UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

IN RE: CAST IRON SOIL PIPE AND FITTINGS ANTITRUST LITIGATION	**No. 1:14-md-2508-HSM-CHS**
THIS DOCUMENT RELATES TO: ALL ACTIONS	

DIRECT PURCHASER PLAINTIFFS' MEMORANDUM IN SUPPORT OF CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

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I. INTRODUCTION

Plaintiffs seek to certify under Rule 23(b)(3)[1] a nationwide class[2] of nearly 750 direct purchasers of cast iron soil pipe and fittings ("CISP") who were forced to pay supracompetitive prices from November 1, 2006, through December 31, 2013, due to violations of the antitrust laws by Defendants McWane,[3] Charlotte,[4] and the Cast Iron Soil Pipe Institute ("CISPI"). At trial, Plaintiffs[5] will show, using evidence that is common to the proposed class, that Defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to maintain their duopoly. They did so by inflating the prices that direct purchasers paid for CISP through both price fixing and coordinated efforts to eliminate import competition, including through exclusion or acquisition of importers and the abuse of CISPI to exchange commercially-sensitive information. Plaintiffs will also show that Charlotte violated Section 7 of the Clayton Act, 15 U.S.C. § 18, by acquiring the CISP business of import competitor Star Pipe Products Inc. ("Star"), which substantially lessened competition in the CISP market.

This is a paradigmatic example of a case suitable for class treatment. Many dozens of similar antitrust class action cases, also involving a commodity product and list prices, have been

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[1] All references to a Rule or Rules are to the Federal Rules of Civil Procedure.

[2] Plaintiffs seek to certify the following class: All persons or entities that purchased cast iron soil pipe or cast iron soil pipe fittings in the United States directly from any of the Manufacturer Defendants, their subsidiaries, predecessors, or affiliates, from November 1, 2006, through December 31, 2013 (the "Class Period"). Excluded from the Class are Defendants, their parent companies, subsidiaries, predecessors, and affiliates, any co-conspirators, federal and state governmental entities and instrumentalities of federal or state governments.

[3] "McWane" includes Defendants AB&I Foundry ("AB&I"), Tyler Pipe Company ("Tyler"), and McWane, Inc.

[4] "Charlotte" includes Defendants Charlotte Pipe and Foundry Company ("Charlotte Pipe") and Randolph Holding Company, LLC. Charlotte Pipe and McWane are referred to as the "Manufacturer Defendants."

[5] Plaintiffs are A&S Liquidating Inc., Hi Line Supply Co. Ltd., and Red River Supply, Inc.

certified in the past. As in those cases, class treatment is the most efficient—and likely the only practical—mechanism for resolving the issues presented in this litigation, given the hundreds of class members. Moreover, the claims of each proposed class member stem from the same central legal and factual questions: whether Defendants' actions violated the antitrust laws and whether, and to what extent, those violations raised prices above competitive levels. For these reasons, as discussed in greater detail below, class certification is warranted.

II. FACTUAL BACKGROUND

A. The CISP Industry

1. The Supply Chain

The characteristics and uses of CISP are detailed in the Expert Declaration of Dr. Russell Lamb, dated March 4, 2016 ("Lamb Decl."), ¶¶ 13-18, 34-45, 52-54. Defendants McWane and Charlotte Pipe are manufacturers of CISP, which is used primarily in wastewater and rainwater drain, waste, and vent systems in hospitals, schools, and other commercial and industrial structures. *Id.* ¶¶ 4, 27, 39, 43–45.

Prior to November 2006, there were three significant domestic manufacturers of CISP: AB&I, Charlotte, and Tyler. *Id.* ¶¶ 4, 156. In November 2006, Tyler's parent company, McWane, acquired AB&I. *Id.* ¶ 62. As a result, from November 2006 through the end of 2013, Defendants McWane and Charlotte Pipe were the sole domestic manufacturers with a combined estimated share of 86.6% to 92.9% of the U.S. CISP market. *Id.* ¶ 156, Table 8. Imported CISP made up the remainder. *Id.* Table ¶ 28, Table 8.

Wholesale plumbing distributors are the direct purchasers of CISP from manufacturers and import suppliers. *Id.* ¶ 19. Wholesale distributors sell CISP to mechanical contractors for installation in new construction and renovations. *Id.* The end users are building owners. *Id.*

2. CISP Pricing

Domestic CISP manufacturers' prices had three components: list prices, regional multipliers, and rebates. *Id.* ¶ 21. List prices were the same nationwide. *Id*. ¶ 22. They were published in list price sheets sent directly to customers and on the website of each Manufacturer Defendant. *Id.* During the Class Period, Charlotte Pipe and McWane increased list prices once each year. *Id.* ¶¶ 22, 89, App. C. Except in 2008, these increases were announced for all three brands in September or October to become effective at the beginning of the following year. *Id.* All three domestic brands used identical list prices for each product they sold. *Id.* ¶¶ 22, 72.

The list price was multiplied by the second pricing component, the multiplier, to determine the "net" price of a CISP product. *Id.* ¶ 21. The same multiplier applied to all sales in a given region. *Id.* ¶¶ 21, 23. The Manufacturer Defendants published regional multipliers in written price lists or maps that they sent to their customers. *Id.* ¶ 23. During the Class Period, McWane's and Charlotte Pipe's multipliers were, in most instances, identical for a given region and, in the few instances where they were not identical, were very similar. *Id.* ¶¶ 148-49.

The third component of prices was rebates. *Id.* ¶ 24. The primary package of rebates was an annual loyalty-based program called the "Stocking Distributor Program" by McWane and the "Loyalty Incentive Program" by Charlotte Pipe. *Id.* ¶¶ 24-26. These programs required branches or trading areas of wholesale distributors to purchase CISP exclusively from a single domestic brand. *Id.* 24-26, 97. By contrast, according to the terms of the rebate programs and in practice, *every* branch of a given wholesale distributor nationwide or in a given region was required to purchase CISP from one of the domestic brands and *not* from importers. *Id.* ¶ 101. There were also discounts for CISP purchased by the truckload and promotional discounts. *Id*. ¶¶ 26, 151.

The terms of the rebate programs were standardized, and identical or nearly identical rebates were typically offered to all customers sometimes based on their region. *Id*. ¶ 24.[6] In addition, the terms and amounts offered by McWane and Charlotte Pipe were similar. *Id*. ¶¶ 150-51.

3. The Cast Iron Soil Pipe Institute

CISPI is a trade association that, during the Class Period, was exclusively comprised of McWane (through its AB&I and Tyler brands) and Charlotte Pipe. *Id.* ¶ 27, 82. CISPI's bylaws permitted only domestic manufacturers to become members. *Id.* CISPI's Board of Directors and Market Development Advisory and Technical Advisory Committees, which consisted of senior McWane and Charlotte Pipe executives and sales personnel, met several times each year. *Id.* ¶¶ 27, 66, 80-81, Tables 3-5. CISPI created standards for CISP and also registered the "CI" trademark, which only its members were permitted to use on CISP. *Id.* ¶¶ 27, 84.

B. Defendants Violated Federal Antitrust Law

1. The Source of the Conspiracy

Before 2006, the three domestic manufacturers of CISP—Tyler, Charlotte Pipe, and AB&I—controlled the bulk of the U.S. CISP market. *Id*. ¶¶ 63, 155-58, Table 8. But the domestic manufacturers recognized that CISP importers' lower prices (about 30% lower) increasingly threatened the domestic manufacturers' market share and had "forced the market price and profitability to drop." Ex. 7, MSPTN-046636–675 at 673. Their concerns were underscored by importer Star's September 2006 announcement that it would enter the CISP

[6] *See also* Declaration of Robert A. Braun in Support of Direct Purchaser Pls.' Mem. & Order in Support of Class Cert. & Appoint. of Class Counsel ("Braun Declaration"), Ex. 1, CP-040273-75 at 75; Ex. 2, CP-071779-782 at 782; Ex. 3, CP-072425-28 at 28; Ex. 4, MSPTN-070416-19; Ex. 5, MSPTN-071119 at 22; Ex. 6, MSPTN-084093 at 97. Unless otherwise noted, all exhibit citations are to exhibits attached to the Braun Declaration.

market in early 2007. Ex. 8, MSPTN-052739; Ex. 9, MSPTN-474834. Star, in particular, threatened the domestic manufacturers because it had previously developed a national distribution network to support its ductile iron pipe fittings ("DIPF") business and had pre-existing relationships with CISP wholesale distributors, many of whom also sold DIPF. Ex. 10, MSPTN-259098 at 27; Ex. 11, McCutcheon Dep. 35:5-38:10. In October 2006, McWane's President, G. Ruffner Page, Jr., and the head of its CISP Division, David Green, attended a meeting with Star executives in Houston, where they "expressed anger that [Star was] about to enter the soil pipe market." Ex. 12, STAR-CISP-000002. They told the Star executives "that it was a mistake to allow [Star] to enter the DIPF market and they will not allow that to happen again with soil pipe." Ex. 13, Star-CISP-000004.

At the beginning of November 2006, McWane acquired AB&I, the smallest of the domestic manufacturers based in Oakland, California, which was increasingly threatened by importers. Lamb Decl. ¶ 62; Ex. 14, MSPTN-484753–820. Charlotte Pipe's then-CEO Frank Dowd, IV told AB&I's former owner, Alan Boscacci, that Dowd was "very positive on the acquisition" and "felt that the move was good for the industry." Ex. 15, MSPTN-052764-65 at 64. Boscacci, who became a senior official at McWane, conveyed Dowd's comments to McWane's Page. *Id*. The AB&I acquisition allowed Defendants McWane and Charlotte Pipe to dominate the U.S. CISP market with a combined market share of sales of around 90%. Lamb Decl. ¶ 63, 155-58, Table 8. It also facilitated McWane's and Charlotte Pipe's coordination of pricing and cooperation on strategies to exclude or acquire import competition.

McWane's acquisition of AB&I, however, did little to relieve the "downward pressure on prices" from the CISP industry's "tremendous overcapacity," which persisted throughout the Class Period. Ex. 16, Boscacci Dep. 54:18-58:10; *see also* Lamb Decl. ¶ 137–38; Figure 4. That

pressure was exacerbated by the sharp decline in demand in 2009 due to the faltering construction industry. Lamb Decl. ¶ 50, 132-34, 138, Figure 4.

2. Defendants Conspired to Fix Prices and Eliminate Importers

To counteract the pricing pressure from overcapacity, declining demand, and imports, Defendants conspired to keep prices up and to eliminate lower-priced import competition.

Before the Class Period, Charlotte Pipe and McWane "mistrusted each other." Ex. 7, MSPTN-046636-75 at 60. However, after McWane's acquisition of AB&I, senior officials from both "competitors" fostered a close relationship[7] through repeated contacts at formal meetings, tours of one another's factories,[8] social events (like hunting trips, weddings, and football games),[9] and frequent telephone calls.[10] Defendants' senior officials gathered for triannual

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[7] McWane President Page explained the reasons for this relationship as follows:

> We will not achieve superior profitability in soil business until CP [Charlotte Pipe] wants to and we also have the ability to reduce the impact imports can have on our market share. In other words, our customers are not going to help us. They are only going to divide and conquer and move on to the next potential carcass. So saying no is still important even if we lose some share in the short run because the ultimate impact is on CP that we care about. All these purchasing assholes will be different in three years. The Dowds will still be here with us.

Ex. 17, MSPTN-052826–28.

[8] Ex. 18, MSPTN-053323; Ex. 19, MSPTN-053373; Ex. 20, MSPTN-330321; Ex. 21, MSPTN-396874; Ex. 22, CP_MDL-095243; Ex. 23, Winter Dep. 214:17-217:5, 229:25-31:19; Ex. 24, Frank Dowd Dep. 33:3-10, 152:24-153:23; Ex. 25, Wickham Dep. 196:18-197:18; *see also* Ex. 26, MSPTN-330337 (discussing manufacturing processes).

[9] Ex. 27, CP-161536; Ex. 28, CP-161581-82; Ex. 29, MSPTN-278049-77; Ex. 30, MSPTN-277707; Ex. 31, CP-000406; Ex. 32, CP-001281; Ex. 33, CP0991413-16; Ex. 34, CP-001588-89; Ex. 35, CP-003093; Ex. 36, CP-161760-61; Ex. 37, CP-166598; Ex. 38, MSPTN-385308; Ex. 19, MSPTN-053373; Ex. 39, MSPTN-127950; Ex. 40, MSPTN-249011; Ex. 41, MSPTN-249631; Ex. 42, MSPTN-250873; Ex. 43, MSPTN-277745; Ex. 44, MSPTN-052716; Ex. 45, MSPTN-052236; Ex. 46, CP-000394-96; Ex. 47, CP-019478; Ex. 48, MSPTN-037557; Ex. 49, MSPTN-053349; Ex. 50, MSPTN-053807; Ex. 51, MSPTN-053844-45; Ex. 52, MSPTN-274081; Ex. 53, MSPTN-278134; Ex. 54, MSPTN-277806; Ex. 55, MSPTN-277847; Ex. 56, Parney Dep. 152:6-18; Ex. 57, Waugaman Dep. 122:4-22, 141:12-142:1, 144:12-20, 273:8-274;6, 275:22-278:17, 288:9-290:16, 323:13-324:11; Ex. 25, Wickham Dep. 102:9-104:16, 106:1-108:23; 284:18-285:6; Ex. 58, Hardison Dep. 161:10-164:23, 170:23-171:24,

meetings—in locations like the Bahamas, Pebble Beach, and Telluride—under the auspices of CISPI.[11] Outside of official committee meetings, Charlotte Pipe and McWane executives met at dinners, cocktail hours, ski days, golf rounds, and on flights on their corporate jets.[12] High-level officials at McWane and Charlotte met regularly to discuss, among other things, buy-sell arrangements in which Charlotte Pipe sold McWane certain pipe and fittings products that McWane did not manufacture, and in which McWane sold Charlotte Pipe other products.[13]

Following the AB&I acquisition, Defendants Charlotte Pipe and McWane each year announced identical list prices for every CISP product they produced (and identical or very similar multipliers), and raised those prices in lockstep to be effective at the beginning of each year (except in 2008, when the increases were effective August 1). Lamb Decl. ¶¶ 22, 72, 148-49, App. C. These price increase announcements typically followed meetings and telephone calls between Defendants.[14] Soon after the beginning of the Class Period, the Manufacturer

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345:5–25; Exs. 16 and 59, Boscacci Dep. 36:5-37:25, 204:6-14, 203:16-204:9, 448:3-450:11; Ex. 24, Frank Dowd Dep. 33:3-15, 292:14-293, 121:13-122:6, 152:24-153:23, 174:2-18, 248:13-249:5, 261:11-263:17, 223:4-22, 290:18-291:25; Ex. 60, Lowe Dep. 182:16-22; Ex. 61, Wixson 53:2-16, 248:6-15.

[10] Ex. 62, McW ATT Boscacci [2151-C] AT&T; Ex. 63, McW ATT Boscacci [5299(L)] - AT&T; Ex. 64, McW ATT Bliss [0900(C) – AT&T; Ex. 65, CP Bill SM6614-R.1.8565.Final; Ex. 66, CP Bill SM6614-R1_CDR_4882_FINAL; Ex. 67, CP ATT 1606988 INTERNATIONAL USAGE; Ex. 68, McW ATT Wixson [2678(C)] - AT&T; Ex. 69, MCWANE_MDL-0094-99; Ex. 70, MCWANE_MDL-0027-28; Ex. 71, CP_MDL-000006-07.

[11] *See, e.g.*, Ex. 72, CISPI 0000042-54; Ex. 73, CISPI 0000055-68; Ex. 74, CP-155511-526; Ex. 75, CISPI 0000100-113; Ex. 76, CISPI 0000127-143.

[12] *See* Ex. 77, CP_MDL-131845-56; Ex. 78, CP-011931-33; *supra* note 10.

[13] Ex. 79, CP_MDL-086437; Ex. 80, MSPTN-054111; Ex. 81, CP-079494; Ex. 82, CP_MDL_087940.

[14] *See, e.g.*, Ex. 62, McW ATT Boscacci [2151-C] AT&T (July 27, 2010 text and call between Charlotte's Frank Dowd IV and McWane's Allan Boscacci); *Id*. (August 3, 2010 call between Allan Boscacci and Frank Dowd IV); Ex. 65, CP Bill SM6614-R.1.8565.Final (August 3, 3020 call between McWane's Kip Wixson and Charlotte's Roddey Dowd, Jr.); Ex. 66, CP Bill SM6614-R1_CDR_4882_FINAL (August 12, 2014 calls between Charlotte's Donald

Defendants also began to emphasize a "transparent pricing" strategy, which "mean[t] that our published price is our only price[, and w]e give no job prices or special deals." Ex. 86, MSPTN-452380-2423 at 2394; *see also* Lamb Decl. ¶¶ 67–71, 147, 153. The transparent pricing strategy facilitated McWane's and Charlotte Pipe's ability to monitor and police one another's prices for "cheating" and "help[ed] to create a more stable market." Ex. 86, MSPTN-452380-2423 at 2394; *see also* Lamb Decl. ¶¶ 69, 73, 149.

The Manufacturer Defendants were able to maintain these supracompetitive prices by taking coordinated actions to destroy CISP importers' ability to effectively compete. For instance, McWane and Charlotte used CISPI as a pipeline for sharing current information about open construction projects that were considering or had recently decided to use imported CISP. Lamb Decl. ¶¶ 90–96. The project name, engineer, contractor, and, frequently, import supplier for each import project was provided to CISPI, which circulated comprehensive "Weekly Import Reports" to Charlotte Pipe and McWane officials. *Id*. ¶ 90. Using this information, officials at both companies worked directly with one another, and with CISPI representatives, to convert "import projects" to "domestic projects." *Id*. ¶¶ 91-94. Such information sharing of potential business opportunities with each company's major competitor is evidence of collusion. *Id*. ¶ 96. Similarly, McWane and Charlotte collusively used the CI trademark to discourage engineers, architects, and municipalities from specifying or using imported CISP in projects. *Id.* ¶¶ 84-89.

McWane and Charlotte Pipe adopted similar exclusive dealing policies "to thwart the growth of imported product" "by limiting importers['] access to distribution without resorting to [a] price war," in part, through the loyalty rebate programs. Ex. 7, MSPTN-046636-675 at 670.

Waugaman and McWane's Bill Bliss and August 24, 2010 call between Kip Wixson and Donald Waugaman); Ex. 83, CP_MDL-097734 (Charlotte September 1, 2010 list price increase letter); Ex. 84, CP-031328 (AB&I September 2, 2010 list price increase letter); Ex. 85, CP-026439 (Tyler September 2, 2010 list price increase letter).

The Manufacturer Defendants terminated the accounts and forfeited the rebates for wholesale distributors that they learned were purchasing import CISP. Lamb Decl. ¶ 101-02.

Even though McWane and Charlotte had excess capacity, they used acquisitions to remove the strongest importers from the market, including Charlotte's Matco-Norca acquisition in 2009; Charlotte's Star acquisition in 2010; and McWane's acquisition of CPPI's assets and rights in 2010. *Id*. ¶ 103-119. Defendants destroyed importers' inventory after the acquisitions. The acquisitions also included multi-year non-competition provisions to lock experienced executives and sale personnel out of the CISP market and confidentiality provisions to prevent each importer from informing the market that its exit was pursuant to an acquisition. *Id*. ¶ 117. Defendants used the closure of multiple importers over a relatively short period to paint importers generally as unreliable, damaging the ability of existing and subsequent import entrants to compete.[15]

Defendants' importer acquisitions were the product of collusion. "Acquisition opportunities" was a common agenda item at meetings between McWane and Charlotte senior executives. Ex. 87, CP-174002-003; Ex. 88, CP-079491; Ex. 81, CP-079494. Furthermore, on the same day that Charlotte was engaged in preliminary acquisition discussions with Star, McWane's Boscacci and Page emailed about the "need to talk" about "buy[ing] star out of P&F" at an upcoming Vail CISPI meeting between senior McWane and Charlotte executives. Ex. 89, MSPTN-464974; Ex. 90, CP-137904.

Defendants' removal from the domestic CISP market of Star—which was by far the largest importer at the time of the acquisition—eliminated serious import competition, allowing

[15] *See, e.g*., Ex. 94, MSPTN-019419-20; Ex. 95, MSPTN-019415-16; Ex. 96, MSPTN-022564; Ex. 97, MSPTN-127907-08; Ex. 98, MSPTN-033643-55 at 643; Ex. 99, MSPTN-443324-40 at 329; Ex. 100, MSPTN-002405-30 at 409; Ex. 101, MSPTN-034364-78 at 366; Ex. 102, MSPTN-034087-99 at 088.

McWane and Charlotte Pipe to raise prices substantially nationwide each year through the rest of the Class Period. Lamb Decl. ¶¶ 107, 112, 118, 166, 169, 184. After Star entered the CISP market in February 2007, it quickly expanded nationally to become "the best importer yet" with "low prices" and "a sophisticated approach." Ex. 91, MSPTN-392369. By comparison, New Age, the largest importer after the Star acquisition was, according to McWane's Boscacci, "not Star" and "[n]ot a threat." Ex. 92, MSPTN-217353. Unlike Star, New Age was "a small player" that was "[n]ot well financed and [had] no distribution structure." Moreover, New Age and other importers struggled because, "when Star exited abruptly it left their wholesalers at risk, such as Pace, who said they would never buy import again." Ex. 93, MSPTN-393912-16. As a result, importers were not "able to capture any wholesalers of any consequence." Ex. 92, MSPTN-217353.

III. ARGUMENT

To certify a class, Plaintiffs must show that there are "sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation" under Rule 23(a), *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1436 (2013) (internal quotation marks omitted), and must establish the predominance of common questions and superiority of a class action under Rule 23(b)(3), *In re Polyurethane Foam Antitrust Litig*., 1:10 MD 2196, 2014 WL 6461355, at *7 (N.D. Ohio Nov. 17, 2014).

The Court must undertake a rigorous analysis. *See Gooch v. Life Inv'rs Ins. Co. of Am*., 672 F.3d 402, 417 & n.8 (6th Cir. 2012); *see also Cason-Merenda v. VHS of Mich., Inc.*, 296 F.R.D. 528, 536 (2013), *reinstated after remand*, No. 06-15601, 2014 WL 905828 (E.D. Mich. Nov. 7, 2014) ("[T]he requisite 'rigorous analysis' of the record and consideration of the merits must be focused on and limited to the question whether the Rule's requirements have been established"). Although sometimes a court's analysis will "overlap with the merits of the

plaintiff's underlying claim," *Comcast Corp*., 133 S. Ct. at 1436, courts do not have "license to engage in free-ranging merits inquiries" at class certification, *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013). Courts may consider "[m]erits questions . . . to the extent—but only to the extent—that they are relevant to determining whether Rule 23 prerequisites for class certification are satisfied." *Id.*

A. The Proposed Class Satisfies Each of Rule 23(a)'s Requirements.

1. The Proposed Class Is Sufficiently Numerous.

Rule 23(a)(1)'s numerosity requirement is "not a difficult burden to satisfy." *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 303 (E.D. Mich. 2001) (certifying a price-fixing class consisting of 80 direct purchasers) (internal quotation marks and citations omitted). "[W]hile no strict numerical test exists to define numerosity under Rule 23(a)(1), 'substantial' numbers of affected consumers are sufficient to satisfy this requirement." *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 722 F.3d 838, 852 (6th Cir. 2013). The proposed class has about 750 members dispersed throughout the United States. Lamb Decl. ¶ 176 n.501. This meets the numerosity requirement.

2. There Are Common Questions.

Under Rule 23(a)(2), Plaintiffs need identify only "one common question to certify a class." *Whirlpool*, 722 F.3d at 853. A "common question" is one that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2241, 2551 (2011); *see also Polyurethane Foam*, 2014 WL 6461355, at *9 (finding common questions where "resolution of all putative class members' claims depend on a single answer provided by a factfinder").

"[T]he existence of the alleged conspiracy, standing alone, is sufficient to establish commonality" in antitrust litigation. *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 338 (D. Md. 2012).[16] It is "well established that class actions are particularly appropriate for antitrust litigation concerning price-fixing schemes because price-fixing presumably subjects purchasers in the market to common harm." *Cardizem*, 200 F.R.D. at 304 (quoting *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 240 (E.D.N.Y. 1998)). Other common questions justifying class treatment in the antitrust context include the "measure of classwide damages" and "whether Defendants engaged in affirmative acts to conceal the conspiracy." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 617 (N.D. Cal. 2015). Each of these common questions suffices here to satisfy Rule 23(a)(2).

3. Plaintiffs' Claims Are Typical of the Proposed Class.

For typicality under Rule 23(a)(3), a class representative's claim must arise "from the same event or practice or course of conduct that gives rise to the claims of other class members" or be "based on the same legal theory." *Polyurethane Foam*, 2014 WL 6461355, at *9 (internal quotation marks and citation omitted). Because "[t]ypicality refers to the nature of the claims of the representative, not the individual characteristics of the plaintiff," it is not necessary for "named plaintiffs to be clones of each other or clones of other class members." *Cardizem*, 200 F.R.D. at 304 (internal quotation marks and citations omitted); *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, Master File No. 06-MD-1775 (JG) (VVP), MDL No. 1775, 2014 WL

[16] *See also* 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 3.10 (4th ed. 2002) (in the antitrust context, "courts have held that the existence of an alleged conspiracy or monopoly is a common issue that will satisfy" the commonality requirement"); 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1763 at 230-31 (3d ed. 2005) ("the claimed existence of a conspiracy to fix prices . . . in violation of the antitrust laws has been found to present common questions in actions brought by plaintiffs who asserted that they had been harmed by those activities").

7882100, at *31 (Oct. 15, 2014), *adopted by* 2015 WL 5093503 (E.D.N.Y. July 10, 2015) ("[F]actual differences in the amount of damages, date, size or manner of purchase, the type of purchaser . . . and other such concerns will not defeat class certification when plaintiffs allege that the same unlawful course of conduct affected all members of the proposed class" (internal quotation marks and citation omitted)).[17]

"The typicality requirement has been liberally construed by courts . . . and in the antitrust context, typicality will be established by plaintiffs and all class members alleging the same antitrust violations by defendants." *Titanium Dioxide*, 284 F.R.D. at 338–39 (internal quotation marks, brackets, and citations omitted).[18] Here, the named plaintiffs and members of the proposed class all assert that: (1) Defendants artificially raised and maintained CISP prices through a conspiracy to fix prices and eliminate import competition in violation of Sherman Act § 1, and (2) Charlotte's acquisition of Star's CISP business substantially lessened competition in the CISP market in violation of Clayton Act § 7. Plaintiffs' claims are typical of the class.

4. Plaintiffs Will Fairly and Adequately Represent the Proposed Class.

To satisfy Rule 23(a)(4)'s adequacy requirement, two criteria must be met: (1) "the representative must have common interests with unnamed members of the class" and (2) "it must appear that the representatives will vigorously prosecute the interests of the class through

[17] *See also Cardizem*, 200 F.R.D. at 304 ("[C]laims in antitrust price-fixing cases generally satisfy Rule 23(a)(3)'s typicality requirement, even if members purchase different quantities and pay different prices" (internal quotations marks and citations omitted)); *In re TFT–LCD Antitrust Litig.*, 267 F.R.D. 291, 300 (N.D. Cal. 2010) (class representatives are typical even when "the plaintiff followed different purchasing procedures, purchased in different quantities or at different prices, or purchased a different mix of products than did the members of the class.").

[18] *See also CRT*, 308 F.R.D. at 613 ("Typicality requirements are often satisfied wherein it is alleged that the defendants engaged in a common [price-fixing] scheme relative to all members of the class." (internal quotation marks and citation omitted)); *Air Cargo*, 2014 WL 7882100, at *31 (typicality requirement is generally satisfied in antitrust suits).

qualified counsel." *Young v. Nationwide Mut. Ins. Co*., 693 F.3d 532, 543 (6th Cir. 2012) (internal quotation marks and citation omitted).

Here, the interests of the proposed class representatives and the unnamed class members are aligned: each has been injured by the same anticompetitive conduct. And, as discussed below, Plaintiffs' counsel are well qualified to pursue this antitrust litigation and have vigorously done so. Rule 23(a)(4) is satisfied.

B. The Proposed Class Satisfies Rule 23(b)(3).

1. Common Questions Predominate.

Rule 23(b)(3)'s predominance requirement tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The predominance inquiry focuses on whether the elements of the claims are "capable of proof at trial through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305, 311–12 (3d Cir. 2008).

In demonstrating that their claims are *capable* of proof at trial, Plaintiffs are not required to *actually* "prove" each element at the class certification stage. *Hydrogen Peroxide*, 552 F.3d at 311. "All that is needed is 'common evidence and methodology,' not 'also common results for members of the class.'" *Polyurethane Foam*, 2014 WL 6461355, at *13 (quoting *Butler v. Sears, Roebuck & Co*., 727 F.3d 796, 801 (7th Cir. 2013)); *see also Whirlpool*, 722 F.3d at 859 (holding that an alleged "failure of proof as to an element of the plaintiffs'" legal claims is "properly addressed at trial or in a ruling on a summary judgment motion"—not "in deciding whether to certify a proposed class" (internal quotation marks and citations omitted)).[19]

[19] *See also Amgen*, 133 S. Ct. at 1196 (noting putative class representatives "need not, at th[e class certification] threshold, prove that the predominating question will be answered in their

Moreover, Rule 23(b)(3) requires only that "'common questions *predominate* over any questions affecting only individual [class] members.'" *Whirlpool*, 722 F.3d at 858 (quoting *Amgen*, 133 S. Ct. at 1196) (internal quotation marks omitted).[20] The "mere fact that questions peculiar to each individual member of the class action remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." *Cason-Merenda*, 296 F.R.D. at 535 (quoting *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) (internal quotation marks and citation omitted)).

The predominance requirement is satisfied here because common evidence will be used to prove each element of Plaintiffs' claims. *See Polyurethane Foam*, 2014 WL 6461355, at *13 ("Therefore, this Court wades through the parties' proof by examining" the elements of their claims). The elements of Plaintiffs' Sherman Act § 1 claim are: (1) liability for a conspiracy, (2) the impact of that conspiracy, (3) damages, and (4) fraudulent concealment. *Polyurethane Foam*, 2014 WL 6461355, at *13. The elements of Plaintiffs' Clayton Act § 7 claim are (1) the relevant market, (2) the impact of the challenged acquisition, and (3) damages. *See, e.g.*, *Cmty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1152 (W.D. Ark. 1995), *aff'd*, 139 F.3d 1180 (8th Cir. 1998). Each of these elements is discussed below; where the elements of Plaintiffs' claims overlap, as with impact and damages, they are addressed together.

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favor"); *Polyurethane Foam*, 2014 WL 6461355, at *16 ("It would, of course, be inappropriate for this Court to decide, on the basis of an incomplete discovery record and in the context of a motion for class certification, that Defendants are correct in arguing the conspiracy did not in fact exist.").

[20] *Cardizem*, 200 F.R.D. at 307 ("The predominance requirement is satisfied unless it is clear that individual issues will overwhelm the common questions and render the class action valueless"); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007) ("[T]he fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones." (internal quotation marks and citations omitted)).

a. Common evidence will be used to prove that Defendants conspired in violation of Sherman Act § 1.

Like many other courts, "the Sixth Circuit has expressed a favorable view of class certification in antitrust conspiracy cases, stating that 'predominance is a test readily met in certain cases alleging violations of the antitrust laws, because proof of the conspiracy is a common question that is thought to predominate over the other issues of the case.'" *Cason-Merenda*, 296 F.R.D. at 538 (quoting *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008) (internal quotation marks, alterations, and citations omitted)); *see also Amchem*, 521 U.S. at 625 (predominance is readily shown "in certain cases alleging . . . violations of the antitrust laws"); 7AA Wright, Miller, & Kane, Federal Practice & Procedure § 1781 ("[W]hether a conspiracy exists is a common question that is thought to predominate over the other issues in the case and has the effect of satisfying the first prerequisite in Rule 23(b)(3).").

As described above, and in the accompanying expert declaration, there is ample evidence in the form of documents, testimony, and economic analysis common to all class members establishing Defendants' conspiracy to preserve their duopoly by fixing prices and eliminating competition from importers, including through Charlotte's acquisition of Star's CISP business. *See Cason-Merenda*, 296 F.R.D. at 548 ("[C]ourts have recognized that common issues often predominate as to the liability element of an antitrust conspiracy claim because consideration of the conspiracy issue would, of necessity, focus on defendants' conduct, not the individual conduct of the putative class members." (internal quotation marks and citation omitted)).

b. Plaintiffs will use common evidence to define the relevant market for purposes of their Clayton Act § 7 claim.

"[D]efining a relevant market is, by virtue of the very concept of a 'market,' an aggregate question." *Merenda*, 296 F.R.D. at 546 (quotations, brackets, and citations omitted). The two aspects of a relevant market are the relevant product market and the relevant geographic

market. "Courts have held that defining the relevant product market in an antitrust lawsuit may be susceptible to class-wide proof because the definition affects all members of the putative class." *Blessing v. Sirius XM Radio Inc*., No. 09 CV 10035 HB, 2011 WL 1194707, at *3 (S.D.N.Y. Mar. 29, 2011). The scope of a geographic market may similarly be determined through evidence common to the class. *See Merenda*, 296 F.R.D. at 546 (citing *In re Nw. Airlines Corp*., 208 F.R.D. 174, 220 (E.D. Mich. 2002)).

Using evidence common to the class, Dr. Russell Lamb, a distinguished economist, has determined that the relevant product market is the market for CISP. Dr. Lamb points to extensive class-wide evidence that CISP is not susceptible to substitution due to its unique properties including resistance to corrosion, non-combustibility, resistance to noise transmission, and strength and rigidity. Lamb Decl. ¶ 33–45. Plastic pipe is not a suitable replacement for cast iron in commercial, industrial, and high-rise residential applications because "in a fire plastic burns, gives off toxic fumes, and spreads fire quickly between floors. Cast iron does not." *Id*. ¶ 39 (quoting MSPTN-046636-675 at 651). Dr. Lamb also relies on classwide proof in concluding that the geographic market for CISP is the United States. Lamb Decl. ¶ 47-60. Based primarily on the Manufacturing Defendants' own data and internal documents, Dr. Lamb finds that during the Class Period changes in CISP prices throughout the United States reflected nationwide movements in raw material prices (on the cost side) and national macroeconomic conditions (on the demand side). *Id.* He also finds that the Manufacturing Defendants had the ability to distribute CISP nationwide; analyzed the geographic market for CISP as the United States; and exhibited behavior consistent with the existence of a national market, including through their participation in CISPI, a national trade association, and the development of national product standards. *Id*.

c. Plaintiffs will prove the impact of Defendants' antitrust violations using common evidence.

Another element of Plaintiffs' claims is the fact of injury—also known as antitrust impact. "Under the prevailing view, price fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated." *In re Urethane Antitrust Litig*., 768 F.3d 1245, 1254 (10th Cir. 2014), *petition for cert. pending*, No. 14-1091 (filed Mar. 9, 2015). The same is true with respect to a merger's impact on prices. *See Messner v. Northshore Univ. Health Sys*., 669 F.3d 802, 808 (7th Cir. 2012) (holding with respect to a Clayton Act § 7 claim that "[o]ne key issue on the merits will be proof that the merger had an antitrust impact on the plaintiff class, primarily in the form of higher prices").

Dr. Lamb's economic analysis of the characteristics of the United States CISP market and CISP pricing and statistical analysis of the Manufacturer Defendants' transactions, all of which is common to class, leads to the conclusion that all or virtually all proposed class members would have been impacted by Defendants' anticompetitive conduct.

First, Dr. Lamb analyzed the structural characteristics of the CISP market to determine whether Defendants' anticompetitive conduct would have caused supracompetitive CISP prices. *See Polyurethane Foam*, 2014 WL 6461355, at *18–20 (plaintiffs' economist's "review of the discovery to date leads him to conclude that there are five characteristics of the flexible foam market that make this case susceptible to a showing that all or nearly all direct purchasers suffered antitrust injury"); *Titanium Dioxide*, 284 F.R.D. at 345–46 ("accepted types of evidence for establishing class-wide injury-in-fact include: evidence of lock-step increases of national price lists; proof that defendants conspired to maintain an inflated base price from which all negotiations began; and evidence of structural factors that make an industry susceptible to

successful collusion"); *CRT*, 308 F.R.D. at 627 ("structural issues could be shown at trial to have generated class impact"). This evidence, which is common to the class, demonstrates:

- Stable or declining demand for CISP (a mature industry) during the Class Period put downward pressure on prices, which incentivized Defendants to form a cartel (Lamb Decl. ¶¶ 132-136, 139), *see Titanium Dioxide*, 284 F.R.D. at 343;

- CISP is a commodity product that is interchangeable across suppliers, making price the primary means by which suppliers can differentiate their products and facilitating coordination because observed differences in prices are more likely to reflect cheating than product customization (Lamb Decl. ¶¶ 123-31), *see Polyurethane Foam*, 2014 WL 6461355, at *19, *Air Cargo*, 2014 WL 7882100, at *51, and *In re Foundry Resins Antitrust Litig*., 242 F.R.D. 393, 410 (S.D. Ohio 2007); and

- Defendants had substantial excess capacity for production of CISP, which suggests that, absent anticompetitive conduct, Defendants would have attempted to increase sales by lowering prices (Lamb Decl. ¶¶ 137-39), *see Polyurethane Foam*, 2014 WL 6461355, at *18, *Urethane*, 768 F.3d at 1265, and *Titanium Dioxide*, 284 F.R.D. at 344.

These market characteristics lead Dr. Lamb to conclude that, "as a result of the alleged misconduct, prices in the U.S. market for CISP were artificially inflated." Lamb Decl. ¶ 139.

Second, Dr. Lamb analyzed additional characteristics of the CISP industry and found that all or nearly all purchasers from Defendants would have paid these inflated prices. *See, e.g.*, *Foundry Resins*, 242 F.R.D. at 410 ("[S]tructural characteristics may serve as common proof that Defendants' alleged conspiracy to fix prices in such a market impacted all purchases."). The evidence, which is common to the class, includes:

- Defendants dominated the U.S. CISP market, enjoying an approximately 90 percent market share, meaning that their customers had little alternative but to purchase CISP at supracompetitive prices (Lamb Decl. ¶¶ 155-58), *see Polyurethane Foam*, 2014 WL 6461355, at *18; *Titanium Dioxide*, 284 F.R.D. at 342;

- The absence of available economic substitutes for CISP meant that class members could not have reasonably avoided supracompetitive prices by switching to an alternative product (Lamb Decl. ¶¶ 33-46, 159), *see Air Cargo*, 2014 WL 7882100, at *50; *Urethane*, 768 F.3d at 1265; and

- The presence of significant barriers to entry into the U.S. CISP market—including significant levels of capital investment required to manufacture CISP, the need for well-developed distribution networks, and regulatory impediments—made it difficult for new entrants to enter the market and provide customers with an alternative to Defendants' artificially-inflated prices (Lamb Decl. ¶¶ 160-65), *see Polyurethane Foam*, 2014 WL 6461355, at *18; *Titanium Dioxide*, 284 F.R.D. at 343.

Based on this evidence, Dr. Lamb concludes that "all or nearly all members of the proposed Class would be injured as a result of the alleged misconduct in that they paid higher prices for the CISP they purchased than they otherwise would have." Lamb Decl. ¶ 165.

Third, Dr. Lamb finds that, based on the evidence of common demand and supply factors for CISP and the Manufacturer Defendants' pricing strategies, the U.S. CISP market exhibited a pricing structure. *Id*. ¶¶ 143-65. A pricing structure is present when the prices paid by different purchasers for the same product from a single seller or for the same product from different sellers tend to move together over time. *Id.* ¶ 143. Therefore, Dr. Lamb concludes that "all members of the proposed Class would have paid higher prices resulting from the misconduct." *Id.* ¶ 154; *see also Polyurethane Foam*, 2014 WL 6461355, at *55 (relying on pricing structure analysis in finding common impact); *In re High-Tech Emp. Antitrust Litig*., 985 F. Supp. 2d 1167, 1206 (N.D. Cal. 2013) (calling the "use of evidence of general price effects plus evidence of a price structure to conclude that common evidence is capable of showing widespread harm to the class" "a roadmap widely accepted in antitrust class actions"); *In re Linerboard Antitrust Litig*., 305 F.3d 145, 153–55 (3d Cir. 2002) (finding that expert's price structure analysis could establish injury on a class-wide basis).

Fourth, using the Manufacturer Defendants' transaction data, Dr. Lamb employed a multiple regression model to confirm the impact on all class members of Defendants' antitrust violations. Lamb Decl. ¶¶ 166-86. Multiple regression analysis is an econometric methodology that is widely accepted by courts and economists for measuring common impact in the antitrust

context. *See Scrap Metal*, 527 F.3d at 529 (observing that "this method is broadly accepted for proving antitrust damages"); *In re Elec. Books Antitrust Litig*., No. 11 MD 2293 DLC, 2014 WL 1282293, at *25 (S.D.N.Y. Mar. 28, 2014) (multiple regression analysis is "a well accepted method of measuring antitrust damages").

Dr. Lamb's model is able to explain nearly 98% of the variation in CISP prices, which means that it closely fits the underlying data. *Id.* ¶ 183. Additionally, the results of Dr. Lamb's model are statistically significant at the 1 percent level. *Id.* This means that there is a less than 1 percent chance that the overcharges that the model detects are due to chance. *Id.* Finally, the coefficient of every variable included in Dr. Lamb's model is statistically significant, indicating that there is a relationship between these variables and the prices Defendants actually charged. *Id.* Dr. Lamb's model compares the CISP prices that the Manufacturer Defendants charged before the alleged conspiracy with the prices they charged during the conspiracy. It finds that prices were elevated by 8.3 percent due to the Manufacturing Defendants' conduct aimed at maintaining their duopoly (with the exception of the Star acquisition by Charlotte Pipe) and by an additional 24.2 percent due to the Star acquisition. Lamb Decl. ¶¶ 166, 184. These results provide strong confirmation that Defendants' anticompetitive behavior impacted CISP prices.

Because Dr. Lamb's model "rests upon a reliable foundation," *Scrap Metal*, 527 F.3d at 529–30, and is the type of expert analysis that courts commonly credit in certifying classes in antitrust actions like this one, Plaintiffs have confirmed that impact is provable on a class-wide basis.

d. Plaintiffs will prove damages on a class-wide basis.

Plaintiffs need not demonstrate that every issue relating to damages is susceptible to common proof in order to justify class treatment. "Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized

damage issues." *Beattie v. CenturyTel, Inc*., 511 F.3d 554, 564 (6th Cir. 2007); *see also Scrap Metal*, 527 F.3d at 535 ("even where there are individual variations in damages, the requirements of Rule 23(b)(3) are satisfied if the plaintiffs can establish that the defendants conspired to interfere with the free-market pricing structure"); *Polyurethane Foam*, 2014 WL 6461355, at *44 ("the presence of some individualized damages issues will not preclude class treatment if common issues otherwise predominate" (internal quotation marks and citation omitted)).

In antitrust cases, "[o]nce liability is established . . . a plaintiff's proof of damages is evaluated under a more lenient standard." *Scrap Metal*, 527 F.3d at 533. "[C]alculations need not be exact." *Comcast*, 133 S. Ct. at 1433. "[I]t will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

Dr. Lamb has presented a reasonable approximation of class-wide damages. He multiplies the percentage overcharges calculated by his multiple regression model by the Manufacturer Defendants' sales to calculate the aggregate damages associated with the Defendants' conduct. Lamb Decl. ¶ 185. *See Scrap Metal*, 527 F.3d at 534; *see also Polyurethane Foam*, 2014 WL 6461355, at *44. Dr. Lamb's model is also capable, using a similar straightforward methodology, of "produc[ing] individualized damage estimates based on individual transaction records." *Elec. Books*, 2014 WL 1282293, at *23; Lamb Decl. ¶ 185 n.515. This satisfies Rule 23(b)(3)'s predominance requirement.

e. Fraudulent concealment is susceptible to class-wide proof.

Defendants' fraudulent concealment of their price-fixing conspiracy will also be proven using evidence that is common to the class.

The issue of fraudulent concealment "rarely defeat[s] class certification"; to the contrary, it typically "supports a finding that common issues predominate." 2 Newberg on Class Actions § 4:57 (5th ed.).[21] This is particularly true here where the focus of the fraudulent concealment inquiry is on the Manufacturer Defendants' issuance of pretextual price increase announcements to conceal the existence of their conspiracy to violate the antitrust laws. *See Linerboard*, 305 F.3d at 163 ("It is the fact of concealment that is the polestar in an analysis of fraudulent concealment. It is the camouflage that demands attention, the cover up, the acts of obscuring or masking. These allegations of proof are all common to the defendants.").[22] The types of evidence relevant to demonstrating concealment center on the Manufacturer Defendants' actions in preparing and issuing price increase announcements to the market and, thus, are common to the class. This evidence will also be common across Defendants because "[f]raudulent concealment . . . may be established through the acts of co-conspirators." *Scrap Metal*, 527 F.3d at 538.[23]

The fraudulent concealment inquiry's "due diligence" requirement likewise supports class certification. As another court in this circuit recognized, "[B]ecause the due diligence

[21] *See also In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 302 F.R.D. 448, 470 (N.D. Ohio 2014) ("[C]ourts have been nearly unanimous . . . in holding that possible differences in the application of a statute of limitations to individual class members, including the named plaintiffs, does not preclude certification of a class action." (citation omitted)).

[22] *See also In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 639–40 (D. Kan. 2008), *aff'd*, 768 F.3d 1245 (10th Cir. 2014) (holding that, where "plaintiffs' fraudulent concealment theory rests on the defendants' conduct in issuing pretextual price increase announcements. . . . the key inquiry will . . . focus on the defendants' conduct—that is, what the defendants did—in issuing pretextual price increase announcements").

[23] *Polyurethane Foam*, 2014 WL 6461355, at *49 ("an affirmative act by one Defendant (or even non-defendant coconspirators) . . . may be imputed to other members of the conspiracy").

standard is an objective one, it can be established using evidence common to the class." *Polyurethane Foam*, 2014 WL 6461355, at *49.[24]

Indeed, the existence of *any* individualized issues relating to fraudulent concealment is speculative at this stage in the litigation and, accordingly, cannot weigh against class certification. *See In re Urethane Antitrust Litig*., No. 04-1616-JWL, 2013 WL 2097346, at *3 (D. Kan. May 15, 2013), *as amended*, 2013 WL 3879264 (D. Kan. July 26, 2013), *aff'd*, 768 F.3d 1245 (10th Cir. 2014).

On this element, Rule 23(b)(3)'s predominance requirement is satisfied.

2. A Class Action Is Superior to Other Methods of Adjudication.

Rule 23(b)(3) provides that a class action should be certified when class treatment is "superior to other available methods for fairly and efficiently adjudicating the controversy."

Class treatment is superior to other procedures for resolving the issues in this case because it will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about undesirable results." *Amchem*, 521 U.S. at 615. The proposed class includes a substantial number of small purchasers "who may have suffered antitrust impact but do not have an individually viable claim in light of the immense expense required to litigate this action." *Polyurethane Foam*, 2014 WL 6461355, at *50; *see also Whirlpool*, 722 F.3d at 861 ("Use of the class method is warranted particularly because class members are not likely to file individual actions—the cost of litigation would dwarf any potential recovery."). Moreover, "[r]equiring separate proceedings to litigate what Direct Purchasers have shown are common questions would

[24] *See also Venture Glob. Eng'g, LLC v. Satyam Comput. Servs., Ltd*., 730 F.3d 580, 588 (6th Cir. 2013) ("[A]ctions such as would deceive a reasonably diligent plaintiff will toll the statute." (internal quotation marks and citation omitted)).

unnecessarily burden federal and state courts, and would risk reaching inconsistent answers to those common questions." *Polyurethane Foam*, 2014 WL 6461355, at *50. Accordingly, this case meets Rule 23(b)(3)'s superiority requirement.

C. Proposed Class Counsel Will Fairly and Adequately Represent the Class

Rule 23(g)(1)(B) provides that "a court that certifies a class must appoint class counsel" who will "fairly and adequately represent the interests of the class." In appointing class counsel, courts must consider: (1) counsel's work in identifying and investigating the plaintiffs' claims; (2) their experience in handling class actions and other relevant litigation; (3) their knowledge of the applicable law; and (4) the resources they will commit to representing the class. Rule 23(g)(1)(A)(i)–(iv).

The firms Cohen Milstein Sellers & Toll PLLC, Cera LLP (formerly Gold Bennett Cera & Sidener LLP), and Kaplan Fox & Kilsheimer LLP, whom this Court has already appointed interim lead counsel pursuant to Rule 23(g), have extensive experience in litigating complex antitrust class actions.[25] They, along with interim liaison counsel Spears, Moore, Rebman & Williams, P.C., have vigorously prosecuted this case and will continue to invest the resources necessary to obtain the best possible result for the class. Therefore, these firms should be appointed to represent the class.

IV. CONCLUSION

For the reasons described above, Plaintiffs respectfully request that the Court: (1) certify this case as a class action; (2) appoint Plaintiffs as class representatives; and (3) appoint Cohen Milstein Sellers & Toll PLLC, Cera LLP, and Kaplan Fox & Kilsheimer LLP as co-lead counsel and Spears, Moore, Rebman & Williams, P.C. as liaison counsel for the Direct Purchaser Class.

[25] *See* Ex. 103 (firm resume of Cohen Milstein Sellers & Toll, PLLC); Ex. 104 (firm resume of Cera LLP); Ex. 105 (firm resume Kaplan Fox & Kilsheimer LLP).

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2016, a true and correct copy of the foregoing and the attached Expert Declaration of Dr. Russell Lamb and Braun Declaration and appended exhibits was served electronically. Notice of this filing will be sent by operation of the Court's CM/ECF system to all parties shown on the electronic filing receipt.

/s/ *Robert A. Braun*
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