UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE: LOESTRIN 24 FE ANTITRUST LITIGATION *City of Providence, Rhode Island v. Warner Chilcott Public Limited Company et al., Civil Action No. 1:13-cv-00307 (D.R.I.);* *United Food and Commercial Workers Local 1776 & Participating Employers Health & Welfare Fund v. Warner Chilcott (US), LLC et al., Civil Action No. 2:13-cv-01807 (E.D. Pa.);* *New York Hotel Trades Council & Hotel Association of New York City, Inc. Health Benefits Fund v. Warner Chilcott Public Limited Company et al., Civil Action No. 2:13-cv-02000 (E.D. Pa.);* *Fraternal Order of Police, Fort Lauderdale Lodge 31, Insurance Trust Fund v. Warner Chilcott Public Limited Company et al., Civil Action No. 2:13-cv-02014 (E.D. Pa.);* *Electrical Workers 242 & 294 Health & Welfare Fund v. Warner Chilcott Public Limited Company et al., Civil Action No. 2:13-cv-02862 (E.D. Pa.);* *Painters District Council No. 30 Health and Welfare Fund v. Warner Chilcott Public Limited Company et al., Civil Action No.2:13-cv-4065 (E.D. Pa.);* *Teamsters Local 237 Welfare Benefits Fund v. Warner Chilcott Public Limited Company et al., Civil Action No. 2:13-cv-03476 (E.D. Pa.);* *Allied Services Division Welfare Fund v. Warner Chilcott (US), LLC et al., Civil Action No. 2:13-cv-05376 (E.D. Pa.);* *Laborers' International Union of North America Local 35 Health Care Fund v. Warner Chilcott (US), LLC et al., Civil Action No. 2:13-cv-05375 (E.D. Pa.);* *Denise Loy, et al. v. Warner Chilcott Public Limited Company et al., Civil Action No. CA 13-695S (D.R.I.).*	C.A. No. 1:13-md-2472-S

MOTION TO DISMISS THE INDIRECT PURCHASER PLAINTIFFS' CONSOLIDATED CLASS ACTION COMPLAINT

Defendants Warner Chilcott Sales (US), LLC, Warner Chilcott (US), LLC, Warner Chilcott Public Limited Company, Warner Chilcott Company, LLC f/k/a Warner Chilcott Company, Inc., Warner Chilcott Laboratories Ireland Limited, Warner Chilcott Holdings Company III, Ltd., Warner Chilcott Corporation, Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc., Watson Laboratories, Inc. LLC, Lupin Pharmaceuticals, Inc., and Lupin Ltd. ("Defendants") hereby move the Court to dismiss the Indirect Purchaser Plaintiffs' Consolidated Class Action Complaint, ECF No. 40, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The grounds for Defendants' motion are set forth in the accompanying memorandum of law.

Request for Oral Argument

Defendants respectfully request oral argument on the present motion and Defendants' motion to dismiss the Direct Purchaser Plaintiffs' Consolidated Class Action Complaint and Jury Demand, with one hour of argument for all Defendants and one hour of argument for all Plaintiffs.

Dated: February 7, 2014

Respectfully submitted,

/s/ *John A. Tarantino*
John A. Tarantino (#2586)
jtarantino@apslaw.com
Patricia K. Rocha (#2793)
procha@apslaw.com
Nicole J. Benjamin (#7540)

nbenjamin@apslaw.com
ADLER POLLOCK & SHEEHAN P.C.
One Citizens Plaza
8th Floor
Providence, RI 02903-1345
Telephone: (401) 274-7200
Facsimile: (401) 751-0604

J. Mark Gidley (pro hac vice)
Peter J. Carney (pro hac vice)
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005
Telephone: (202) 626-3600
Facsimile: (202) 639-9355

Jack E. Pace III (pro hac vice)
Alison Hanstead (pro hac vice)
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
Telephone: (212) 819-8200
Facsimile: (212) 354-8113

Attorneys for Warner Chilcott Sales (US), LLC, Warner Chilcott (US), LLC, Warner Chilcott Public Limited Company, Warner Chilcott Company, LLC f/k/a Warner Chilcott Company, Inc., Warner Chilcott Laboratories Ireland Limited, Warner Chilcott Holdings Company III, Ltd., Warner Chilcott Corporation, Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc., and Watson Laboratories, Inc.

/s/ Leiv Blad
Leiv Blad
Michael Whitlock
Zarema Arutyunova
BINGHAM MCCUTCHEN LLP
2020 K Street NW
Washington, DC 20006-1806
Telephone: (202) 373-6000
Facsimile: (202) 373-6001

Attorneys for Lupin Ltd. and Lupin Pharmaceuticals, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE: LOESTRIN 24 FE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: INDIRECT PURCHASER PLAINTIFF ACTIONS	)	C.A. No. 1:13-md-2472-S

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE INDIRECT PURCHASER PLAINTIFFS' CONSOLIDATED CLASS ACTION COMPLAINT

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INTRODUCTION

Each of the reasons the Direct Purchaser Plaintiffs' ("Direct Plaintiffs") Consolidated Amended Class Action Complaint ("Direct Complaint")[1] should be dismissed applies equally to the Indirect Purchaser Plaintiffs' ("Indirect Plaintiffs" or "Plaintiffs") Consolidated Class Action Complaint ("Indirect Complaint"). Defendants incorporate and summarize those reasons in this memorandum. The Indirect Complaint should also be dismissed for several unique reasons, discussed below.

Both sets of Plaintiffs seek to use the antitrust laws to challenge patent litigation settlement agreements that the pleadings reveal do not contain the kind of reverse payments required to trigger antitrust scrutiny under the test recently established by the United States Supreme Court in *Federal Trade Commission v. Actavis*, 133 S. Ct. 2223 (2013). Both sets of Plaintiffs challenge, under Section 1 of the Sherman Act, a settlement agreement entered and announced more than four years ago between Defendants Warner Chilcott Company, Inc. n/k/a Warner Chilcott Company, LLC ("Warner Chilcott") and Watson Pharmaceuticals, Inc. ("Watson") that resolved patent litigation over a pharmaceutical product known as Loestrin® 24 Fe ("Loestrin 24") ("Loestrin 24 Settlement"). Indirect Plaintiffs also assert various state law statutory and common law theories[2] to attack the Loestrin 24 Settlement and also challenge,

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[1] Defendants are filing a separate Memorandum of Law in Support of Defendants' Motion to Dismiss the Direct Purchaser Class Plaintiffs' Consolidated Amended Class Action ("Direct Motion"). Defendants incorporate herein by reference the arguments set forth in the Direct Motion.

[2] Indirect Plaintiffs assert close to one hundred state and common law claims because they are barred from seeking monetary damages for their federal claims. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734-35 (1977) (limiting Sherman Act damage recovery to direct purchasers only). Indirect Plaintiffs purport to seek only injunctive relief under Section 1 of the Sherman Act.

under Section 1 of the Sherman Act and various state law and common law theories, a separate, later settlement – not challenged by the Direct Purchasers – between Warner Chilcott and Defendants Lupin Ltd. and Lupin Pharmaceuticals, Inc. ("Lupin") resolving patent litigation over Loestrin 24 and another oral contraceptive product known as Femcon® Fe ("Femcon").

This Court should dismiss the Indirect Plaintiffs' Complaint for at least the following reasons:

First, for the reasons set forth in the Direct Motion to Dismiss and discussed briefly below, Plaintiffs' effort to depict as disguised "reverse" payments certain terms of the Loestrin 24 Settlement, and two business agreements entered between Warner Chilcott and Watson affiliates on the same day as the settlement, fails as a matter of law.[3]

Second, Plaintiffs' effort to depict as disguised "reverse" payments the Warner Chilcott-Lupin agreements regarding Femcon and Asacol, which were entered concurrently with the Warner Chilcott-Lupin Loestrin Settlement, fails as a matter of law. Indeed, in those agreements Redacted Attached to this memorandum is a table providing an overview and summary of the agreements between Warner Chilcott and Watson and between Warner Chilcott and Lupin discussed herein. *See* Attachment 1.

Third, Plaintiffs' allegations concerning Warner Chilcott's launches of the oral contraceptive products Lo Loestrin® Fe ("Lo Loestrin") and Minastrin® 24 Fe ("Minastrin") are

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[3] Plaintiffs allege one form of purported reverse "payment" not claimed by the Direct Purchasers, an "acceleration clause" in the Loestrin 24 Settlement which allowed Watson to market its generic Loestrin 24 even earlier than January 22, 2014 in the event that another firm marketed a generic version before then. Indirect Compl. ¶ 95. As discussed below, Plaintiffs also fail in their attempt to portray the "acceleration clause" – which facilitates earlier generic entry – as a reverse payment. *See* Section II.A of the Argument.

not relevant to any of Plaintiffs' asserted claims, and should be disregarded or rejected. Plaintiffs' allegations concerning those products describe only lawful, FDA-approved conduct and fail to state a claim for any violation of state or federal law.

Fourth, Plaintiffs' state antitrust claims fail because (1) Plaintiffs lack standing in those states that have adopted a bar on indirect purchaser claims under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), (2) Plaintiffs fail to allege primarily intrastate conduct as required under several states' antitrust laws, and (3) Plaintiffs fail to allege concerted action as required by many of the asserted state antitrust laws. For the Court's convenience, Defendants attach two tables relating to Plaintiffs' state law and common law claims. The first table lists the state statutory and common law claims asserted in the Indirect Complaint (*see* Attachment 2); the second provides an overview of claims to which each of Defendants' arguments applies (*see* Attachment 3).

Fifth, Plaintiffs' consumer protection claims fail to meet the requirements of the asserted state laws because the statutes at issue (1) require deceptive conduct towards consumers not alleged here, (2) do not address antitrust-related conduct, (3) impose pre-pleading requirements that Plaintiffs have not met, (4) reach only conduct occurring primarily within the state, or (5) do not permit class action claims.

Sixth, Plaintiffs' state law unjust enrichment claim asserted under the laws of "all states and jurisdictions within the United States," except Indiana and Ohio, fail because (1) Plaintiffs make no effort to even identify, let alone plead, the requirements of any particular state's unjust enrichment law, (2) Plaintiffs base their claim on state laws that do not recognize such a cause of action, and (3) Plaintiffs have failed to allege injury in certain states.

Finally, many of Plaintiffs' claims are barred under the applicable two or four-year statutes of limitations.

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Accordingly, this Court should dismiss the Indirect Plaintiffs' Complaint with prejudice.

FACTUAL AND REGULATORY BACKGROUND

I. THE HATCH-WAXMAN ACT ESTABLISHES A STRUCTURE BY WHICH GENERIC MANUFACTURERS ARE ALLOWED TO FREE RIDE ON THE INNOVATOR'S RIGOROUS REVIEW AND APPROVAL PROCESS

New pharmaceuticals, such as Loestrin 24 and Femcon, must be approved by the FDA before they can be sold in the United States. 21 U.S.C. §§ 355(a), (b).[4] The FDA will approve a new pharmaceutical only after it determines through rigorous scientific review of the data provided by the applicant, "that the drug meets the statutory standards for safety, effectiveness, manufacturing and controls, and labeling." 21 C.F.R. § 314.105(c).

Under the Hatch-Waxman Act, a generic drug manufacturer may file an abbreviated new drug application ("ANDA") that relies on "the scientific findings of safety and effectiveness included in the brand name manufacturer's original [application], requiring only a showing that the generic drug is pharmaceutically equivalent and bioequivalent" to the brand name drug. Indirect Compl. ¶ 52; 21 U.S.C. § 355(j). To receive FDA approval, an ANDA applicant must show only that its proposed generic copy is bioequivalent and pharmaceutically equivalent to the innovator drug. Indirect Compl. ¶ 52; 21 U.S.C. § 355(j)(2)(A).

[4] Defendants incorporate by reference the regulatory background set forth in Sections I and II of the Factual and Regulatory Background in the Direct Motion.

II. WARNER CHILCOTT ACQUIRES THE '394 PATENT, DEVELOPS LOESTRIN 24, AND ON JANUARY 9, 2009 SETTLES ITS '394 PATENT LITIGATION WITH WATSON, THE FIRST ANDA FILER FOR LOESTRIN 24

In response to side effects experienced by women using low-dose contraceptive drugs, medical researchers at the Eastern Virginia Medical School developed a new dosing regimen and secured U.S. Patent No. 5,552,394 ("the '394 patent") to protect that invention.[5] Indirect Compl. ¶¶ 74, 76. Warner Chilcott acquired the '394 patent in 2003, seven years after it issued. [6] Indirect Compl. ¶ 76. Once it acquired the patent, Warner Chilcott proceeded to develop a commercial product, which was launched as Loestrin 24 in April 2006.

As required by Hatch-Waxman, Warner Chilcott reported the '394 patent for listing in the Orange Book. Indirect Compl. ¶ 76.[7] In April 2006, just two months after Loestrin 24 was approved by the FDA, Watson filed an ANDA seeking approval to market a generic copy of Loestrin 24, together with a Paragraph IV Certification claiming that the '394 patent was invalid or not infringed. As provided by Hatch-Waxman procedures, Warner Chilcott brought suit

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[5] Defendants incorporate by reference the background set forth in set forth in Sections III, IV, and V of the Factual and Regulatory Background of the Direct Motion.

[6] Documents referenced in a complaint such as the settlements and other agreements between Warner Chilcott and Watson and Warner Chilcott and Lupin at issue here, are incorporated by reference into the pleadings and the court may consider such documents on a motion to dismiss without converting it into one for summary judgment. *See, e.g., Tripp v. DeCarlo*, C.A. No. 11–325 S., 2013 WL 836791, at *2 (D.R.I. Mar. 6, 2013) (citing *Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001) ("documents the authenticity of which are not disputed by the parties," "official public records," "documents central to plaintiffs' claim," or "documents sufficiently referred to in the complaint" may be considered in connection with a motion to dismiss without converting such motion into a summary judgment motion). The '394 patent is one such document. *See Davidson v. Cao*, 211 F. Supp. 2d 264, 267 n.2 (D. Mass. 2002) (court considered patents attached to complaint in reviewing motion to dismiss).

[7] *See also* FDA, ORANGE BOOK: APPROVED DRUG PRODUCTS WITH THERAPEUTIC EQUIVALENCE EVALUATIONS *available at* http://www.accessdata.fda.gov/scripts/cder/ob/docs/patexclnew.cfm?Appl_No=021871&Product_No=001&table1=OB_Rx (last visited Feb. 6, 2014).

against Watson in the District of New Jersey, alleging that Watson's proposed generic would infringe the '394 patent. Civil Action No. 2:06-cv-3491-HAA-ES (D.N.J.). After more than two years of hard-fought litigation, on January 9, 2009, Warner Chilcott and Watson settled all patent litigation then pending between them.[8] Under the Loestrin 24 settlement, Warner Chilcott provided Watson with a license to market its generic version of Loestrin 24 at the latest on January 22, 2014, six months before the expiry of the '394 patent.[9]

III. WARNER CHILCOTT AND LUPIN SETTLE LOESTRIN 24 AND FEMCON PATENT CASES ON OCTOBER 14, 2010

In July 2009, Lupin notified Warner Chilcott, pursuant to 21 U.S.C. § 355(j)(2)(B)(iv), that it had filed ANDA No. 91-398 seeking approval to market a generic copy of Loestrin 24, together with a Paragraph IV Certification claiming that the '394 patent was invalid or not infringed. Indirect Compl. ¶¶ 79, 99. On September 9, 2009, Warner Chilcott sued Lupin in the United States District Court for the District of Delaware in Civil Action No. 1:09-cv-00673-JCJ, alleging that Lupin's proposed generic product would infringe the '394 patent. *Id.* at ¶ 100. Lupin did not move to dismiss Warner Chilcott's complaint, and the parties proceeded into discovery. Before fact discovery closed, on October 14, 2010, Warner Chilcott and Lupin settled the Loestrin 24 patent case and another patent infringement case regarding Femcon, a different Warner Chilcott product as to which Lupin had filed an ANDA.

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[8] *See* Warner Chilcott Ltd., Regulation FD Disclosure and Financial Statements and Exhibits (Form 8-K) (Jan. 12, 2009) (attaching as Exhibit 99.1 a press release, Warner Chilcott and Watson Pharmaceuticals Announce Agreements on Loestrin® 24 and Femcon® Fe Patent Litigation, dated January 12, 2009), Hanstead Decl., Ex. G.

[9] Loestrin 24 Settlement, Hanstead Decl., Ex. B, ¶¶ 5, 7.

Redacted

Redacted

[10] According to the FDA's Orange Book, the '050 patent expires on April 6, 2019. *See* FDA, ORANGE BOOK *available at* http://www.accessdata.fda.gov/scripts/cder/ob/docs/patexclnew.cfm?Appl_No=021490&Product_No=001&table1=OB_Rx (last visited February 6, 2014).

[11] Form 8-K, Hanstead Decl., Ex. G, Ex. 99.1.

[12] Lupin Settlement, Hanstead Decl., Ex. I, Redacted

[13] Redacted

[14] Lupin Settlement, Hanstead Decl., Ex. I, Redacted

[15] In the *Actavis* litigation, the FTC admitted that litigation expenses saved through settlement are not a reverse payment, Brief for Petitioner, *Actavis* (No. 12-416), at 38, and the Supreme Court agreed, *Actavis*, 133 S. Ct. at 2236.

Concurrently with the two patent settlements, Warner Chilcott and Lupin also concluded a business agreement involving Asacol.[16] Redacted

As noted, the Asacol supply agreement was entered on the same day as the Loestrin 24 and Femcon patent settlements, and all three agreements were announced together in a single press release.[18] These agreements were produced to Plaintiffs as part of the early disclosures in this litigation.[19]

Warner Chilcott filed the above-noted agreements[20] (the Loestrin 24 and Femcon settlements and the Asacol supply agreement) with the FTC and the Antitrust Division of the Department of Justice as required by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173 ("MMA"). 117 Stat. 2461-62, § 1112(b). Neither agency raised an objection.

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[16] Lupin Settlement, Hanstead Decl., Ex. I, Redacted

[17] Lupin Settlement, Hanstead Decl., Ex. I.,

[18] Warner Chilcott Ltd., Regulation FD Disclosure and Financial Statements and Exhibits (Form 8-K) (Oct. 14, 2010) (attaching as Exhibit 99.2 a press release, "Warner Chilcott Announces Settlement with Lupin of Loestrin 24 Fe and Femcon Fe Patent Litigations), Hanstead Decl., Ex. J.

[19] Hanstead Decl., ¶¶ 3-6, 10.

[20] As noted above, for the Court's convenience, relevant agreements are summarized in an attachment (*see* Attachment 1).

IV. INDIRECT PLAINTIFFS SEEK TO CONJURE REVERSE PAYMENTS

A. Indirect Plaintiffs

The Complaint is filed on behalf of a putative class of indirect purchasers of Loestrin 24.[21] Nine Plaintiffs are health and/or welfare benefit plans that claim to have purchased, paid for, or reimbursed members for some or all of the purchase price of Loestrin 24: City of Providence, Rhode Island, A.F. of L. – A.C.G. Building Trades Welfare Plan,[22] Allied Services Division Welfare Fund, Electrical Workers 242 and 294 Health & Welfare Fund, Fraternal Order of Police, Fort Lauderdale Lodge 31, Insurance Trust Fund, Laborers International Union of North America, Local 35 Health Care Fund, Painters District Council No. 30 Health & Welfare Fund, Teamsters Local 237 Welfare Benefits Fund, and United Food and Commercial Workers Local 1776 & Participating Employers Health and Welfare Fund. Indirect Compl. ¶¶ 13-21. Three Plaintiffs are individual consumers residing in Florida, North Carolina, and Tennessee

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[21] As Plaintiffs define it, indirect purchasers include third-party payors who reimburse for all or a portion of the cost of medications received by a consumer, as well as consumers who pay at least a portion of the cost of medication prescribed for them.

[22] A.F. of L. – A.C.G. Building Trades Welfare Plan ("A.F. of L.) is among the named Plaintiffs in the Indirect Complaint. A.F. of L. initially filed an action in the District of New Jersey on April 16, 2013 but later filed a notice of voluntary dismissal on July 10, 2013. *A.F. of L.- A.G.C. Building Trades Welfare Plan v. Warner Chilcott Public Ltd., Co.*, Civ. A. No. 3:13-cv-02456-JAP-TJB (D.N.J.), ECF No. 15. To our knowledge, A.F. of L. has not re-filed in this Court, or in any other district, and Plaintiffs have not sought leave to add A.F. of L. to the Indirect Purchaser Action. This is contrary to Fed. R. Civ. P. 42(a), which permits consolidation of "actions before the court." A.F. of L. is not a party to any action before the Court. *See Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933). New York Hotel Trades Council & Hotel Assoc. of New York City, Inc. Health Benefits Fund ("New York Hotel"), which filed an action against Defendants in the Eastern District of Pennsylvania on April 15, 2013, Civ. A. No. 2:13-cv-0200-PD (E.D. Pa.), and whose case was among those subsequently transferred to Rhode Island following the JPML transfer order of October 13, 2013, *In re Loestrin 24 Fe Antitrust Litig.*, Civ. A. No. 1:13-md-02472-S-PAS, MDL No. 2472, is *not* among the Plaintiffs named in the Indirect Complaint.

who claim to have purchased or paid for some or all of the purchase price of Loestrin 24. Indirect Compl. ¶¶ 22-24. Plaintiffs claim they indirectly purchased, paid for, or reimbursed some or all of the purchase price of Loestrin 24 in the following states: Alabama, California, Connecticut, Delaware, the District of Columbia, Florida, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. Indirect Compl. ¶¶ 13-21.

B. Indirect Plaintiffs' Claims

The first "indirect purchaser" complaint in this matter, *United Food And Commercial Workers Local 1776 & Participating Employers Health And Welfare Fund v. Warner Chilcott (US), LLC, et al.*, Civil Action No. 2:13-cv-01807 (E.D. Pa.), was filed on April 5, 2013, more than four years after the Loestrin 24 Settlement was entered and announced on January 12, 2009.[23]

The Complaint challenges both the Loestrin 24 Settlement and the Warner Chilcott-Lupin settlement under Section 1 of the Sherman Act. Indirect Compl., First and Third Claims for Relief, ¶¶ 171-181, 191-201. Plaintiffs also challenge the settlement agreements under (1) the antitrust laws of 25 states, the District of Columbia, and Puerto Rico, *id.*, Second, Fourth, and Fifth Claims for Relief, ¶¶ 182-190, 202-210, 211-220; (2) state consumer protection laws of 15 states and the District of Columbia, *id.*, Sixth Claim for Relief, ¶¶ 221-234; and

(3) the common law of unjust enrichment of all states and jurisdictions, except Indiana and Ohio, *id.*, Seventh Claim for Relief, ¶¶ 223-234.

[23] Hanstead Decl., Exs. B, I.

The threshold issue under *Actavis* is whether the branded pharmaceutical manufacturer (the plaintiff in the patent case) made a "payment" (that is "large") to the generic manufacturer as part of the settlement. *Actavis*, 133 S. Ct. at 2237 ("a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects"); *see also, e.g.*, Opinion, *In re Lamictal Direct Purchaser Antitrust Litig.*, No. 12-995 (WHW), ECF No. 128, at 8 (D.N.J. Jan. 24, 2014) (threshold issue under *Actavis* is whether plaintiffs can plead not only a cognizable reverse "payment," but one that is "large"). Plaintiffs' attempt to characterize Warner Chilcott's agreements with Watson as obtaining reverse payments is discussed in Section II of the Argument in the Direct Motion and is not repeated here. With respect to Lupin, because Redacted , Plaintiffs are forced to look elsewhere to try to conjure a "payment" by Warner Chilcott. They allege that the following should qualify as "payments" to Lupin:

- **The Femcon settlement.** Plaintiffs claim that Redacted , constitutes a "payment" to Lupin to delay the entry of its generic version of Loestrin 24. Indirect Compl. ¶¶ 107, 109.

- **The Asacol supply agreement.** Plaintiffs assert that this agreement also qualifies as a "payment" to Lupin, Indirect Compl. ¶¶ 108, 109, even though the agreement called for Redacted

Plaintiffs do not allege any facts that, if true, demonstrate that the alleged "payments" were "large" and "unjustified." Therefore, the Complaint should be dismissed with prejudice.

ARGUMENT

I. THE STANDARD OF REVIEW AND THE SUPREME COURT'S DECISION IN *FTC V. ACTAVIS*

A. On a Rule 12 Motion, the Court Must Scrutinize the Complaint for Factual Allegations Making the Claim Plausible

Antitrust complaints that fail to state a claim plausibly must be dismissed at the outset. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (explaining that courts should expose deficiencies "at the point of minimum expenditure of time and money by the parties and the court").[24] In assessing whether a plaintiff has alleged sufficient facts to make a case plausible, the court must consider "context" and "draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "Naked assertion[s]," "threadbare recitals of the elements of a cause of action," or "mere conclusory statements" are insufficient to survive dismissal. *Id.* at 678. Although on a motion to dismiss the Court assumes the accuracy of well-pled facts, the Court is not limited to the four corners of the Complaint. It is well-established that in deciding a motion to dismiss, the Court may consider facts contained in the documents that Plaintiff quotes, cites, or relies on in the Complaint.[25] Additionally, the Court may take judicial notice of SEC filings and other publicly available documents on the FDA's website.[26]

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[24] The standard of review is more fully set forth in Section I.A of the Argument in the Direct Motion. Defendants incorporate that discussion by reference here.

[25] *See A.G. ex rel Maddox v. Elsevier, Inc.*, 732 F.3d 77, 80 (1st Cir. 2013) ("[W]e accept as true all well-pleaded facts alleged in the complaint and draw all reasonable inferences therefrom in pleaders' favor. We may augment these facts and inferences with data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice."); *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (noting that when deciding a motion to dismiss courts have made an exception to the prohibition against consideration of documents not attached to the complaint, or not expressly incorporated therein, "for documents the authenticity of which are not disputed by the parties; official public records;

B. Under *Actavis*, Settlements Allowing Generic Entry Before Patent Expiry, and Not Involving Large Payments from Brand to Generic, Are Lawful

In *Actavis*, the Supreme Court set forth the standard by which courts should evaluate pharmaceutical patent settlements challenged under the antitrust laws. Not all "value" or "consideration" flowing to a settling generic qualifies as a "reverse payment" under *Actavis*. Defendants incorporate by reference the discussion regarding the *Actavis* decision set forth in Section I.B. of the Argument in the Direct Motion.

II. THE COMPLAINT DOES NOT PLEAD EVEN A POTENTIALLY UNLAWFUL SETTLEMENT UNDER *ACTAVIS*

A. Plaintiffs' Claims with Respect to the Loestrin 24 Settlement Fail for the Same Reason that Direct Purchasers' Claims Fail

Like the Direct Plaintiffs, the Indirect Plaintiffs allege that Warner Chilcott "paid" Watson in the following four ways: (1) by giving Watson six months of exclusivity on its early entry license for generic Loestrin 24, Indirect Compl. ¶¶ 90, 94;[27] (2) by entering into an

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for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint.").

[26] *See Butler v. Balolia*, 763 F.3d 609, 611 (1st Cir. 2013) (noting that when deciding a 12(b)(6) motion, the court can supplement factual allegations in the complaint by examining "documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice."); *OrbusNeich Medical Co. v. Boston Scientific Corp.*, 694 F. Supp. 2d 106, 111 (D. Mass. 2012) ("[T]his court may properly consider [a report filed with the SEC] on a motion to dismiss as a matter of official public record. The public filing of this document with a regulatory agency also makes it a proper subject of judicial notice, at least with regard to the fact that it contains certain information, though not as to the truth of its contents."). *Accord Bryant v. Avado Brands, Inc.*, 187 F. 3d 1271 (11th Cir. 1999); *Kramer v. Time Warner, Inc.*, 937 F. 2d 767, 774 (2d Cir. 1991); *In re Stone & Webster, Inc., Sec. Litig.*, 253 F. Supp. 2d 102, 109 n.11 (D. Mass. 2003).

[27] Like the Direct Plaintiffs, the Indirect Plaintiffs also attempt to convert this same basic exclusivity feature into two "payments," articulated as follows: (1) Warner Chilcott agreed not to launch an authorized generic during Watson's first 180 days of marketing, Indirect Compl. ¶ 165, and (2) Warner Chilcott agreed not to license any other generic during Watson's first 180

agreement under which Watson would promote Warner Chilcott's Femring product for a period of three years, ¶ 92; (3) by entering into an agreement to market a Warner Chilcott product that was then in late development and eventually came to the market as the Generess contraceptive, ¶ 93; and (4) by granting Watson a purportedly worldwide license to market generic Loestrin 24, ¶ 91. As explained in Section II of the Argument in the Direct Motion, none of these terms comes close to qualifying as a reverse payment under *Actavis*. We will not repeat that argument here, but rather incorporate it by reference.

Indirect Plaintiffs also allege one additional form of "payment" from Warner Chilcott to Watson not challenged by the Direct Plaintiffs, an "acceleration clause" in the Loestrin 24 Settlement which allowed Watson to market its generic even earlier than January 22, 2014 if another generic firm launched a generic version of Loestrin 24 before then. Indirect Compl. ¶ 95. Plaintiffs fail in their attempt to portray the "acceleration clause" as a reverse payment. This cannot plausibly be viewed as a reverse payment, among other reasons because it actually facilitates earlier entry of Watson's generic.

The Supreme Court in *Actavis* made clear that, absent a large reverse payment, settlements permitting entry before patent expiry are procompetitive: "Settlement on terms permitting the patent challenger to enter the market before the patent expires would . . . bring about competition, *to the consumer's benefit*." 133 S. Ct. at 2234; *see also id.* at 2237 (lawful to settle "by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point"). Early

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days of marketing, *id.* at ¶ 169. An authorized generic is a drug marketed as a generic but produced by the branded company under its "New Drug" approval from FDA.

entry settlements are therefore lawful, unless a plaintiff can plead and prove that the patent holder made a "large" reverse "payment" to the generic infringer. *See, e.g., Actavis,* 133 S. Ct. at 2237 (a "reverse payment, *where large and unjustified*, can bring with it the risk of anticompetitive effects") (emphasis added); *id.* ("the likelihood of a reverse payment bringing about anti-competitive effects *depends on its size*.") (emphasis added); *id.* at 2236 (where an agreement "reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern").

Even if the challenged "acceleration clause" somehow could be viewed as a reverse payment (and it cannot), Plaintiffs plausibly must allege that it was "large." The Supreme Court in *Actavis* warned that only "large" reverse payments would qualify for a rule of reason analysis. *See Actavis*, 133 S. Ct. at 2237 ("large" payment as proxy for confidence in patent case); *id.* (large relative to generic's earnings in selling its ANDA generic); *id.* at 2236 (referring to paying "large sums"). The Complaint makes no effort to quantify the size of this or any other claimed "payment" relative to any of the above metrics. And, of course, even where a large reverse payment can be alleged, only "sometimes" will it be found unlawful after a rule of reason inquiry. *Actavis*, 133 S. Ct. at 2236.

As discussed in the context of the exclusivity provision in the Loestrin 24 Settlement, *see* Section II.B.1 of the Argument in the Direct Motion, the courts are clear that value flowing to the generic settler as a result of sales of the generic before patent expiry – in a word, through competition – cannot qualify as a reverse payment. *See also Actavis*, 133 S. Ct. at 2234; *Asahi Glass Co., Ltd. v. Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986, 994 (N.D. Ill. 2003). Here, the acceleration clause is "valuable" to Watson, but its value flows from the opportunity to enter with its generic even earlier – and Watson earns not one penny from the acceleration

provision unless it is actually triggered and Watson gets the opportunity to sell its generic Loestrin 24 earlier than six months before expiry of the '394 patent. This is *not* a reverse payment under *Actavis*.

B. Plaintiffs Have Not Asserted Any Cognizable Reverse Payment from Warner Chilcott to Lupin

Plaintiffs do not, and cannot, allege that the settlement agreements between Warner Chilcott and Lupin involved any "large" and "unjustified" payments to trigger the analysis called for by *Actavis*. According to Plaintiffs, Warner Chilcott "paid" Lupin in two ways: Redacted

This is precisely the scenario the *Actavis* Court had in mind when discussing the presence of "offsetting or redeeming virtues." *Actavis*, 133 S. Ct. at 2236. The only monetary payment—which Plaintiffs do not challenge – "amount[ed] to no more than a rough approximation of the litigation expenses saved through the settlement." *Id.* Even if the separate Femcon and Asacol agreements are relevant to the analysis, they "reflect compensation for other services that the generic has promised to perform – such as distributing the patented item or helping to develop a market for that item." *Id.* Thus, far from "large" and "unjustified," the arrangements fall squarely within what the *Actavis* Court described as permissible and lawful.

1. Plaintiffs Fail to Alleged Adequately that the Femcon Settlement is a Reverse Payment

Plaintiffs attempt to depict as a reverse payment the license by which Warner Chilcott Redacted . Under the terms of the Warner Chilcott-Lupin Settlement, Redacted , as settlement of litigation involving that patent, *Warner Chilcott Company, LLC v. Lupin Ltd. and Lupin Pharmaceuticals, Inc.*, 09-cv-672 (D. Del.). Under the Femcon settlement, Redacted

[28] Warner Chilcott also granted Lupin Redacted .[29] Plaintiffs' argument that the Femcon settlement is a "reverse payment" fails as a matter of law, for at least the following reasons.

a. Lupin derives value from the Femcon settlement only by selling its generic prior to patent expiry

The Femcon settlement did not include a large, unjustified reverse payment. Lupin earned nothing under the Femcon license unless it sold its lower-priced generic before patent expiry. Such "value" – earned only through early competition, not through any payment from Warner Chilcott – simply cannot qualify as a reverse payment in light of *Actavis*' holding that early-entry settlements are lawful, because they would "bring about competition to the consumer's benefit." *Id.* at 2234. Moreover, Plaintiffs have not alleged any facts showing that

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[28] Lupin Settlement, Hanstead Decl., Ex. I, ¶ 12.

[29] *Id.*, Ex. D.

the value Lupin derived from the Femcon agreement, Redacted constituted a large, unjustified reverse payment. Thus, there are no allegations supporting Plaintiffs' claim with respect to the Femcon agreement.

b. Lupin agreed to pay Warner Chilcott if it launched an authorized generic version of Femcon instead of its own ANDA product

To the extent that Plaintiffs challenge those provisions of the Warner Chilcott-Lupin settlement which permitted Lupin to Redacted that argument must also fail. Lupin agreed to Redacted

If Plaintiffs are suggesting that Redacted and the Complaint is by no means clear that Plaintiffs are suggesting anything of the sort – then the suggestion is hollow, as the Complaint is devoid of facts supporting such a theory Redac Thus, the Femcon "authorized generic" payment theory must be dismissed as well. *See Actavis*, 133 S. Ct. at 2236 (side business deals for "fair value" not reverse payments).

2. Plaintiffs Fail to Plead, and Cannot Legitimately Alleged, that the Asacol Supply Agreement – in which Lupin Was to Pay Warner Chilcott – is a Reverse Payment

On the same day the parties entered the Loestrin 24 and Femcon settlements, Warner Chilcott and Lupin Redacted a

[30] *See* Femcon Supply Agreement, Hanstead Decl., Ex. I, Redacted

Redacted

[3] Nonetheless, Plaintiffs attempt to depict this agreement as a "payment" by Warner Chilcott in return for delay of Lupin's Loestrin 24 generic. Plaintiffs' effort fails on multiple levels.

Actavis makes clear that business arrangements entered in conjunction with a patent settlement – such as distribution or co-promotion agreements – can be unjustified reverse payments only when they do not constitute "fair value" for the contemplated services. 133 S. Ct. at 2236 (where payment to generic settler represents "fair value for services" in connection with co-promotion or other business deal, "not the same concern" that patent holder made payment to secure delay); *id.* at 2237 (payments that are "independen[t]" of "other services [*e.g.*, co-promotion services] for which [they] might represent payment" not likely to have "anticompetitive effects").

Here, Plaintiffs make no effort to satisfy this requirement of *Actavis*: to plead (and ultimately prove) facts that the Asacol supply agreement was not for fair value. Redacted

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[31] Form 8-K, Hanstead Decl., Ex. J, Ex. 99.2.

[32] Asacol Agreement, Hanstead Decl., Ex. IRedacted

[33] *Id.* at ¶ 3.1.

Redacted

.[34] As noted, when the generic pays the brand, it is the *opposite* of a reverse payment. If Plaintiffs are suggesting that Redacted

– and the Complaint never says so – the Complaint is devoid of facts as to how that is the case or why the deal is not for "fair value" in any event.

III. INDIRECT PLAINTIFFS FAIL TO STATE A CLAIM BASED ON WARNER CHILCOTT'S ALLEGED "PRODUCT SWITCHING"

Indirect Plaintiffs also allege that Defendants' "anticompetitive scheme" included "switch[ing] its marketing efforts [from Loestrin 24] to Lo Loestrin 24 and Minastrin 24." Indirect Compl. ¶¶ 111-17. Indirect Plaintiffs claim that Warner Chilcott would not have launched its "follow-on branded products," Lo Loestrin and Minastrin, "or, if it had, they would have made very few sales," in the absence of the purported reverse payments to Watson and Lupin. Indirect Compl. ¶¶ 7-8. According to Indirect Plaintiffs, "[t]hese products are not medically superior to Loestrin 24 Fe. Warner Chilcott designed the products not in order to deliver a superior product to consumers, but to impair competition from generic Loestrin 24 Fe." *Id.* at ¶ 113.

But Plaintiffs fail to tie these stray allegations – which do not appear in the Direct Plaintiffs' Complaint – to any cause of action or claim for relief. For that reason alone, Plaintiffs' allegations concerning "product-switching" should be disregarded.

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[34] Asacol Supply Agreement, Hanstead Decl., Ex. I, Redacted

Plaintiffs also fail to plead any facts concerning how Warner Chilcott's alleged "product switching" could constitute anti-competitive conduct actionable under the Sherman Act. Among many other deficiencies in Plaintiffs' allegations:

- Plaintiffs fail to allege that Warner Chilcott violated any rule or regulation governing the approval or marketing of pharmaceutical products in launching its Lo Loestrin and Minastrin products;

- Plaintiffs fail to allege that the launch of any new product by Warner Chilcott prevented or even delayed the launch of any generic pharmaceutical product;

- Plaintiffs fail to allege how competition from the launch of Warner Chilcott's new products has caused or could have caused antitrust injury, *i.e.*, "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484, 488-89 (1977); and

- Plaintiffs fail to allege facts to overcome the immunity provided by the *Noerr-Pennington* doctrine. The only conduct alleged by Indirect Plaintiffs concerning the introduction of Lo Loestrin and Minastrin is Warner Chilcott's petitioning of the FDA for approval, followed by the company's marketing of the approved products.[35] That conduct is fully immunized under the *Noerr-Pennington* doctrine, which provides complete antitrust immunity (absent sham, not alleged here) to those who petition the government. *See E. R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *accord United Mine Workers of Am. v. Pennington*, 381 U.S. 647, 670 (1965); *see also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (applying immunity to petitioning of courts and government agencies).

As one court evaluating a "product switching" claim (where, unlike here, the allegations at least related to a cause of action) concluded:

> Plaintiffs have also not identified any antitrust law that requires a product new to the market – with or without a patent – to be superior to existing products. Antitrust law holds, and has long held, to the contrary. *Courts and juries are not tasked with*

[35] Warner Chilcott obtained FDA approval for the marketing of Minastrin on May 8, 2013, *See* FDA, "ORANGE BOOK" *available at* http://www.accessdata.fda.gov/scripts/cder/ob/docs/obdetail.cfm?Appl_No=203667&TABLE1=OB_Rx (last visited February 6, 2014). Approval for Lo Loestrin was obtained on October 21, 2010. *Id.*.

> *determining which product among several is superior.* Those determinations are left to the marketplace.

Walgreen Co. v. AstraZeneca Pharm. L.P., 534 F. Supp. 146, 151 (D.D.C. 2008) (dismissing plaintiffs' complaint regarding launch of Nexium on the pleadings for failure to allege antitrust injury); *see also Mylan Pharm. v. Warner Chilcott Public Ltd. Co.*, Civ. No. 12-3824-PD, 2013 WL 5692880, at *2 (E.D. Pa. June 12, 2013) (describing that court is "skeptical that the 'product hopping' alleged here constitutes anticompetitive conduct under the Sherman Act" and "agree[ing] that Plaintiffs' theory here is 'novel' at best"); *AstraZeneca AB v. Mylan Labs. Inc*., Nos. 00 Civ. 6749, 03 Civ. 6057, 2010 WL 2079722, at *6-7 (S.D.N.Y. May 19, 2010) (granting motion to dismiss Mylan's antitrust counterclaim that AstraZeneca's launch of new omeprazole products was illegal "product switching").

Finally, Plaintiffs' allegation that Lo Loestrin is "not medically superior to Loestrin 24 Fe," Indirect Compl. ¶ 113 – implying that the new version of the product somehow was not sufficiently innovative to survive antitrust liability – has been refuted definitively in the patent litigation over the Lo Loestrin product. There, in holding that the patent covering Lo Loestrin, U.S. Patent No. 7,704,984, was not obvious in view of the prior art including the Loestrin 24 '394 patent, the District Court specifically found that the "evidence showed that Lo Loestrin enjoyed commercial success and fills an unmet need." *Warner Chilcott Co., LLC v. Lupin Ltd.*, Civ. A. No. 11-5048, slip op. at 40 (JAP) (D.N.J. Jan. 17, 2014); *Warner Chilcott Co., LLC v. Amneal Pharmaceuticals, LLC*, Civ. A. No. 12-2928 (JAP) (D.N.J. Jan. 17, 2014).

Accordingly, those allegations should be disregarded and ignored, if not stricken entirely from the Complaint.

IV. INDIRECT PLAINTIFFS LACK STANDING TO ASSERT STATE LAW CLAIMS

A. Indirect Plaintiffs Lack Standing to Assert State Antitrust Claims in *Illinois Brick* States

Indirect purchaser plaintiffs have long been deemed too remote to assert damages claims under federal antitrust law. *Illinois Brick v. Illinois*, 431 U.S. 720 (1977). The rule under *Illinois Brick* has been followed by many states and territories, and accordingly, Indirect Plaintiffs cannot assert state law antitrust claims in those jurisdictions. *See, e.g., In re Terazosin Hydrochloride Antitrust Litig.*, 160 F. Supp. 2d 1365, 1372 (S.D. Fla. 2001). Indirect Plaintiffs nonetheless assert antitrust claims under the laws of Puerto Rico, Massachusetts, and Utah, where indirect purchaser actions are barred by *Illinois Brick*.

Most courts have held that *Illinois Brick* applies to the Puerto Rican Anti-Monopoly Act because Puerto Rico interprets its state laws consistently with federal antitrust law, and the legislature has not passed an *Illinois Brick* repealer statute. *See, e.g.*, 4 P.R. Laws Ann. §§ 257-76 (2005); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-md-01819 CW, 2010 WL 5094289, at *4 (N.D. Cal. Dec. 8, 2013); *cf. In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 413 (S.D.N.Y. 2011) (recognizing Puerto Rico as a jurisdiction that applies *Illinois Brick*). In view of this, the Puerto Rican Anti-Monopoly Act claims must be dismissed because Puerto Rico follows *Illinois Brick* and does not permit indirect purchaser claims.

Several other states also bar indirect purchaser claims under *Illinois Brick.* For instance, Massachusetts has fully adopted the rule of *Illinois Brick* for all antitrust claims. Massachusetts Antitrust Act, Mass. Gen. Laws ch. 93, §§ 1-114 (2006); *Ciardi v. F. Hoffman-La Roche, Ltd.*, 762 N.E. 2d 303, 308 (Mass. 2002) (The "rule of law established in *Illinois Brick* [] would apply with equal force to preclude claims brought under G.L. c. 93 by Indirect Plaintiffs in

Massachusetts."). The Utah Antitrust Act grants Indirect Plaintiffs the right to bring antitrust damages claims but only if they are citizens or residents of Utah, and Plaintiffs do not meet this criterion. *See* Utah Code Ann. § 76-10-919(1)(a) (Sup. 2010).

Accordingly, the Indirect Plaintiffs' Puerto Rican Anti-Monopoly Act, Massachusetts Antitrust Act, and Utah Antitrust Act claims must be dismissed, as each of the relevant states follows *Illinois Brick* and does not permit indirect purchaser claims.

B. Indirect Plaintiffs Cannot Circumvent *Illinois Brick* by Asserting Antitrust Claims under Unjust Enrichment Theories

For several other states that follow *Illinois Brick*, Indirect Plaintiffs do not assert antitrust claims, but instead attempt to circumvent the *Illinois Brick* doctrine by labeling their claims as "unjust enrichment" claims. Indirect Plaintiffs do not allege any unique conduct justifying such claims, instead asserting that the same alleged antitrust conduct gives rise to the same alleged harm but supports a claim under a common law theory.

Courts routinely reject attempts to circumvent the *Illinois Brick* indirect purchaser bar by recasting antitrust claims as unjust enrichment claims. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F. Supp. 2d 160, 211 (D. Me. 2004) (*NMV*) (dismissing claims for restitutionary recovery for violations of state antitrust law in states that maintain the *Illinois Brick* prohibition on indirect purchaser recovery because it would "subvert the statutory scheme."); *see also In re K-Dur Antitrust Litig.*, No. 01-1652 (JAG), 2008 WL 2660780, at *5 (D.N.J. Feb. 28, 2008) (dismissing indirect purchasers' unjust enrichment claims because "where the applicable state law . . . simply does not recognize a private cause of action for antitrust violations, a plaintiff cannot circumvent the statutory framework by recasting an antitrust claim as one for unjust enrichment."); *In re Flonase Antitrust Litig.*, 692 F. Supp. 2d 524, 539 (E.D. Pa.

2010) (rejecting "end run" around *Illinois Brick* through consumer fraud statute); *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 162 (E.D. Pa. 2009) (dismissing a "classic 'example' of an antitrust claim" brought under consumer fraud statute because state antitrust statute did not allow indirect purchaser claims).

Accordingly, Indirect Plaintiffs' claims under the unjust enrichment laws of at least Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Idaho, Kentucky, Louisiana, Maryland, Missouri, Montana, New Jersey, Oklahoma, Pennsylvania,[36] South Carolina, Texas and Virginia should be dismissed on this basis, because each state applies *Illinois Brick*.[37]

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[36] Pennsylvania law does not recognize any cause of action for damages sustained as a result of antitrust violations, and courts have rejected attempts by plaintiffs to recover for antitrust violations under the guise of unjust enrichment claims. *Stutzle v. Rhonepoulenc S.A.*, No. 002768, 2003 WL 22250424, at *2 (Pa. Com. Pl. Sept. 26, 2003) (dismissing unjust enrichment claims because, "to allow plaintiffs to use a claim for unjust enrichment as a means for collecting damages, which are not allowable by Pennsylvania's antitrust law is not a proper use of the claim and can only lead to mischief"); *see also K-Dur*, 2008 WL 2660780, at *4-5 (dismissing unjust enrichment claims because they were precluded by Pennsylvania law; Pennsylvania has no general antitrust statute or private right of action against restraints of trade or monopolization).

[37] *See Sheet Metal Workers*, 737 F. Supp. 2d 380, 429, 435-37, 442, 446-47 (E.D. Pa. 2010) (Alabama, Indiana, Louisiana, Oklahoma, and Texas apply *Illinois Brick*); *Flonase*, 692 F. Supp. 2d at 539 (Illinois); *In re Relafen Antitrust Litig.*, 225 F.R.D. 14, 22-26 (D. Mass. 2004) (Alabama, Georgia, Maryland, Wyoming); *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 44-46, 50, 52-53 (D.D.C. 1999) (Alaska, Colorado, Idaho, Ohio, Utah, Washington); *In re TFT II*, 599 F. Supp. 2d at 1191-92 (Montana, Puerto Rico, Virginia); *NMV*, 350 F. Supp. 2d at 170, 180-81, 185-86, 190-92, 194-95, 199-200 (Connecticut, Kentucky, Louisiana, Missouri, New Jersey, Oklahoma); *K-Dur*, 2008 WL 2660780, at *5 (Delaware, New Jersey); *Siena v. Microsoft Corp.*, 796 A.2d 461, 464-65 (R.I. 2002) (Rhode Island); *In re Microsoft Corp. Antitrust Litig.*, 401 F. Supp. 2d 461, 464 (D. Md. 2005) (South Carolina); *Davidson v. Microsoft Corp.*, 792 A.2d 336, 344-45 (Md. Ct. Spec. App. 2002) (Maryland); *Pomerantz v. Microsoft Corp.*, 50 P.3d 929, 934 (Colo. App. 2002) (Colorado); *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 102 (Fla. 1996) (Florida).

V. INDIRECT PLAINTIFFS' CLAIMS ARE TIME-BARRED

Indirect Plaintiffs concede that the agreement between Warner Chilcott and Watson resolving patent infringement litigation involving Loestrin 24 was executed on or around January 12, 2009, more than four years before the earliest complaint was filed by any plaintiff in this action, on April 5, 2013, in *United Food and Commercial Workers Local 1776 & Participating Employers Health and Welfare Fund v. Warner Chilcott (US), LLC, et al.*, 2:13-cv-01807-CMR (E.D. Pa.). Indirect Compl. ¶ 87.[38] They also concede that the agreement with Lupin resolving the Loestrin 24 patent litigation was executed on or around October 10, 2010, more than two years before the first claim was filed in this action. Indirect Compl. ¶ 105.

A. Plaintiffs' Second, Fifth, and Six Claims for Relief Should be Dismissed as Untimely

In their Second, Fifth, and Six Claims for Relief, Indirect Plaintiffs assert state antitrust and consumer protection claims purportedly arising from the Warner Chilcott-Watson Loestrin 24 Settlement.[39] Indirect Compl. ¶¶ 182-190, 211-222. Almost all of these claims are time-barred.

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[38] Defendants incorporate by reference Section IV of the Argument in the Direct Motion.

[39] Indirect Plaintiffs concede that any purported liability under their "all Defendant" Fifth and Sixth Claims originates in the Loestrin 24 Settlement, which Lupin is expressly alleged to have "joined." *See* Indirect Compl. ¶¶ 213, 214 (setting forth the terms of the Loestrin 24 Settlement and asserting that "[d]uring the negotiation of its Exclusion Payment Agreement with Warner Chilcott, Lupin was aware" of those terms, and "joined in the ongoing conspiracy" by agreeing to an entry date "pursuant to the terms of the conspiracy initiated by Warner Chilcott and Watson"). Accordingly, the Fifth and Sixth Claims for Relief accrued in January 2009 – well before the limitations period set forth in the state laws enumerated above.

Indirect Plaintiffs' antitrust claims under the laws of Arizona (4 year limitations period, Ariz. Rev. Stat. § 44-1408), California (4 years, Cal. Bus. & Prof. Code § 16750.1), District of Columbia (4 years, D.C. Code. § 28-4511(a)), Florida (4 years, Fla. Stat. § 542.26(1)), Illinois (4 years, 740 Ill. Comp. Stat. Ann. 10/7(2)), Iowa (4 years, Iowa Code § 553.16(2)), Kansas (3 years, *Four B Corp. v. Daicel Chem. Indus. Ltd.*, 253 F. Supp. 2d 1147, 1155 (D. Kan. 2003)), Massachusetts (4 years, Mass. Gen. Laws. Ch. 93, § 13), Michigan (4 years, Mich. Comp. Laws. § 445.781), Minnesota (4 years, Minn. Stat. § 325D.64), Mississippi (3 years, *Carder v. BASF Corp.*, 919 So. 2d 258, 261 (Miss. Ct. App. 2005)), Nebraska (4 years, Neb. Rev. Stat. § 25-212), Nevada (4 years, Nev. Rev. Stat. § 598A.220(1), (2)(a)), New Mexico (4 years, N.M. Stat. Ann. § 57-1-12), New York (4 years, N.Y. Gen. Bus. Law § 340), North Carolina (4 years, N.C. Gen. Stat. § 75-16.2), North Dakota (4 years, N.D. Cent. Code § 51-08.1-10), Oregon (4 years, Or. Rev. Stat. § 646.800(2)), Puerto Rico (4 years, 10 P.R. Laws Ann. §268(c)), Rhode Island (4 years, R.I. Gen. Laws § 6-36-23), South Dakota (4 years, S.D. Codified Laws § 37-1-14.4), Utah (4 years, Utah Code Ann. § 76-10-925(2)), and West Virginia (4 years, W. Va. Code § 47-18-11) must be dismissed as untimely.

Similarly, Indirect Plaintiffs' consumer protection claims under the laws of Alabama (1 year, Ala. Code § 8-19-14 (2007)), California (4 years, Cal. Bus. & Prof. Code § 17208), the District of Columbia (3 years, D.C. Code § 12-301(8)), Florida (4 years, Fla. Stat. § 542.26(1)), Idaho (2 years, Idaho Code § 48-619), Illinois (3 years, 815 ILCS § 505/10a(3)(e)), Massachusetts (4 years, Mass. Gen. Laws ch. 260, § 5A), Nebraska (4 years, Neb. Rev. Stat. § 59-1612), Nevada (4 years, Nev. Rev. Stat. § 11.190(2)(d)), New Mexico (4 years, N.M Stat. Ann. § 37-1-4), North Carolina (4 years, N.C. Gen. Stat. § 75-16.2), Tennessee (1 year, Tenn. Code § 47-18-110), West Virginia (4 years, *Harper v. Jackson Hewitt, Inc.*, 706 S.E. 2d 63, 74

(2010) (the applicable limitations statute is W.Va. Code § 46A-5-101)), and Wisconsin (3 years, Wis. Stat. § 100.18(11)(b)(3)) are barred under those states' statutes of limitations and must be dismissed.

B. Indirect Plaintiffs' Consumer Protection Claims Arising from the Warner Chilcott-Lupin Agreement Are Time-Barred under the Laws of Alabama, Idaho, and Tennessee

With respect to the Warner Chilcott-Lupin agreement, all Indirect Plaintiffs' consumer protection claims under at least the laws of Alabama (1 year, Ala. Code § 8-19-14 (2007)), Idaho (2 years, Idaho Code § 48-619), and Tennessee (1 year, Tenn. Code § 47-18-110) must be dismissed as untimely.

VI. INDIRECT PLAINTIFFS' STATE LAW ANTITRUST CLAIMS MUST BE DISMISSED FOR ADDITIONAL REASONS

A. Indirect Plaintiffs Cannot Allege Primarily Intrastate Conduct as Required in Several States

The alleged illegal activity pleaded here was directed at settling patent litigation, and Indirect Plaintiffs' own allegations describe claimed *nationwide* conduct and injury. Indirect Compl. ¶¶ 134-36. At least five of the state antitrust statutes invoked by Indirect Plaintiffs require that the challenged conduct take place, or that its effects occur, purely or primarily within the state, rather than across the country:

- Massachusetts Antitrust Act: The Massachusetts Antitrust Act applies only to conduct or activities that "occur and have their competitive impact primarily or predominantly within the commonwealth and *at most, only incidentally outside New England*."[40]

[40] Mass. Gen. Laws Ch. 93 § 3 (emphasis added); *Tanol Distribs., Inc. v. Panasonic Co., Div. of Matsushita Elec. Corp. of Am.*, No. 86-3355-S, 1987 WL 13319, at *2 (D. Mass. July 2, 1987).

- Mississippi Antitrust Act: The Mississippi Antitrust Act applies exclusively to combinations or conspiracies that have as their object a monopoly in *intrastate* trade and that are accomplished by wholly *intrastate* transactions.[41] In *In re DDAVP Indirect Purchaser Antitrust Litig.*, 903 F. Supp. 2d 198, 230 (S.D.N.Y. 2012), the court held that as long as some conduct offensive to the statute occurs within the state (*i.e.*, purchase of price-inflated drugs), the requirement is met. 2012 WL 4932158, at *24-25. But *none* of the Indirect Plaintiffs reside in Mississippi.[42] Nor is the conduct on the part of Defendants which Plaintiffs challenge alleged to have occurred in Mississippi. Therefore, Indirect Plaintiffs fail to allege any fraudulent conduct directed to someone in that state, much less conduct "wholly" within the state.

- New York Donnelly Act: New York's antitrust law does not apply where the conduct primarily affects interstate commerce.[43]

- Tennessee Trade Practices Act: The scope of Tennessee's antitrust laws is limited to anticompetitive conduct that affects Tennessee trade to a "substantial degree."[44]

- The D.C. Antitrust Act: The District of Columbia's antitrust law does not apply to claims which, even if they bear some connection to the District, are interstate in nature.[45]

The claims asserted under the antitrust laws of Massachusetts, Mississippi, New York, Tennessee, and the District of Columbia accordingly should be dismissed.

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[41] Miss. Code Ann. § 75-21-21. *Standard Oil Co. of Ky. v. State ex rel. Att'y Gen.*, 65 So. 468, 471 (Miss. 1914), *overruled in part, on other grounds, Mladinich v. Kohn*, 164 So. 2d 785 (Miss. 1964); *see also Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d 758 (S.D. 2012); *In re Microsoft Corp. Antitrust Litig.*, No. JFM-03-741-48, 2003 WL 22070561, at *2 (D. Md. Aug. 2, 2003); *Infineon Tech.*, 531 F. Supp. 2d at 1156-57.

[42] Plaintiffs reside in Pennsylvania, Florida, Alabama, Rhode Island, New York, Minnesota, Illinois, Tennessee, and North Carolina. Indirect Compl. ¶¶ 13-24.

[43] N.Y. Gen. Bus. Law § 340(1); *H-Quotient, Inc. v. Knight Trading Grp., Inc.*, No. 03 Civ. 5889(DAB), 2005 WL 323750, at *5 (S.D.N.Y. Feb. 9, 2005). 2001 c.415 §1.

[44] Tenn. Code Ann. § 47-25-101 (2001). *Freeman Indus. v. Eastman Chem. Co.*, 172 S.W.3d 512, 523 (Tenn. 2005) (Tennessee Supreme Court adopts "substantial effects standard"); *In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042, 2013 WL 1431756 at *15 (E.D. Mich. Apr. 9, 2013) (dismissing claim under Tennessee Trade Practices Act because plaintiffs fail to allege any Tennessee-specific antitrust activities or effects).

[45] D.C. Code § 28-4502. *Sun Dun, Inc. v. Coca-Cola Co.*, 740 F. Supp. 381, 396 (D. Md. 1990), *enforcing*, 770 F. Supp. 285, 288-89 (D. Md. 1991).

B. Indirect Plaintiffs Lack Standing to Assert State Law Claims under the Rhode Island Antitrust Act Because that State's *Illinois Brick* Repealer Amendment Does Not Apply Retroactively

Until recently, Rhode Island followed *Illinois Brick* and barred antitrust suits by indirect purchasers. *See DDAVP*, 903 F. Supp. 2d at 232. However, on July 15, 2013, the state legislature enacted a so-called *Illinois Brick* repealer statute allowing indirect purchasers to maintain an action under the Rhode Island Antitrust Act. R.I. Gen. Laws § 6-36-7(d). Where other states have enacted similar *Illinois Brick* repealers, courts have interpreted those statutes to operate prospectively unless the statute or the legislative record expressly instructed otherwise. *See, e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-5944 SC, MDL No. 1917, 2010 WL 9543295, at *14 (Feb. 5, 2010) (holding Nebraska and Nevada statutes intended to operate prospectively and recommending dismissal of state law claims based on sales made prior to enactment); *Relafen*, 225 F.R.D. at 19-28 (declining to apply Idaho and Arkansas repealer statutes to conduct that occurred prior to enactment in order to avoid affront to "[e]lementary considerations of fairness.") (internal citation omitted).

Nothing in the amendments to the Rhode Island Antitrust Act indicates that the new section should be applied retroactively and, under Rhode Island law, "[i]t is well established . . . that statutes and their amendments are presumed to apply prospectively." *Hydro- Mfg v. Kayser-Roth*, 640 A.2d 950, 954 (R.I. 1994) (internal citation omitted); *see also VanMarter v. Royal Indem. Co.*, 556 A.2d 41, 44 (R.I. 1989). "Only when it appears by clear, strong language or by necessary implication that the Legislature intended a statute to have retroactive application will the courts apply it retrospectively." *Hydro-Mfg*, 640 A.2d at 954-55 (internal citation and quotation omitted); *see also Avanzo v. Rhode Island Dep't of Human Servs.*, 625 A.2d 208, 211 (R.I. 1993) ("As a general rule statutes operate prospectively from and after the effective date of

the statute."). Thus, Indirect Plaintiffs' claims under the Rhode Island Antitrust Act must be dismissed because they arise entirely from conduct or sales made prior to July 15, 2013, the date of the amendment. Indirect Compl. ¶¶ 87, 105, 121.

VII. PLAINTIFFS' CLAIM BASED ON A PURPORTED SCHEME INVOLVING ALL DEFENDANTS MUST BE DISMISSED

In addition to the claims discussed above, Indirect Plaintiffs assert various antitrust state law claims against "all Defendants," and allege an undefined "scheme" to violate the antitrust laws. Indirect Compl., Fifth Claim for Relief, ¶¶ 211-220. Those claims also must be dismissed.

A. Plaintiffs' "Scheme" Claim Requires Them to Plead a Meeting of the Minds of All Defendants

Indirect Plaintiffs' antitrust claims relate to the purported existence of a conspiracy, an essential requirement of which is common design among the conspiracy's participants. To determine whether a restraint of trade is caused by a combination or conspiracy, "the crucial question is whether the challenged anticompetitive conduct stems from an independent decision or from an *agreement*, tacit or express." *Evergreen Partnering Group Inc. v. Pactiv Corp.*, 720 F.3d 33, 43 (1st Cir. 2013) (emphasis added). To plead agreement sufficiently, Plaintiffs must allege facts showing that the alleged conspirators have "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful agreement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); *Copperweld Independence Tube Corp.*, 467 U.S. 752, 771 (1984). Evidence of parallel conduct simply is not enough. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the *agreement* necessary to make out a § 1 claim . . . . ") (emphasis added). It is not sufficient, therefore, that one alleged participant in the conspiracy ostensibly conceived of the impugned conduct as forming part of some overarching

scheme, as might be argued under a monopolization claim (not asserted here); Indirect Plaintiffs must adequately plead that all participants in the so-called conspiracy shared a common purpose. They have failed to do that here.

To demonstrate concerted action, Indirect Plaintiffs must allege more than the fact that certain Defendants entered agreements with certain other Defendants: they must show that Defendants "*knowingly* participated in an arrangement *with an intent to suppress*" competition. *See Impro Prods., Inc. v. Herrick,* 715 F.2d 1267, 1276 (8th Cir. 1983); *see also Euromodas Inc. v. Zanella, Ltd.*, 368 F.3d 11, 19 (1st Cir. 2004) (dismissing case involving allegations that manufacturer and dealer conspired to maintain artificially high prices for failure to allege facts in complaint that supported conclusion that there was concerted action). In *Shionogi Pharma., Inc. v. Mylan, Inc.*, Mylan alleged a conspiracy between a patent holder and its exclusive licensee. No. 10-1055, 2011 WL 2174499, at *5 (D. Del. May 26, 2011). The court held that the mere allegations the defendants "'were motivated to delay and prevent generic competition' were 'purely conclusory.'" *Id.* Here, Indirect Plaintiffs present no evidence that the Defendants entered into an agreement with the shared motivation of delaying generic entry of Loestrin. At best, Plaintiffs allege that Lupin and Watson separately (and at different times) entered into agreements with Warner Chilcott. If Plaintiffs are trying to establish a conspiracy in which Warner Chilcott served as a "hub," they need to allege a "rim" plausibly connecting Watson with Lupin. *See, e.g. Dickson v. Microsoft Corp.*, 309 F.3d 193, 203-04 (4th Cir. 2002); *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, No. 12-cv-05847-JST, 2013 WL 3242245, at *8 (N.D. Cal. June 25, 2013). They have done no such thing here.

B. Plaintiffs Fail to Plead Facts That Could Establish a "Scheme" Involving All Defendants

At bottom, Indirect Plaintiffs' amended consolidated complaint is fatally vague as to the existence of *any agreement* in restraint of trade among "all Defendants." Indirect Plaintiffs have not pled, and cannot plead, that Defendants entered into the challenged agreements with a common purpose to foreclose competition or that there was any overarching agreement among Defendants to restrain trade.

From the opening of their amended complaint, Indirect Plaintiffs refer repeatedly to an undefined overall scheme involving all defendants: "*Warner Chilcott's* scheme and payments to suppress generic competition to Loestrin 24 have delayed and substantially diminished the sale of generic Loestrin 24 . . . . *Warner Chilcott's overarching anticompetitive scheme*, and the Generic Defendants' participation in it, delayed and substantially diminished the sale of generic Loestrin 24 in the United States, and unlawfully enabled Warner Chilcott to sell Loestrin 24 at artificially inflated prices." Indirect Compl. ¶¶ 118, 119 (emphasis added); *see also id.* ¶¶ 1, 9, 11, 120, 121. But, beyond such conclusory assertions, Plaintiffs describe only the separate *bi-lateral* settlement and other agreements between, on the one hand, Warner Chilcott and Watson, and, on the other, Warner Chilcott and Lupin. Plaintiffs allege no facts to suggest that Watson or Lupin made any agreement with each other to do anything, let alone to assist Warner Chilcott in a scheme to delay entry of generic versions of Loestrin 24. The Indirect Complaint sets forth the unremarkable conduct of two generic firms separately litigating, then resolving, patent litigation. Indeed, Lupin did not even file its ANDA for Loestrin 24 until after the Watson patent cases were resolved. In short, there is no basis to suggest coordination between Lupin and Watson.

Conclusory allegations, in particular the invocation of antitrust buzzwords such as "scheme" or "conspiracy," without facts, have long been deemed inadequate. *See, e.g.*, *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield*, 552 F.3d 430, 436-37 (6th Cir. 2008) (allegations of conspiracy "fall significantly short of the required pleading threshold" where complaint offers "bare allegations" and does "not supply facts adequate to show illegality"); *Tal v. Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006) ("use of antitrust buzzwords and parroting of general antitrust theories insufficient to support a Sherman Act violation"); *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 56, 58 (1st Cir. 1999) (courts not required to accept terms such as "conspiracy" or "agreement" because pleading antitrust violation "requires more than epithets").

Virtually every state law invoked by Indirect Plaintiffs either provides expressly that it should be interpreted harmoniously with federal law, or has been so construed by courts: Arizona, California, District of Columbia, Florida, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, Oregon, Puerto Rico, Rhode Island, South Dakota, Utah, Vermont, West Virginia, and Wisconsin. For the Court's convenience, the relevant state statutes and case law are set forth in a table accompanying this memorandum (*see* Attachment 4). Indirect Plaintiffs' claims against "all defendants" under the laws of each of the above states therefore must be dismissed. [46]

[46] The Indirect Plaintiffs' antitrust state law claims against Warner Chilcott and Watson and Warner Chilcott and Lupin in their Second and Fourth Claims for Relief, respectively, should also be dismissed on this basis. As explained in Section II of the Argument in the Direct Motion and Section II of the Argument herein, Plaintiffs have failed to establish a violation of Section 1 of the Sherman Act, the only federal claim asserted.

VIII. INDIRECT PLAINTIFFS' CONSUMER PROTECTION CLAIMS MUST BE DISMISSED BECAUSE THERE IS NO ALLEGATION OF ACTIONS TO DECEIVE CONSUMERS

A. Indirect Plaintiffs Fail to Allege Consumer Deception or Consumer Reliance

The conduct alleged to violate state consumer protection statutes in the Indirect Complaint is identical to the conduct alleged to violate the federal and state antitrust laws, namely, the purportedly unlawful settling of patent litigation. However, state consumer protection statutes address something different: the *manner* in which products are sold or advertised – and they are aimed at conduct that risks *deceiving consumers* in connection with such sales. As the Supreme Court has observed, the "law of unfair competition has its roots in the common-law tort of deceit: its general concern is with protecting *consumers* from confusion as to source." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 157 (1989) (emphasis in original).

Consequently, to recover under the laws of several states at issue here, a plaintiff must show that the conduct was *deceptive*, and that this deception was directed *towards consumers* and relied upon *by consumers*. Here, no deception whatsoever is alleged, much less deception toward or relied on *by consumers*. *See, e.g.*, *Wellbutrin XL*, 260 F.R.D. at 164 (E.D. Pa. 2009).

Courts have dismissed claims for failure to allege such conduct under the California Unfair Competition Act;[47] Maine Unfair Trade Practices Act;[48] Nevada Deceptive Trade

[47] Cal. Bus. & Prof. Code § 17204; *Durell v. Sharp Healthcare*, 108 Cal. Rptr. 3d 682, 696-97 (Cal. Ct. App. 2010); *Medina v. Safe-Guard Prods.*, 78 Cal. Rptr. 3d 672, 679 (Cal. Ct. App. 2008); *Hall v. Time Inc.*, 70 Cal. Rptr. 3d 466, 471-72 (Cal. Ct. App. 2008); *In re Tobacco II Cases*, 207 P.3d 20, 39-41 (Cal. 2009); *In re iPhone Consumer Litig.*, No. 12-1127 CV, 2013 WL3829653, at *11 (N.D. Cal. July 23, 2013) ("A plaintiff seeking to prosecute [a California Unfair Competition Law] claim is required to plead actual reliance on the allegedly deception or misleading statements.").

Practices Act;[49] Tennessee Consumer Protection Act;[50] Vermont Consumer Protection Act[51] and West Virginia Consumer Credit & Protection Act.[52]

The Wisconsin Deceptive Trade Practices law prohibits *deception* or other misrepresentations to the *general public*. Wis. Stat. Ann. § 100.18; *K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 732 N.W.2d 792, 798-99, FN 6 (Wis. 2007) (holding that to prevail on a 100.18 claim, the plaintiff must show (1) that with the intent to induce an obligation, the defendant made a representation to "the public;" (2) that the representation was untrue, deceptive or misleading; and (3) that the representation caused the plaintiff a pecuniary loss); *Tietsworth v. Harley-Davidson, Inc.* 677 N.W.2d 233, 244-46 (Wis. 2004);[53] *Terrill v. Electrolux Home Products, Inc.,* 753 F. Supp. 2d 1272, 1295 (S.D. Ga. 2010) (noting that the Wisconsin Act requires an affirmative misrepresentation). Notably, under § 100.20, there is no private right of action except for violation of an order issued by the Wisconsin Department of Agriculture, Trade and Consumer Protection. *Emergency One, Inc. v. Waterous Co., Inc*. 23 F. Supp. 2d 959

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[48] Me. Rev. Stat. tit. 5, §§ 207, 213(1); *GPU*, 527 F. Supp. 2d at 1031; *Tungate v.MacLean-Stevens Studios, Inc.*, 714 A.2d 792, 797 (Me. 1998).

[49] Nev. Rev. Stat. § 598.0915; *Sheet Metal Workers*, 737 F. Supp. 2d at 417; *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657-58 (D. Nev. 2009).

[50] Tenn. Code Ann. § 47–18–104; *NMV*, 350 F. Supp. 2d at 203; *Messer Griesheim Indus. v. Cryotech of Kingsport, Inc.*, 131 S.W.3d 457, 468-69 (Tenn. Ct. App. 2003).

[51] Vt. Stat. Ann. Tit. 9 § 2453; *Bergman v. Spruce Peak Realty, LLC*, 847 F. Supp. 2d 653, 671 (D. Vt. 2012); *Moffitt v. Icynene, Inc.*, 407 F. Supp. 2d 591, 603 (D. Vt. 2005); *Ianelli v. U.S. Bank*, 996 A.2d 722, 726 (Vt. 2010)..

[52] W. Va. Code §§ 46A-6-104, -102(7); *White*, 705 S.E.2d at 837-38.

[53] To our knowledge, no court has yet rendered an opinion on whether the Wisconsin Deceptive Trade Practices Act applies to antitrust conduct of the type alleged here.

(1998); *In re Aftermarket Filters Antitrust Litig.*, No. 08 C 4883, 2009 WL 3754041, at *10 (N.D. Ill. 2009).

Under the DC Consumer Protection Act, a plaintiff must plead unconscionable conduct towards consumers, which requires affirmative misconduct and not merely an allegation that a price was higher than it should have been. D.C. Code Ann. § 28-3904; *In re Graphics Processing Units Antitrust Litig.* (*GPU*), 527 F. Supp. 2d at 1029-30 (dismissing plaintiffs' claims under the D.C., Kansas, and New Mexico Consumer Protection Acts because "pleading unconscionability requires something more than merely alleging that the price of a product was unfairly high" and plaintiffs did not plead the "kind of grossly unequal bargaining power prohibited by these statutes").

Simply stated, as alleged in the Indirect Complaint, this is not a consumer fraud case. Indirect Plaintiffs *do not* allege consumer deception or reliance, and therefore their claims under the consumer protection laws of at least California, the District of Columbia, Illinois, Maine, Nevada, Tennessee, Vermont, West Virginia, and Wisconsin must be dismissed.

B. Several State Consumer Fraud Statutes Require Conduct Related to a Specific Consumer Transaction That Is Consumer Oriented or Has a Consumer Nexus

A number of state statutes require that the challenged conduct not only involve deception – again, *not* pleaded here – but also that it take place in connection with a specific consumer transaction. Warner Chilcott's purportedly unlawful settlement agreements with generic manufacturers plainly do not meet this requirement.

The alleged conduct therefore falls outside the strictures of the following states' statutes:

- New Mexico Unfair Practices Act: New Mexico's consumer protection law prohibits unfair, unconscionable, or deceptive trade practices and has been held to

require a misrepresentation made in connection with the sale at issue or other similar transactions.[54]

- West Virginia Consumer Credit & Protection Act: West Virginia law requires not only that the alleged misconduct take place in connection with a consumer transaction, but also that it induce a consumer to make a purchase he or she otherwise would not have made.[55]

Other consumer protection statutes invoked by Indirect Plaintiffs address conduct that is "consumer oriented" or that has a "consumer nexus":

- Claims under the Illinois Consumer Fraud and Deceptive Business Practices Act "must meet the consumer nexus test by alleging that the conduct involves trade practices directed to the market generally or otherwise implicates consumer protection concerns."[56]

- The Idaho Consumer Protection Act prohibits nineteen forms of conduct, only two of which Indirect Plaintiffs could possibly claim encompass Defendants' alleged actions. Arguments as to either must fail because the first expressly requires a deceptive act or practice directed "to the consumer," and the second, barring unconscionable acts in the conduct of trade or commerce, has been interpreted as requiring conduct that is directed at the consumer as well.[57]

- Likewise, the D.C. Consumer Protection Act "does not apply to commercial dealings outside the consumer sphere," and its scope is limited to transactions that are "primarily for personal use."[58]

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[54] N.M. Stat. Ann. §§ 57-12-3, -12-2 (2006); *Taylor v. United Mgmt.*, 51 F. Supp. 2d 1212, 1216-17 (D.N.M. 1999); *Stevenson v. Louis Dreyfus Corp.*, 811 P.2d 1308, 1311 (N.M. Ct. App. 1991); *Dellaira v. Farmers Ins. Exch.*, 103 P.3d 111, 117 (N.M. Ct. App. 2004).

[55] W. Va. Code §§ 46A-6-104, -102(7) (2011); *White v. Wyeth*, 705 S.E.2d 828, 837-38 (W. Va. 2010).

[56] 815 Ill. Comp. Stat. 505/10a(a); *see Athey Prods. Corp. v. Harris Bank Roselle*, 89 F.3d 430, 436-37 (7th Cir. 1996); *Stepan Co. v. Winter Panel Corp.*, 948 F. Supp. 802, 807 (N.D. Ill. 1996) (dismissing plaintiff's claim because allegation that "consumers ultimately used the product" failed to state a "consumer nexus").

[57] Idaho Code Ann. § 48-603(17) & (18)); *State ex rel. Wasden* v. *Daicel Chem. Indus., Ltd*., 106 P.3d 428, 434-35 (Idaho 2005) (holding that Idaho Code Ann. § 48-603(18) is directed at the consumer even though the language of the statute does not explicitly say this).

[58] D.C. Code § 28-3905(k) *Antoine v. U.S. Bank Nat. Ass'n*, 821 F. Supp. 2d 1, 7 (D.D.C. 2010)

- The Nebraska Consumer Protection Act has also been interpreted to apply only to unfair or deceptive acts or practices that affect the public interest and "have an impact on consumers at large."[59]

- And, as noted above, the Wisconsin Deceptive Trade Practices law prohibits deception or other misrepresentations to the *general public*.[60]

These statutes are directed at transactions with consumers; the fact that a transaction *indirectly* affects consumers does not make such conduct actionable. *See, e.g., Auto. Refinishing Paint,* 515 F. Supp. 2d at 552 (under New York Deceptive Acts and Practices Act, when "alleged deceptive act occurs in a transaction between two companies, even when the result of the deception [indirectly] impacts on a consumer, it is not actionable"); *In Re Rezulin Prods. Liab. Litig.*, 390 F. Supp. 2d 319, 399 n.101 (S.D.N.Y. 2005) ("[N]or . . . does the fact that consumers were the ultimate end-users convert the [upstream] transaction in to a consumer transaction" and give rise to liability.). Here, the alleged conduct – the so-called "reverse payment" agreements – had no direct connection to consumers. Accordingly, Indirect Plaintiffs' claims under at least these state statutes should be dismissed.

(stating that the DCCPPA does not apply to commercial dealings outside the consumer sphere and granting defendants' motion for summary judgment on plaintiffs' DCCPPA claim where the loan at issue in the case was not a consumer transaction); *see also Shaw v. Marriott, Int'l, Inc.*, 605 F.3d 1039, 1043 (D.C. Cir. 2010) (stating that the D.C. Court of Appeals has held that the DCCPPA protects only consumers and ruling plaintiffs lacked standing to sue under the Act because they were not consumers where they stayed in a hotel for business purposes).

[59] Neb. Rev. Stat. §§ 59-1601, 1602; *Nelson v. Lusterstone Surfacing Co.*, 605 N.W.2d 136, 141-42 (Neb. 2000).

[60] Wis. Stat. Ann. § 100.18; *K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 732 N.W.2d 792, 798-99 n.6 (Wis. 2007).

C. The Consumer Fraud Statutes of Various States Have Been Held Inapplicable to Antitrust Conduct

Certain consumer fraud statutes address entirely different conduct than what antitrust laws cover and have been held inapplicable to antitrust-related claims. For example, courts in Illinois have held that the Illinois Consumer Fraud Act is meant to deal with consumer fraud and is not intended to be an additional antitrust enforcement mechanism.[61]

Similarly, the DC Consumer Protection Act[62] and the Tennessee Consumer Protection Act[63] have been held not to apply to antitrust conduct.

Indirect Plaintiffs' claims under the consumer fraud statutes of at least Illinois, Tennessee, and the District of Columbia therefore should be dismissed.

D. Other State Consumer Fraud Statutes Do Not Include Antitrust Conduct as Prohibited Conduct Under the Statute

Still other state consumer fraud statutes apply only to certain types of prohibited conduct that do not include antitrust violations. For example, the Alabama Deceptive Trade Practices Act,[64] Idaho Consumer Protection Act,[65] West Virginia Consumer Credit & Protection Act,[66] and

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[61] *See, e.g.*, 815 Ill. Comp. Stat. 505/2; *Wellbutrin XL*, 260 F.R.D. at 162; *Laughlin v. Evanston Hosp.*, 550 N.E.2d 986, 993 (Ill. 1990); *Gaebler v. N.M. Potash Corp.*, 676 N.E.2d 230 (Ill. App. Ct. 1996).

[62] D.C. Code Ann. §28-3904.

[63] Tenn. Code Ann. § 47-18-104(b); *Bennett v. Visa USA Inc.*, 198 S.W.3d 747, 754-55 (Tenn. Ct. App. 2006) (stating that the Tennessee Consumer Protection Act does not apply to anti-competitive conduct); *Sherwood v. Microsoft Corp.*, No. M2000-01850-COA-R9-CV, 2003 WL 21780975, at *31-33 (Tenn. Ct. App. July 31, 2003) (holding that "claims based upon anticompetitive conduct are not cognizable under the TCPA").

[64] Ala. Code § 8-19-5.

[65] Idaho Code Ann. § 48-603.

[66] W. Va. Code § 46A-6-102(7); *DRAM*, 516 F. Supp. 2d at 1118; *In re Graphics Processing Units Antitrust Litig.* (*GPU*), 527 F. Supp. 2d 1011, 1030 (N.D. Cal. 2007).

Wisconsin[67] are limited to specific types of conduct, none of which includes antitrust violations. Because Indirect Plaintiffs do not allege conduct prohibited by these statutes, these claims should be dismissed.

E. Several States Allow Suits Only in a Consumer Capacity

Many states allow a plaintiff to sue only in its capacity as a consumer. Indirect Plaintiffs – with the exceptions of Denise Loy, Melissa Chrestman and Mary Alexander – are not consumers but third-party payors, and so they have no right of action in these states.

- Alabama Deceptive Trade Practices Act: The ADTPA states that any consumer, defined as "any natural person who buys goods or services for personal, family or household use," may recover under the Act.[68]

- Maine Unfair Trade Practices Act: Private suits under Maine's consumer protection statute may be brought only by a "person who purchases or leases goods, services or property, real or personal, *primarily for personal, family or household purposes.*"[69]

- North Carolina Unfair & Deceptive Trade Practices Act: Because the North Carolina act's "primary purpose is to protect the consumer public," it generally gives a private cause of action to (1) consumers aggrieved by unfair or deceptive business practices and (2) businesses, but only when the businesses are competitors or engaged in commercial dealings with each other.[70] Here, Indirect Plaintiffs are neither competitors of Warner Chilcott nor in commercial dealings with Warner Chilcott.

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[67] Wis. Stat. § 100.20 (1)-(1t).

[68] Ala. Code § 8-19-3(2); *EBSCO Indus., Inc. v. LMN Enters., Inc.*, 89 F. Supp. 2d 1248, 1266 (N.D. Ala. 2000) (granting defendants' motion for summary judgment because the plaintiff, an owner of a corporation that manufactured and sold fishing lures, was not a "consumer" under the ADTPA definition and thus lacked standing to bring a claim).

[69] Me. Rev. Stat. Ann. Tit. 5, § 213(1) (2007) (emphasis added); *Hoglund ex rel. Johnson v. DaimlerChrysler Corp.*, 102 F. Supp. 2d 30, 31-32 (D. Me. 2000).

[70] N.C. Gen. Stat. Ann. § 75-1.1 (2010); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 519-20 (4th Cir. 1999).

- Vermont Consumer Protection Act: Vermont allows a civil remedy only to a "consumer who contracts for goods or services" in reliance on false representations or prohibited practices.[71]

Accordingly, Indirect Plaintiffs' claims under the laws of at least Alabama, Maine, North Carolina, and Vermont should be denied.

IX. INDIRECT PLAINTIFFS' CONSUMER PROTECTION CLAIMS MUST BE DISMISSED FOR ADDITIONAL REASONS

A. Indirect Plaintiffs Fail to Allege Compliance with Pre-Filing Notice Requirements

Several state laws under which the Indirect Plaintiffs are pursuing claims require that the plaintiff, prior to bringing a claim, notify either the defendant or the state attorney general of its intentions. For example, under the Massachusetts Consumer Protection Act a demand letter providing such notice 30 days prior to suit is a "jurisdictional prerequisite to suit," and "not merely a procedural nicety."[72]

The following statutes have similar requirements:

- California Unfair Competition Act: A party must "serve, within three days of filing with the court, a copy of that brief or petition on the Attorney General."[73]

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[71] Vt. Stat. Ann. Tit. 9 § 2461(b); *State v. Int'l Collection Serv.*, 594 A.2d 426, 248 (Vt. 1991) (private remedy limited to consumer plaintiffs). Indirect Plaintiffs cannot meet this requirement.

[72] *See* Mass. Gen. Laws ch. 93A, § 9(3); *Shaw v. BAC Home Loans Servicing, LP*, No. 10-11-021-DJC, 2013 WL 789195, at *5 (D. Mass. Mar. 1, 2013) (noting that demand letter under Mass. Gen. L. ch. 93A must be both timely and include sufficient description of the unfair or deceptive act and dismissing claim for plaintiff's failure to include the alleged violation in demand letter); *Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 19 (1st Cir. 2004); *Spring v. Geriatric Auth. of Holyoke*, 475 N.E.2d 727, 735-36 (Mass. 1985). "Furthermore, 'as a special element' of the cause of action, [prior notification to defendant] must be alleged in the plaintiff's complaint." *Rodi*, 389 F.3d at 19 (quoting *Entrialgo v. Twin City Dodge, Inc.*, 333 N.E.2d 202, 204 (Mass. 1975)).

[73] Cal. Gen. Bus. Prof. Code § 17209.

- Maine Unfair Trade Practices Act: "At least 30 days prior to the filing of an action for damages, a written demand for relief, identifying the claimant and reasonably describing the unfair and deceptive act or practice relied upon and the injuries suffered, must be mailed or delivered to any prospective respondent . . . ."[74]

- West Virginia Consumer Credit & Protection Act: Under the West Virginia statute, "[n]o action may be brought . . . until the consumer has informed the seller . . . in writing and by certified mail of the alleged violation and provided the seller

. . . twenty days from receipt of the notice of violation to make a cure offer."[75]

The Indirect Plaintiffs have not alleged that they met these requirements, and their claims under the consumer protection laws of these states must be dismissed on this basis alone.

B. Indirect Plaintiffs Fail to Allege Primarily Intrastate Conduct for Consumer Protection Statutes That Require Such Conduct

As noted above, many states require that certain types of claims arise from purely or primarily intrastate (rather than nationwide) conduct. *See supra* Section V.A.

- Massachusetts Consumer Protection Act: Under Massachusetts law, the conduct at issue must have occurred "primarily and substantially within the commonwealth."[76]

- North Carolina Unfair Trade Practices Act: North Carolina's consumer protection statute has been construed to address "primarily local concerns," and thus requires that any alleged anti-competitive conduct have substantial effects within North Carolina.[77]

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[74] Me. Rev. Stat. tit. 5, § 213(I-A).

[75] W. Va. Code § 46A-6-106(b); *Perry v. Tri-State Chrysler Jeep, LLC*, No. 3:08-0104, 2008 U.S. Dist. LEXIS 33218, at *12 (S.D. W. Va. Apr. 16, 2008).

[76] Mass. Gen. Laws ch. 93A, § 1; *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 139 F.3d 1396, 1410 (11th Cir. 1998).

[77] N.C. Gen. Stat. § 75-1.1; *The "In" Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 505 (M.D.N.C. 1987); *Merck & Co., Inc. v. Lyon*, 941 F. Supp. 1443, 1463 (M.D.N.C. 1996); *see also In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042, 2013 WL 1431756, at *18-19 (E.D. Mich. Apr. 9, 2013) (dismissing claims under North Carolina's consumer protection statute because what was alleged was merely "incidental" in-state injury).

Because Indirect Plaintiffs do not allege primarily intrastate conduct in Massachusetts and North Carolina, their claims under these laws must be dismissed.

C. Indirect Plaintiffs' Claims Are Barred in States that Disallow Class Action Claims

Indirect Plaintiffs seek class action treatment under four state consumer protection laws that prohibit class actions. In each case, the state law class action prohibition survives *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), in which the Supreme Court held that New York's general class action bar was preempted by Federal Rule of Civil Procedure 23. As Justice Stevens explained in his concurrence in that case, when a state rule "is part of a State's framework of substantive rights or remedies," the state rule controls, and the bar on class actions remains effective. *Shady Grove*, 130 S. Ct. at 1449 (Stevens, J., concurring).[78] That is the case with at least the following state statutes:

- The Alabama Deceptive Trade Practices Act authorizes only the attorney general or state district attorneys to bring class action lawsuits. "A consumer or other person bringing an action under this chapter may not bring an action on behalf of a class . . . ."[79]

- The Tennessee Consumer Protection Act is similarly limited to actions brought "individually," precluding class actions.[80]

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[78] Justice Stevens' concurrence has been adopted by the majority of lower courts. *See, e.g.*, *Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 983 (10th Cir. 2010); *Wellbutrin*, 756 F. Supp. 2d at 675.

[79] Ala. Code § 8-19-10(f). *Univ. Fed. Credit Union* v. *Grayson*, 878 So. 2d 280, 285 n.2 (Ala. 2003) (stating that the trial court exceeded its discretion if it certified a class for a deceptive-trade-practices claim because Alabama law does not allow consumers to bring class actions based on deceptive trade practices).

[80] Tenn. Code Ann. § 47-18-109(a)(1); 109(g). Several courts have held that this restriction is substantive and survives *Shady Grove*. *Tait v. BSH Home Appliances Corp.*, No. SACV 10-711 DOC (ANx), 2011 WL 1832941, at *9 (C.D. Cal. May 12, 2011); *Berden v. Honeywell Int'l Inc.*, No. 3:09-1035, 2010 WL 3239285, at *10 (M.D. Tenn. Aug. 16, 2010); *Wellbutrin*, 756 F. Supp.

- While the Illinois Consumer Fraud and Deceptive Business Practices Act does not explicitly bar class actions, courts have held that the statute may not be used to bring indirect purchaser class action antitrust claims that would have been prohibited under the Illinois Antitrust Act, which bars indirect purchaser class actions by anyone other than the state Attorney General.[81]

The Indirect Plaintiffs' class action claims under the consumer protection statutes of Alabama, Illinois, and Tennessee accordingly must be dismissed, as class claims are not permitted under these laws.

D. Indirect Plaintiffs Have Not Pled a Claim under the West Virginia Consumer Credit and Protection Act, Which Does Not Apply to the Purchase of Prescription Drugs

To state a claim under the West Virginia Consumer Credit and Protection Act, a plaintiff must allege: "(1) unlawful conduct by the seller; (2) an ascertainable loss on the part of the consumer; and (3) proof of a causal connection between the alleged unlawful conduct and the consumer's ascertainable loss." W. Va. Code § 46A-6-106(a); *White v. Wyeth*, 705 S.E.2d 828, 837-38 (W. Va. 2010). In *Wyeth*, the West Virginia Supreme Court of Appeals (the state's highest court) held that no "causal connection" exists, and thus the third prong of the statute cannot be met, in the context of prescription drug purchases: "Prescription drug cases are not the type of private causes of action contemplated under the terms and purposes of the WVC-CPA because the consumer can not [*sic*] and does not decide what product to purchase." *Id.* at 837-

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2d at 677.

[81] 740 ILCS § 10/7; *see Flonase*, 692 F. Supp. 2d at 539 ("Because the indirect purchaser class action claims in this case would be precluded under the Illinois Antitrust Act, they cannot be brought under the [Illinois Consumer Fraud Act] instead; to allow otherwise would constitute an end run around the Illinois legislature's determination."). This restriction reflects a decision about substantive rights and remedies by the legislature intended to limit duplicative recovery and therefore survives *Shady Grove*. *See Wellbutrin*, 756 F. Supp. 2d at 677.

38. Indirect Plaintiffs' claim under West Virginia's consumer protection law therefore fails as a matter of law.

E. Indirect Plaintiffs Cannot Recover under the Consumer Protection Laws of the District of Columbia, Florida, or Massachusetts Because Their Sole Alleged Injury Is the Alleged Payment of Inflated Prices

Indirect Plaintiffs' central allegation is that they paid higher prices for Loestrin 24 than they would have, but for Defendants' alleged anticompetitive conduct. Indirect Compl. ¶¶ 1, 164-65. But the payment of supposedly inflated prices for otherwise effective drugs cannot form the basis for a cause of action in three of the states from which Indirect Plaintiffs claim violations of consumer protection statutes:

- D.C. Consumer Protection Act: Under the D.C. Act, Plaintiffs must show a personal injury; the present action – brought solely on the basis that Plaintiffs allegedly paid higher prices for Loestrin 24 due to the alleged violation of a legal duty – cannot be sustained.[82]

- Florida Consumer Protection Act: Plaintiffs' allegations that they may have paid a higher price than warranted for a drug are too speculative to show injury-in-fact or provide any other basis for standing under the Florida statute.[83]

- Massachusetts Consumer Protection Act: Actionable conduct under Massachusetts' consumer protection law requires a showing of economic injury, but does not encompass claims based on alleged price "premiums" where a consumer purchased a drug but no other form of injury was suffered.[84]

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[82] D.C. Code § 28–3905(k)(1); *Williams v. The Purdue Pharma Co.*, 297 F. Supp. 2d 171, 177-78 (D.D.C. 2003).

[83] Fla. Stat. § 501.211; *Prohias v. Pfizer, Inc.*, 485 F. Supp. 2d 1329, 1337 (S.D. Fla. 2007).

[84] Mass. Gen. Laws ch. 93A, § 9(1); *Rule v. Fort Dodge Animal Health Inc.*, 607 F.3d 250, 255 (1st Cir. 2010).

F. Indirect Plaintiffs' Nevada Deceptive Trade Practices Act Claims Are Barred Because Plaintiffs Are Not Elderly or Disabled Persons

The Nevada Deceptive Trade Practices Act allows private enforcement only by an elderly or disabled person. Nev. Rev. Stat. § 598.0977; *see also Wellbutrin XL*, 260 F.R.D. at 163-64; *In re Chocolate Confectionary Antitrust Litig.*, 749 F. Supp. 2d 224, 234 (M.D. Pa. 2010). The Indirect Plaintiffs have not alleged (and cannot allege) that they are elderly or disabled persons located in Nevada. Accordingly, they have no private right of action under this statute.

X. INDIRECT PLAINTIFFS' UNJUST ENRICHMENT CLAIMS MUST BE DISMISSED

A. Indirect Plaintiffs' Undifferentiated Unjust Enrichment Claims Fail

Indirect Plaintiffs assert that "it would be inequitable under the laws of all states and jurisdictions within the United States, except for Indiana and Ohio, for the Defendants to be permitted to retain any of the overcharges for Loestrin 24 derived from Defendants' unfair and unconscionable methods, acts and trade practices alleged in this Complaint." Indirect Compl. ¶ 231. Courts routinely dismiss undifferentiated unjust enrichment claims such as these. *See, e.g.*, *Wellbutrin XL*, 260 F.R.D. at 167 ("[C]obbling together the elements of a claim of unjust enrichment from the laws of the fifty states is no different from applying federal common law," and there is no federal "general" common law applicable to all states and jurisdictions); *In re Ductile Iron Pipe Fitting (DIPF) Indirect Purchaser Antitrust Litig.*, No. 12-169, 2013 WL 5503308, at *8 (D.N.J. Oct. 2, 2013) (dismissing indirect purchasers' unjust enrichment claims for failure to specify the particular state law under which they intended to proceed); *Refrigerant Compressors*, 2013 WL 1431756, at *23-24 (same); *Flonase*, 692 F. Supp. 2d at 541 (commenting that "the elements necessary to allege unjust enrichment vary by state"). Indirect Plaintiffs' unjust enrichment claim therefore should be dismissed.

At best, Indirect Plaintiffs *may* purport to be alleging 49 separate unjust enrichment claims, under the laws of 48 states (excluding Indiana and Ohio) and the District of Columbia.[85] However, even if such vague pleading were permissible under the Federal Rules, which it is not, Indirect Plaintiffs' unjust enrichment claims still fail for numerous reasons including (1) several states do not recognize such claims, (2) Plaintiffs lack standing to assert such claims in states in which they have not alleged injury, (3) Plaintiffs fail to plead the absence of an adequate legal remedy as required by most states, (4) Plaintiffs fail to allege the required relationship with Defendants, (5) Plaintiffs fail to plead a direct benefit to Defendants, and (6) Plaintiffs fail to allege mistake or fraud. Defendants reserve the right to assert these and any applicable state-specific basis for dismissal in the event Plaintiffs clarify or revise their unjust enrichment claims.

B. Several States Do Not Recognize Unjust Enrichment Claims

Several states, including at least California, Georgia, Illinois, and Mississippi, do not recognize an independent cause of action for unjust enrichment. *See Bruton v. Gerber Prods. Co.*, No. 12-CV-02412-LHK, 2013 WL 4833413, at *22 (N.D. Cal. Sept. 6, 2013) ("[T]his court has previously determined that there is no distinct cause of action for unjust enrichment under California law."); *In re iPhone 4S Consumer Litig.*, 2013 WL 3829653, at *18 (N.D. Cal. July 23, (dismissing unjust enrichment claim after court had already dismissed various other claims based on California consumer protection laws because "a stand-alone claim for unjust enrichment cannot be maintained"); *Mechior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (Cal. Ct. App. 2003) ("[T]here is no cause of action in California for unjust enrichment . . .

[85] Although Plaintiffs have not specified any "territories" with respect to the unjust enrichment claim in their Complaint, we address herein Puerto Rico because Plaintiffs assert state law claims for this territory.

."); *Refrigerant Compressors*, 2013 WL 1431756, at *25; *see also Durell*, 108 Cal. Rptr. 3d at 699; *Berry v. Bryan Cave LLP*, No. 08-cv-2035-B, 2010 WL 1904885, at *8 (N.D. Tex. May 11, 2010); *Sheet Metal Workers*, 737 F. Supp. 2d at 433 (no unjust enrichment in Georgia or Illinois); *Cole v. Chevron USA, Inc.*, 554 F. Supp. 2d 655, 671 (S.D. Miss. 2007) (dismissing unjust enrichment claims because "[u]nder Mississippi law, unjust enrichment is not an independent theory of recovery") (citing *Estate of Johnson v. Adkins*, 513 So. 2d 922, 926 (Miss. 1987)); *Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804, 813 (S.D. Miss. 2002). The Indirect Plaintiffs' claims in California, Georgia, Illinois, and Mississippi therefore must be dismissed for this reason alone.

C. Indirect Plaintiffs Lack Standing to Assert Claims under the Laws of Multiple States in Which They Have Not Alleged Any Injury

The Indirect Plaintiffs lack standing to bring claims under the laws of the states in which they cannot claim to have been injured. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *In re Ductile Iron Pipe Fittings (DIPF) Indirect Purchaser Antitrust Litig.*, No. 12-169, 2013 WL 5503308, at *10-11 (D.N.J. Oct. 2, 2013); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, No. 09-CR 3690, 2013 WL 4506000, at *8 (N.D. Ill. Aug. 23, 2013); *Refrigerant Compressors*, 2012 WL 2917365, at *7; *In re Magnesium Oxide Antitrust Litig.*, No. 10-5943 (DRD), 2011 WL 5008090, at *7-10 (D.N.J. Oct. 20, 2011); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 924 (N.D. Ill. 2009). Here, Indirect Plaintiffs fail to allege that any named plaintiff was injured in Alabama, Alaska, Arkansas, Colorado, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Mississippi, Montana, Oklahoma, Washington, or Wyoming.

Where a purported class representative seeks to assert claims under the laws of states in which it does not even claim injury, those claims must be dismissed. *See, e.g., Wellbutrin XL*,

260 F.R.D. at 158; *In re Herley Indus. Inc. Sec. Litig.*, No. 06-2596, 2009 WL 3169888, at *8 (E.D. Pa. Sept. 30, 2009) ("Whether a class has Article III standing 'is determined vis-à-vis the named parties.'") (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306 (3d Cir. 1998); *In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 1098, 1106-07 (N.D. Cal. 2007).

Article III jurisdiction is the "threshold question in every federal case," determining whether a federal court has the power to hear the suit before it. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To establish a case or controversy, plaintiffs must allege *personal injury* fairly traceable to defendants' allegedly unlawful conduct and likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (emphasis added); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Lujan*, 504 U.S. at 561 n.1; *A. Auto. Ins. Co. v. Murray*, 658 F.3d 311, 318 (3d Cir. 2011). It is the "burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Spencer v. Kemna*, 523 U.S. 1, 11 (1998) (internal quotations omitted).

While some courts have held, relying on *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), that the Article III standing issue may be deferred until after class certification is considered, courts in the First Circuit have underscored that "[t]hreshold individual standing is a prerequisite for all actions, including class actions," and "class representatives must meet this standing requirement." *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, No. MDL 1532, 2006 WL 623591, at *3 (D. Me. Mar. 10, 2006). The District Court of Massachusetts in *In re Bank of Boston Corp. Securities Litig.*, 762 F. Supp. 1525, 1531 (D. Mass. 1991), stated that "[a] federal district court may not permit a plaintiff to circumvent the standing requirement simply because the plaintiff files his suit as a

class action . . . . [W]hen the issue of standing is raised by a party, the Court must resolve that issue before considering the class certification requirements . . . [because] standing is the threshold issue in every federal case."

Other circuits have also made clear that the "*initial inquiry* . . . is whether the lead plaintiff individually has standing, not whether or not other class members have standing." *Winer Family Trust v. Queen*, 503 F.3d 319, 326 (3d Cir. 2007) (emphasis added); *see also, e.g.*, *Easter v. Am. W. Fin.*, 381 F.3d 948, 962 (9th Cir. 2004); *Magnesium Oxide*, 2011 WL 5008090, at *10; *Flonase*, 692 F. Supp. 2d at 533-34; *Wellbutrin XL*, 260 F.R.D. at 153-55; *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir.1998) (citing *Brown v. Sibley*, 650 F.2d 760, 770 (5th Cir.1981)) ("A potential class representative must demonstrate individual standing vis-as-vis [sic] the defendant; he cannot acquire such standing merely by virtue of bringing a class action.").

Plaintiffs thus lack standing to bring claims in Alabama, Alaska, Arkansas, Colorado, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Mississippi, Montana, Oklahoma, Washington, and Wyoming, and their unjust enrichment claims under the laws of those states and territories must be dismissed. *In re Dairy Farmers*, 2013 WL 4506000, at *8 ("Indirect Purchaser Plaintiffs fail to satisfy their burden of showing Article III standing for states in which they do not reside and/or did not purchase the products at issue.");[86] *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 642, 657-58 (E.D. Mich. 2011) ("[N]amed plaintiffs lack standing to assert claims under the laws of the states in which they do not reside or in which they suffered no injury.").

[86] Plaintiffs' state antitrust and consumer protection claims similarly should be dismissed for those states in which they cannot claim to have been injured.

CONCLUSION

For the foregoing reasons, this Court should dismiss Indirect Plaintiffs' claims with prejudice.

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Respectfully submitted,

/s/ *John A. Tarantino*
John A. Tarantino (#2586)
jtarantino@apslaw.com
Patricia K. Rocha (#2793)
procha@apslaw.com
Nicole J. Benjamin (#7540)
nbenjamin@apslaw.com
ADLER POLLOCK & SHEEHAN P.C.
One Citizens Plaza
8th Floor
Providence, RI 02903-1345
Telephone: (401) 274-7200
Facsimile: (401) 751-0604

J. Mark Gidley (pro hac vice)
Peter J. Carney (pro hac vice)
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005
Telephone: (202) 626-3600
Facsimile: (202) 639-9355

Jack E. Pace III (pro hac vice)
Alison Hanstead (pro hac vice)
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
Telephone: (212) 819-8200
Facsimile: (212) 354-8113

Attorneys for Warner Chilcott Sales (US), LLC, Warner Chilcott (US), LLC, Warner Chilcott Public Limited Company, Warner Chilcott Company, LLC f/k/a Warner Chilcott Company, Inc., Warner Chilcott Laboratories Ireland Limited, Warner

Chilcott Holdings Company III, Ltd., Warner Chilcott Corporation, Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc., and Watson Laboratories, Inc.

/s/ Leiv Blad
Leiv Blad
Michael Whitlock
Zarema Arutyunova
BINGHAM MCCUTCHEN LLP
2020 K Street NW
Washington, DC 20006-1806
Telephone: (202) 373-6000
Facsimile: (202) 373-6001

Attorneys for Lupin Ltd. and Lupin Pharmaceuticals, Inc.

ATTACHMENT 1

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ATTACHMENT 2

STATE LAW CLAIMS ASSERTED BY INDIRECT PURCHASER PLAINTIFFS

Compl./ Claims	State Antitrust Claims		State Consumer Protection Claims	State Unjust Enrichment
	Conspiracy/ Comb. In Restraint of Trade (Warner Chilcott and Watson; Warner Chilcott and Lupin)	**Conspiracy/ Comb. In Restraint of Trade (All Defendants)**		
Indirect Plaintiffs	Arizona California District of Columbia Florida Kansas Maine Massachusetts Michigan Minnesota Mississippi Nebraska Nevada New Mexico New York North Carolina North Dakota Oregon Rhode Island South Dakota Tennessee Utah Vermont West Virginia Wisconsin	Arizona California District of Columbia Florida Illinois Iowa Kansas Maine Massachusetts Michigan Minnesota Mississippi Nebraska Nevada New Mexico New York North Carolina North Dakota Oregon Puerto Rico Rhode Island South Dakota Tennessee Utah Vermont West Virginia Wisconsin	Alabama California District of Columbia Florida Illinois Idaho Maine Massachusetts Nebraska Nevada New Mexico North Carolina Tennessee Vermont West Virginia Wisconsin	All states and jurisdictions within the United States, except Indiana and Ohio

ATTACHMENT 3

STATE-SPECIFIC GROUNDS TO DISMISS INDIRECT PURCHASER STATE LAW CLAIMS

In the following table, Defendants summarize the state-specific reasons why Plaintiffs' state law and common law claims should be dismissed. Plaintiffs' state law and common law claims also should be dismissed for the additional reasons – applicable to ***all Plaintiffs' claims*** in these cases – set forth in Defendants' Motion to Dismiss the Direct Purchaser Plaintiffs' Complaint.

I. State Antitrust Claims

Second Claim[87] Conspiracy & Combination in Restraint of Trade Under State Law (WC & Watson)	**Ground for Dismissal**	**Fourth Claim Conspiracy & Combination in Restraint of Trade Under State Law (WC & Lupin)**	**Ground for Dismissal**	**Fifth Claim Conspiracy & Combination in Restraint of Trade Under State Law[88] (WC & Watson & Lupin)**	**Ground for Dismissal**
Ariz Rev. Stat. § 44-1401, et seq.	Time-barred	Ariz Rev. Stat. § 44-1401, et seq.		Ariz Rev. Stat. § 44-1401, et seq.	Time-barred, no concerted action
Cal. Bus. Code §§ 16700 & 17200, *et seq.*	Time-barred	Cal. Bus. Code §§ 16700 & 17200, *et seq.*		Cal. Bus. Code §§ 16700 & 17200, *et seq.*	Time-barred, no concerted action

[87] Indirect Plaintiffs' First Claim for Relief is against Warner Chilcott and Watson only, under federal law (*i.e.*, declaratory and injunctive relief under § 16 of the Clayton Act for alleged violations of § 1 of the Sherman Act). Plaintiffs' Third Claim for Relief is under federal law, and is asserted against Warner Chilcott and Lupin only.

[88] Under Indirect Plaintiffs' Fifth Claim for Relief, Lupin is alleged to have "joined [Warner Chilcott and Watson's] ongoing conspiracy."

Second Claim[87] Conspiracy & Combination in Restraint of Trade Under State Law (WC & Watson)	**Ground for Dismissal**	**Fourth Claim Conspiracy & Combination in Restraint of Trade Under State Law (WC & Lupin)**	**Ground for Dismissal**	**Fifth Claim Conspiracy & Combination in Restraint of Trade Under State Law[88] (WC & Watson & Lupin)**	**Ground for Dismissal**
D.C. Code Ann. § 28-45031, *et seq.*	Time-barred, intrastate activity	D.C. Code Ann. § 28-45031, *et seq.*	Intrastate activity	D.C. Code Ann. § 28-45031, *et seq.*	Time-barred, intrastate activity, no concerted action
Fla. Stat. § 501 Part II, *et seq.*	Time-barred	Fla. Stat. § 501 Part II, *et seq.*		Fla. Stat. § 501 Part II, *et seq.*	Time-barred, no concerted action
				740 Ill. Comp. Stat. § 10/3, *et seq.*	Time-barred, no concerted action
				Iowa Code § 553.2, *et seq.*	Time-barred, no concerted action
Kan. Stat. Ann. § 50-101, *et seq.*	Time-barred	Kan. Stat. Ann. § 50-101, *et seq.*		Kan. Stat. Ann. § 50-101, *et seq.*	Time-barred, no concerted action
Me. Rev. Stat. Ann. 10, § 1101, *et seq.*		Me. Rev. Stat. Ann. 10, § 1101, *et seq.*		Me. Rev. Stat. Ann. 10, § 1101, *et seq.*	No concerted action
Mass. Ann. Laws ch. 93, *et seq.*	Time-barred, *Illinois Brick*, intrastate activity	Mass. Ann. Laws ch. 93	*Illinois Brick*, intrastate activity	Mass. Ann. Laws ch. 93, *et seq.*	Time-barred, *Illinois Brick*, intrastate activity, no concerted action
Mich. Comp. Laws Ann. § 445.771, *et seq.*	Time-barred	Mich. Comp. Laws Ann. § 445.771, *et seq.*		Mich. Comp. Laws Ann. § 445.771, *et seq.*	Time-barred, no concerted action
Minn. Stat. § 325D.52, *et seq.*	Time-barred	Minn. Stat. § 325D.52, *et seq.*		Minn. Stat. § 325D.52, *et seq.*	Time-barred, no concerted action
Miss. Code Ann. § 75-21-1, *et seq.*	Time-barred, intrastate activity	Miss. Code Ann. § 75-21-1, *et seq.*	Intrastate activity	Miss. Code Ann. § 75-21-1, *et seq.*	Time-barred, intrastate activity, no concerted action

Second Claim[87] Conspiracy & Combination in Restraint of Trade Under State Law (WC & Watson)	**Ground for Dismissal**	**Fourth Claim Conspiracy & Combination in Restraint of Trade Under State Law (WC & Lupin)**	**Ground for Dismissal**	**Fifth Claim Conspiracy & Combination in Restraint of Trade Under State Law[88] (WC & Watson & Lupin)**	**Ground for Dismissal**
Neb. Code Ann. § 59-801, *et seq.*	Time-barred	Neb. Code Ann. § 59-801, *et seq.*		Neb. Code Ann. § 59-801, *et seq.*	Time-barred, no concerted action
Nev. Rev. Stat. Ann. § 598A, *et seq.*	Time-barred	Nev. Rev. Stat. Ann. § 598A, *et seq.*		Nev. Rev. Stat. Ann. § 598A, *et seq.*	Time-barred, no concerted action
N.M. Stat. Ann § 57-1-1, *et seq.*	Time-barred	N.M. Stat. Ann § 57-1-1, *et seq.*		N.M. Stat. Ann § 57-1-1, *et seq.*	Time-barred, no concerted action
NY General Business Law § 340, *et seq.*	Time-barred, intrastate activity	NY General Business Law § 340, *et seq.*	Intrastate activity	NY General Business Law § 340, *et seq.*	Time-barred, intrastate activity, no concerted action
N.C. Gen. Stat. § 75-1, *et seq.*	Time-barred	N.C. Gen. Stat. § 75-1, *et seq.*		N.C. Gen. Stat. § 75-1, *et seq.*	Time-barred, no concerted action
N.D. Cent. Code § 51-08.1-01, *et seq.*	Time-barred	N.D. Cent. Code § 51-08.1-01, *et seq.*		N.D. Cent. Code § 51-08.1-01, *et seq.*	Time-barred
Or. Rev. Stat. § 646.705, *et seq.*	Time-barred	Or. Rev. Stat. § 646.705, *et seq.*		Or. Rev. Stat. § 646.705, *et seq.*	Time-barred, no concerted action
P.R. mentioned in ¶¶ 189 & 209, but not listed independently	Time-barred, *Illinois Brick*	P.R. mentioned in ¶¶ 189 & 209, but not listed independently	*Illinois Brick*	10 L.P.R.A § 251, *et seq.*	Time-barred, *Illinois Brick*, no concerted action
R.I. Gen Laws § 6-36-5, *et seq.*	Time-barred, repealer not applied retroactively	R.I. Gen Laws § 6-36-5, *et seq.*	Repealer not applied retroactively	R.I. Gen Laws § 6-36-5, *et seq.*	Time-barred, repealer not applied retroactively, no concerted action
S.D. Codified Laws Ann. § 37-1, *et seq.*	Time-barred	S.D. Codified Laws Ann. § 37-1, *et seq.*		S.D. Codified Laws Ann. § 37-1, *et seq.*	Time-barred, no concerted action

Second Claim[87] **Conspiracy & Combination in Restraint of Trade Under State Law (WC & Watson)**	**Ground for Dismissal**	**Fourth Claim** **Conspiracy & Combination in Restraint of Trade Under State Law (WC & Lupin)**	**Ground for Dismissal**	**Fifth Claim** **Conspiracy & Combination in Restraint of Trade Under State Law[88] (WC & Watson & Lupin)**	**Ground for Dismissal**
Tenn. Code. Ann. § 47-25-101, *et seq.*	Time-barred, intrastate activity	Tenn. Code. Ann. § 47-25-101, *et seq.*	Time-barred, intrastate activity	Tenn. Code. Ann. § 47-25-101, *et seq.*	Time-barred, intrastate activity, no concerted action
Utah Code Ann. § 76-10-911, *et seq.*	Time-barred, *Illinois Brick*	Utah Code Ann. § 76-10-911, *et seq.*	*Illinois Brick*	Utah Code Ann. § 76-10-911, *et seq.*	Time-barred, *Illinois Brick*, no concerted action
Vt. Stat. Ann. 9, § 2453, *et seq.*		Vt. Stat. Ann. 9, § 2453, *et seq.*		Vt. Stat. Ann. 9, § 2453, *et seq.*	No concerted action
W. Va. Code § 47-18-1, *et seq.*	Time-barred	W. Va. Code § 47-18-1, *et seq.*		W. Va. Code § 47-18-1, *et seq.*	Time-barred, no concerted action
Wis. Stat. § 133.01, *et seq.*		Wis. Stat. § 133.01, *et seq.*		Wis. Stat. § 133.01, *et seq.*	No concerted action

II. State Consumer Protection Claims

Sixth Claim **Unfair or Unconscionable Acts & Practices Under State Law (WC & Watson & Lupin)**	**Grounds for Dismissal**
Ala. Code. § 8-19-1, *et seq.*	Time-barred, no listed prohibited conduct alleged, consumers only, no class actions
Cal. Bus. & Prof. Code § 17200, *et seq.*	Time-barred (WC/Watson agreement), consumer deception/reliance, pre-filing requirement
D.C. Code § 28-3901, *et seq.*	Time-barred (WC/Watson agreement), unconscionable conduct toward consumers, not antitrust enforcement mechanism, outside of the consumer sphere, price inflation
Fla. Stat. § 501.201, *et seq.*	Time-barred (WC/Watson agreement), price inflation
Idaho Code § 48-601, *et seq.*	Time-barred, action directed at consumer, no listed prohibited conduct alleged, no injury in the state

Sixth Claim **Unfair or Unconscionable Acts & Practices Under State Law** **(WC & Watson & Lupin)**	**Grounds for Dismissal**
815 ILCS § 505/1, *et seq.*	Time-barred (WC/Watson agreement), not antitrust enforcement mechanism, consumer nexus, no class actions
5 Me. Rev. Stat. § 207, *et seq.*	Consumer deception/reliance, consumers only, pre-filing requirement
Mass. Gen. L. Ch. 93A, *et seq.*	Time-barred (WC/Watson agreement), pre-filing requirement, primarily intrastate conduct, price inflation
Neb. Rev. Stat. § 59-1601, *et seq.*	Time-barred (WC/Watson agreement), matters in public interest/consumers at large
Nev. Rev. Stat. § 598.0903, *et seq.*	Time-barred (WC/Watson agreement), consumer deception/reliance, not elderly/disabled
N.M. Stat § 57-12-1, *et seq.*	Time-barred (WC/Watson agreement), unconscionable conduct toward consumers, specific consumer transaction, not antitrust enforcement mechanism
N.C. Gen. Stat § 75-1.1, *et seq.*	Time-barred (WC/Watson agreement), consumers only, primarily intrastate conduct
Tenn. Code § 47-18-101, *et seq.*	Time-barred, consumer deception/reliance, not antitrust enforcement mechanism, no class actions
9 Vt. § 2451, *et seq.*	Consumer deception/reliance, consumers only
West Virginia Code § 46A-6-101, *et seq.*	Time-barred (WC/Watson agreement), consumer deception/reliance, specific consumer transaction, no listed prohibited conduct alleged, pre-filing requirement, no application to prescription drugs
Wisconsin Code § 100.2, *et seq.*	Time-barred (WC/Watson agreement), no private right of action, no listed prohibited conduct alleged, no deception of general public

III. Unjust Enrichment

Seventh Claim **Unjust Enrichment**	**Grounds for Dismissal**[89]
Alabama	Requires mistake or fraud, direct benefit required, *Illinois Brick* (end run), no injury in state
Alaska	No injury in the state, *Illinois Brick* (end run), no other claims
Arizona	Direct benefit required, adequate legal remedy

[89] All claims should be dismissed because they are undifferentiated; table lays out individual state arguments.

Seventh Claim **Unjust Enrichment**	**Grounds for Dismissal**[89]
Arkansas	No injury in the state, no other claims
California	No independent cause of action for unjust enrichment
Colorado	No injury in the state, *Illinois Brick* (end run), no other claims
Connecticut	*Illinois Brick* (end run), no other claims
Delaware	*Illinois Brick* (end run), adequate legal remedy, no other claims
District of Columbia	Direct benefit required
Florida	Direct benefit required, adequate legal remedy
Georgia	No independent cause of action for unjust enrichment, no injury in the state, direct benefit required, *Illinois Brick* (end run), no other claims
Hawaii	No injury in the state, no other claims
Idaho	Defined relationship between plaintiff and defendant, direct benefit required, *Illinois Brick* (end run), no injury in state
Illinois	No independent cause of action for unjust enrichment, defined relationship between plaintiff and defendant
Iowa	
Kansas	Defined relationship between plaintiff and defendant, direct benefit required
Kentucky	No injury in the state, *Illinois Brick* (end run), no other claims
Louisiana	No injury in the state, *Illinois Brick* (end run), adequate legal remedy, no other claims
Maine	Direct benefit required
Maryland	Direct benefit required, *Illinois Brick* (end run), no other claims
Massachusetts	Direct benefit required, adequate legal remedy
Michigan	Direct benefit required
Minnesota	
Mississippi	No injury in the state, no independent cause of action for unjust enrichment, requires mistake or fraud
Missouri	*Illinois Brick* (end run), no other claims
Montana	No injury in the state, *Illinois Brick* (end run), no other claims
Nebraska	
Nevada	
New Hampshire	No other claims
New Jersey	Direct benefit required, *Illinois Brick* (end run), no other claims
New Mexico	

Seventh Claim **Unjust Enrichment**	**Grounds for Dismissal**[89]
New York	Defined relationship between plaintiff and defendant, direct benefit required
North Carolina	Direct benefit required
North Dakota	Direct benefit required, adequate legal remedy
Oklahoma	No injury in the state, *Illinois Brick* (end run), adequate legal remedy, no other claims
Oregon	
Pennsylvania	Direct benefit required, *Illinois Brick* (end run), no other claims
Puerto Rico	Adequate legal remedy
Rhode Island	Direct benefit required
South Carolina	Defined relationship between plaintiff and defendant, direct benefit required, *Illinois Brick* (end run), no other claims
South Dakota	
Tennessee	
Texas	Requires mistake or fraud, direct benefit required, *Illinois Brick* (end run), no other claims
Utah	
Vermont	
Virginia	*Illinois Brick* (end run), no other claims
Washington	No injury in the state, direct benefit required, no other claims
West Virginia	Requires mistake or fraud, direct benefit required
Wisconsin	Direct benefit required
Wyoming	No injury in the state, direct benefit required, no other claims

ATTACHMENT 4

RELEVANT STATE STATUTES AND CASE LAW

Arizona

Ariz. Rev. State. § 44-1412 (2009) (providing legislative intent that "courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes" and that "[t]his article shall be applied and construed to effectuate its general purpose to make uniform the [antitrust] law" among the states); *Bunker's Glass Co. v. Pilkington PLC*, 47 P.3d 1119, 1126-27 (Ariz. Ct. App. 2002) (noting that Arizona appellate courts "typically" follow federal antitrust case law and that 44-1412 permits, but does not require courts to look to federal case law).

California

Clayworth v. Pfizer, Inc., 49 Cal. 4th 758,233 P.3d 1066, 111 Cal. Rptr. 3d 666 (Cal. 2010) (noting that in 1975, "federal antitrust cases were treated as 'applicable' and 'authoritative' on Cartwright Act questions"); *State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal.3d 1147, 1164 (1988), *overruled in part on other grounds by statute* ("Our Supreme Court has noted that "judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters' intent"); *Marin County Bd. of Realtors, Inc. v. Palsson*, 549 P.2d 833, 835 (Cal. 1976) (recognizing that a "long line of California cases" has recognized that federal cases interpreting the Sherman Act are applicable to state antitrust cases because "both statutes have their roots in the common law"); *Freeman v. San Diego Assn. of Realtors*, 77 Cal.App.4th 171, 183, fn. 9 (1999) (federal precedent should be used "with caution").

District of Columbia

D.C. CODE § 28-4515 (WEST 2009) ("In construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes."); *Peterson v. Visa U.S.A., Inc.*, No. Civ. A. 03-8080, 2005 D.C. Super. LEXIS 17, *9 (D.C. Super. April 22, 2005) (citing D.C. CODE § 28-4515) ("The [D.C. Antitrust Act] allows "a court of competent jurisdiction . . . [to] use as a guide interpretations given by federal courts to comparable antitrust statutes.").

Florida

FLA. STAT. § 542.32 (2009) (describing legislative intent that "due consideration and great weight" be given to federal antitrust case law when interpreting state antitrust statute); *Duck Tours Seafari, Inc. v. Key West*, 875 So. 2d 650, 653 (Fla. Dist. Ct. App. 2004) ("Under Florida law, 'Any activity or conduct . . . exempt from the provisions of the antitrust laws of the United

States is exempt from the provisions of this chapter [542]'").

Illinois

People v. Crawford Distrib. Co., 291 N.E.2d 648, 652-53 (Ill. 1972) (declaring that federal antitrust precedent is a "useful guide to our court").

Iowa

IOWA CODE § 553.2 (1997) (requiring courts to construe Iowa statute "to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter" but not "in such a way as to constitute a delegation of state authority" to the federal courts); *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181–182 (Iowa 2001) (recognizing that Iowa Competition law is "patterned" after federal Sherman Act and that IOWA CODE § 553.2 "explicitly requires" state courts to consider federal case law and construe state law "uniformly with the Sherman Act"). *But cf. Comes v. Microsoft Corp.*, 646 N.W.2d 440, 446 (Iowa 2002) (finding that "Congress intended federal antitrust laws to supplement, not displace, state antitrust remedies" and that IOWA CODE § 553.2 does not require "Iowa courts to interpret the Iowa Competition Law the same way federal courts have interpreted federal law," thus rejecting *Illinois Brick*).

Kansas

Bergstrom v. Noah, 974 P.2d 520, 531 (Kan. 1999) (finding federal antitrust case law "persuasive" but "not binding" on the interpretation of the Kansas antitrust statute).

Maine

Pease v. Jasper Wyman & Son, 2002 WL 1974081, at *8, n. 13 (Me.Super. Aug 09, 2002) (stating that there are no state law cases on point, and following the First Circuit's reasoning that "the Maine antitrust statutes parallel the Sherman Act, and that those types of claims should be analyzed according to the doctrines developed in relation to federal law."); *Davric Maine Corp. v. Rancourt*, 216 F.3d 143, 149 (1st Cir. 2000) (noting that the Maine antitrust statutes parallel the Sherman Act, "and analyzing state claims according to federal law" (quoting *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1081 (1st Cir. 1993))).

Massachusetts

MASS. GEN. LAWS CH. 93, § 1 (2009) (requiring the Massachusetts antitrust laws to be "construed in harmony with judicial interpretations of comparable federal statutes insofar as practicable"); *Ciardi v. F. Hoffmann La Roche, Ltd.*, 762 N.E.2d 303, 307-08 (Mass. 2002) (reconciling state antitrust law with *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729–736 (1977) because MASS. GEN. LAWS CH. 93, § 1 requires state courts to harmonize state antitrust law with comparable federal law).

Michigan

MICH. COMP. LAWS § 445.784(2) (2009) (declaring intent of legislature that "in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason").; *Little Caesar Enters. v. Smith*, 895 F. Supp. 884, 898 (D. Mich. 1995) (finding no practical difference between federal and state vertical price fixing claims because "Michigan antitrust law is identical to federal law and follows the federal precedents").

Minnesota

Lorix v. Crompton Corp., 736 N.W.2d 619, 627–29 (Minn. 2007) (Minnesota generally follows federal law but rejects *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983)); *see also State by Humphrey v. Road Constructors*, 1996 Minn. App. LEXIS 597 at *5 (Minn. Ct. App. 1996) (recognizing that '"Minnesota antitrust law is to be interpreted consistently with the federal courts' construction of federal antitrust law'" (quoting *State v. Alpine Air Prods.*, 490 N.W.2d 888, 894 (Minn. Ct. App. 1992) *aff'd*, 500 N.W.2d 788 (Minn. 1993)).

Mississippi

Futurevision Cable Sys., Inc. v. Multivision Cable TV Corp., 789 F. Supp. 760, 780 (D. Miss. 1992) (dismissing state law violations because the federal law violations failed) (citing *Walker v. U-Haul of Mississipp*i, 734 F.2d 1068, 1070 n.5 (5th Cir. 1984) (treating Mississippi and federal antitrust claims as "analytically identical")), *aff'd*, 986 F.2d 1418 (5th Cir. 1993).

Nebraska

NEB. REV. STAT. § 59-829 (2009) (mandating that courts "shall follow the construction given to the federal law by the federal courts" when any provision is the same as or similar to the language of a federal antitrust law); *Arthur v. Microsoft Corp.*, 676 N.W.2d 29, 35 (Neb. 2004)

(interpreting NEB. REV. STAT. § 59-829 to require courts to look to federal law unless federal interpretation would not support the state's statutory purpose).

Nevada

NEV. REV. STAT. ANN. § 598A.050 (WEST 2009) (declaring provisions "shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes"); *Boulware v. Nev. Dep't of Human Res.*, 960 F.2d 793, 800–01 (9th Cir. 1992) (finding Nevada statute adopts by reference applicable federal antitrust case law).

New Mexico

N.M. STAT. ANN. § 57-1-15 (WEST 2009) (requiring that act "shall be construed in harmony with judicial interpretations of the federal antitrust laws" in order to achieve uniform application of the state and federal antitrust laws); *Romero v. Philip Morris, Inc.*, 242 P.2d 280, 289 (N.M. 2010) (statute directs court to "construe our [antitrust] law in harmony with federal law"); *Smith Mach. Corp. v. Hesston, Inc.*, 694 P.2d 501, 505 (N.M. 1985) (recognizing that New Mexico courts look to federal antitrust cases "[i]n the absence of New Mexico decisions directly on point").

New York

Sperry v. Crompton Corp., 863 N.E.2d 1012, 1018 (N.Y. 2007) (noting that courts generally construe Donnelly Act in light of federal antitrust case law, but that it is "well settled" that New York courts will interpret Donnelly Act differently "where State policy, differences in the statutory language or the legislative history justify such a result." (quoting *Anheuser-Busch, Inc. v. Abrams*, 520 N.E.2d 535, 539 (N.Y. 1988)); *see also Aimcee Wholesale Corp. v. Tomar Prod., Inc.*, 237 N.E.2d 223, 225 (N.Y. 1968) (recognizing that New York antitrust law was modeled on Sherman Act).

North Carolina

Madison Cablevision, Inc. v. Morganton, 386 S.E.2d 200, 213 (N.C. 1989) (finding that the Sherman Act is instructive though not binding when interpreting state antitrust statute) (citing *Rose v. Vulcan Materials Co.*, 194 S.E.2d 521, 530 (N.C. 1973)); *see also North Carolina Steel, Inc. v. Nat'l Council on Comp. Ins.*, 472 S.E.2d 578, 582–83 (N.C. App. 1996) (noting extensive North Carolina history of reliance on interpretations of federal antitrust law), *aff'd in part and rev'd in part*, 496 S.E.2d 369 (N.C. 1998).

Oregon

OR. REV. STAT. § 646.715(2) (2009) (declaring legislative intent that federal court decisions interpreting federal antitrust law "shall be persuasive authority").; *Jones v. City of McMinnville*, No. 05-35523, 2007 U.S. App. LEXIS 11235 at *8 (9th Cir. 2007) (finding that Oregon and federal antitrust statutes are "almost identical" and that Oregon courts look to federal decisions as "persuasive") (quoting OR. REV. STAT. § 646.715; *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963 n.4 (9th Cir. 1999)), *cert. denied 528 U.S. 1075 (2000)*; *see also Willamette Dental Group, P.C. v. Oregon Dental Serv. Corp.*, 882 P.2d 637, 640 (Or. Ct. App. 1994) (with no reported Oregon decisions on point, "we look to federal decisions interpreting Section 2 of the Sherman Act for persuasive, albeit not binding, guidance").

Puerto Rico

4 P.R. Laws Ann. §§ 257-76 (2005); *Caribe BMW v. Bayerische Motoren Werke*, 19 F.3d 745, 754 (1st Cir. 1994); *Podiatrist Ass'n, Inc. v. La Cruz Azul de Puerto Rico*, 332 F.3d 6, 16 (1st Cir. 2003) (treating Puerto Rico's antitrust statute Section 258, which "mirrors the language of the Sherman Act," as coextensive for the purposes of interpretation).

Rhode Island

R.I. GEN. LAWS § 6-36-2(b) (2009) (requiring that act "shall be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable, except where provisions of this chapter are expressly contrary to applicable federal provisions as construed"); *UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp.*, 599 A.2d 1033, 1035 (R.I. 1991) (statute requires court to interpret state antitrust statute in harmony with federal antitrust statutes).

South Dakota

S.D. CODIFIED LAWS § 37-1-22 (2009) (allowing courts to "use as a guide interpretations given by the federal or state courts to comparable antitrust statutes"); *In re S.D. Microsoft Antitrust Litig.*, 707 N.W.2d 85, 99 (S.D. 2005) (reaffirming that "great weight should be given to the federal cases interpreting the federal statute" and citing *Byre* for the proposition that, when state courts lack precedent on an issue, they look to federal case law for guidance).

Utah

UTAH CODE ANN. § 76-10-926 (2009) (declaring legislative intent that "the courts, in construing this act, will be guided by interpretations given by the federal courts to comparable federal antitrust statutes and by other state courts to comparable state antitrust statutes"); *Evans*

v. State, 963 P.2d 177, 181 (Utah 1998) (citing and following statutory mandate to look to federal and state courts for guidance when construing Utah statute).

Vermont

VT. STAT. ANN. TIT. 9, § 453(b) (2009) (declaring that in construing the statute, "the courts of this state will be guided by the construction of similar terms contained in Section 5(a)(1) of the Federal Trade Commission Act"); *Elkins v. Microsoft Corp.*, 817 A.2d 9, 15–17 (Vt. 2002) (holding that "harmonization provision" requiring courts to look to regulations and decisions of the Federal Trade Commission and federal court decisions of the FTC Act does not require courts to look to other federal antitrust statutes or corresponding decisions, thus rejecting *Illinois Brick*); *see also State v. Heritage Realty*, 407 A.2d 509, 511 (Vt. 1979) (interpreting VT. STAT. ANN. TIT. 9, § 2453(a) in light of federal case law to find that horizontal price fixing is per se unlawful).

West Virginia

W. VA. CODE § 47-18-16 (2009) (declaring legislative intent that statute "shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes").

Wisconsin

Emergency One v. Waterous Co., 23 F. Supp. 2d 959, 962, 970 (D. Wis. 1998) (noting that Wisconsin courts have "repeatedly" stated that federal antitrust law guides the interpretation of WIS. STAT. § 133.03) (citing *Grams v. Boss*, 294 N.W.2d 473, 480 (Wis. 1980)); *but cf. Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 144, 154–55 (Wis. 2005) (finding that one of the major objectives of revisions made to the state's antitrust law in 1980 was to reverse the holding in *Illinois Brick*, and that Wisconsin's antitrust laws are to be interpreted "in a manner which gives the most liberal construction to achieve the aim of competition").

Certificate of Service

I hereby certify that on the 7th day of February 2014, I did send a true copy of the within Memorandum **by electronic means (ECF)** to all counsel of record in MDL2472.

/s/ John A. Tarantino