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, LP, 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 F. Fenner

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I. INTRODUCTION

Nearly twenty years ago the Supreme Court made it abundantly clear that where a *per se* antitrust violation is alleged, continuing sales at supracompetitive prices constitute continuing violations of the antitrust laws:

> Antitrust law provides that, in the case of a "continuing violation", say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," *e.g.*, each sale to the plaintiff, "starts the statutory period running again . . . ."

Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997) (citation omitted). This holding has been uniformly followed by this Circuit in *In re Wholesale Grocery Products Antitrust Litigation*, 752 F.3d 728 (2014) and by its sister circuits. Defendants provide no legitimate means for distinguishing *Klehr*, nor any persuasive argument for overturning *Wholesale Grocery*.

Under *Klehr* and *Wholesale Grocery*, Plaintiffs' allegations that Defendants continued to sell Filled Propane Tanks at supracompetitive prices pursuant to their fill-level conspiracy qualifies as a continuing violation entitling Plaintiffs to damages sustained within the limitations period. Plaintiffs' allegations of Defendants' active participation in the conspiracy during the limitations period provide an alternative, equally persuasive basis for finding a continuing violation in this case.

II. ARGUMENT

A. As Price-Fixing Victims, Plaintiffs May Recover Damages Sustained During the Four-Year Limitations Period (March 27, 2010 Forward).

1. Continuing Sales at Supracompetitive Prices Constitute Continuing Violations Under Binding Supreme Court and Eighth Circuit Law.

Both the Supreme Court and this Circuit have held that continued sales at supracompetitive prices constitute continuing violations of the antitrust laws, allowing plaintiffs to recover for damages sustained during the limitations period. Because Plaintiffs alleged that, within four years of filing their complaint, they purchased Filled Propane Tanks from Defendants at supracompetitive prices *caused* by the alleged conspiracy, Plaintiffs' damages claims premised on those purchases are timely.

Defendants ignore some of the case law regarding continuing violations, including two Supreme Court cases that support Plaintiffs' interpretation of the law.[1] Their attempts to distinguish binding precedents *Klehr* and *Wholesale Grocery* are equally unpersuasive.

[1] *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) ("In the context of a continuing conspiracy . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act."); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968) (holding plaintiff could pursue claim based

Defendants casually dismiss *Klehr* as "not [even] an antitrust case," and thus "not dispositive" of this appeal. Opp. Br. at 18-19. They could not be more wrong. In *Klehr* the Supreme Court explained that civil RICO actions were subject to the same statute of limitations that governed private civil antitrust actions: Section 4B of the Clayton Act. *Klehr*, 521 U.S. at 183, citing *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). Thus, *Klehr*'s holding about when Section 4B's limitations period begins to accrue applies with equal force to antitrust and RICO actions. The Supreme Court rejected the lower court's accrual reasoning in part because the lower court's approach was inconsistent with well-developed precedent regarding the accrual of antitrust actions. *Id*. at 189.[2] Clearly, the relevant provision in *Klehr* regarding continuing violations (the provision relied upon in *Wholesale Grocery*) expressly pertains to antitrust cases – specifically, *per se* price-fixing conspiracies. *Id*. Thus, *Klehr* is both relevant to, and binding on, antitrust cases.

Defendants (as well as the District Court) also attempt to limit *Klehr*'s holding to a rejection of the last predicate act rule. Opp. Br. at 19. This too is a

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on an anticompetitive policy enacted 43 years prior where that policy "inflicted continuing and accumulating harm" on plaintiff).

[2] The Court noted that "Congress consciously patterned civil RICO after the Clayton Act . . . [a]nd by the time civil RICO was enacted, the Clayton Act's accrual rule was well established."

misreading of *Klehr*. *Klehr* held that the commission of predicate acts during the limitations period did not allow plaintiffs to recover for injuries sustained *before* the limitations period. *Klehr*, 521 U.S. at 187-91. In reaching this holding, however, *Klehr* specifically noted that plaintiffs, "may point to new predicate acts that took place [during the limitations period] such as sales," so long as they can demonstrate, "how any new act could have caused them harm over and above the harm that the earlier acts caused." *Klehr*, 521 U.S. at 190. The *Klehr* plaintiffs themselves had not made any purchases during the class period and could not benefit from the continuing violations theory, but the Court recognized that had they made such purchases, they could have raised a valid claim. *Id*.; *see also id*. at 189 ("each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times'") (citation omitted).

Defendants next contend – incorrectly – that "no court within the Eighth Circuit has interpreted *Klehr* in the manner that Plaintiffs advocate." Opp. Br. at 19. This rhetoric, oft-repeated throughout their brief,[3] is plainly refuted by *Wholesale Grocery*'s holding – a binding precedent from this Circuit – that a defendant commits an overt act (restarting the statute of limitations) every time it

[3] *See* Opp. Br. at 9, 13-14, 18.

charges a supracompetitive price, i.e. a price elevated above the competitive level. 752 F.3d at 736 ("a monopolist commits an overt act each time he uses unlawfully acquired market power to charge an elevated price"). Indeed, Defendants-Appellees quote with approval the relevant language from the district court opinion in *Wholesale Grocery*: "the alleged charging of supra-competitive prices amounts to more than the mere reaffirmation of the prior market/customer allocation." Opp. Br. at 21 (quoting *In re Wholesale Grocery Prods. Antitrust Litig.*, 722 F. Supp. 2d 1079, 1087 (D. Minn. 2010)).

Defendants attempt to distinguish *Wholesale Grocery* by emphasizing that in that case, prices *increased* during the limitations period. They contend these price increases constituted new overt acts sufficient to trigger the continuing violations doctrine. Opp. Br. at 20-22. This interpretation is directly contradicted by *Wholesale Grocery*, which quoted and emphasized *Klehr*'s language that "*each sale to the plaintiff*, starts the statutory period running again." *Wholesale Grocery*, 752 F.3d at 736 (quoting *Klehr*, 521 U.S. at 189) (emphasis in *Wholesale Grocery*).[4] Notably, *Wholesale Grocery* did not state "each price *increase* to the

[4] This holding, directed by *Klehr*, has been recognized by numerous courts outside this Circuit. Opening Br. at 18-20. Defendants dismiss this extensive authority as "reached in contexts significantly different from those presented here," but then fail to describe why the differences they highlight render those out-of-circuit cases unpersuasive for the basic concept that continuing sales at supracompetitive prices are sufficient to establish continuing violations allowing

plaintiff." As explained in Plaintiffs' opening brief, antitrust laws make no distinction between price increases, stabilization, or decreases – the crux for antitrust purposes concerns only whether the prices exceeded those which a competitive market would have demanded. Opening Br. at 20.[5] This is exactly

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plaintiffs to recover damages for sales made during the limitations period. Opp. Br. at 24-25, n.11. Likewise, as Plaintiffs-Appellants explained in their opening brief, *Southeast Missouri Hospital v. C.R. Bard, Inc.*, No. 1:07cv00031 TCM, 2008 WL 4104534 (E.D. Mo. Aug. 27, 2008) implicitly endorsed the rule articulated in *Wholesale Grocery* which would allow for recovery of damages sustained due to sales made during the limitations period. Opening Br. at 24-25. In fact Defendants admit (Opp. Br. at 17) that in *Southeast Missouri*, the court allowed the plaintiffs to recover for damages within the limitations period; however, they claim "Plaintiffs have *no* claims that accrued within the limitations period." Opp. Br. at 17-18. To the contrary, this appeal is limited to Plaintiffs' claim for damages for overcharges within the limitations period only. CAC ¶ 11 (JA0134).

[5] Defendants-Appellees also cite *Insulate, SB* for the proposition that, "[t]he 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.'" Opp. Br. at 23, quoting *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, No. 13-2664, 2014 U.S. Dist. LEXIS 31188, at *22 (D. Minn. Mar. 11, 2014) (allegations of vertical, not horizontal price fixing). This argument suggests that a customer's injury thus *ends* after the initial price increase. But this is certainly not the law when it comes to horizontal price fixing agreements. *See* Opening Br. at 31. So long as customers continue to pay supracompetitive prices as a result of defendants' anticompetitive agreement, they continue to sustain new and additional antitrust injury. *See Zenith Radio*, 401 U.S. 321 at 338. Indeed, if Defendants began to charge supracompetitive prices on January 1, and a customer first bought the price-fixed product 6 months later on June 1, Defendants cannot possibly be correct that the customer's injury occurs on January 1, before they have even purchased the price-fixed product. Rather, an important basis for the continuing violations doctrine is that a plaintiff's injury is not sufficiently ascertainable until it has actually purchased the price-fixed product; by contrast, damages based on future overcharges are likely to be

what Plaintiffs have alleged. CAC ¶¶ 11, 15, 18-21, 110-11, 121-23 (JA0134-36, JA0155, JA0157-58).

In a further attempt to distinguish this case from *Wholesale Grocery*, Defendants mischaracterize the continuing violation alleged here as solely the continuation of the prior fill-level reduction, *e.g.* Opp. Br. at 13, and then mischaracterize the overt acts in *Wholesale Grocery* as based on "a coordinated price increase within the limitations period," not simply overcharges resulting from the earlier market allocation agreement. Opp. Br. at 22. As a preliminary matter, Plaintiffs allege much more than the mere continuation of Defendants' fill-level reduction: as described in more detail *infra* at Section II.B.2. But regardless, the text of the *Wholesale Grocery* opinion gives no indication that the price increases there required coordination beyond the initial customer and market allocation agreement. In fact, a review of the relevant allegations in the *Wholesale Grocery* complaint reveals pricing allegations very similar to those alleged in this case:

"speculative" or "unprovable". *Zenith*, 401 U.S. at 339; *see also Wholesale Grocery*, 752 F.3d at 737 ("The limitations period begins to run against customers only when the 'customers *have reason to know* of the violation and their damages are *sufficiently ascertainable* to justify an antitrust action.'" (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 320c4, at 303–04 (3d ed. 2007) (emphasis as supplied)). Regardless, to the extent *Insulate SB* holds, as Defendants urge, that the charging of supra-competitive prices pursuant to a horizontal price-fixing agreement is not an overt act, it was abrogated by *Wholesale Grocery*. 2014 U.S. Dist. LEXIS 31188, at *4.

Wholesale Grocery	**Propane**
"Defendants actively used their secret customer and territorial allocation to harm retailers in a number of ways. For example, Defendants charged retailers higher prices for grocery wholesale goods and related services than they would have paid if SuperValu and C&S had competed. SuperValu ensured the continuation of ABS pricing in the Midwest rather than having to engage in aggressive price competition like that which it experienced in competing with C&S in New England, and C&S no longer had to engage in intense price competition in New England with SuperValu. As a result, retail customers both in the Midwest and in New England have sustained overcharges in their purchases of grocery wholesale products and services from Defendants. These overcharges continue to the present (with retailers' repeated purchases of grocery wholesale products and services from Defendants at inflated prices) and constitute independent acts injuring Plaintiffs and the Class." ¶ 39 (emphasis added).[6]	"Plaintiffs purchased Filled Propane Exchange Tanks from Blue Rhino or AmeriGas on multiple occasions during the Class Period. On each occasion, Plaintiffs purchased Filled Propane Exchange Tanks containing only 15 pounds of propane, pursuant to the conspiracy, but sold at the price they would have been charged for 17-pound tanks but for the conspiracy. As Defendants kept prices constant despite the fill level reduction, this amounted to an effective price increase of 13%." CAC ¶ 111 (JA0155) (emphasis added).[7] "As a result of the anticompetitive conduct challenged in this Complaint, Defendants have charged Plaintiffs and members of the proposed Class supracompetitive prices for Filled Propane Exchange Tanks throughout the Class Period." CAC ¶ 121 (JA0157) (emphasis added). "Plaintiffs and members of the proposed Class purchased Filled Propane

[6] Consol. Amended Class Action Complaint, *In re: Wholesale Grocery Prods. Antitrust Litig.*, Civ. A. No. 09-md-02090 ADM/AJB (D. Minn. Jan. 4, 2010), ECF No. 18.

[7] Defendants also argue that the Complaint failed to allege a continuing violation because it did "not allege that Defendants' tank prices remained stable throughout the class period . . . ." Opp. Br. at 13. As highlighted above and in Section II.B.2, however, Plaintiffs make *exactly* that allegation. To the extent Defendants concede this is all that is needed to constitute a continuing violation in this case, the parties are in agreement.

	Exchange Tanks directly from Defendants at prices artificially inflated by the conduct challenged in this Complaint and throughout the Class Period." CAC ¶ 122 (JA0157) (emphasis added).

Both cases allege that, as a result of a *per se* anticompetitive agreement occurring outside the limitations period, defendants charged (and plaintiffs paid) supra-competitive prices during the limitations period – although here, Plaintiffs allege additional ongoing conduct besides the illegal overcharges. *See infra* at Section II.B.2. If the overcharges in *Wholesale Grocery* were sufficient to establish a continuing violation, 752 F.3d at 736-37, the overcharges here, which were coupled with even more examples of ongoing conduct, are undoubtedly enough.

The majority of Defendants' brief focuses on one case: *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004). *Varner* involved a challenged contract requiring plaintiffs to purchase certain farm goods from the defendant and other identified entities. *Id*. at 1014, 1019-20. Notably, *Varner* contains no mention of allegations that defendants abused their market power, charged supracompetitive prices, or otherwise harmed competition. In *Varner* the Court held plaintiffs had "failed to plead sufficient facts to support a cause of action for a tying-contract antitrust violation *or* establish an exception to toll the statutes of limitation." *Id*. at 1020 (emphasis added). Arguably, with this statement the Court recognized

plaintiffs had failed to allege a viable antitrust claim regardless of the timeliness of their allegations.[8]

Varner in no way contradicts, abrogates, or undermines the legions of cases finding that continued supracompetitive sales pursuant to a conspiratorial agreement between competitors – a *per se* violation of the antitrust laws – constitute continuing violations. Defendants do not and cannot identify a single appellate case from this Circuit or any other that has refused to recognize a continuing violation in these circumstances.

Defendants contend the facts underlying *Varner* are immaterial because courts make no distinction between the nature of the underlying antitrust violation when considering the existence of a continuing violation. Opp. Br. at 16, 17 n.6. Indeed, they claim to be "unaware of any Eighth Circuit case law supporting Plaintiffs' contention that the continuing violations framework varies depending on the type of [antitrust] violation alleged." *Id*. at 17 n.6. This Court made *exactly* that distinction in *Midwestern Machinery Co. v. Northwest Airlines, Inc.*, 392 F.3d 265 (8th Cir. 2004).

[8] The claimed injury in Varner did not fit neatly within the rubric of a typical tying claim, nor indeed, any other recognized cause of action. The plaintiffs in *Varner* additionally raised claims of securities fraud, common-law fraud, violations of RICO, civil conspiracy, unjust enrichment, and violations under the Packers and Stockyard Act. 371 F.3d at 1015.

In *Midwestern Machinery* the Court recognized that "to apply the continuing violation theory to *non-conspiratorial conduct*," *i.e.*, in scenarios other than the "typical" price-fixing case, "new overt acts must be more than the unabated inertial consequences of the initial violation." 392 F.3d at 270 (emphasis added). Whether something more than continued supracompetitive sales is needed to establish a continuing violation outside the traditional price-fixing context is a question for another day. That continued sales pursuant to an illegal agreement among horizontal competitors qualify as a continuing violation, however, has been clearly established in *Klehr*, *Wholesale Grocery*, and every other case to have addressed the issue.[9] This rule makes perfect sense given that agreements among competitors to elevate prices or restrain output have no redeeming social value (hence, they are

[9] *See also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000) (recognizing that "each new sale by a Sherman Act price fixing defendant" constitutes a "separate new overt act" and continuing violation) (citing *Klehr*, 521 U.S. at 189); Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonz. L. Rev. 271, 313 (2008) (summarizing the law of continuing violations and recognizing "that each sale made to a consumer pursuant to a price-fixing or market-allocation conspiracy will give rise to a separate claim with its own limitations period, even if these sales were the completely predictable result of a notorious agreement to manipulate the market perfected outside of the limitations period"). *See also* Opening Br. at 15-25.

per se illegal)[10] and therefore defendants engaging in such conduct on a continuous basis have no legitimate interest in repose.

2. *Klehr* and its Progeny Appropriately Balance Competing Policy Considerations.

The continuing violation doctrine, as articulated in *Klehr* and *Wholesale Grocery*, appropriately balances the policies protected by statutes of limitations (repose, elimination of stale claims, and certainty) with the policies advanced by aggressive enforcement of the antitrust laws (namely the protection of competition). By permitting recovery for those damages sustained during the limitations period, the usual policies behind statutes of limitations are preserved while still holding defendants accountable for their continuing anticompetitive conduct. As the Fifth Circuit stated, a contrary rule would, "improperly transform the limitations statute from one of repose to one of continued immunity." *Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 127-28 (5th Cir. 1975).

Defendants would have the Court believe that a reversal here could leave the price-fixers and monopolists impermissibly vulnerable to "never ending" litigation, "effectively" eliminating the statute of limitations in price-fixing suits. Opp. Br. at 26; *see also id*. at 8, 28. But there is little risk of such a catastrophe. Not only

[10] A price-fixing cartel is "the supreme evil" prohibited by the antitrust laws. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

does the continuing violation doctrine limit a plaintiff's incentive to delay bringing a suit by limiting damages to only those sustained during the limitations period (here, beginning four years prior to the FTC filing suit), but a plaintiff's ability to *prove* claims and causation for injuries sustained far into the future is inherently limited.[11] Moreover, for a plaintiff to file suit (as discussed more fully *infra* Section II.B.2), a plaintiff must have a Rule 11 basis for making plausible allegations that despite the passage of time, the defendants' prices continued to be inflated due to their anticompetitive conspiracy.

It is simply untrue that, as a result of the application of the continuing violation doctrine here, companies will face liability in perpetuity. Usually, where defendants' anticompetitive conduct is brought to light, defendants *cease* their conspiracy and prices/fill levels return to normal.[12] It is indeed the bold defendant

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[11] *See, e.g.*, *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("The passage of time between an agreement and a defendant's later actions may affect the plausibility of an inference that the actions were connected to the agreement.")

[12] Note, that where defendants conspire for a prolonged period but *conceal* their illegal conduct, the doctrine of fraudulent concealment tolls the statute of limitations allowing plaintiffs to recover all their damages. Thus, it is not uncommon for defendants to face liability ten or even twenty years after they have begun to conspire in violation of the antitrust laws. The rule advanced by Defendants would, as explained in Plaintiffs' opening brief, allow defendants to profit from their price-fixing scheme in perpetuity so long as they alert the world of their illegal behavior early-on in the conspiracy and do not alter the terms of their earlier agreement. This odd result is not and should not be the law.

who continues to sell at collusive, supracompetitive prices even after its illegal conduct has been exposed. But in such a circumstance – as Plaintiffs plausibly allege here – such defendants should be held accountable for their conduct.

Defendants contend finding a continuing violation premised on continued sales presents "practical difficulties," for "what price," they ponder, "would no longer constitute an 'inflated' price?" Opp. Br. at 29. This argument illustrates a pervasive problem in Defendants' brief. To survive a motion to dismiss plaintiffs need not provide a damages model or otherwise *prove* that the prices charged were indeed higher than they otherwise would have been in a competitive market. At this stage, the court is to take *as true* plaintiffs' allegations that they paid prices that were inflated by the alleged conspiracy.

Finally, Defendants assert they have already been held accountable for the alleged anticompetitive conduct in this case. They note that they previously settled a related lawsuit with indirect purchasers and were subject to a Federal Trade Commission investigation and consent order. Opp. Br. at 30. Importantly, however, the FTC's action was brought nearly five years *after* Defendants' public settlement with indirect purchasers (and less than a year before the instant suit) suggesting that the FTC, like Plaintiffs, believed the prior suit had not been sufficient to quell the anticompetitive conduct challenged herein. Where, as here, Defendants have *continued* to charge supracompetitive prices or otherwise prevent

a return to competitive conditions, despite a prior lawsuit, the statute of limitations should not shield them from liability for the new and additional harm their continuing violations caused.

B. Defendants' Conspiratorial Meetings and Repeated Commitments to their Anticompetitive Scheme Within the Limitations Period Independently Qualify as Continued Violations.

Not only did the continued sales of Filled Propane Tanks at supra-competitive prices constitute a continuing violation of the antitrust laws, Plaintiffs have alleged Defendants *affirmatively continued* their conspiracy, meeting in private to discuss fill levels, customer allocations, and prices. CAC ¶¶ 13, 46-47, 60, 91-92 (JA0134, 0142, 0144-45, 150-51); Opening Br. at 25-33.[13] Although Defendants and the opinion below dismiss these allegations as "mere reaffirmations" of the previous conspiracy, a closer look at the facts and relevant

[13] Defendants argue that Plaintiffs' allegations of conspiratorial meetings were not indicative of an ongoing conspiracy because their co-packing agreements provided legitimate reasons for Defendants to communicate. Opp. Br. at 35. But Plaintiffs' allegations go much further than simply alleging Defendants' opportunity to conspire: Plaintiffs allege Defendants met specifically to discuss their illegal conspiracy including fill levels, customer allocations, and prices. CAC ¶¶ 13, 60-62, 90-92, 109 (JA0134, JA0145-46, JA0150-51, JA0154). These allegations plausibly allege conspiratorial conduct as discussed more fully *infra* Section II.B.2.

case law reveals Defendants' ongoing activities are just the kind of "overt acts" that constitute a continuing violation.[14]

1. The Relevant Allegations Constitute More than "Mere Reaffirmation" of the Fill-Level Agreement.

The importance of the "reaffirmation" language becomes clear in the merger context where much of the relevant case law emerged. As the Court explained in *Midwestern Machinery*, a merger is unlike a conspiracy to fix prices or unlawful monopoly in that a merger is a "discrete act." 392 F.3d at 271. While a conspiracy to fix prices involves an ongoing scheme, and an unlawful monopoly requires the maintenance of monopoly power and charging of supracompetitive prices, an allegedly unlawful merger does not present the kind of ongoing conduct that the continuing violations doctrine was meant to protect against. *Id*. The Court explained that even if a merger is initially unlawful under Section 7 of the Clayton Act, "the continued existence of the merged entity is not a continuing violation: It is simply the natural unabated inertial consequence of the merger." *Id*. The Court specifically noted, however, that the natural consequences of an unlawful merger

[14] In the event that this Court decides to reach the issue of whether the conduct alleged constitutes "fine-tuning" or "mere reaffirmations," that is a question of fact with a fine line. Plaintiffs' allegations set forth in Section II.B.2, *infra* raise relevant issues of fact for which discovery would have been helpful before a decision was reached. There was no discovery allowed by the District Court on these allegations. Order of Feb. 24, 2015 (ECF No. 93) (JA0186-95).

may "violate other antitrust laws," but are not actionable under Section 7 as a continuing violation. *Id*.

In reaching this conclusion, the Court specifically distinguished continuing violations "involving a conspiracy violating § 1 (e.g., cartel meetings occurred to effectuate a price-fixing agreement), or a case violating § 2 (e.g., ongoing policy of predatory pricing undertaken to effectuate monopolization)." *Id*. Accordingly, the Court recognized that cartel meetings such as those alleged by Plaintiffs were exactly the type of conduct that *would* establish a continuing violation.

Defendants cite *Midwestern Machinery* for the proposition that "a continuing violation is only established where a plaintiff alleges that defendants continued to meet to 'fine-tune' their earlier alleged anticompetitive agreement." Opp. Br. at 10; *see also id*. at 19-20. But Defendants confuse what *Midwestern Machinery* identifies as a *sufficient* condition for a continuing violation for a *necessary* one. *See* 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.") (emphasis added). If Defendants' interpretation of *Midwestern Machinery* were correct, there would be no way for it to be consistent with either *Klehr* or *Wholesale Grocery*. While Plaintiffs agree that Defendants' continuing to meet to fine-tune their cartel agreement is a *sufficient* condition to trigger the continuing violations rule (and

indeed that the complaint adequately alleges such activity), none of the controlling cases cited by the Defendants establishes that it is a *necessary* condition. Indeed, Defendants make the same misguided argument with respect to the identical passage as quoted in *Wholesale Grocery*. Opp. Br. at 20.[15]

2. The Complaint Plausibly Alleges Conspiratorial Conduct Within the Limitations Period.

In arguing that the Plaintiffs' allegations regarding the genesis of the conspiracy and its continuation into the limitations period are "vague and conclusory", Opp. Br. at 38, Defendants undermine their own argument by quoting at length from the CAC (*see* Opp. Br. at 38-40). These and other allegations demonstrate that the CAC provides ample notice of the nature of the challenged conduct and far exceeds the requirement set forth in *Bell Atl. Corp v. Twombly*, 550 U.S. 544 (2007) of alleging a plausible claim for relief.

[15] Defendants attempt to distinguish the cases Plaintiffs cite in their opening brief (at 17-20 & n.6), only some of which were Third Circuit cases, by arguing that the Third Circuit held in *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 107 (3d Cir. 2010) that "mere reaffirmations are sufficient to constitute overt acts." Opp. Br. at 25. However, the nature of the conduct alleged in *West Penn* shows the Third Circuit used the term "reaffirmation" differently than this and other courts. In *West Penn*, the plaintiff alleged specific conduct within the limitations period: "The complaint alleges, for example, that as part of the conspiracy, [the defendant] refused to increase [plaintiff's] reimbursement rates . . . ." 627 F.3d at 106. *See also id*. at 93-94. By contrast, this Court equated "reaffirmations" with the continued *existence* of a merged entity in *Midwestern Machinery*. The plaintiffs in *West Penn* alleged far more than the defendants' continued existence, as do Plaintiffs here.

"In order to meet [Rule 8's notice pleading] standard, and survive a motion to dismiss under Rule 12(b)(6), 'a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). This plausibility standard is not a "probability requirement." *Braden*, 588 F.3d at 594 (quoting *Iqbal*, 556 U.S. at 678). "[T]o present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment[.]" *Anderson News, L.L.C. v. Am. Media, Inc.,* 680 F.3d 162, 184 (2d Cir. 2012). Thus, "plaintiffs need not provide specific facts in support of their allegations," although "they must include sufficient factual information to provide the 'grounds' on which the claim rests, and to raise a right to relief above a speculative level." *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008) (citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Viewing Plaintiffs' allegations "as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible," *Braden*, 588 F.3d at

594, and drawing all inferences in Plaintiffs' favor, *id*. at 595, Plaintiffs have more than plausibly alleged both the existence of Defendants' conspiracy and its continuation into the limitations period. The CAC details steps each defendant took to reach their initial fill-level agreement and to force retailers to accept that price increase. CAC ¶¶ 48-89 (JA0142-50).[16] The CAC cites ongoing communications through at least late 2010 between Defendants on the specific topics of fill levels (*id*. ¶¶ 13, 60-62, 109, JA0134, JA0145-46, JA0154), contract pricing (*id*. ¶¶ 13, 109, JA0134, JA0154), market allocation (*id*. ¶¶ 90-92, 109, JA0150-51, JA0154), and enforcing compliance with their overall conspiracy (*id*. ¶¶ 13, 92, JA0134, JA0151). For some of these contacts, the complaint even names a specific individual (AmeriGas's Janish) who spoke with his counterparts at Blue Rhino (*id*. ¶¶ 13, 60-62, JA0134, JA0145-46), or specific customers (Wal-Mart, Kroger, Albertson's) that were allocated between Defendants (*id.* ¶ 91, JA0150-51). Lastly, the CAC alleges that Defendants continued to charge supracompetitive prices, thus injuring Plaintiffs and the proposed Class, throughout the class period. (*Id*. ¶¶ 11, 13, 14-15, 18-21, 110-11, 121-23, 136, JA0134-36,

[16] In light of the painstaking detail with which the CAC describes the origin of the fill-level agreement, down to specific conversations and dates, ¶¶ 48-68 (JA0142-47), Defendants' argument that these allegations do not state a plausible claim under *Twombly* cannot be taken seriously. *Cf*. Opp. Br. at 40 n.20. The fact that the FTC complaint did not specifically allege that the initial fill-level agreement was conspiratorial, *cf. id.*, is irrelevant; the Complaint here does so.

JA0155, JA0157-58, JA0160). Based on these detailed allegations, it is eminently plausible that not only did Defendants conspire, but their conspiracy continued through at least late 2010.[17]

These detailed allegations stand in stark contrast to the facts in *Twombly*, where the "plaintiffs rest[ed] their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement . . . ." *Twombly*, 550 U.S. at 564. As other courts have recognized, *Twombly*'s plausibility requirement is readily satisfied when antitrust plaintiffs have alleged details regarding the terms of the defendants' agreement and their collusive activities, not merely parallel conduct. For instance, the court in *In re Aftermarket Filters Antitrust Litig.*, No. 08 C 4883, 2009 WL 3754041 (N.D. Ill. Nov. 5, 2009), denied a motion to dismiss because:

> the complaint in the instant case, unlike *Twombly,* alleges an actual agreement initiated by specified persons, witnessed in its inception and on several later occasions by an actual participant in the price fixing scheme. Although the series of alleged price fixing arrangements among defendants was followed by parallel rises in

[17] In addition to specific allegations regarding the nature and performance of Defendants' agreement, the CAC discusses well-known "plus factors" that made the conspiracy even more plausible, and which continued into the limitations period: the fact that Defendants are by far the two largest players in a highly concentrated market (¶¶ 1, 42, JA0131, JA0140-41); their opportunities to monitor each other's pricing via co-packing agreements (¶¶ 46-47, 58, JA0142, JA0144-45); the homogenous, standardized nature of the product (¶¶ 37-39, JA0139-40); and barriers to market entry plus a lack of substitute products (¶¶ 40-42, JA0140-41).

> prices, the complaint does not rely only on the alleged parallel conduct to imply a conspiracy.

Id. at *3. *See also In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2014 WL 4955377, at *32 (N.D. Cal. Oct. 2, 2014) (holding *Twombly* satisfied "where Plaintiffs have alleged many dozens of discrete contacts . . . .").

Given that Plaintiffs' allegations are both plausible and sufficiently detailed to put Defendants on notice of the nature of the challenged conduct, Defendants have no grounds to insist that the CAC should contain yet more detail about specific meetings, customers, or prices. Such information would not normally be available to antitrust plaintiffs without discovery, and "[i]f plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail[.]" *Braden*, 588 F.3d at 598.[18] Numerous courts have held that *Twombly* does not require plaintiffs to

[18] *See also Boland v. Consol. Multiple Listing Serv., Inc.*, 868 F. Supp. 2d 506, 514 (D.S.C. 2011), *aff'd and remanded sub nom. Robertson v. Sea Pines Real Estate Cos., Inc.*, 679 F.3d 278 (4th Cir. 2012) ("Although the complaints do not include specific dates and locations of the meetings, it is difficult to fathom how the Plaintiffs, without the benefit of discovery, could know such details, as those facts are particularly within the knowledge and control of the Defendants."); *Garrett v. Cassity*, No. 4:09CV01252 ERW, 2010 WL 2540748, at *8 (E.D. Mo. June 17, 2010) ("*Twombly* and *Iqbal* may have refined notice pleading by emphasizing that legal conclusions couched as factual assertions do not satisfy Rule 8's requirements, but they did not go so far as requiring fact pleading under the Federal Rules of Civil Procedure.").

plead specifics regarding the time, place, and person as to each allegation of conspiracy.[19]

In particular, Defendants' criticism of Plaintiffs for not pleading specific dates for specific unlawful activities is unfounded. "[T]he period of limitations is an affirmative defense that a complaint need not address. Unless the complaint alleges facts that create an ironclad defense, a limitations argument must await factual development." *Foss v. Bear, Stearns & Co.*, 394 F.3d 540, 542 (7th Cir. 2005). To hold otherwise would be to improperly draw the inference in *Defendants'* favor that the conduct alleged took place outside of the limitations period. *Cf. Braden*, 588 F.3d at 595 (holding district court erred when it "drew inferences in appellees' favor, faulting Braden for failing to plead facts tending to contradict those inferences.").[20]

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[19] *See Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2010); *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 871 F. Supp. 2d 143, 162 (E.D.N.Y. 2012); *Milliken & Co. v. CNA Holdings, Inc.*, No. 3:08-CV-578, 2011 WL 3444013, at *5 (W.D.N.C. Aug. 8, 2011); *In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1005 (E.D. Mich. 2010); *In re Se. Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 943 (E.D. Tenn. 2008); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007).

[20] Neither *Varner*, 371 F.3d at 1020, nor *Insulate SB*, 2014 U.S. Dist. LEXIS 31188, at *21-22 (cited in Opp. Br. at 38), hold that where a plaintiff alleges a continuing conspiracy, the burden of proof on the statute of limitations defense shifts to the *plaintiff* to allege specific dates and specific activities. Rather, in both of those cases, the only legally sufficient overt acts alleged in the complaints occurred wholly outside the relevant limitations period, and therefore "the

Nor is the CAC overly vague in describing the activities that continued into the limitations period. Far from simply "asserting, without any factual support, that conduct was 'ongoing,'" Opp. Br. at 40, the CAC specifies the type of conduct that continued through at least late 2010: discussions between Janish and Blue Rhino to prevent competition on pricing or fill levels (CAC ¶¶ 13, 60-62, JA0134, JA0145-46); coordination on pricing for contracts with customers (¶¶ 13, 92, JA0134, JA0151); policing each other's compliance with the conspiracy (¶¶ 13, 92, JA0134, JA0151); allocation of markets and customers (¶¶ 12, 90-92, JA0134, JA0150-51); and, of course, continuing to overcharge Plaintiffs and the proposed Class (¶¶ 11, 13, 14-15, 18-21, 108, 110-11, 121-23, 136, JA0134-36, JA0154-55, JA0157-58, JA0160).[21]

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complaint itself establishe[d] the defense." *Joyce v. Armstrong Teasdale, LLP*, 635 F.3d 364, 367 (8th Cir. 2011) (citation and quotation marks omitted).

[21] The cases Defendants cite (Opp. Br. at 40 & n.21) are distinguishable. Two cases, *Smithrud v. City of St. Paul*, 746 F.3d 391, 396 (8th Cir. 2014) and *Cervantes v. Countrywide Home Loans, Inc.*, No. CV 09-517-PHX-JAT, 2009 WL 3157160, at *6-7 (D. Ariz. Sept. 24, 2009), were based on discrete events that took place outside of the limitations period, and the plaintiffs alleged no additional conduct by defendants that would constitute a continuing violation. *Smithrud*, 746 F.3d at 396 (demolition of plaintiff's properties); *Cervantes*, 2009 WL 3157160, at *6 (issuance of home loans).

Insulate SB is distinguishable because the complaint there completely lacked "any factual allegation that the Distributor Defendants met or communicated for the purpose of 'fine-tuning' or furthering the objectives of their alleged price-fixing conspiracy." 2014 U.S. Dist. LEXIS 31188, at *22. The language Defendants cite pertains to the *Insulate* plaintiffs' allegation that certain defendants

Likewise, while Defendants claim Plaintiffs needed to allege further (unspecified) details about Defendants' pricing, Opp. Br. at 13 n.5, they cite no authority for this proposition. In fact Plaintiffs' allegation that they "purchased Filled Propane Exchange Tanks containing only 15 pounds of propane, pursuant to the conspiracy, but sold at the price they would have been charged for 17-pound tanks but for the conspiracy" at "an effective price increase of 13%," CAC ¶ 111 (JA0155), or generally that prices were "supracompetitive,"*e.g.* ¶¶ 11, 13, 121 (JA0134, JA0157), coupled with allegations of anti-competitive conduct during the class period, state a plausible antitrust claim.[22] To plead precisely how much Defendants' prices exceeded the competitive price would require discovery and

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communicated at industry conferences, *id*. (quoted in Opp. Br. at 40), but unlike the CAC, the *Insulate* complaint did not specify which distributors were involved or whether they even discussed the alleged anti-competitive agreement. *Id*.

In both *Garrison v. Oracle Corp.*, No. 14-CV-04592-LHK, 2015 WL 1849517, at *7 (N.D. Cal. Apr. 22, 2015) and *Ryan v. Microsoft Corp.*, No. 14-CV-04634-LHK, 2015 WL 1738352, at *13 (N.D. Cal. Apr. 10, 2015), suits arising out of agreements between high-tech employers not to recruit each other's employees, the only conduct pled was the agreements themselves (which pre-dated the limitations period); the plaintiffs did not allege any additional acts during the limitations period to enforce the agreements. *Garrison*, 2015 WL 1849517, at *7; *Ryan*, 2015 WL 1738352, at *13.

[22] *See In re Ductile Iron Pipe Fittings (DIPF) Direct Purchaser Antitrust Litig.*, No. CIV. 12-711, 2013 WL 812143, at *10 (D.N.J. Mar. 5, 2013) (rejecting argument that complaint was deficient because it was "devoid of *any* facts regarding any prices actually paid, let alone facts establishing that any price was 'artificially inflated' or 'supra-competitive;'" holding allegations that plaintiffs purchased during conspiracy were sufficient).

expert analysis to "construct a hypothetical market . . . free of the restraints and conduct alleged to be anticompetitive." *Concord Boat*, 207 F.3d at 1055 (citation omitted). Such analysis is not required to survive a motion to dismiss.

III. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court REVERSE the district court's order dismissing their claims and REMAND this matter for further proceedings.

Dated: January 15, 2016

Respectfully Submitted,

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