Docket No. 15-2789

In the United States Court of Appeals
For the Eighth Circuit

MORGAN-LARSON, LLC; JOHNSON AUTO ELECTRIC, INC.; SPEED STOP 32, INC.; and YOCUM OIL COMPANY, INC.

Plaintiffs-Appellants,

v.

FERRELLGAS PARTNERS, L.P., A LIMITED PARTNERSHIP; FERRELLGAS, L.P., A LIMITED PARTNERSHIP, DOING BUSINESS AS BLUE RHINO; AMERIGAS PARTNERS, L.P., A LIMITED PARTNERSHIP; UGI CORPORATION; AMERIGAS PROPANE, INC., DOING BUSINESS AS AMERIGAS CYLINDER EXCHANGE; and AMERIGAS PROPANE, L.P.

Defendants-Appellees.

Appeal from a Decision and Judgment of the United States District Court for the Western District of Missouri, No. 4:14-MD-2567-GAF
Honorable Gary A. Fenner

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SUMMARY OF CASE

This appeal involves Plaintiffs' challenge to conduct they were fully aware of in 2008, but which they did not contest until 2014, well beyond the applicable four-year statute of limitations. In 2008, both Defendants independently decided to reduce the fill level in their propane exchange tanks from 17 pounds to 15 pounds. Plaintiffs allege that Defendants' fill reductions, without corresponding price decreases, amounted to a price-fixing conspiracy in violation of Section 1 of the Sherman Act. The District Court properly held that Plaintiffs' claim was time barred under the Sherman Act's four-year statute of limitations. Plaintiffs now assert that the alleged conspiracy initiated in 2008 continues today, solely because Defendants continue to sell 15-pound propane exchange tanks. Accepting Plaintiffs' argument would expand the continuing violations doctrine and render the statute of limitations meaningless in price-fixing cases. The District Court accordingly rejected this argument. It held both that mere allegations of continued sales of 15-pound propane exchange tanks, without ongoing price coordination or price increases, and Plaintiffs' threadbare allegations of overt acts within the limitations period, which at most reaffirmed the alleged agreement, were insufficient under Eighth Circuit precedent to establish a continuing violation.

Defendants respectfully request 30 minutes of oral argument.

CORPORATE DISCLOSURE STATEMENT

Appellees Ferrellgas Partners, L.P. and Ferrellgas, L.P., also doing business as Blue Rhino (collectively "Ferrellgas"), certify pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Local Rule 26.1A that Ferrellgas, L.P. is a limited partnership owned by Ferrellgas Partners, L.P., which is a publicly-traded Master Limited Partnership. Ferrellgas, Inc. is a 1% owner of each of those entities. No other publicly-held corporation owns 10% or more of the Appellees' stock. Ferrellgas has no other affiliates that have issued shares to the public.

Appellees AmeriGas Partners, L.P. ("AmeriGas"), AmeriGas Propane, L.P., AmeriGas Propane, Inc., and UGI Corporation, certify pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Local Rule 26.1A that AmeriGas is a publicly-traded limited partnership that conducts its business principally through its subsidiary, AmeriGas Propane, L.P. (the "Operating Partnership"), a Delaware limited partnership. AmeriGas Propane, Inc. (the "General Partner") is the general partner of AmeriGas and of the Operating Partnership and is responsible for managing operations. The General Partner is a wholly-owned subsidiary of AmeriGas, Inc., which is a wholly-owned subsidiary of UGI Corporation, a publicly traded company. UGI has no parent corporation and no corporation owns 10% or more of UGI's stock as of September 30, 2015. The General Partner, together with its wholly-owned subsidiary, Petrolane Incorporated, has an

approximate 26% effective ownership interest in AmeriGas. The remaining approximate 74% interest in AmeriGas is owned by the public. AmeriGas Cylinder Exchange is not a separate entity, but is a program which enables consumers to purchase propane cylinders or exchange empty propane cylinders at various retail locations. As a program, AmeriGas Cylinder Exchange has no stock and therefore no corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

I. STATEMENT OF ISSUES

A. Whether the continued sale of consumer products pursuant to an alleged anticompetitive agreement to reduce the size of the product constitutes a continuing violation where Plaintiffs do not allege any ongoing price coordination or price increases within the limitations period. *Varner v. Peterson Farms*, 371 F.3d 1011, 1020 (8th Cir. 2004); *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004); *Insulate SB, Inc. v. Advanced Finishing Sys.*, No. 13-2664, 2014 U.S. Dist. LEXIS 31188, at *23 (D. Minn. Mar. 11, 2014), *aff'd on other grounds*, 797 F.3d 538 (8th Cir. 2015); *Se. Mo. Hosp. v. C.R. Bard, Inc.*, No. 1:07cv0031 TCM, 2008 U.S. Dist. LEXIS 65926, at *12 (E.D. Mo. Aug. 27, 2008).

B. Whether conclusory allegations of communications between Defendants during the limitations period are sufficient to allege an overt act in support of continuing violations absent any allegations that the alleged communications were "new and independent" conduct or were done to "fine-tune" their initial agreement. *Midwestern Mach.*, 392 F.3d at 269; *In re Wholesale Grocery Prods. Antitrust Litig.*, 722 F. Supp. 2d 1079, 1086 (D. Minn. 2010), *aff'd on statute of limitations grounds*, 752 F.3d 728 (8th Cir. 2014); *Little Rock Cardiology Clinic, P.A. v. Baptist Health*, 573 F. Supp. 2d 1125, 1134 (E.D. Ark. 2008); *Insulate SB*, 2014 U.S. Dist. LEXIS 31188, at *22.

C. Whether vague and conclusory allegations of a continuing violation without concrete allegations relating to ongoing collusion or parallel pricing can satisfy the *Twombly* plausibility standard. *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007); *Varner*, 371 F.3d at 1020; *Insulate SB*, 2014 U.S. Dist. LEXIS 31188, at *18-24.

II. STATEMENT OF THE CASE

Direct Purchaser Plaintiffs' ("Plaintiffs") Consolidated Amended Complaint ("CAC") alleges a price-fixing conspiracy that occurred in 2008, almost six years before Plaintiffs filed this lawsuit and well beyond the applicable four-year statute of limitations for federal antitrust claims. Plaintiffs' allegations in the current lawsuit are almost entirely recycled from an earlier class action brought in 2009, and settled shortly thereafter, and an FTC complaint filed against Defendants in March 2014. The alleged conspiracy is based on Blue Rhino's unilateral decision in 2008 to reduce the volume of propane in its tanks from 17 pounds to 15 pounds, in light of a substantial increase in costs, and AmeriGas's independent decision to follow Blue Rhino's lead and reduce the fill level in its tanks.

A. Propane Exchange Tanks

Propane exchange tanks are portable steel cylinders pre-filled with propane gas. CAC ¶¶ 2, 38-41 (JA0132, JA0139-40). Defendants sell these tanks directly to retailers, such as Plaintiffs, including gas stations, convenience stores, hardware

stores, grocery stores, and big-box retailers. *Id.* ¶¶ 2, 44-45 (JA0132, JA0141). Defendants market their propane exchange tanks through these retailers, who in turn sell them to consumers or charge consumers to exchange a near-empty tank for a pre-filled tank. *Id.* ¶ 2 (JA0132).

B. *In re Propane I*

In mid-2009, indirect purchasers of propane exchange tanks filed class action complaints in several states alleging that Defendants' 2008 decision to reduce the amount of propane in their exchange tanks from 17 pounds to 15 pounds violated various state consumer protection and antitrust laws. From May to September 2009, eighteen separate class action lawsuits were filed on behalf of indirect purchasers against Ferrellgas and AmeriGas based on their independent decisions in 2008 to reduce their propane exchange tank fill levels.[1]

On October 6, 2009, the Judicial Panel on Multidistrict Litigation ("JPML") consolidated five of these actions in the Western District of Missouri as part of *In re Propane I*, and the cases were assigned to Honorable Gary A. Fenner, United

[1] Although Defendants believe the *In re Propane I* class included only indirect purchasers, Plaintiffs have argued that the earlier lawsuits were brought on behalf of direct and indirect purchasers. *See* CAC ¶ 103 (JA0153) ("The proposed class was not limited to indirect purchasers"). Pls.' Opp. to Mot. to Dismiss at 5 (JA0260) ("The proposed class in *In re Propane I* included direct purchasers").

States District Court Judge.[2] Thirteen additional related actions were transferred and consolidated into *In re Propane I* shortly thereafter. On February 22, 2010, the *In re Propane I* plaintiffs filed a Consolidated Class Action Complaint against Ferrellgas for its 2008 fill reduction (AmeriGas had settled in principle with the plaintiffs by this time and thus was not a named defendant).

Like the current lawsuit, plaintiffs in *In re Propane I* alleged that Defendants conspired in the summer of 2008 to increase the price of their propane exchange tanks by reducing the amount of propane in their tanks from 17 pounds to 15 pounds without a corresponding price decrease.[3] Both AmeriGas and Ferrellgas entered into settlement agreements with the *In re Propane I* indirect purchaser plaintiffs and, in exchange for the payment of claims to plaintiffs and substantial attorneys' fees, the plaintiffs agreed to a broad release of claims.

C. FTC Administrative Action

On March 27, 2014, the FTC issued an administrative complaint alleging that Ferrellgas and AmeriGas agreed in 2008 to pressure their common customer, Walmart Stores, Inc., to accept a propane exchange tank fill reduction from 17 to 15 pounds. *See In the Matter of AmeriGas and Blue Rhino*, FTC Docket No. 9360

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[2] Transfer Order, *In re Propane I*, No. 4:09-md-02086 (W.D. Mo. Oct. 6, 2009), ECF No. 2.

[3] *See* Consolidated Class Action Compl., *In re Propane I*, No. 4:09-md-02086 (W.D. Mo. Feb. 22, 2010), ECF No. 79.

(Mar. 27, 2014). Notably, the FTC complaint sought no monetary fine and did not allege that AmeriGas and Ferrellgas's initial decisions to reduce the fill levels in their tanks were the result of an illegal agreement.[4] The FTC complaint did not allege that Defendants ever fixed the prices at which their propane exchange tanks were sold or that Defendants engaged in any anticompetitive conduct beyond 2008. Defendants settled with the FTC without admitting liability, and in January 2015, the FTC issued its Decision and Consent Orders.

D. *In re Propane II*

Shortly after the FTC complaint was filed, and more than four years after the filing of the consolidated complaint in the earlier MDL, plaintiffs across the country filed thirty-seven follow-on civil class action lawsuits against Ferrellgas and AmeriGas on behalf of putative classes of both direct and indirect purchasers of propane exchange tanks. The JPML transferred all thirty-seven actions to the

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[4] *See* Statement of Chairwoman Edith Ramirez and Commissioner Julie Brill at 1, *In the Matter of AmeriGas and Blue Rhino*, FTC Docket No. 9360 (Oct. 31, 2014) ("The Commission's Complaint does not allege that the Respondents' initial decisions to reduce fill levels to 15 pounds were the result of an agreement."); Dissenting Statement of Commissioner Maureen K. Ohlhausen at 1-2, *In the Matter of AmeriGas and Blue Rhino*, FTC Docket No. 9360 (Oct. 31, 2014) ("[T]he majority's treatment of the alleged conduct as *per se* unlawful depends on an unfounded assertion that the parties agreed to keep their prices fixed. . . . [T]he complaint in this matter did not allege an agreement between AmeriGas and Blue Rhino to keep their respective prices to Walmart constant. There was no allegation in the complaint that the parties agreed in any way on the pricing of the lesser-filled propane tanks.").

Western District of Missouri for consolidated proceedings, and the case was assigned to Judge Fenner who presided over the initial MDL, *In re Propane I*. (JA0082).

The current Plaintiffs filed their Consolidated Amended Complaint on January 29, 2015. The CAC rehashes the allegations made in the earlier MDL: that Ferrellgas and AmeriGas conspired in 2008 to reduce the amount of propane in their exchange tanks from 17 pounds to 15 pounds in violation of Section 1 of the Sherman Act. CAC ¶¶ 7, 57-68 (JA0133, JA0144-47). Plaintiffs allege that "faced [with] rapidly increasing input costs, including increases in the cost of propane, steel for the tanks, and the diesel fuel for the delivery trucks," Defendants began conspiring in 2008 to decrease the fill levels in their propane exchange tanks. *Id.* ¶¶ 50-51 (JA0142-43). According to the CAC, Blue Rhino informed Walmart in April 2008 that it "intended to reduce its fill level," *id.* ¶ 56 (JA0144), and then informed AmeriGas of its decision to move to 15 pounds during a May 23, 2008 meeting. *Id.* ¶ 58 (JA0144-45). Plaintiffs further allege that "[n]o later than the last week of June 2008," Defendants had agreed to reduce the amount of propane in their exchange cylinders from 17 pounds to 15 pounds. *Id.* ¶ 66 (JA0146).

The CAC also copies the allegations from the FTC complaint that Defendants pressured their common customer Walmart to accept the fill reduction

in 2008. *Id.* ¶¶ 10, 69-89 (JA0133-34, JA0147-50). Plaintiffs allege that AmeriGas and Blue Rhino believed they could not sustain their respective fill reductions unless the reductions were accepted by Walmart. *Id.* ¶ 69 (JA0147). Although Walmart is "the largest retailer of propane exchange tanks in the United States," *id.* ¶ 54 (JA0143), Plaintiffs allege that "Defendants' combined efforts succeeded in forcing Walmart" to accept the fill reduction on October 10, 2008. *Id.* ¶¶ 87-88 (JA0150).

Absent from the CAC, however, are any allegations that: (1) Defendants ever agreed to the price at which they would sell their propane; (2) Defendants' prices ever mirrored one another; or (3) Defendants (either collectively or individually) ever increased the prices of their propane exchange tanks after 2008.

E. Procedural History

On March 30, 2015, Defendants moved to dismiss the CAC. Joint Mot. to Dismiss the Direct Purchaser Pls.' Consol. Am. Compl., ECF No. 137 (JA0196). On July 2, 2015, the District Court issued an order granting Defendants' motion and dismissed the CAC. Order Granting Mot. to Dismiss ("Order"), ECF No. 162 (JA0333). The District Court found that Plaintiffs' Sherman Act claim accrued in August 2008 and "absent any tolling theories, the statute of limitations expired on August 1, 2012, almost two years before the first claim was filed in this case." *Id.* at 7 (JA0338). The District Court held that Plaintiffs' Sherman Act claim was

therefore time barred by the four-year statute of limitations and that Plaintiffs had not adequately alleged a continuing violation to toll the statute. In doing so, the court held that: (1) mere allegations of continued sales by Defendants were insufficient to restart the limitations period; and (2) Plaintiffs' other allegations of conduct within the limitations period amounted to reaffirmations of the earlier alleged agreement and did not constitute an overt act. *Id*. at 7-14 (JA0339-46). On July 21, 2015, the District Court entered a judgment dismissing the case. (JA0358).

III. SUMMARY OF ARGUMENT

The issue in this case is whether a one-time reduction in product size, without any allegations of subsequent price coordination, price increases, or parallel pricing, creates antitrust liability in perpetuity. Eighth Circuit case law—and common sense—dictate that the answer is no.

The District Court correctly concluded that mere continued sales of a product pursuant to an alleged anticompetitive agreement are insufficient to establish a continuing violation. Order at 11 (JA0343). This is consistent with over a decade of controlling Eighth Circuit case law that has explicitly held that continued performance of an alleged anticompetitive agreement is insufficient to restart the limitations period under the antitrust laws. *See Varner*, 371 F.3d at 1020 ("Performance of the alleged anticompetitive contracts during the limitations

period is not sufficient to restart the period."); *Midwestern Mach.*, 392 F.3d at 269 ("The typical antitrust continuing violation occurs in a price-fixing conspiracy, actionable under § 1 of the Sherman Act, when conspirators continue to meet to fine-tune their cartel agreement."). Plaintiffs cannot point to a single Eighth Circuit case that has held that mere continued sales pursuant to an alleged anticompetitive agreement constitute a continuing violation. Plaintiffs' appeal nevertheless requests that this Court not only reverse the District Court decision, but also reverse a decade of Eighth Circuit case law on continuing violations.

Moreover, Plaintiffs' interpretation of the continuing violations doctrine is untenable. Under Plaintiffs' view, a purchaser of a 15-pound tank ten, twenty, or one hundred years from now would have a timely cause of action for a one-time price increase in 2008. Such an extreme interpretation not only runs contrary to the four-year limitations period specified for Sherman Act claims and to the concept of repose, it is unnecessary for the effective enforcement of the antitrust laws. As the District Court recognized, there is no compelling reason to allow the doctrine of continuing violations to nullify the statute of limitations in all price-fixing cases. Order at 11(JA0343) ("To hold otherwise . . . would make such a defendant indefinitely subject to suit and would undermine the policies behind the statutes of limitation which insure the defense is [not] hampered by lost evidence,

faded memories, . . . disappearing witnesses, and . . . unfair surprise.") (citations and quotations omitted) (modifications in original).

Further, the District Court correctly held that Plaintiffs' vague allegations of communications between Defendants were insufficient to restart the limitations period. *Id.* at 11-14 (JA0343-46). In the Eighth Circuit, mere reaffirmations of an earlier alleged illegal agreement do not constitute an overt act for purposes of alleging a continuing violation and restarting the limitations period. *See Varner*, 371 F.3d at 1019 (an overt act must not be "merely a reaffirmation of a previous act"). Rather, a continuing violation is only established where a plaintiff alleges that defendants continued to meet to "fine-tune" their earlier alleged anticompetitive agreement. *See Midwestern Mach.*, 392 F.3d at 269. Plaintiffs' allegations fall well short of this standard and the District Court concluded that Plaintiffs' allegations of ongoing conduct amounted to mere reaffirmations of the alleged 2008 agreement between Defendants. Order at 11-14 (JA0343-46).

Finally, all of Plaintiffs' allegations of overt acts in support of their continuing violations theory are impermissibly vague and conclusory under *Twombly* and *Iqbal*. *See Twombly*, 550 U.S. at 555-57; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 603-04 (6th Cir. 2014) (applying *Twombly* to continuing violations allegations and affirming dismissal where factual allegations of continuing violations did not rise

above a "speculative level"). The statute of limitations is not tolled where a plaintiff "fail[s] to plead sufficient facts" to establish a continuing violation. *Varner*, 371 F.3d at 1020 (affirming dismissal). Plaintiffs' conclusory continuing violations allegations are inadequate under this settled standard.

The District Court's decision is consistent with Eighth Circuit precedent and with the policies supporting the Sherman Act's four-year limitations period. Defendants respectfully request that this Court affirm the District Court's decision that Plaintiffs failed to allege a continuing violation and that their claim is time barred.

IV. ARGUMENT

A. Standard of Review

The Eighth Circuit "review[s] de novo a district court's grant of a motion to dismiss, applying the same standards as the district court." *Varner*, 371 F.3d at 1016. "[A] motion to dismiss may be granted when a claim is barred under a statute of limitations." *Id*. "[W]hen it appears from the face of the complaint itself that the limitation period has run, a limitations defense may properly be asserted through a Rule 12(b)(6) motion to dismiss." *Id.* (quotations omitted). In assessing a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation" and "[t]hreadbare recitals of the elements of a

cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555-57.

Recently, this Court described the need to "weed[] out" unmeritorious antitrust cases at the pleading stage. *See Insulate SB, Inc. v. Advanced Finishing Sys.*, 797 F.3d 538, 543 (8th Cir. 2015) ("Given the unusually high cost of discovery in antitrust cases the limited success of judicial supervision in checking discovery abuse[,] and the threat [that] discovery expense will push cost-conscious defendants to settle even anemic cases . . . , the federal courts have been reasonably aggressive in weeding out meritless antitrust claims at the pleading stage.") (citations and quotations omitted) (modifications in original).

B. The District Court Properly Concluded that Allegations of Continued Sales After a One-Time Reduction in Product Size Do Not Constitute Overt Acts.

Consistent with Eighth Circuit precedent, the District Court held that mere allegations of continued sales of 15-pound tanks were insufficient to invoke the doctrine of continuing violations. Order at 7-11 (JA0339-343). Despite Plaintiffs' attempts to rewrite the CAC in their Opening Brief, the CAC alleges only a one-time price increase, through a reduction in propane fill levels, in 2008. CAC ¶¶ 7, 57-68 (JA0133, JA0144-47). Plaintiffs allege that Defendants entered into a conspiracy in 2008 to reduce the fill levels in their tanks without a corresponding price decrease and that "[b]y October 2008, the propane conspiracy succeeded."

CAC ¶ 10 (JA0133-34). Plaintiffs do not allege that Defendants' tank prices remained stable throughout the class period, nor do they allege that Defendants' prices tracked one another or were coordinated after the initial fill reduction. In fact, Plaintiffs do not allege anything about the price of Defendants' tanks into the limitations period other than to vaguely assert that Defendants sold 15-pound tanks at prices that were "supracompetitive" or "inflated." *See* CAC at ¶¶ 13, 17-21, 108, 121, 122 (JA0134, JA0135-36, JA0154, JA0157).[5] Thus, Plaintiffs allege only a single price increase via a fill reduction and continued sales of tanks at the reduced fill level—without alleging *any* coordination on pricing.

As the District Court recognized, the issue presented here is whether continuing to sell at a fixed volume, pursuant to an alleged anticompetitive agreement, at a non-collusive price, is sufficient to allege an overt act under the continuing violations doctrine. Under Eighth Circuit precedent, the answer is no.

To invoke continuing violations, "an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." *Varner*, 371 F.3d at 1019. "An overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff." *Id.* Every court in the

[5] These allegations of "supra competitive" or "inflated" prices are conclusory and should be disregarded under *Twombly* and *Iqbal*. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555-57.

Eighth Circuit to confront the issue has held that mere continued sales pursuant to an alleged anticompetitive agreement do not constitute an overt act in support of continuing violations.

In *Varner*, plaintiffs alleged that their contracts with defendants amounted to unlawful "tying arrangements." 371 F.3d at 1020. While these tying arrangements were entered into outside the limitations period, plaintiffs argued that defendants' performance of these contracts within the limitations period constituted overt acts sufficient to restart the limitations period. *Id.* Namely, plaintiffs alleged that they continued within the limitations period to purchase from defendants pursuant to the allegedly anticompetitive arrangement. *Id*. at 1019-20. The Eighth Circuit affirmed dismissal on statute of limitations grounds and held that plaintiffs had failed to plead any overt acts within the limitations period. The Court stated, "[p]erformance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period." *Id*.

The two district court cases from within the Eighth Circuit to address this issue have also held that continued sales pursuant to an anticompetitive agreement do not constitute a continuing violation. Most recently, in *Insulate SB, Inc. v. Advanced Finishing Systems*, the District of Minnesota addressed and rejected the same argument that Plaintiffs expound here. 2014 U.S. Dist. LEXIS 31188, at *18-24 (D. Minn. Mar. 11, 2014). Like the present case, the *Insulate SB* plaintiffs

alleged price fixing under Section 1 of the Sherman Act, but failed to identify any overt acts by defendants to restart the limitations period. *Id.* at *21-24. The *Insulate SB* court stated: "[T]he Eighth Circuit has observed that an antitrust continuing violation occurs in a price-fixing conspiracy . . . when conspirators continue to meet to fine-tune their cartel agreement." *Id.* at *22 (quotations omitted). The court dismissed the price-fixing claim as untimely and held, as this Court should, that "[w]here a defendant's continued sales under an anticompetitive arrangement merely enforces the initial, unabated arrangement, the sales do not constitute a continuing violation." *Id*. at *23.

In 2008, the Eastern District of Missouri addressed a situation similar to *Varner* in *Southeast Missouri Hospital v. C.R. Bard, Inc*., No. 1:07cv0031 TCM, 2008 U.S. Dist. LEXIS 65926, at *12 (E.D. Mo. Aug. 27, 2008). In *Southeast Missouri Hospital*, plaintiffs alleged that defendant violated Section 1 of the Sherman Act by entering into anticompetitive exclusionary dealing contracts and tying agreements within the market for urological catheters. *Id*. at *3. Plaintiffs alleged "that each sale of the urological catheters at unlawful prices and each unknowing remittance for payment are continuing violations." *Id.* at *11. The court disagreed, holding:

> Sales of a product pursuant to an allegedly illegal arrangement are not new, overt acts, nor is the act of remitting payment for such sales a new, overt act. To hold otherwise would effectively abrogate the statute of

> limitations in situations such as the one now at issue because each sale of a product pursuant to the underlying agreement would start the statute of limitations running anew.

Id. at *12. *Varner*, *Insulate SB*, and *Southeast Missouri Hospital* are directly analogous to the present case, and support the District Court's dismissal of Plaintiffs' claim. The District Court properly concluded that under Eighth Circuit case law, the continued sale of 15-pound tanks does not constitute a continuing violation, and correctly dismissed Plaintiffs' time-barred Sherman Act claim.

Plaintiffs' limited efforts to distinguish these cases fail. Plaintiffs attempt to distinguish *Varner* by bizarrely emphasizing that the anticompetitive agreement at issue in *Varner* was a formal written contract rather than the ill-defined "secret" agreement that Plaintiffs allege here. Opening Br. at 32. This is a distinction without legal significance. It is unclear why *Varner's* holding should be limited to instances where the alleged anticompetitive agreement is reduced to writing. Nothing in the *Varner* opinion supports this contention, and Defendants are unaware of any case law interpreting *Varner* in this manner.

Plaintiffs' attempts to distinguish *Southeast Missouri Hospital* are equally puzzling. First, Plaintiffs appear to argue that *Southeast Missouri Hospital* stands for the proposition that the overt act requirement applies differently depending on whether the conduct alleged is conspiratorial or non-conspiratorial. *See* Opening Br. at 24 ("[T]o apply the continuing violation theory to *non-conspiratorial*

conduct, new overt acts must be more than the initial unabated inertial consequences of the initial violation") (emphasis in original). Reading *Southeast Missouri Hospital* in this manner ignores that that case involved conspiratorial conduct, yet applied the same continuing violations framework used in *Varner*.[6]

Second, Plaintiffs contend that *Southeast Missouri Hospital* endorses their position because the Magistrate Judge permitted "plaintiffs to proceed on their claim for damages incurred within the limitations period." Opening Br. at 25. Plaintiffs' interpretation is incorrect. Instead, the court dismissed all claims for damages that ***accrued*** outside the limitations period and permitted only plaintiffs' claims for damages that ***accrued*** within the limitations period. *See Se. Mo. Hosp.*, 2008 U.S. Dist. LEXIS 65926, at *6, *15 (granting, in part, defendants' motion "to strike any claim for damages that accrued earlier than February 2003 on statute of limitation grounds.").[7] In the present case, Plaintiffs have *no* claims that accrued

[6] Defendants are unaware of any Eighth Circuit case law supporting Plaintiffs' contention that the continuing violations framework varies depending on the type of Sherman Act violation alleged. In fact, cases from the Eighth Circuit apply the same framework regardless of the nature of the Sherman Act violation alleged. *See, e.g., Varner*, 371 F.3d at 1019 (a finding of continuing violations in tying claim requires "new and independent act" that "inflict[s] new and accumulating injury"); *Insulate SB*, 2014 U.S. Dist. LEXIS 31188, at *18-19 (same for price-fixing claim); *Little Rock Cardiology Clinic, P.A.*, 573 F. Supp. 2d at 1136 (same for refusal to deal claim).

[7] *See also* Pls.' Am. Class Definitions and Stipulations at 2, *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 1:07cv0031 TCM (E.D. Mo. Oct. 6, 2008), ECF No. 211 ("[I]n accordance with the Court's previous ruling that plaintiffs may not assert any

within the limitations period. *See* Order at 7 (JA0339) (stating that Plaintiffs' claims accrued August 1, 2008 and that absent tolling, the limitations period expired in 2012). Thus, consistent with *Southeast Missouri Hospital*, Plaintiffs' only claim (which accrued in August 2008) is time barred.

Plaintiffs do not cite a single opinion from within the Eighth Circuit that interprets the continuing violations doctrine in the manner they advocate. Plaintiffs argue that "the district court's decision departs from decades of controlling precedent holding that each sale at a supra-competitive price pursuant to a horizontal price-fixing conspiracy is an overt act." Opening Br. at 10. It is telling, however, that one of the two cases that Plaintiffs cite for this proposition is not even an antitrust case, and neither case actually held that mere continued sales amounted to an overt act. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997); *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 736 (8th Cir. 2014).

Plaintiffs rely primarily on *Klehr*, which never held that continuing sales constitute a continuing violation. 521 U.S. 179. The District Court correctly noted that *Klehr* was a civil RICO case, not an antitrust case. Order at 8-9 (JA0340-41). In *Klehr*, plaintiffs alleged that the defendants had engaged in mail and wire fraud in violation of RICO and sought damages twenty years after the alleged violations

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claims earlier than February 21, 2003, Order at 8, the class period has been revised to begin on this date.").

occurred. 521 U.S. at 183-84. As explained by the District Court, the purpose of the language quoted by Plaintiffs was to explain that, unlike the last predicate act rule, "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Id.* at 189; Order at 9 (JA0341) ("Thus, *Klehr* never ruled that each time a sale is made at a steady supra-competitive price, the overt act requirement of the continuing violations theory in the context of an alleged price fixing conspiracy is met."). Thus, *Klehr* is not dispositive of the issue presented here.

Further, no court within the Eighth Circuit has interpreted *Klehr* in the manner that Plaintiffs advocate. In fact, several cases that cite to *Klehr* have restated the proposition that "The typical antitrust continuing violation occurs in a price-fixing conspiracy, actionable under § 1 of the Sherman Act . . . when conspirators continue to meet to fine-tune their cartel agreement." *See, e.g.*, *Midwestern Mach.*, 392 F.3d at 269 (citing *Klehr* for the proposition that "each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.") (modifications in original); s*ee also Insulate SB*, 2014 U.S. Dist. LEXIS 31188, at *22 (citing *Klehr*, but dismissing complaint as time barred because it lacked "any factual allegation that the [] Defendants met or communicated for the purpose of 'fine-tuning' or furthering the

objectives of their alleged price-fixing conspiracy."); *Se. Mo. Hosp.*, 2008 U.S. Dist. LEXIS 65926, at *12 (citing *Klehr*, but noting, "[s]ales of a product pursuant to an allegedly illegal arrangement are not new, overt acts"). Notably, the district court in *Wholesale Grocery* also cited *Klehr*, but stated: "The typical antitrust continuing violation occurs in a price-fixing conspiracy . . . when conspirators continue to meet to fine-tune their cartel agreement." 722 F. Supp. 2d at 1086. Plaintiffs' interpretation of *Klehr* cannot be reconciled with subsequent Eighth Circuit case law and should be rejected.[8]

Plaintiffs' other primary case, *Wholesale Grocery*, also never held that mere sales pursuant to an anticompetitive agreement constitute an overt act in support of continuing violations. In *Wholesale Grocery*, plaintiff alleged a market allocation conspiracy that was formed outside the limitations period. 752 F.3d at 736. The overt act in *Wholesale Grocery* was defendants' price increase within the limitations period. *Id.* at 731 (during limitations period, plaintiff's "fees increased

[8] The Supreme Court in *Klehr* actually expressed concern with lengthening the statute of limitations in RICO cases. 521 U.S. at 187. In fact, the *Klehr* Court rejected an alternate interpretation of the accrual rules in RICO cases that would "lengthen[] the limitations period dramatically." *Id*. (stating that such a reading "conflicts with a basic objective – repose – that underlies limitations periods."). The Court noted that the adoption of permissive limitations rules "would permit plaintiffs who know of the defendant's pattern of activity simply to wait, sleeping on their rights, as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the memories of witnesses have faded or evidence is lost." *Id.*

thirty basis points."). This was stated explicitly by the district court opinion from *Wholesale Grocery*:

> Thus, the alleged charging of supra-competitive prices amounts to more than the mere reaffirmation of the prior market/customer allocation. Closing the exchanged facilities effectuated the alleged allocation conspiracy; charging supra-competitive prices, however, is not effectuated if and until Defendants raise their prices.

Wholesale Grocery, 722 F. Supp. 2d at 1087.[9] Thus, *Wholesale Grocery* does not stand for the proposition that continued sales pursuant to an alleged price-fixing conspiracy, standing alone, constitute an overt act.

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[9] Many of the out-of-circuit cases Plaintiffs cite support this reading as they involved allegations of subsequent price increases or other acts during the limitations period, rather than just allegations of continued sales. *See Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029, 1035 (5th Cir. 1977) (alleging that "*increases* in the amount of the rent" occurred within limitations period); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 526 (D.N.J. 2004) (plaintiffs provided allegations regarding how an earlier anticompetitive agreement permitted defendants to "continue *to set* artificially high prices" within the limitations period); *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2000 U.S. Dist. LEXIS 14433, at *19-21 (E.D. Pa. Oct. 5, 2000) (various plaintiffs alleged "many details of the conspiracy" along with "a series of price increases," which were "joined by virtually every major manufacturer," "at least seven such coordinated price increases," that defendants "had communications with each other . . . during which they agreed to implement and coordinate price increases" and "fixing, [and] raising" prices during class period and complaints filed within four years of class period.); Compl. ¶¶ 60-94, *In re Aspartame Antitrust Litig.*, 2:06-CV-1732 (E.D. Pa. June 30, 2006), ECF No. 19 (alleging that price of aspartame tripled within limitations period despite increase in global supply, and including detailed allegations that defendants met and communicated regarding price and volume, sold at agreed prices, signaled price increases by offering simultaneous price quotations, and moved prices in lock-step).

In stark contrast to *Wholesale Grocery*, where the later price increase within the limitations period was a "new and independent" act that was distinct from the underlying agreement to allocate markets, Plaintiffs argue that the sale of 15-pound tanks constitutes both the original conspiracy and the overt act. The continued sale of 15-pound tanks, however, cannot be a "new and independent act" when such sales formed the basis of the alleged underlying agreement itself. *See Varner*, 371 F.3d at 1020 ("Performance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period."). Thus, unlike the price increase in *Wholesale Grocery*, the continued sale of 15-pound tanks in the present case is "merely a reaffirmation of a previous act," which does not toll the statute of limitations. *See id*. at 1019.

Plaintiffs next argue that "this Court's opinion in *Wholesale Grocery* was not based on a price *elevation*, but based on the infliction of a *new injury* during the limitations period by charging inflated prices." Opening Br. at 20 (emphasis in original). This contention is at odds with the Eighth Circuit's instruction that an overt act has two distinct requirements: (1) it must be "a new and independent act" *and* (2) "it must inflict new and accumulating injury on the plaintiff." *See Varner*, 371 F.3d 1019. The holding in *Wholesale Grocery* was based on plaintiff's allegations of: (1) a new and independent act (*i.e*., a coordinated price increase within the limitations period); and (2) new injury (*i.e*., beginning to pay increased

prices within the limitations period). Thus, *Wholesale Grocery* does not stand for the proposition that new injury within the limitations period, on its own, constitutes a continuing violation.

Furthermore, Plaintiffs have failed to allege any new injury within the limitations period. The continued sales of products under an anticompetitive agreement, without more, do not constitute a new and accumulating injury because "a customer's injury resulting from a price-fixing agreement occurs when the defendants begin to charge supra-competitive prices." *See Insulate SB*, 2014 U.S. Dist. LEXIS 31188, at *22; *Wholesale Grocery*, 722 F. Supp. 2d at 1088 ("[A]ny injury to Plaintiffs occurred when Defendants began to charge supra-competitive prices."). Thus, a continuing violation is not found where—as here—a plaintiff alleges a single price increase outside the limitations period, but continued sales within the limitations period.

The only other Eighth Circuit case Plaintiffs cite is a thirty-year-old criminal case. Opening Br. at 22 (citing *U.S. v. N. Improv.* Co., 814 F.2d 540 (8th Cir. 1987)). This case does not support Plaintiffs' argument because the continuing violations analysis in *Northern Improvement* is limited to criminal conspiracies and does not apply to civil antitrust cases. *Id.* at 542. ("[A] *criminal conspiracy* once formed continues until the object of it has been accomplished unless abandoned short of an overt act, or broken up by the arrest of the participants.") (emphasis

added); s*ee also In re Ciprofloxacin Hydrochloride Antitrust Litig*., 261 F. Supp. 2d 188, 227 (E.D.N.Y. 2003) (stating that continuing violations in criminal context are distinct from civil context and noting: "Policy considerations justify different treatment."). Even if this criminal analysis applied to civil claims—which it does not—*Northern Improvement* cannot help Plaintiffs because they allege that Defendants accomplished the goals of their alleged conspiracy in October 2008.[10] *See* CAC ¶ 88 (JA0150) (alleging that in October 2008, "Defendants' combined efforts succeeded in forcing Walmart and the rest of their retail customers to accept 15-pound Filled Propane Exchange Tanks at what had previously been 17-pound prices."). Thus, *Northern Improvement* does not support Plaintiffs' argument.

Without any Eighth Circuit cases to support their position, Plaintiffs rely heavily on out-of-circuit case law.[11] Notably, Plaintiffs cite a number of cases

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[10] In the criminal conspiracy context, moreover, a recent Second Circuit decision has limited the concept of the overt act under the continuing violation theory and has held that routine payments pursuant to an ordinary commercial arrangement over an indefinite period of time or the receipt of such payments, without more, cannot revive otherwise time-barred offenses. *See U.S. v. Grimm*, 738 F.3d 498, 502-503 (2d Cir. 2013) ("[W]hen anticipated economic benefit continues in a regular and ordinary course, well beyond the period when the unique threats to society posted by a conspiracy are present, the advantageous interest payment is the result of a completed conspiracy, and is not in furtherance of one that is ongoing" and is therefore not an "overt act").

[11] Defendants recognize that other circuits to confront the issue have held or issued dictum that allegations of continued sales can be sufficient to plead a continuing violation. These decisions, however, were reached in contexts significantly different from that presented here. *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d

from the Third Circuit to support their argument that continued sales by Defendants amount to a continuing violation. *See Meijer, Inc. v. 3M*, No. Civ. A. 04-5871, 2005 U.S. Dist. LEXIS 13995, at *11-12 (E.D. Pa. July 13, 2005); *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732, 2007 U.S. Dist. LEXIS 16995, at *8 (E.D. Pa. Jan. 18, 2007); *In re K-Dur Antitrust Litig*., 338 F. Supp. 2d 517, 551 (D.N.J. 2004); *In re Linerboard Antitrust Litig*., No. MDL 1261, 2000 U.S. Dist. LEXIS 14433, at *21 (E.D. Pa. Oct. 4, 2000). These cases are inapposite because the framework for analyzing continuing violations in the Third Circuit is different than the law in the Eighth Circuit. In the Third Circuit, mere reaffirmations are sufficient to constitute overt acts. *See W. Penn Allegheny Health Sys., Inc. v.*

274, 291 (4th Cir. 2007) (holding only that an arbitration agreement with a one-year statute of limitations was enforceable and did not preclude plaintiffs from effectively prosecuting antitrust class action and stating in dictum that new sales can constitute overt acts and that fraudulent concealment could be applicable); *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 828 (11th Cir. 1999) (reversing district court award of summary judgment finding no evidence in the record that defendants unlawfully contrived the prices they charged commercial customers after 1987 because the defendant dairies' 1992 guilty pleas showed that pricing had increased). *See also Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014) (holding that overt acts must be new and independent and not merely a reaffirmation of a previous act, but assuming that new sales were plausibly alleged to have been made under the prior conspiracy and constituted new overt acts). Moreover, even if analogous, each of these cases are incompatible with the Eighth Circuit's holding in *Varner* and, as discussed in Section III.C, are inconsistent with the concept of repose. To the extent that a circuit split exists, Defendants believe that the Eighth Circuit rule as announced in *Varner* is the correct rule and should continue to be followed by this Court. *See Varner*, 371 F.3d at 1020 ("Performance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period.").

UPMC, 627 F.3d 85, 107 (3d Cir. 2010) (holding "plaintiff's suit was timely even though the acts that occurred within the limitations period were reaffirmations of decisions originally made outside the limitations period."). The law from the Third Circuit, however, is directly at odds with the Eighth Circuit's mandate that a mere reaffirmation of prior conduct is not an overt act. *See Varner*, 371 F.3d at 1019; Order at 14 (JA0346) ("Unlike the Third Circuit, the Eighth Circuit has unequivocally held that mere reaffirmations are not overt acts."). Plaintiffs' citation to these Third Circuit cases should therefore be disregarded.

C. The District Court's Holding that Continued Sales Pursuant to an Anticompetitive Agreement Are Insufficient to Invoke Continuing Violations Is Consistent with the Purpose of the Statute of Limitations and the Concept of Repose.

Plaintiffs' interpretation of the continuing violations doctrine would effectively negate the statute of limitations in all price-fixing cases. The District Court correctly held that continued sales pursuant to an alleged anticompetitive agreement do not constitute overt acts, stating:

> To hold otherwise would effectively abrogate the statute of limitations in situations such as the one now at issue because each sale of a product pursuant to the underlying agreement would start the statu[t]e of limitations running anew. This would make such a defendant indefinitely subject to suit and would undermine the policies behind the statutes of limitation which insure the defense is [not] hampered by lost evidence, faded memories, [] disappearing witnesses, and [] unfair surprise.

Order at 11 (JA0343) (citations and quotations omitted).

The District Court's holding is consistent with the policies supporting statutes of limitations generally. The Supreme Court has stated that the "basic policies of all limitations provisions [are]: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000).[12] Each of these basic policies is undermined if Plaintiffs' interpretation of the continuing violations doctrine is adopted. Plaintiffs' position would place companies in the impossible position of defending against stale claims many years after the conduct at issue occurred. Further, plaintiffs' attorneys would be free to bring price-fixing lawsuits based on any prior price increase, no matter how old. This is not the law in the Eighth Circuit. *See Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000) (discussing continuing violations in Clayton Act context: "The abuses which would occur if plaintiffs were permitted to search the history of other firms and challenge at their pleasure any possible violations, no matter how old,

[12] Further, plaintiffs bringing a claim under the Clayton Act are not merely seeking compensation for their own damages, but are also acting as "private attorneys general." *Rotella*, 528 U.S. at 557. Thus, it would "be strange to provide an unusually long basic limitations period that could only have the effect of postponing whatever public benefit [private enforcement] might realize." *Id*. at 558.

seem apparent."). This Court should—as the District Court did—interpret the continuing violations doctrine to allow the statute of limitations to have effect.[13]

Plaintiffs advocate not merely for the expansion of the continuing violations doctrine, but instead argue against a statute of limitations in any case in which a plaintiff can allege ongoing sales. Under Plaintiffs' reading, the exception swallows the rule and the statute of limitations period is effectively nullified in all price-fixing cases. According to Plaintiffs, so long as Defendants continue to sell propane in 15-pound tanks (regardless of the actual price at which those tanks are sold), Defendants will be subject to an ongoing barrage of Sherman Act claims for damages. If this view is adopted, a direct purchaser one hundred years in the future would have a timely claim against Defendants so long as he or she bought a 15-pound tank from Defendants, regardless of price. This is antithetical to the purpose of statutes of limitations and should not be endorsed by this Court.

Further, under Plaintiffs' view, once a parallel price increase is implemented, it is unclear how a Defendant could ever stop the string of never-

[13] Plaintiffs appear to argue that the basic policy considerations supporting a statute of limitations are effectively negated in price-fixing cases because price fixing is *per se* unlawful under the Sherman Act. Opening Br. at 24. This, however, is merely an argument that there should be no statute of limitations for price-fixing claims under the Sherman Act. This is not contemplated by the antitrust laws. Thus, the District Court correctly declined Plaintiffs' invitation to interpret the continuing violations doctrine so expansively as to render the Sherman Act's four-year statute of limitations meaningless in all price-fixing cases.

ending lawsuits short of increasing its fill levels or reducing prices. The practical difficulties of Plaintiffs' position are obvious. For example, what price would no longer constitute an "inflated" price? And if the solution is to raise fill levels, then how much should those 17-pound tanks cost? Unsurprisingly, Plaintiffs' view is that rather than having the market set appropriate prices, plaintiffs' attorneys and courts would effectively set the price at which propane is sold. This is not the appropriate role for the courts. *See Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908) (stating that "the establishment of a rate [*e.g.*, regulation of price] is the making of a rule for the future, and therefore is an act legislative, not judicial in kind").

Ignoring the basic policies underlying statutes of limitations, Plaintiffs attempt to paint the District Court's interpretation of the continuing violations doctrine as some kind of antitrust loophole. Opening Br. at 11. According to Plaintiffs, unless this Court endorses an infinitely expansive version of the continuing violations doctrine, companies will be free to fix prices with impunity. *Id.* Plaintiffs argue, "the rule announced by the district court would allow cartels to decide upon a fixed price, quickly settle any lawsuits by purchasers, and then continue to charge the illegally fixed price indefinitely." *Id*. The history of this case proves otherwise. Defendants have already litigated a massive MDL based on the same purported conspiracy that Plaintiffs now allege. Defendants have also

been subject to an FTC investigation and consent order based on the same conduct alleged here. Yet, according to Plaintiffs, the antitrust laws have somehow failed unless the current Direct Purchaser Plaintiffs are able to bring their claim for damages relating to conduct of which they were aware in 2008.[14] This makes no sense. It is entirely unclear why the expansion of the continuing violations doctrine is necessary to enforce the antitrust laws when: (1) the antitrust laws were already enforced well within the limitations period by the FTC and private plaintiffs; (2) the alleged conspiracy was immediately apparent to the FTC and private plaintiffs, and there are no claims of fraudulent concealment of the alleged conspiracy; and (3) there are no allegations of subsequent price increases or parallel pricing.[15] This lawsuit could have been brought seven years ago and, in

[14] Plaintiffs initially included fraudulent concealment allegations in many of their individual direct purchaser complaints, but sensibly abandoned such claims when they filed the Consolidated Amended Complaint. *Compare* Compl. ¶¶ 98–103, *Speed Stop 32, Inc. v. Ferrellgas, L.P.*, No. 14-cv-02379 (D. Kan. July 30, 2014), ECF No. 1 (alleging fraudulent concealment to toll limitations period); Compl. ¶¶ 82–88, *Zerka's Party Store, Inc.*, No. 14-cv-04193 (W.D. Mo. July 24, 2014), ECF No. 1 (same); Compl. ¶¶ 81–91, *Butch's Central Coastal, Inc.*, No. 14-cv-4190 (W.D. Mo. July 22, 2014), ECF No. 1 (same) *with* CAC ¶¶ 120–32 (JA0157-59) (no fraudulent concealment allegations).

[15] Further, Defendants have never been adjudged guilty of any wrongdoing in connection with their independent decisions to reduce fill levels in 2008.

fact, an almost identical lawsuit ***was*** brought seven years ago.[16] Thus, Plaintiffs' supposed fears of the antitrust laws somehow going unenforced are unfounded.

D. The District Court Properly Concluded that Plaintiffs' Other Allegations of Overt Acts Amounted to Mere Reaffirmations of the Alleged 2008 Agreement and Were Insufficient to Invoke the Continuing Violations Doctrine.

Plaintiffs argue that alleged communications between Defendants, reaffirming the existence of the allegedly illegal agreement, constitute overt acts in support of a continuing violation. This position is inconsistent with Eighth Circuit case law. The Eighth Circuit has held: "An overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff." *Varner*, 371 F.3d at 1019. In the context of a Section 1 price-fixing claim, the continuing violations doctrine does not apply unless the defendants "meet to fine-tune" their conspiracy. *See Midwestern Mach.*, 392 F.3d at 269; *Wholesale Grocery*, 722 F. Supp. 2d at 1086; *Little Rock Cardiology Clinic*, 573 F. Supp. 2d at 1134; *Insulate SB*, 2014 U.S. Dist. LEXIS 31188, at *21-22.

Under this framework, the District Court properly concluded that Plaintiffs' allegations of ongoing conduct were insufficient to plead an overt act. First, the

[16] As noted in Section II.B, Plaintiffs previously argued that direct purchasers were initially included in the *Propane I* class. Thus, a lawsuit could have been brought on behalf of direct purchasers in 2009 and Plaintiffs have argued that it was. *See* Pls.' Opp. to Mot. to Dismiss at 5 (JA0260) ("The proposed class in *In re Propane I* included direct purchasers.").

District Court correctly held that Plaintiffs' allegations amounted to reaffirmations of the alleged 2008 agreement because Plaintiffs failed to allege that the putative conspiracy was ever fine-tuned, abated, or that any additional acts were necessary to perpetuate the agreement. Second, the District Court correctly held that mere communications between Defendants are insufficient to plead a continuing violation.

Plaintiffs' allegations of ongoing activity after the initial 2008 agreement between Defendants are limited primarily to several vague allegations that are repeated throughout the CAC. Although Plaintiffs attempt to re-write the CAC in their Opening Brief, it is important to note what ongoing conduct Plaintiffs actually allege in the CAC:

- Moreover, during calls and meetings with AmeriGas executives occurring at least as late as 2010, Janish repeatedly dismissed concerns that Blue Rhino might undercut AmeriGas on price or fill levels with words to the effect of, "I talked to Blue Rhino, and that's not going to happen." AmeriGas and Blue Rhino continued to have discussions regarding pricing for contracts at least through 2010 which constituted new and independent acts in furtherance of Defendants' agreement not to compete. Defendants' agreement not to compete caused members of the Class to pay supracompetitive prices for Filled Propane Exchange Tanks. CAC ¶ 13 (JA0134).

- Employees from Blue Rhino and AmeriGas participated in regular calls to discuss their co-packing agreements, presenting ample opportunities for conspiratorial communications. CAC ¶ 47 (JA0142).

- From June 18 to June 19, 2008, Blue Rhino's President, Tod Brown, exchanged seven phone calls with AmeriGas's Director of National

Accounts, Ken Janish. During that time, AmeriGas indicated to Blue Rhino that it would follow closely behind Blue Rhino if it successfully implemented its fill reduction, and that it would not sell both 15-pound and 17-pound tanks. Janish had similar conversations with employees of Blue Rhino on numerous occasions from at least as early as 2007 until at least late 2010. CAC ¶ 60 (JA0145).

- Through at least the end of 2010, Defendants regularly communicated to assure compliance with the conspiracy. Defendants also monitored the market to ensure that neither cheated on their anticompetitive agreement by offering a price reduction or competing for one another's customers or geographic markets. Should cheating be suspected, Defendants communicated with each other to reassure each other of their compliance with the conspiracy. CAC ¶ 92 (JA0151).

All of Plaintiffs' allegations of purported ongoing conduct from the CAC are mere reaffirmations of the alleged 2008 agreement. These allegations are very similar to those from *Insulate SB*,[17] which the District Court relied on in concluding that Plaintiffs' allegations were insufficient to invoke the continuing violations doctrine:

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[17] In *Insulate SB*, the plaintiffs alleged that a "letter from [one defendant] to [another defendant] 'reminding them' they were not to carry the Gama product line [as agreed to under their conspiracy] was an overt act in furtherance of the conspiracy that started the limitations period running anew." 2014 U.S. Dist. LEXIS 31188, at *20. The court rejected this argument stating that the "letter merely reflected and reaffirmed the alleged prior agreement . . . and therefore did not restart the limitations period." *Id.* The court in *Insulate SB* additionally concluded that even providing further instructions on how to carry out the conspiracy amounted to a "reflection and reaffirmation of the alleged prior refusal to deal" and thus was not an overt act. *Id.* at *20 n.5. Further, plaintiffs in *Insulate SB* alleged that in furtherance of the purported price-fixing conspiracy "key Distributors, as well as other FSE Distributors, know and communicate with each other at industry conferences and otherwise." *Id.* at *22. The court held that this did not constitute an overt act as "no information [was] provided about the conferences, who attended them, or what was discussed." *Id.*

> Like in *Insulate SB*, Plaintiffs allege that Defendants communicated to assure that each party was complying with the conspiracy. (*See* Direct Purchaser Plaintiffs' CAC ¶¶ 13, 47, 60, 92, 125). Also like in *Insulate SB*, Plaintiffs make no allegations that Defendants ever made any changes or modifications to their agreement during the limitations period. (*See id.*). Thus, these communications were mere reaffirmations of the prior agreement and are insufficient to constitute overt acts.

Order at 13 (JA0345). Like *Insulate SB*, Plaintiffs have alleged communications between Defendants, but have not alleged any "new and independent act that is not merely a reaffirmation of" the alleged agreement to reduce fill levels. *Varner*, 371 F.3d at 1019. This Court should therefore affirm the District Court's holding.[18]

Plaintiffs next argue that merely alleging communications between Defendants is sufficient to plead a continuing violation. Plaintiffs, however, fail to cite a single case from the Eighth Circuit or elsewhere to support this novel theory. Nonetheless, Plaintiffs argue that mere communications constitute overt acts because "a cartel is not a static agreement but is rather an 'ongoing scheme' that inherently requires continued communications between co-conspirators in order to

[18] Plaintiffs attempt to distinguish *Insulate SB* by arguing that the anticompetitive agreement in *Insulate SB* did not require any further collusive activity in order to continue, whereas the agreement alleged by Plaintiffs here does require ongoing collusion. Opening Br. at 30-31. However, it is unclear why ongoing collusion would be necessary in the present case for Defendants to merely continue selling 15-pound tanks at a non-collusive price. In other words, a one-time price increase in 2008 does not require any ongoing collusion in 2010 and beyond. Further, contrary to their Opening Brief, Plaintiffs do not allege that any of the communications between Defendants were necessary to perpetuate the agreement. Opening Br. at 31.

endure." Opening Br. at 28. This argument misses the mark for several reasons. Plaintiffs argue that because a continuing conspiracy requires communications between competitors, allegations of any communication between competitors are sufficient to allege a continuing conspiracy. Not only is this faulty logic, it also ignores the facts of the case (as alleged by Plaintiffs). Defendants are parties to various legitimate co-packing agreements. CAC ¶ 46 (JA0141) ("Pursuant to these agreements, each company agreed to refurbish and refill propane exchange tanks for the other company at certain of each company's facilities."). Plaintiffs allege that Defendants continue to be parties to such co-packing agreements. *Id.* ("Today, each Defendant processes slightly less than ten percent of the other company's used, empty tanks pursuant to co-packing agreements."). As such, it is unsurprising that Defendants would communicate regularly and that such communications are in no way indicative of an ongoing conspiracy. *See Insulate SB*, 797 F.3d at 544 ("Pleading . . . conduct merely consistent with [an] agreement is not sufficient to show a conspiracy.") (quotations omitted); *Process Controls Int'l, Inc. v. Emerson Process Mgmt.*, 753 F. Supp. 2d 912, 922 (E.D. Mo. 2010) ("[I]t is well established that the mere opportunity to conspire, even in the context of parallel business activity, is insufficient to state a Section 1 claim.").

Second, Plaintiffs do not allege that Defendants' prices mirrored one another or continued to increase after the initial fill reduction. It is unclear how ongoing

communications between Defendants could possibly amount to anything more than mere reaffirmations of the alleged agreement reached in 2008 when Plaintiffs do not allege that the agreement was ever changed, modified, or abated.

Unable to allege any ongoing collusion between Defendants, Plaintiffs cite to several cases for the proposition that conspiracies are presumed to continue "until there has been an affirmative showing that it has been terminated so long as there is a continuity of purpose and a continued performance of acts." *See* Opening Br. at 29 (citing *U.S. v. Williams*, 87 F.3d 249, 253 (8th Cir. 1996); *U.S. v. Lewis*, 759 F.2d 1316, 1343 (8th Cir. 1985); *U.S. v. Portsmouth Paving Corp.*, 694 F.2d 312, 318 (4th Cir. 1982)). All of these opinions, however, involve post-trial appeals of criminal convictions and have no bearing on the pleading standard for a continuing violation in civil antitrust cases at the motion to dismiss stage.[19]

Realizing that they have failed to allege a new act, fine-tuning, or any new or accumulating injury, Plaintiffs take issue with the very concept of a continuing violation in the Eighth Circuit. Opening Br. at 29 ("Nor are the 'overt acts' required to cause specific, independent antitrust injury above and beyond the

[19] Plaintiffs also cite *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999) in this section of their brief. In *Morton's Market*, the defendants had pled guilty to criminal antitrust charges within the limitations period. 198 F.3d at 826. It was during a discussion of the admitted criminal conspiracy that the Eleventh Circuit cited to the language from *Portsmouth Paving* that the "conspiracy must be presumed to have continued." *See id.* at 828-29. Regardless, *Morton's Market* is not a motion to dismiss case and does not discuss the pleading requirements for continuing violations.

overall injury inflicted by the cartel"). In doing so, Plaintiffs are forced to argue that this Court should adopt the Third Circuit's framework, which is completely at odds with Eighth Circuit precedent. *See In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1172 (3d Cir. 1993) ("[O]vert acts aren't what cause damage. It is the effectiveness of the overall conspiracy that causes damages."); *see also W. Penn Allegheny*, 627 F.3d at 106-07 (rejecting argument that continuing violations doctrine did not apply because injurious acts occurring during limitations period were merely "reaffirmations" of decisions made outside the limitations period).

This is not the law in the Eighth Circuit. *See Varner*, 371 F.3d at 1019 ("An overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff."); *Midwestern Mach.*, 392 F.3d at 271 (continuing violations require "new and independent act[s] that . . . inflict new and accumulating injury on the plaintiff") (modifications in original). This Court should therefore decline Plaintiffs' invitation to abandon the Eighth Circuit precedent for continuing violations.

E. Plaintiffs' Allegations of an Overt Act Within the Limitations Period Are Impermissibly Vague and Conclusory.

A separate and independent ground on which the District Court's decision may be affirmed is that Plaintiffs' allegations of overt acts in support of their

continuing violations theory are impermissibly vague and conclusory under *Twombly* and *Iqbal*. *See Twombly*, 550 U.S. at 555-57; *Iqbal*, 556 U.S. at 678; *see also Z Techs.*, 753 F.3d at 603-04 (applying *Twombly* to continuing violations allegations and affirming dismissal where factual allegations of continuing violations did not rise above a "speculative level"). The continuing violations doctrine does not toll the statute where a plaintiff "fail[s] to plead sufficient facts" to establish that this doctrine applies. *Varner*, 371 F.3d at 1020 (affirming dismissal); *Insulate SB*, 2014 U.S. Dist. LEXIS 31188, at *24 (dismissing Sherman Act claim where "[t]he Complaint does not allege facts suggesting the initial price-fixing agreement was abated or that new acts beyond the initial price-fixing were required to perpetuate the agreement."). Plaintiffs' continuing violations allegations are inadequate under this settled standard.

In arguing that they have adequately pled continuing violations, Plaintiffs highlight their allegation that: "[D]uring calls and meetings with AmeriGas executives occurring at least as late as 2010, Janish repeatedly dismissed concerns that Blue Rhino might undercut AmeriGas on price or fill levels with words to the effect of, 'I talked to Blue Rhino, and that's not going to happen.'" CAC ¶¶ 13, 62 (JA0134, JA0145-46). This allegation, however, lacks sufficient factual support to make it plausible. The CAC does not describe who from Blue Rhino Janish allegedly talked to and provides no dates for these internal AmeriGas meetings

other than the vague assertion that they happened "as late as 2010." *Id*. Most importantly, this allegation does not indicate when Janish allegedly "talked to Blue Rhino." This is a fatal omission. As currently pled, Plaintiffs allege only that sometime in 2010, Janish spoke internally with other AmeriGas employees about prior conversations with Blue Rhino. Because Plaintiffs do not allege that Janish's "talk" with Blue Rhino occurred within the limitations period, this allegation is insufficient to invoke continuing violations.

The remainder of Plaintiffs' allegations regarding continuing violations are similarly conclusory and lack any factual support. *See* CAC ¶ 13 (JA0134) (alleging that Defendants "continued to have discussions regarding pricing for contracts at least through 2010 which constituted new and independent acts"); *id.* ¶ 60 (JA0145) ("Janish had similar conversations with employees of Blue Rhino on numerous occasions from at least as early as 2007 until at least late 2010"); *id.* ¶ 92 (JA0151) ("Through at least the end of 2010, Defendants regularly communicated to assure compliance with the conspiracy"); *id.* ¶ 109 (JA0154) ("Defendants continued to have regular communications regarding pricing, fill levels, and market allocation until at least late 2010."); *id.* ¶ 125 (JA0158) ("Defendants' unlawful communications regarding pricing, fill levels, and market allocation continued until at least late 2010"). Plaintiffs do not include any supporting facts other than to allege that these unspecified acts occurred, quite conveniently for

their continuing violations theory, "until at least late 2010." *See, e.g., id.* ¶ 109 (JA0154).[20]

Merely asserting, without any factual support, that conduct was "ongoing" or "continuous" is insufficient to invoke the doctrine of continuing violations. *See Smithrud v. City of St. Paul*, 746 F.3d 391, 396 (8th Cir. 2014) (affirming lower court's rejection of continuing violations theory in Fair Housing Act and civil rights context where plaintiff alleged only that violations were "ongoing" without identifying a specific act or occurrence); *Insulate SB*, 2014 U.S. Dist. LEXIS 31188, at *22 (finding plaintiffs had not plausibly alleged a continuing violation where they asserted that unidentified "key" distributors "know and communicate with each other at industry conferences and otherwise," but lacked any allegations "about the conferences, who attended them, or what was discussed.").[21] Thus,

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[20] Plaintiffs' failure to plead any detail with respect to their continuing violations allegations is especially noteworthy considering the lack of detailed allegations regarding the underlying alleged agreement to reduce fill levels. Defendants note that the FTC chose not to allege that "Respondents' initial decisions to reduce fill levels to 15 pounds were the result of an agreement" (*see* note 4, *supra*) and that Plaintiffs allege that the object of the conspiracy—to get Walmart to accept a 15-pound fill level—was accomplished in October 2008. *See* CAC ¶¶ 87-88. (JA0150). Indeed, Defendants argued in the District Court, and still maintain, that Plaintiffs' allegations of concerted conduct relating to the Defendants' respective decisions to change the fill level to 15 pounds does not satisfy *Twombly* and *Iqbal* and respectfully suggest that the District Court's decision can be affirmed on this ground as well.

[21] Several recent out-of-circuit cases have reached this same conclusion. *See Garrison v. Oracle Corp.*, No. 14-CV-04592, 2015 U.S. Dist. LEXIS 53653, at

even if communications between alleged co-conspirators can potentially constitute a continuing violation, Plaintiffs' conclusory allegations of ongoing communications are insufficient to allege a continuing violation.

Finally, Plaintiffs also appear to argue for the first time that their market allocation allegations are sufficient to constitute an overt act. *See* Opening Br. at 8. These generalized allegations fail miserably under the pleading standards set forth in *Twombly* and *Iqbal*. *See Insulate SB*, 797 F.3d at 546-47 ("[A] naked assertion of conspiracy . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief.") (quoting *Twombly*, 550 U.S. at 557). Plaintiffs do not allege when the purported agreement was formed, how it was formed, what its terms were, or who was involved in making it. CAC ¶¶ 90-93

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*20-22 (N.D. Cal. Apr. 22, 2015) (dismissing antitrust claim as time barred: "[T]he bald assertion that '[Defendant's] conspiracy was a continuing violation through which [Defendant] repeatedly invaded Plaintiff and Plaintiff Class' interests by adhering to, enforcing, and reaffirming the anticompetitive agreements described herein' is insufficient to show a continuing violation."); *Ryan v. Microsoft Corp.*, No. 14-CV-04634, 2015 U.S. Dist. LEXIS 47753, at *41-45 (N.D. Cal. Apr. 10, 2015) (dismissing antitrust claim as time barred: "Plaintiffs need to do more than merely allege a continuing violation—they must also allege an overt act"); *see also Cervantes v. Countrywide Home Loans, Inc.*, No. CV 09-517, 2009 U.S. Dist. LEXIS 87997, at *21 n.4 (D. Ariz. Sept. 23, 2009) (dismissing Fair Housing Act claim as time barred: "Plaintiffs' allegation that 'Defendants have engaged in a pattern or extended practice of exploiting the market of Hispanics in the market area where Plaintiffs reside' is a mere legal conclusion unsupported by any factual allegations and, as such, is not a plausible claim for a continuing violation under the standards enunciated by *Twombly* or *Iqbal*.") (citation omitted).

(JA0150-51). The only factual support relating to the market allocation allegations is from 2008—two years outside the limitations period. *Id.* ¶ 93 (JA0151). As pled, Plaintiffs merely describe the geographic markets in which each Defendant operates. Thus, Plaintiffs' half-hearted market allocation allegations cannot establish an overt act within the limitations period when they do not allege when this nebulous agreement was formed, or that it was modified, fine-tuned, or abated within the limitations period.

V. CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment of the District Court.

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Dated: December 2, 2015

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CERTIFICATE OF SERVICE

The undersigned herby certifies that on December 2, 2015, a copy of the foregoing was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, which will automatically send notification of such filing to all counsel of record.

Dated: December 2, 2015

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