaintiff's Motion for Class Certification at 22 (Iowa Dist. Ct., Polk Cnty. Mar. 19, 2007). Exhibit 10.	Synthetic rubber, ethylene propylene diene monomer ("EPDM")	Iowa class certified
	Comes v. Microsoft Corp., 696 N.W.2d 318, 323, 327 (Iowa 2005)	Computer software	Iowa class certified
	Ferrell v. Wyeth-Ayerst Labs., No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004). Exhibit 1.	Estrogen replacement products	Iowa class certified
	In re Static Random Access Memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 617-22 (N.D. Cal. 2009)	Memory chips	Multi-state classes certified, including Iowa
	In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 608-13 (N.D. Cal. 2010), *amended in part*, 2011 WL 3268649 (N.D. Cal. July 28, 2011)	LCD panels	Multi-state classes certified, including Iowa
Michigan	*In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	Michigan class certified
	Robinson v. EMI Music Dist., Inc., No. L-10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including Michigan

STATE	CASE AUTHORITY	PRODUCT INVOLVED	RULING
	In re Static Random Access Memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 617-22 (N.D. Cal. 2009)	Memory chips	Multi-state classes certified, including Michigan
	In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 608-13 (N.D. Cal. 2010), *amended in part*, 2011 WL 3268649 (N.D. Cal. July 28, 2011)	LCD panels	Multi-state classes certified, including Michigan
Minnesota	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004). Exhibit 1.	Estrogen replacement products	Minnesota class certified
	Gordon v. Microsoft Corp., No. 00-5994, 2001 WL 366432, at *13 (Minn. Dist. Ct. Mar. 30, 2001), *interlocutory review denied*, 645 N.W.2d 393 (Minn. 2002) and 2003 WL 23105552, at *10 (Minn. Dist. Ct. Mar. 14, 2003).	Computer software	Minnesota class certified
	In re Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	Minnesota class certified
	Robinson v. EMI Music Dist., Inc., No. L-10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including Minnesota
	In re Static Random Access Memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 617-22 (N.D. Cal. 2009)	Memory chips	Multi-state classes certified, including Minnesota

STATE	CASE AUTHORITY	PRODUCT INVOLVED	RULING
	In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 608-13 (N.D. Cal. 2010), *amended in part*, 2011 WL 3268649 (N.D. Cal. July 28, 2011)	LCD panels	Multi-state classes certified, including Minnesota
Nevada	*In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	Nevada class certified
	In re Static Random Access Memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 617-22 (N.D. Cal. 2009)	Memory chips	Multi-state classes certified, including Nevada
	In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 608-13 (N.D. Cal. 2010), *amended in part*, 2011 WL 3268649 (N.D. Cal. July 28, 2011)	LCD panels	Multi-state classes certified, including Nevada
South Dakota	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004). Exhibit 1.	Estrogen replacement products	South Dakota class certified
	Ferrell v. Wyeth-Ayerst Labs., No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005). Exhibit 2.	Estrogen replacement products	South Dakota class certified
	Hagemann v. Abbott Labs., Inc., No. 94-221, Order Granting Class Certification (S.D. Cir. Ct., Hughes Cnty. Nov. 21, 1995). Exhibit 11.	Infant formula	South Dakota class certified
	In re S.D. Microsoft Antitrust Litig., 657 N.W.2d 668, 672 (S.D. 2003)	Computer software	Certification of South Dakota class affirmed

STATE	CASE AUTHORITY	PRODUCT INVOLVED	RULING
	In re Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	South Dakota class certified
	Robinson v. EMI Music Dist., Inc., No. L-10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including South Dakota
	In re Static Random Access Memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 617-22 (N.D. Cal. 2009)	Memory chips	Multi-state classes certified, including South Dakota
	In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 608-13 (N.D. Cal. 2010), *amended in part*, 2011 WL 3268649 (N.D. Cal. July 28, 2011)	LCD panels	Multi-state classes certified, including South Dakota