No.

In the Supreme Court of the United States

FERRELLGAS PARTNERS, L.P., ET AL.,
Petitioners,

v.

MORGAN-LARSON, LLC, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A private antitrust suit for damages "shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. Petitioners are suppliers of pre-filled propane tanks that fuel gas grills and outdoor heaters. In 2008, Petitioners both moved from filling their tanks with 17 pounds of propane to 15 pounds—a shift that Respondents allege stemmed from a "price-fixing conspiracy." Since 2008, Petitioners have both continued to fill their propane tanks to 15 pounds.

Respondents brought private treble-damages antitrust suits against Petitioners in 2014—six years after the alleged agreement in restraint of trade, five years after indirect purchasers sued based on the same conduct, four years after those claims settled, and nearly two years after the Clayton Act's four-year statute of limitations expired. To satisfy the statute of limitations, Respondents alleged a "continuing violation" based on Petitioners' sales of 15-pound tanks at allegedly supracompetitive prices coupled with generalized allegations that the prices stemmed from the conspiracy purportedly formed in 2008. The district court held that Respondents' claims were time-barred. On appeal, a 2-1 panel of the Eighth Circuit affirmed. But the Eighth Circuit granted rehearing and, in a 5-4 decision, the en banc court found the claims timely as pleaded.

The question presented is whether, or in what circumstances, a plaintiff adequately pleads a "continuing violation" of the antitrust laws, sufficient to satisfy the statute of limitations, by alleging continuing sales during the limitations period when the alleged price-fixing conspiracy was formed outside the limitations period.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Ferrellgas Partners, L.P. and Ferrellgas, L.P., also doing business as Blue Rhino, (collectively, "Ferrellgas"), and AmeriGas, Inc., AmeriGas Propane, L.P., AmeriGas Propane, Inc., and UGI Corporation (collectively, "AmeriGas").

Ferrellgas, L.P. is a limited partnership owned by Ferrellgas Partners, L.P., which is a publicly traded Master Limited Partnership. Ferrellgas, Inc. is a 1% owner of each of those entities and no other publicly held company owns 10% or more of their stock. Ferrellgas has no other affiliates that have issued shares to the public.

AmeriGas, Inc. is a publicly traded limited partnership that conducts its business principally through its subsidiary, AmeriGas Propane, L.P. (the "Operating Partnership"), a Delaware limited partnership. AmeriGas Propane, Inc. (the "General Partner") is the general partner of AmeriGas, Inc. and of the Operating Partnership and is responsible for managing operations. The General Partner is a wholly owned subsidiary of AmeriGas, Inc., which, in turn, is a wholly owned subsidiary of UGI Corporation ("UGI"), a publicly traded company. UGI has no parent corporation and no publicly held company owns 10% or more of UGI's stock. The General Partner has a direct or indirect approximate 26% effective ownership interest in AmeriGas, Inc. The remaining approximate 74% effective ownership interest in AmeriGas, Inc. is owned by the public, and no publicly held company other than UGI owns 10% or more of the effective ownership interest in AmeriGas, Inc.

Respondents are Morgan-Larson, LLC, Johnson Auto Electric, Inc., Speed Stop 32, Inc., and Yocum Oil Company, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Ferrellgas Partners L.P., Ferrellgas, L.P. (collectively, "Ferrellgas"), AmeriGas, Inc., AmeriGas Propane, L.P., AmeriGas Propane, Inc., and UGI Corporation (collectively, "AmeriGas") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The divided en banc decision of the court of appeals (App. 1a-32a) is reported at 860 F.3d 1059. The divided panel decision of the court of appeals (*id.* at 33a-49a) is reported at 834 F.3d 943. The district court's order granting Petitioners' motion to dismiss (*id.* at 50a-80a) is unreported but available at 2015 WL 12791756.

JURISDICTION

The court of appeals entered judgment on June 23, 2017. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 4B of the Clayton Act, 15 U.S.C. § 15b, provides in relevant part: "Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued."

INTRODUCTION

This case presents an issue of undeniable importance to the administration of the Nation's antitrust laws. It has been nearly half a century since this Court last addressed the "continuing violation" doctrine in antitrust law. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Since then, lower courts have struggled to define the contours of the doctrine, adopting different standards and applying those standards differently depending on the species of antitrust claim alleged. And that confusion has been exacerbated by dicta in a civil RICO case decided by this Court, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997), that made a passing reference to the application of the continuing violation doctrine in alleged price-fixing conspiracies. This Court's intervention is needed to provide guidance to defendants and plaintiffs alike on when the Clayton Act's four-year statute of limitations (15 U.S.C. § 15b) runs on this important class of claims.

This case provides a timely and compelling vehicle for providing such guidance. Respondents allege that Petitioners unlawfully conspired in 2008 to reduce the fill level of their propane tanks without a corresponding reduction in price. But they did not bring this action until 2014—*six years* after the alleged price-fixing conspiracy "succeeded," according to Respondents themselves (App. 85a (¶ 10)). To get around the four-year statute of limitations, Respondents alleged continuing *sales* at "supracompetitive" prices within the limitations period. The district court saw through this ploy and dismissed the Complaint as untimely. And the

Eighth Circuit initially affirmed. But then the court granted rehearing en banc and reversed by a bare, 5-4 majority.

The Eighth Circuit's en banc majority held that all a plaintiff need do to plausibly allege a timely violation of the antitrust laws is plead a pre-limitations period agreement with respect to a product plus the later sale of that product during the limitations period. The en banc majority's ruling that Respondents have pleaded a timely claim underscores just how far lower courts have strayed from the text of the Clayton Act's statute of limitations and this Court's precedents. Indeed, as the dissent put it, the en banc majority "morphed" this Court's dicta in "*Klehr* into a sledgehammer and then reared that hammer to shatter the antitrust statute of limitations." App. 32a. This Court's review is warranted.

STATEMENT OF THE CASE

A. Factual Background[1]

Petitioners are suppliers of propane exchange tanks. App. 83a (¶ 1). Propane exchange tanks are portable steel cylinders pre-filled with propane gas and used primarily to fuel residential outdoor heaters and gas barbeque grills. *Id.* at 83a, 91a-93a (¶¶ 2, 38-41). Petitioners sell propane tanks directly to retailers, such as Respondents, including gas

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[1] This recitation of the facts is based on the allegations set forth in Respondents' Consolidated Amended Complaint (App. 82a-119a), which are accepted as true at the motion to dismiss stage.

stations, convenience stores, hardware stores, grocery stores, and big-box stores. *Id.* at 83a (¶ 2). Retailers in turn sell those pre-filled tanks to consumers, either as an initial sale or in exchange for a near-empty tank. *Id.* at 83a, 94a-95a (¶¶ 2, 44-45).

Petitioners' propane tanks are standard in size, with a fill capacity of 20 pounds. *Id.* at 83a (¶ 3). For safety reasons the tanks are not filled to maximum capacity for sale. *Id.* Before 2008, Petitioners sold tanks pre-filled with 17 pounds of propane. *Id.* at 83a-84a (¶ 3). In 2008, following increases in the price of propane, Petitioners both reduced the fill levels in their tanks from 17 to 15 pounds, without contemporaneously changing the per-tank prices they charged their customers. *Id.* at 84a-85a (¶¶ 4-7).

B. Procedural Background

1. *In re Propane I*

Petitioners' 2008 reduction in the fill levels of their propane tanks immediately drew legal challenge. Over the course of the following year, 18 class action complaints were filed, alleging that Petitioners' change from 17- to 15-pound tanks violated various consumer protection and antitrust statutes. The cases were consolidated into an MDL proceeding and, by October 6, 2010, all of the cases had settled.[2] *See In re: Pre-Filled Propane Tank*

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[2] The named plaintiffs in *Propane I* were all indirect purchasers (*i.e.*, end-consumers). Although they purported to bring their cases on behalf of all purchasers of propane exchange tanks (including direct purchasers, like

Marketing & Sales Practice Litig., No. 4:09-2086-MD-W-GAF ("*Propane I*"), ECF Nos. 2, 166.

2. FTC Administrative Action

On March 27, 2014, the Federal Trade Commission ("FTC") filed an administrative complaint alleging that, in 2008, Petitioners had illegally restrained competition by coordinating to obtain Walmart's consent to the change in fill level. *See* Complaint ¶¶ 1-9, 48-59, *In re Ferrellgas Partners, L.P.*, FTC Docket No. 9360 (Mar. 27, 2014), 2014 WL 1396496.

The FTC did not allege that Petitioners' reduction from 17 to 15 pounds was the result of any anticompetitive agreement. *See* Statement of Chairwoman Edith Ramirez and Commissioner Julie Brill at 1, *In re Ferrellgas Partners, L.P.*, FTC Docket No. 9360 (Oct. 31, 2014), 2014 WL 5787605, at *6 ("The Commission's Complaint does not allege that [Petitioners'] initial decisions to reduce fill levels to 15 pounds were the result of an agreement."). The FTC did not allege that Petitioners engaged in any price-fixing. *See* Dissenting Statement of Commissioner Maureen K. Ohlhausen at 1-2, *In re Ferrellgas Partners, L.P.*, FTC Docket No. 9360 (Oct. 31, 2014), 2014 WL 5787604, at *7 ("[T]he complaint in this matter did not allege an agreement between [Petitioners] to keep their respective prices to Walmart constant. There was no allegation in the complaint that the parties agreed in any way on the pricing of the

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Respondents), the settlements were entered only with respect to indirect purchasers. *See Propane I*, ECF Nos. 114, 166.

lesser-filled propane tanks."). And the FTC did not allege any anticompetitive conduct after 2008. On October 31, 2014, Petitioners settled with the FTC without any admission of liability.[3]

3. *In re Propane II* (This Case)

The FTC's complaint spawned a new round of putative class actions. Beginning in May 2014, direct and indirect purchasers returned to court, filing 37 complaints. The Judicial Panel on Multi-District Litigation consolidated all actions in the Western District of Missouri before the same district judge who presided over *Propane I*. This petition concerns the claims of the direct purchaser plaintiffs (*i.e.*, wholesale purchasers rather than end-consumers).[4] On January 29, 2015, Respondents filed their Consolidated Amended Complaint ("Complaint")—the operative complaint in this case. *See* App. 117a.

The Complaint largely parrots the allegations in *Propane I*—*i.e.*, that Petitioners conspired in 2008 to reduce the fill levels of their propane tanks from 17

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[3] *See* Agreement Containing Consent Order as to Ferrellgas Partners, L.P. and Ferrellgas L.P., *In re Ferrellgas Partners, L.P.*, FTC Docket No. 9360 (Oct. 31, 2014), 2014 WL 5787604, at *9-11; Agreement Containing Consent Order as to AmeriGas Partners, L.P. and UGI Corporation, *In re Ferrellgas Partners, L.P.*, FTC Docket No. 9360 (Oct. 31, 2014), 2014 WL 5787605, at *1-3.

[4] The district court separately granted summary judgment on the indirect purchaser plaintiffs' claims, which are subject to a separate appeal currently pending in the Eighth Circuit. *See Ortiz v. Ferrellgas Partners, L.P.*, No. 16-4086 (8th Cir.); *Orr v. Ferrellgas Partners, L.P.*, No. 16-4164 (8th Cir.).

to 15 pounds, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. *Compare* App. 84a-85a, 96a-101a (¶¶ 7, 50-68), *with* Consolidated Class Action Complaint ¶¶ 50-67, *Propane I*, No. 09-2086 (W.D. Mo. Feb. 22, 2010), ECF No. 76. Respondents allege that "faced [with] rapidly increasing input costs, including increases in the cost of propane, steel for the tanks, and the diesel fuel for the delivery trucks," Petitioners conspired in 2008 to decrease the fill levels in their propane exchange tanks. App. 96a (¶¶ 50-51). According to the Complaint, Petitioners had agreed to reduce the fill levels of their exchange tanks from 17 to 15 pounds "[n]o later than the last week of June 2008." *Id.* at 100a (¶ 66). "By October 2008," Respondents allege, "the propane conspiracy succeeded." *Id.* at 85a (¶ 10).

The Complaint also repeats many of the FTC's allegations that, in 2008, Petitioners pressured Walmart to accept the fill reduction. *Compare id.* at 85a, 100a-05a (¶¶ 10, 68-89), *with* Complaint ¶¶ 30-59, *In re Ferrellgas Partners, L.P.*, FTC Docket No. 9360 (Mar. 27, 2014), 2014 WL 1396496. According to Respondents, Petitioners believed they could not sustain their respective fill reductions unless Walmart accepted them, App. 101a (¶ 69), and therefore "combined efforts" to "forc[e] Walmart" to accept the fill reduction on October 10, 2008, *id.* at 104a-05a (¶¶ 87-88).

Because these allegations all involved conduct in 2008 about a conspiracy that allegedly "succeeded" in October 2008, and because the core allegations were well-known to the world by mid-2009 at the latest, Respondents' claims were facially untimely under the Clayton Act's four-year statute of

limitations. *See* 15 U.S.C. § 15b (applying to "[a]ny action to enforce any cause of action under section 15 . . . of this title"). Respondents therefore added a handful of vague and conclusory allegations about conduct during the limitations period—*i.e.*, from 2010 onward. They allege that, "[t]hrough at least the end of 2010, [Petitioners] regularly communicated to assure compliance with the conspiracy" (App. 105a-06a (¶ 92)), and engaged in "unlawful communications regarding pricing, fill levels, and market allocation" that "continued until at least late 2010" (*id.* at 114a (¶ 125)). The most specific allegation Respondents offer about these "communications" is that, "during calls and meetings with AmeriGas executives occurring at least as late as 2010, [one AmeriGas executive] repeatedly dismissed concerns that [Ferrellgas] might undercut AmeriGas on price or fill levels with words to the effect of, 'I talked to [Ferrellgas], and that's not going to happen.'" *Id.* at 86a (¶ 13). There are no allegations about the substance of any conversation the AmeriGas executive had with Ferrellgas, when such a conversation occurred, or whether any actual agreement was reached as a result.

The Complaint is also bereft of allegations that Petitioners ever agreed with each other on price. There are no allegations of a price at which Petitioners agreed to sell propane tanks or even that the prices of Petitioners' tanks actually mirrored each other at any time. Indeed, the Complaint is silent about the post-2008 prices Petitioners charged as a result of this supposed price-fixing conspiracy, even though Respondents must have known the price they paid for tanks.

C. The District Court's Order Dismissing Respondents' Complaint As Time-Barred

Petitioners moved to dismiss the Complaint as time-barred. Defs.' Mot. to Dismiss the Direct Purchaser Pls.' Consolidated Am. Compl., *In re Pre-Filled Propane Tank Antitrust Litig.*, No. 4:14-md-02567-GAF (Mar. 30, 2015), ECF Nos. 137, 138. The district court agreed and, on July 2, 2015, dismissed the Complaint. *See* App. 80a. The court held that Respondents' claim accrued in August 2008; that "absent any tolling theories, the statute of limitations expired on August 1, 2012, almost two years before the first claim was filed"; and that Respondents had not alleged a continuing violation sufficient to commence a new limitations period. *Id.* at 57a-66a. In particular, the district court recognized that the mere fact that Petitioners continued to sell 15-pound tanks after 2008 did not warrant treating the supposed conspiracy as a continuing violation. *Id.* at 61a-62a. The district court further held that bare allegations about communications between Petitioners "at least as late as 2010" were likewise insufficient to plausibly allege a continuing violation. *Id.* at 64a-65a; *id.* at 86a (¶ 13).[5]

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[5] Respondents also advanced several tolling theories that the district court rejected. *See* App. 56a-57a, 66a-77a. Respondents have since abandoned those alternative theories by failing to pursue them on appeal. *See Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008) ("Claims not raised in an opening brief are deemed waived.").

D. The Eighth Circuit Panel Decision Affirming Dismissal Of The Complaint

In a 2-1 decision, a panel of the Eighth Circuit affirmed. App. 33a-49a. Like the district court, the panel majority concluded that Respondents "have not alleged any overt acts within the limitations period that were new and independent acts, uncontrolled by the initial agreement." *Id.* at 43a. The panel explained that "[Respondents] do not allege that [Petitioners] met to fine-tune their agreement, further increased price of the propane tanks, further reduced the fill levels without reducing the price, or took any other novel overt act in furtherance of the conspiracy within the limitations period." *Id.*

Judge Benton, in dissent, believed that Respondents had plausibly alleged a continuing violation based on dicta in this Court's decision in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), which he understood to announce a rule that "each sale to the plaintiff[] starts the [Clayton Act] statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times."[6] *Id.* at 46a-48a.

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[6] *Klehr* stated: "[I]n the case of a 'continuing violation,' say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'" 521 U.S. at 187 (citations omitted).

E. The Eighth Circuit's 5-4 En Banc Decision

The Eighth Circuit granted Respondents' petition for rehearing en banc and reversed in a 5-4 decision. App. 1a-32a.

Judge Benton authored the majority opinion which, like his panel dissent, relied on dicta in *Klehr* to hold that allegations of "sales at artificially inflated prices are overt acts that restart the statute of limitations." *Id.* at 6a. The majority recognized that its decision conflicted with circuit precedent holding that "unabated inertial consequences" of pre-limitations period anticompetitive conduct, without more, do not commence a new limitations period on a continuing violation theory. *Id.* at 13a (citing *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004)). But it distinguished those cases on the ground that "the horizontal restraint here is a per se antitrust violation," which "has 'manifestly anticompetitive effects, and lack[s] . . . any redeeming virtue.'" *Id.* at 13a-14a (alterations in original) (citation omitted). And the majority held that Respondents sufficiently pleaded that the conspiracy continued into the limitations period because the Complaint alleged that "conversations" that were "similar" to those in 2008 occurred "until at least late 2010." *Id.* at 17a, 20a (quoting *id.* at 99a ¶ 60).

Judge Shepherd dissented, joined by Judges Wollman, Loken, and in part by Judge Kelly. The dissent explained that the majority had misunderstood *Klehr*'s discussion of the continuing violation doctrine in a way that effectively eliminated any requirement to "show a live, ongoing

conspiracy within the limitations period to survive a motion to dismiss." *Id.* at 23a. The dissent noted that *Klehr* had borrowed its example from the leading antitrust treatise, which "says nothing about 'each sale to the plaintiff' constituting an overt act." *Id.* at 25a. Rather, the treatise "explains that, '*so long as an illegal price-fixing conspiracy was alive*, each sale at the fixed price [started the four-year statute of limitations anew]." *Id.* (emphasis and alterations by dissent) (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 338b at 145 (rev. ed. 1995) (*1995 Antitrust Law*)). "Therefore each sale to the plaintiff can start the statutory period running again *so long as* an illegal price-fixing conspiracy is alive and ongoing." *Id.*

Under this standard, the dissent would have found that the Complaint here failed to allege a continuing violation. The dissent explained that, other than the fact that Petitioners both continued to sell 15-pound tanks, the only allegations of conduct during the limitations period were "naked assertions of misconduct, combined with a name discovered from a company directory, [which] are not enough" to establish a continuing violation within the limitations period. *Id.* at 29a n.4.

The dissent also observed that "[t]he majority opinion fails to discuss one factual allegation from within the limitations period in concluding that the plaintiffs have sufficiently alleged a conspiracy." *Id.* at 28a. That, to the dissent, was "not surprising," as "virtually all" of the Complaint consists of "either factual allegations from before the limitations period or naked assertions and conclusion." *Id.* at 28a-29a. Indeed, even Respondents' counsel "essentially conceded [at oral argument] that the[y] . . . lack any

factual allegations of a live, ongoing conspiracy during the limitations period." *Id.* at 29a.

The dissent further explained that "nothing in th[e majority] opinion prevent[s] a new lawsuit against [Respondents] four (or 40) years from now so long as fill levels remain at 15 pounds, even if price fluctuates." App. 31a n.6.

REASONS FOR GRANTING THE PETITION

Underscoring that it means what it says about the important policies served by statutes of limitations, this Court has repeatedly granted certiorari to ensure that lower courts give effect to congressionally imposed time limits on bringing federal claims—particularly where, as here, courts have invoked judge-created doctrines to circumvent those statutory deadlines. *See, e.g.*, *California Pub. Emps.' Retirement Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017); *Kokesh v. SEC*, 137 S. Ct. 1635 (2017); *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015).

Certiorari is similarly warranted here to clarify whether, or in what circumstances, new sales of a good at a price that is allegedly affected by a pre-limitations period antitrust violation is sufficient to plead around the four-year statute of limitations in the Clayton Act. In the decision below, the Eighth Circuit split 5 to 4 over whether the complaint in this case adequately pleads a "continuing violation" of the antitrust laws based on sales allegedly affected by a pre-limitations period agreement that, even as alleged, had long since "succeeded" (App. 85a (¶ 10)). That decision is emblematic of the longstanding confusion in the lower courts over the application of the "continuing violation" doctrine in

this context—confusion that stems in no small measure from dicta in this Court's decision in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997). The Eighth Circuit's decision also exemplifies how far courts have strayed from the text of the Clayton Act's directive that claims be "forever barred" unless brought within four years. Indeed, during the oral argument below, Respondents themselves acknowledged that, under their theory, they could have waited "100 years" before bringing suit.[7]

The question presented is undeniably important, for consumers and antitrust defendants alike. How it is answered dictates whether private enforcement of the antitrust laws will be carried out promptly and efficiently (when it has its maximum impact), or whether private plaintiffs will instead be permitted to sit back and wait until evidence has disappeared and memories have faded before raising claims about supposed violations from years ago. This case presents an ideal vehicle to decide the question and provide needed clarity on this threshold issue. And the Eighth Circuit's decision, by a bare 5-4 majority, that Respondents' claims are timely is flat wrong.

The petition should be granted.

I. WIDESPREAD CONFUSION EXISTS OVER THE CONTINUING VIOLATION DOCTRINE IN ANTITRUST LAW

The text of the Clayton Act's statute of limitations is clear and emphatic: A private

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[7] CA8 Oral Argument at 4:55-5:49, http://media-oa.ca8.uscourts.gov/OAaudio/2016/3/152789.MP3.

antitrust suit for damages "shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. It is well-settled that the limitations period generally begins to run "when a defendant commits an act that injures a plaintiff's business," and ends four years later. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). And the statute facially and indisputably applies equally to every private damages claim for a violation of the antitrust laws.

From there, however, it gets murky. As with most statutes of limitations, the Clayton Act's time-bar has generated bodies of judge-made law, including the "continuing violation" doctrine. As a general matter, when a violation continues into the limitations period, a plaintiff may recover for injuries sustained as a result of that violation, though recovery for injuries incurred more than four years prior is barred. Though simply stated, this judge-made doctrine has generated enormous confusion as lower courts have applied it to various claims, particularly alleged price-fixing conspiracies.

A. The Circuits Are Split On When An Antitrust Violation "Continues" Into The Limitations Period

To begin with, the circuits have diverged on what it means for a violation to "continue" into the limitations period. Most courts of appeals have (with some variation in phrasing) correctly distinguished new, independently injurious acts of the defendant (which qualify as a continuing violation) from the "mere reaffirmation" or "the abatable but unabated inertial consequences" of pre-limitations conduct (which do not). Other courts of

appeals, by contrast, hold that virtually any act or injury during the limitations period is sufficient to establish a continuing violation.

In particular, the Second, Fifth, Sixth, Ninth, and Tenth Circuits have all held that acts subsequent to an initial antitrust violation are not continuing violations if they are "the abatable but unabated inertial consequences of some pre-limitations action." *Poster Exch., Inc. v. National Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *see also Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014); *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1041-42 (2d Cir.), *cert. denied*, 506 U.S. 986 (1992); *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1274 (5th Cir. 1991); *Kaw Valley Elec. Coop. Co. v. Kansas Elec. Power Coop., Inc.*, 872 F.2d 931, 933-34 (10th Cir. 1989); *AMF, Inc. v. General Motors Corp. (In re Multidistrict Vehicle Air Pollution)*, 591 F.2d 68, 72 (9th Cir. 1979).

Under this approach, for example, the mere act of continuing to collect money due under an allegedly anticompetitive contract does not constitute a continuing violation. "[P]rofits, sales and other benefits accrued as the result of an initial wrongful act are not treated as 'independent acts.' Rather, they are uniformly viewed as 'ripples' caused by the initial injury, not as distinct injuries themselves." *Z Techs.*, 753 F.3d at 600. These courts have reasoned that "such receipts [a]re merely 'the abatable but unabated inertial consequences of some pre-limitations action,' rather than [independent injuries flowing] from 'some injurious act actually occurring during the limitations period.'" *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale*

Shipyards, Inc., 677 F.2d 1045, 1052-53 (5th Cir. 1982) (citation omitted), *cert. denied*, 459 U.S. 1105 (1983); *see also Kahn*, 970 F.2d at 1041 ("performance under the contract merely affects damages and does not give rise to a new cause of action"; "[t]he possibility of rescinding the contract . . . does not make the subsequent payments new wrongs").

Likewise, courts have held that repeated refusals to deal are not continuing violations when they flow from an earlier act or agreement that permanently excluded a plaintiff from the market upon inception. *See, e.g.*, *Kaw Valley*, 872 F.2d at 933-34 (repeated refusals to provide power to non-members of a rural electric cooperative did not constitute continuing violations because the pre-limitations agreement to exclude non-members was final). Under this class of cases, a market participant could not repeatedly commence a new limitations period by continually asking, "Will you sell to me today?"

Some cases state essentially the same rule in more affirmative terms: To constitute a continuing violation, a defendant's act within the limitations period must be "a new and independent act that is not merely a reaffirmation of a previous act" and must "inflict new and accumulating injury on the plaintiff." *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1979). Under this approach, continued payments made pursuant to anticompetitive agreements also are not continuing violations, but rather mere "manifestation[s] of the previous agreement[s]." *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 406 (6th Cir. 1999); *see also Aurora Enters., Inc. v. NBC, Inc.*, 688 F.2d 689, 694 (9th Cir. 1982) (packaged sale of syndication and

network exhibition rights to TV network occurred outside limitations period, and subsequent receipt of syndication profits by network did not commence a new limitations period); *Eichman v. Fotomat Corp.*, 880 F.2d 149, 160 (9th Cir. 1989) (defendant's continued receipt of lease payments under an allegedly illegal tying agreement did not commence a new limitations period).

In contrast, the Third, Eleventh, and D.C. Circuits have adopted a much more permissive view of what acts or injuries come within the continuing violation doctrine. The Third Circuit has held, for example, that a new limitations period commences even when "the acts that occurred within the limitations period were reaffirmations of decisions originally made outside the limitations period." *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 107 (3d Cir. 2010), *cert. denied*, 565 U.S. 817 (2011); *see also Wills Trucking, Inc. v. Baltimore & Ohio R.R. Co. (In re Lower Lake Erie Iron Ore Antitrust Litig.)*, 998 F.2d 1144, 1172 (3d Cir.), *cert. denied*, 510 U.S. 1021 (1993); *Harold Friedman, Inc. v. Thorofare Mkts. Inc.*, 587 F.2d 127, 139 (3d Cir. 1978).

Likewise, the D.C. Circuit has held that continued payments under a pre-limitations lease were actionable because of their "continuing allegedly 'anticompetitive' effect[s]." *National Souvenir Ctr., Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 514 (D.C. Cir.), *cert. denied*, 469 U.S. 825 (1984). And the Eleventh Circuit has noted that claims challenging activities occurring "more than four years" before suit were proper "because each payment under a contract which constitutes an illegal tie is a new injury." *Midwestern Waffles, Inc.*

v. Waffle House, Inc., 734 F.2d 705, 714 (11th Cir. 1984) (per curiam).

B. The Conflict Compounds When Courts Apply The Continuing Violation Doctrine In Alleged Antitrust Conspiracy Cases

Even among the majority of the courts of appeals that have articulated an "inertial consequences" or "mere reaffirmation" standard, disagreements about applying that standard to alleged conspiracies, in particular, have further divided the circuits.

A number of courts of appeals, including the en banc Eighth Circuit here, have openly departed from the continuing violation standard they apply to other species of antitrust violations when the plaintiff alleges a "price-fixing conspiracy." For those cases, the courts have created a unique (and less demanding) pleading-stage standard. Rather than consider whether the only timely injury was a mere reaffirmation, or the inertial consequence, of pre-limitations period conduct, these courts flatly declare that if a price-fixing conspiracy is alleged, then a plaintiff need only plead a sale of the product within the limitations period to survive a motion to dismiss. *See* App. 10a-12a; *Oliver v. SD-3C, LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1733 (2015); *cf. Atlantic Textiles v. Avondale Inc. (In re Cotton Yarn Antitrust Litig.)*, 505 F.3d 274, 290-91 (4th Cir. 2007) (applying same standard to assess the timeliness of claims compelled to arbitration); *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 828 (11th Cir. 1999), *cert. denied*, 529 U.S. 1130 (2000) (applying same standard at summary judgment).

Under this view of the continuing violation rule, it matters not whether the plaintiff plausibly alleges that the price-fixing conspiracy itself is continuing—for example, by alleging that co-conspirators have undertaken further collusive acts to maintain the conspiracy. Rather, these courts have held that, so long as there are allegations of continued sales of a product at a price somehow affected by a pre-limitations agreement, a later sale is itself sufficient to commence a new limitations period. *See Oliver*, 751 F.3d at 1086; *In re Cotton Yarn Antitrust Litig.*, 505 F.3d at 290-91; *Morton's Mkt.*, 198 F.3d at 828. This approach—derived from an incorrect reading of dicta in *Klehr*, *see infra* Section II.A.1—is irreconcilable with cases that view such "ripples" of earlier antitrust violations as nothing more than time-barred "inertial consequences" of those distant violations.

By contrast, other courts have refused to distinguish among antitrust claims for purposes of applying the continuing violation doctrine. In *Tam Travel, Inc. v. Delta Airlines, Inc. (In re Travel Agent Commission Antitrust Litigation)*, for example, the Sixth Circuit refused to hold that subsequent adherence to a commission policy allegedly implemented by a pre-limitations period horizontal agreement was sufficient to establish a continuing violation. 583 F.3d 898 (6th Cir. 2009), *cert. denied*, 562 U.S. 1134 (2011). The Sixth Circuit explained that if it were to "conclud[e] that an overt act occurred" in that scenario, "the applicable limitations period for a § 1 claim would be infinite—an antitrust plaintiff could routinely salvage an otherwise untimely claim by asserting that it

continues to lose revenue because of past alleged anticompetitive conduct." *Id.* at 902.

This conflict and confusion has created an ad hoc regime in which the timeliness of antitrust claims that have enormous consequences for defendants and plaintiffs alike often depends on what court, and what judge, happens to be looking at the issue—as the procedural history of this case underscores.

II. THE EIGHTH CIRCUIT EN BANC MAJORITY'S DECISION IS WRONG

The Eighth Circuit en banc majority joined the worst of these approaches. It adopted a special rule for price-fixing cases, and then found the Complaint sufficient to survive a motion to dismiss because the same product was (a) allegedly the subject of a pre-limitations period price-fixing agreement and (b) sold during the limitations period—notwithstanding the lack of plausible allegations that those later sales were the subject of the alleged earlier agreement. This ruling effectively erects a presumption that all "price-fixing" allegations necessarily state a continuing violation. Nothing in the text of the Clayton Act's statute of limitations supports that rule. Nor is there any reason why mere sales many years after a price-fixing agreement should be sufficient to commence a brand new limitations period when similar sales that follow other antitrust violations do not. Under the correct standard, Respondents' claims are woefully time-barred, as the four dissenters below recognized.

A. Neither *Klehr* Nor The *Per Se* Nature Of The Violation Justifies A Special Rule For Price-Fixing Conspiracies

The en banc Eighth Circuit majority gave two primary reasons for treating alleged "price-fixing" conspiracies differently from other antitrust violations. First, it read this Court's decision in *Klehr* to announce a special rule for certain antitrust conspiracies. Second, it believed that the *per se* nature of a price-fixing conspiracy justifies a different rule. Neither reason withstands scrutiny. Rather, in the context of an alleged price-fixing conspiracy—as with any other violation of Section 1 of the Sherman Act, or indeed any violation of the antitrust laws—the continuing violation doctrine requires a plaintiff to plausibly allege ongoing and injurious new acts that perpetuate the violation, not merely continued sales of the product that had been the subject of a pre-limitations violation.

1. *Dicta from* Klehr *led the Eighth Circuit majority, and several other courts, astray*

Like other courts of appeals, the Eighth Circuit majority misread one sentence of dicta from this Court's decision in *Klehr* to establish a special rule that "each sale" starts the statute of limitations running anew when the plaintiff alleges a price-fixing conspiracy.[8] The courts of appeals, of course,

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[8] *See* App. 16a ("Under *Klehr*, 'each sale to the plaintiff[s]' in a price-fixing conspiracy 'starts the statutory period running again'" (alteration in original)); *Oliver*, 751 F.3d at 1086-87 (applying *Klehr* to hold that downstream sales of SD Memory Cards, the prices of which were allegedly "fixed" by a

cannot be faulted for looking to this Court for guidance. But they have taken *Klehr* to say something this Court never could have intended. *Klehr* cannot reasonably be read to pronounce a substantive rule of antitrust law that, in the context of a price-fixing conspiracy, mere allegations of "sales at artificially inflated prices are overt acts that restart the statute of limitations." App. 6a.

Klehr was a civil RICO case, in which this Court was urged to adopt a "last predicate act" rule for such claims. Under that rule, plaintiffs could recover not just for "any added harm caused them by that late-committed act, but for all the harm caused by all the acts that make up the total 'pattern.'" *Klehr*, 521 U.S. at 187. In rejecting that approach, the Court offered an "analogy" to the Clayton Act's statute of limitations to explain why the last predicate act rule "goes too far" because it would allow plaintiffs to extend the limitations period indefinitely by "bootstrap[ping]" their way to

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supracompetitive patent royalty set and charged by patent licensors to SD Memory Card manufacturers many years earlier, were "overt act[s]" that commenced new limitations periods on price-fixing and related claims); *Morton's Mkt.*, 198 F.3d at 828 (applying *Klehr* to hold that even absent price-fixing conversations or other acts in furtherance of the conspiracy, subsequent purchases of milk at a fixed price "would constitute an overt act that injured [the plaintiffs]. A cause of action would accrue with each purchase and a new statutory period would begin to run"); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d at 291 ("Under *Klehr*, then, the plaintiffs' claims would be timely even under a one-year limitations period so long as the plaintiffs made a purchase from the Defendants within a year before the complaints were filed.").

recovering "for injuries caused by other earlier predicate acts that took place outside the limitations period." *Id.* at 189-90.

To illustrate the substance of the continuing violation doctrine, this Court observed in passing that:

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

Id. (citations omitted). This is the statement that has led lower courts, including the Eighth Circuit en banc majority below, astray.

Klehr, however, was plainly describing the prototypical *continuing* price-fixing conspiracy in which the conspirators act to maintain or further their conspiracy during the limitations period. This is especially evident because this Court quoted a paragraph in the leading antitrust treatise which referenced a "continuing" conspiracy involving "conventional price fixing" and an "illegal price-fixing conspiracy" that was still "alive" at the time of "each sale at the fixed price." App. 25a (Shepherd, J., dissenting) (quoting *1995 Antitrust Law* ¶ 338b at 145). Thus, the treatise simply recognizes that each sale to a plaintiff can restart the limitations period anew only *"so long as an illegal price-fixing*

conspiracy [i]s alive." *Id.* (emphasis added by dissent) (quoting *1995 Antitrust Law* ¶ 338b at 145 (citing *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968))).

As the dissenters below explained, the Eighth Circuit majority's reading of *Klehr* fails to take account of that key premise—"so long as an illegal price-fixing conspiracy [i]s alive." And it invites the precise result that *Klehr* rejected: It "permit[s] plaintiffs who know of the defendant's pattern of activity simply to wait, 'sleeping on their rights,' . . . perhaps bringing suit only long after the 'memories of witnesses have faded or evidence is lost,'" and thereby "conflicts with a basic objective—repose—that underlies limitations periods." *Klehr*, 521 U.S. at 187 (citations omitted). Only this Court can correct the grave misreading of its own decision, and certiorari is warranted for that reason alone.

2. *No special limitations rule exists for allegations of restraints subject to* per se *antitrust analysis on the merits*

The majority below also relied on the "*per se*" treatment of price-fixing claims to justify applying a special (and more permissive) limitations rule here. App. 13a-14a. Specifically, the majority believed that a different approach was warranted because, "[a]s a *per se* violation, the horizontal restraint has 'manifestly anticompetitive effects, and lack[s] . . . any redeeming virtue.'" *Id.* at 14a (alterations in original) (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)). In so concluding, it echoed Respondents' argument that "defendants have no legitimate interest in repose in the context of price-fixing conspiracies, as such

conspiracies are *never* lawful." CA8 Resp'ts Suppl. En Banc Br. 20 (Feb. 17, 2017).

The text of the Clayton Act's statute of limitations, however, draws no such distinctions. This is not surprising: The very purpose of a statute of limitations is "to protect defendants . . . from incurring liability on stale claims because of lost evidence," and from "the burden of defending against stale claims regardless of whether liability is eventually established." *Steele v. United States*, 599 F.2d 823, 829 (7th Cir. 1979). Thus, application of the statute of limitations is "generally unrelated to the merits of the litigation." *Id.* And it would be particularly undesirable to hinge a threshold limitations question on the potentially complex and fact-intensive question of whether an alleged agreement is subject to *per se* analysis.

That Respondents purport to allege a *per se* violation of the antitrust laws is of course relevant to the framework for analyzing the *merits* of their claim. But it provides no reason to deprive Petitioners of the repose the statute of limitations is intended to secure. After all, a limitations defense is by definition offered as a defense against accusations of wrongdoing. Holding that a statute of limitations has less force when a defendant is accused of something that is "never lawful" is an exception large enough to swallow the rule whole.

B. The Same Rules That Govern Whether A Conspiracy Has Been Adequately Alleged Also Govern Whether An *Ongoing* Conspiracy Has Been Adequately Alleged

Rather than devising a wholly separate statute-of-limitations approach for price-fixing allegations,

the Eighth Circuit should instead have recognized that the same statute of limitations and the same pleading rules apply to price-fixing claims just as to any other antitrust claims. In *Bell Atlantic Corp. v. Twombly,* this Court held that it is insufficient for a plaintiff to make conclusory allegations that parallel conduct was carried out under an ongoing agreement; rather, a plaintiff must plead facts "plausibly suggesting (not merely consistent with) agreement," *i.e.*, facts "that raise[] a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." 550 U.S. 544, 554-57 (2007). That standard applies to all antitrust claims based on concerted action, including price-fixing allegations. *See, e.g.*, *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d at 902-03 (applying *Twombly* to evaluate price-fixing allegations).

To succeed, price-fixing conspiracies require ongoing enforcement or fine-tuning. *See Z Techs.*, 753 F.3d at 599; *Midwestern Mach. Co. v. Northwest Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004) ("The typical antitrust continuing violation occurs in a price-fixing conspiracy . . . when conspirators continue to meet to fine-tune their cartel agreement."). Indeed, basic economic theory establishes that a price-fixing conspiracy "cannot survive absent some enforcement mechanism because otherwise the incentives to cheat are too great." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir.) (citing Richard A. Posner, *Economic Analysis of Law* 265-66 (3d ed. 1986)), *cert. denied*, 510 U.S. 994 (1993). Accordingly, to allege an *ongoing* price-fixing conspiracy, a plaintiff must allege facts showing that

the conspiracy remains in effect. If the plaintiff cannot muster allegations of continued fine-tuning, enforcement, or the like, it is implausible to infer that today's market prices are the product of an unlawful agreement reached long ago. Put another way, without allegations showing how the conspiracy survived into the limitations period, it is implausible that a pre-limitations period agreement nonetheless lives on.

As a practical matter, unless courts actually require plaintiffs to connect their injuries to "a live, ongoing conspiracy" (App. 23a (Shepherd, J., dissenting)), the continuing violation doctrine will supersede the statute of limitations Congress prescribed. Without that connection, *any* sale could overcome the statute of limitations at the pleading stage, allowing plaintiffs to pursue recovery based on supposedly elevated prices that are at most the inertial consequences of a pre-limitations violation. Elevated prices are the quintessential "unabated inertial consequence" of *many* antitrust violations. There is no reason to deem them sufficient by themselves to sustain price-fixing allegations when they are insufficient (in most circuits, *see supra* Section I.A.) to sustain other sorts of allegations.[9]

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[9] *See Z Techs.*, 753 F.3d at 600 ("profits, sales, and other benefits accrued as the result of an initial wrongful act are not treated as 'independent acts'" but "are uniformly viewed as 'ripples' caused by the initial injury"); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 320c1 (2017 online ed.) (*2017 Antitrust Law*) ("[H]igh prices following an anticompetitive merger or the creation of a monopoly are mere 'inertial consequences' that one naturally expects to flow from such acts."); *id.* ¶ 320c4 (noting, in the context of single-firm

The costs of the Eighth Circuit majority's watered-down approach, moreover, are tremendous. As this Court has explained, statutes of limitations represent a pervasive legislative judgment that it is unjust to fail to "put the adversary on notice to defend within a specified period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 554-55 (1974) (citation omitted). By refusing to insist that Respondents meet the standard rules for adequately pleading a conspiracy, the Eighth Circuit blew a hole through the statute of limitations.

C. Respondents' Price-Fixing Claim Is Woefully Time-Barred Under A Proper Conception Of The Continuing Violation Doctrine

All told, the combination of these errors below—from the misreading of *Klehr*, to the misplaced reliance on a *per se* merits inquiry, to the watered-down pleading standard—had a dramatic effect. As the dissent put it, the "majority has morphed *Klehr* into a sledgehammer and then reared that hammer to shatter the antitrust statute of limitations." App. 32a. And there is no better proof than the facts of this case.

Consider the claim that the Eighth Circuit en banc majority allowed to proceed to discovery:

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conduct, that "courts consistently hold that if [a] monopoly is created by a single identifiable act and is not perpetrated by an ongoing policy, the statute of limitations runs from the time of the commission of the act, notwithstanding that high prices may last indefinitely into the future").

Respondents brought this action in 2014—six years after the alleged conspiratorial agreement in restraint of trade (an alleged agreement to increase the price of gas by decreasing the volume of tanks) "succeeded" according to Respondents (App. 85a (¶ 10)), five years after indirect purchasers sued based on the same conduct, four years after those cases settled, and nearly two years after the Clayton Act's four-year statute of limitations had run. Yet the majority allowed this action to go forward because Petitioners both continued to sell propane exchange tanks at the 15-pound fill level nearly two years after the alleged 2008 agreement, and the Complaint alleged communications in support of the conspiracy within the limitations period. That, according to the majority, plausibly alleged a continuing violation of the statute.

But as the dissent explained, the Complaint falls far short of pleading the actual, ongoing conspiracy necessary to establish a continuing violation based on a later sale. "[V]irtually all of the amended complaint comprises either factual allegations from before the limitations period or naked assertions and conclusions." App. 28a-29a. The continued sale of 15-pound tanks is at most parallel conduct and, without more, "it falls short of 'conclusively establish[ing] agreement or . . . itself constitu[ting] a Sherman Act offense.'" *Twombly*, 550 U.S. at 553 (alterations in original) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954)); *see* App. 30a.[10] Indeed, "[e]ven

[10] In fact, as Respondents allege, Petitioners are parties to various legitimate co-packing agreements, whereby they

'conscious parallelism,' a common reaction of 'firms in a concentrated market [that] recognize[e] their shared economic interests and their interdependence with respect to price and output decisions[,]' is 'not in itself unlawful.'" *Twombly*, 550 U.S. at 553-54 (last alteration added) (citation omitted).

Once it is recognized that the continued *sales* are not enough, then it is clear from the face of the Complaint that Respondents' claims are untimely. As the dissent explained, "[a]t oral argument, [Respondents'] counsel essentially conceded that the [Respondents] lack any factual allegations of a live, ongoing conspiracy during the limitations period." App. 29a. And the few paragraphs of the Complaint that counsel did point to consist entirely of general and conclusory allegations, such as blanket assertions of ongoing "communications" without any details about what was said, when, and to whom. *See id.* Those generalized allegations are no more sufficient to extend the initial conspiracy into the limitations period than the ongoing sales themselves. And, notably, the Complaint is completely silent about the post-2008 prices Petitioners charged as a result of this supposed "price-fixing" conspiracy, even though Respondents must have known the price they paid for tanks.[11]

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refurbish and refill each other's propane exchange tanks. App. 95a (¶ 46). Therefore, the mere continued sale of 15-pound tanks by Petitioners is equally (and more plausibly) attributable to the need to maintain fill-levels in order to fulfill these co-packing agreements.

[11] Respondents' failure to allege any specific acts of wrongdoing after 2008 is consistent with the fact that the FTC,

Thus, in the end, the Eighth Circuit en banc majority concluded that mere allegations of continued sales—in the absence of any plausible allegations of a live, ongoing conspiracy—were sufficient to survive a motion to dismiss the antitrust claims as time-barred. That conclusion not only flouts Congress's proscription that antitrust claims not brought within four years of accrual shall be "forever barred," but also charts a course by which plaintiffs can plead around the statute of limitations in price-fixing cases. If Congress had intended to subject businesses to such a "specter of perpetual litigation" (App. 32a (Shepherd, J., dissenting)), it would have said so. But it said just the opposite. This Court should grant certiorari and give effect to Congress's command.

III. THIS CASE PRESENTS A RECURRING AND IMPORTANT ISSUE

Review is further warranted because this case implicates issues of exceptional national importance. The Eighth Circuit's rule is not unique to this case. Nor is it limited to defendants actually engaged in *per se* unlawful price-fixing conspiracies. Rather, it threatens to eliminate repose for any business arrangement that can be *challenged* as a horizontal agreement subject to *per se* condemnation, whether actually illicit or not. And its distortion of the continuing violation doctrine paves the way for perpetual suits regardless of the passage of time,

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in its administrative complaint, did not allege any anticompetitive conduct after 2008. *See supra* at 5.

and the inevitable erosion of the Clayton Act statute of limitations.

"Repose is especially valuable in antitrust, where tests of legality are often vague," "business practices can be simultaneously efficient . . . but also challengeable as antitrust violations," and "where duplicate treble damages for the same offense may be threatened." *2017 Antitrust Law* ¶ 320a. It is also no secret that antitrust litigation is immensely costly especially when it comes to discovery; if anything, concerns about the expense of litigation are even more pronounced in cases involving pre-limitations period conduct, where discovery will undoubtedly cover much longer spans of time. That is why the repose afforded by the statute of limitations is most valuable and effective at the pleadings stage; there is no meaningful repose for an antitrust defendant that must endure the significant cost of full-blown litigation to achieve vindication.

Interpreting the continuing violation doctrine in a way that could potentially "extend[] the limitations period to many decades" would "thwart[] the basic objective of repose underlying the very notion of a limitations period." *Rotella v. Wood*, 528 U.S. 549, 554 (2000). Moreover, the public benefit of authorizing plaintiffs to act as private attorneys general to enforce the antitrust laws is realized best when suits are brought promptly. Indeed, it would "be strange to provide an unusually long basic limitations period that could only have the effect of postponing . . . [that] public benefit." *Id.* at 558 (citing *Zenith*, 401 U.S. at 338). Conversely, the rule that antitrust plaintiffs must "bring their claims promptly" also guards against the over-enforcement of the antitrust laws to the detriment of otherwise

procompetitive business practices. *See, e.g.*, *2017 Antitrust Law* ¶ 320a (it is "especially important" that antitrust challenges be "timely made" to "minimiz[e] the social costs of any antitrust violation but giv[e] the parties repose for conduct that is lawful").

This case provides a stark illustration of how the lower courts' misreading of *Klehr* has produced results that are good for neither antitrust defendants nor consumers. The purported conspiracy here was publicly alleged in 2009, when the plaintiffs in *Propane I* filed suit. Nothing prevented Respondents from filing suit then; damages were neither speculative nor unascertainable. Nor was there any concealment of the alleged "conspiracy" hindering Respondents' ability to sue. If the en banc majority's analysis were correct, then (as the dissent put it) there is "nothing in this opinion preventing a new lawsuit against [Petitioners] four (or 40) years from now so long as fill levels remain at 15 pounds, even if price fluctuates." App. 31a n.6. Indeed, Respondents themselves acknowledged that, under their approach to the continuing violation doctrine, they could have waited "100 years" before bringing suit.[12] And, as the second wave of indirect purchaser cases makes clear (*see supra* at 6 & n.4), not even a settlement can stop plaintiffs from reprising claims under the banner of a "continuing violation." By reading *Klehr* to permit Respondents' tardy claim, the Eighth

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[12] CA8 Oral Argument at 4:55-5:49, http://media-oa.ca8.uscourts.gov/OAaudio/2016/3/152789.MP3.

Circuit has permitted a stale case to go forward at (significant) cost to the very repose the statute of limitations is intended to afford.

Over forty years ago, this Court in *Zenith* laid out a limited exception to the Clayton Act's four-year statute of limitations. The Eighth Circuit's en banc decision, however, is emblematic of recent cases that functionally render that exception the rule, marginalizing the statute of limitations Congress actually enacted. This case is an ideal vehicle for addressing this error and providing much needed clarity regarding the continuing violation doctrine before it further subsumes the antitrust statute of limitations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 21, 2017

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15-2789

In re: In Re: Pre -Filled Propane Tank Antitrust Litigation

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Hartig Drug Company; Jason Moore's Texaco, L.L.C., doing business as Moore's Texaco; Mario Ortiz; Stephen Morrison; Steven Tseffos; Glenville Shell, LLC; Zarco USA, Inc.; AQ Investments, LLC; LJax Enterprises, Inc.; J & V Management, LLC; Butch's Central Coastal, Inc.; Zerka's Party Store, Inc.; OM Commercial Neenah Oil, Inc.; CCLAS, Inc.; Hopewell Exxon, LLC; Tuban Petroleum, LLC; 33 and a Third, LLC; Tuban 610, LLC; Highway 182, LLC; West Main Street, LLC; Roth's Country Corner, Inc.; 1919 Airline Hwy., LLC; East Airline, LLC; Gramercy Cheap Smokes, LLC; Conti's Service Center, Inc.;
Route 49 Gas & Go, Inc.; Surinder Kaur, Inc.

Plaintiffs

Morgan-Larson, LLC

Plaintifff - Appellant

Ashville General Store, Inc.; Sean Venezia; Michael S. Harvey; Gregory Ludvigsen; Arthur Hull; Alan Rockwell; James Halgerson; Thomas R. Clark; Bryce Mander; Alex Chernavsky; Arrow Hardware, LLC; Birdie's, Inc.; Alex Chernavsky; Lochraven Sunoco, Inc.; American Auto Repair

Plaintiffs

Johnson Auto Electric, Inc.

Plaintifff - Appellant

Cedar Holly Investments, LLC; Tuckerton Lumber Company; Ace High Auto Repair & Propane; CEFO Enterprise Corp.; Jon Wall, Inc.; RC Gasoline

Plaintiffs

Speed Stop 32, Inc.

Plaintifff - Appellant

Zarco USA, Inc.; Dunmore Oil Co., Inc.; JoJo Oil Co., Inc.; Ekonomy Enterprises, Inc.

Plaintiffs

Yocum Oil Company, Inc.

Plaintifff - Appellant

v.

Ferrellgas Partners, L.P. a limited partnership; Ferrellgas, L.P. a limited partnership, doing business as Blue Rhino; AmeriGas Partners, LP a limited partnership; UGI Corporation; AmeriGas Propane, Inc., doing business as AmeriGas Cylinder Exchange; AmeriGas Propane, LP

Defendants - Appellees

Appeal from United States District Court for the Western District of Missouri - Kansas City

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Submitted: April 4, 2017
Filed: June 23, 2017

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860 F.3d 1059

Before SMITH, Chief Judge, WOLLMAN, LOKEN,

RILEY, COLLOTON, GRUENDER, BENTON, SHEPHERD, and KELLY, Circuit Judges, En Banc.

BENTON, Circuit Judge.

Plaintiffs Morgan-Larson, LLC, Johnson Auto Electric, Inc., Speed Stop 32, Inc., and Yocum Oil Company, Inc. sued Defendants Ferrellgas Partners, L.P., Ferrellgas, L.P. (collectively "Ferrellgas"), AmeriGas Partners, L.P., AmeriGas Propane, Inc., and AmeriGas Propane, L.P. (collectively "AmeriGas") under Section 1 of the Sherman Act, 15 U.S.C. § 1. The district court dismissed the claims as barred by the statute of limitations. Having jurisdiction under 28 U.S.C. § 1291, this court reverses.

I.

Ferrellgas[1] and AmeriGas are the largest distributors of pre-filled propane exchange tanks, which come in a standard size. Before 2008, Defendants filled the tanks with 17 pounds of propane. In 2008, due to rising propane prices, Defendants reduced the amount of propane in each tank from 17 to 15 pounds, but maintained the same price. According to the amended complaint, "this amounted to an effective price increase of 13%."

In 2009, a group of plaintiffs—indirect purchasers who bought tanks from retailers—filed a class action alleging Defendants conspired to reduce the amount of propane in the tanks while maintaining the price, in violation of Section 1 of the Sherman Act and state antitrust and consumer protection laws. In 2010, the parties settled. *See* ***In***

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[1] Ferrellgas does business as "Blue Rhino."

re Pre-Filled Propane Tank Mktg. & Sales Practices Litig., No. 09-2086-MD-W-GAF, 2010 WL 2008837 (W.D. Mo. May 19, 2010) (approving first amended settlement agreement).

In 2014, the Federal Trade Commission issued a complaint against Defendants—later settled—for conspiring to artificially inflate tank prices. *See* ***In re Ferrellgas Partners, L.P., et al.***, Docket No. 9360, 2014 WL 1396496 (Mar. 27, 2014). Later that year, Plaintiffs in this case—direct purchasers who bought tanks directly from Defendants for resale—sued. They allege Defendants colluded to decrease the fill level of tanks and continued to charge "supracompetitive prices . . . throughout the Class Period."

The district court dismissed Plaintiffs' claims as barred by the statute of limitations. On appeal, a divided panel of this court affirmed. ***In re Pre-Filled Propane Tank Antitrust Litig.***, 834 F.3d 943 (8th Cir. 2016), *as corrected* (Aug. 25, 2016), *reh'g en banc granted, opinion vacated* (Dec. 29, 2016). This court granted rehearing en banc, vacated the panel decision, and now reverses.

II.

This court reviews de novo the grant of a motion to dismiss. ***Christiansen v. West Branch Cmty. Sch. Dist.***, 674 F.3d 927, 933-34 (8th Cir. 2012). To survive a motion to dismiss for failure to state a claim, the complaint must show the plaintiff "is entitled to relief," **Fed. R. Civ. P. 8(a)(2)**, by alleging "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" ***Ashcroft v. Iqbal***, 556 U.S. 662, 678 (2009), *quoting* ***Bell Atlantic Corp. v. Twombly***, 550 U.S.

544, 570 (2007). A plausible claim must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." ***Id.***, *quoting* ***Twombly***, 550 U.S. at 556. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." ***Id.***, *citing* ***Twombly***, 550 U.S. at 556. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" ***Id.***, *quoting* ***Twombly***, 550 U.S. at 555, 557 (citation omitted). Rather, the facts alleged "must be enough to raise a right to relief above the speculative level." ***Twombly***, 550 U.S. at 555.

Also reviewed de novo is whether a claim is barred by the statute of limitations. ***McDonough v. Anoka Cnty.***, 799 F.3d 931, 939-40 (8th Cir. 2015). "A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) as barred by a statute of limitations if the complaint itself shows that the claim is time-barred." ***Wong v. Wells Fargo Bank N.A.***, 789 F.3d 889, 897 (8th Cir. 2015), *citing* ***Illig v. Union Elec. Co.***, 652 F.3d 971, 976 (8th Cir. 2011). Actions under Section 1 of the Sherman Act must be filed "within four years after the cause of action accrued." **15 U.S.C. § 15b**. "Generally, the period commences on the date the cause of action accrues, that being, the date on which the wrongdoer commits an act that injures the business of another." ***Varner v. Peterson Farms***, 371 F.3d 1011, 1019 (8th Cir. 2004), *citing* ***Zenith Radio Corp. v. Hazeltine Research, Inc.***, 401 U.S. 321, 338 (1971).

Plaintiffs allege a continuing violation—an exception to the general rule—which restarts the statute of limitations period each time the defendant commits an overt act. ***See id.*** "An overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff." ***Id.****, citing* ***Pace Indus., Inc. v. Three Phoenix Co.****,* 813 F.2d 234, 238 (9th Cir. 1987).

III.

Plaintiffs allege two types of overt acts within the limitations period: (1) Defendants' sales to Plaintiffs at artificially inflated prices; and (2) conspiratorial communications between Defendants about pricing and fill levels. The first type of act is at issue here—whether sales at artificially inflated prices are overt acts that restart the statute of limitations.[2] Also at issue is whether Plaintiffs allege a continuing violation exception sufficient to restart the statute of limitations.

A.

The Supreme Court of the United States addressed the first issue in ***Klehr v. A.O. Smith Corporation***, 521 U.S. 179 (1997). The Supreme Court defined a continuing violation under antitrust law:

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[2] Because continued sales at supracompetitive prices are overt acts under the continuing violations theory, this court need not address Plaintiffs' allegations that Defendants' conspiratorial communications about pricing and fill levels were additional overt acts sufficient to invoke the theory.

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

Klehr, 521 U.S. at 189, *quoting* **2 P. Areeda & H. Hovenkamp, Antitrust Law 338b**, p. 145 (rev. ed. 1995) (hereinafter **2 Areeda & Hovenkamp**).

Defendants argue *Klehr* does not apply because it is a RICO case, and the quoted language is dicta. This court and others have held that "federal courts 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement.'" ***Jones v. St. Paul Co., Inc.***, 495 F.3d 888, 893 (8th Cir. 2015), *quoting* ***City of Timber Lake v. Cheyenne River Sioux Tribe***, 10 F.3d 554, 557 (8th Cir. 1993), *quoting* ***McCoy v. Massachusetts Inst. of Tech.***, 950 F.2d 13, 19 (1st Cir. 1991). *See* ***American Civil Liberties Union of Ky. v. McCreary Cnty., Ky.***, 607 F.3d 439, 447 (6th Cir. 2010) ("Lower courts are obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale.") (internal quotation marks omitted); ***Gaylor v. United States***, 74 F.3d 214, 217 (10th Cir. 1996) ("While these statements are dicta, this court considers itself

bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements.").

Although panels have held that federal courts are "bound" by Supreme Court dicta, this goes too far. Appellate courts should afford deference and respect to Supreme Court dicta, particularly where, as here, it is consistent with longstanding Supreme Court precedent. *See* ***Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery***, 330 F.3d 548, 561 (3d Cir. 2003) (en banc) ("Although the Committee is doubtless correct that the Supreme Court's dicta are not binding on us, we do not view it lightly. . . . [W]e should not idly ignore considered statements the Supreme Court makes in dicta."); ***United States v. Montero-Camargo***, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc) ("We do not treat considered dicta from the Supreme Court lightly. Rather, we accord it appropriate deference. . . . As we have frequently acknowledged, Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding.") (citations and internal quotation marks omitted); ***Nichol v. Pullman Standard, Inc.***, 889 F.2d 115, 120 n.8 (7th Cir. 1989) ("This Court should respect considered Supreme Court dicta."); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, **81 N.Y.U.L. Rev. 1249**, 1269-75 (2006).

Klehr's definition of a continuing violation follows longstanding Supreme Court precedent. The Supreme Court first applied the doctrine in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S.

481 (1968). Hanover alleged that United, its shoe machinery manufacturer and distributor, monopolized the industry in violation of Section 2 of the Sherman Act. ***Hanover Shoe***, 392 U.S. at 483-84. United moved to dismiss the claims as time-barred because "the earliest impact on Hanover of United's lease only policy occurred in 1912." ***Id.*** at 502 n.15. Rejecting that argument, the Supreme Court said:

> We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. . . . Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

Id.

The Supreme Court again applied the doctrine in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), a case alleging antitrust violations by unlawful participation in patent pools. The issue was "whether Zenith can recover in its 1963 suit for damages suffered after June 1, 1959, as the consequence of pre-1954 conspiratorial conduct." ***Zenith***, 401 U.S. at 338. Describing when an antitrust claim accrues under 15 U.S.C. § 15b, the Court said:

> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . In the context of a continuing conspiracy to violate the antitrust laws, such

> as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Id. *Klehr* thus is consistent with the Supreme Court's continuing violation doctrine as established in *Hanover Shoe* and *Zenith*.

Klehr also is consistent with Areeda and Hovenkamp's Antitrust Law, the leading treatise on the subject. The version of the treatise quoted in Klehr explains that, "In the case of a continuing violation, each overt act that is part of the violation and that injures the plaintiff starts the statutory period running again." **2 Areeda & Hovenkamp**, at 145. Citing *Hanover Shoe*, it also directly addresses additional sales at fixed prices: "so long as an illegal price-fixing conspiracy was alive, each sale at the fixed price [started the four-year statute of limitation anew]." ***Id.***, *citing* ***Hanover Shoe***, 392 U.S. at 502 n.15.

Every other circuit to consider this issue applies *Klehr*, holding that each sale in a price-fixing conspiracy is an overt act that restarts the statute of limitations. *See* ***Oliver v. SD-3C LLC***, 751 F.3d 1081, 1086 (9th Cir. 2014) ("Turning first to the continuing violation exception, the Supreme Court and federal appellate courts have recognized that each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs

from the date of the act."); ***In re Travel Agent Comm'n Antitrust Litig.***, 583 F.3d 896, 902 (6th Cir. 2009) ("*Klehr* simply reiterates that the antitrust laws recognize continuing violations and, more precisely, that a new § 1 claim arises each time a company sells a price-fixed product."); ***In re Cotton Yarn Antitrust Litig.***, 505 F.3d 274, 290-91 (4th Cir. 2007) ("In the context of a continuing conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. Thus, in cases like this one involving allegations of a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, *e.g.*, each sale to the plaintiff, starts the statutory period running again.") (citation and internal quotation marks omitted); ***Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.***, 198 F.3d 823, 828 (11th Cir. 1999), *amended in part*, 211 F.3d 1224 (11th Cir. 2000) ("An act constitutes a continuing violation, if it injures the plaintiff over a period of time. Even though the illegal act occurs at a specific point in time, if it inflicts continuing and accumulating harm on a plaintiff, an antitrust violation occurs each time the plaintiff is injured by the act. For example, when sellers conspire to fix the price of a product, each time a customer purchases that product at the artificially inflated price, an antitrust violation occurs and a cause of action accrues. As a cause of action accrues with each sale, the statute of

limitations begins to run anew.") (citations and internal quotation marks omitted).

This court recently established that *Klehr* controls. In *In re Wholesale Grocery Products Antitrust Litigation*, 752 F.3d 728 (8th Cir. 2014), two rival wholesalers allegedly used an asset-exchange agreement to allocate customers and territories in violation of Section 1 of the Sherman Act. ***Wholesale Grocery***, 752 F.3d at 729. The plaintiffs sued more than four years after the agreement. ***Id.*** at 731. The defendants argued the claims were untimely and the continuing violation theory inapplicable because sales at supracompetitive prices were not overt acts. ***Id.*** This court held:

> The timeliness question in this case is controlled by *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S. Ct. 1984, 138 L.Ed.2d 373 (1997). In *Klehr*, the Supreme Court explained that "in the case of a continuing violation," "each overt act that is part of the violation and that injures the plaintiff, *e.g.*, *each sale to the plaintiff*, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times."

Id. at 736, *quoting* ***Klehr***, 521 U.S. at 189. *See* ***Concord Boat Corp. v. Brunswick Corp.***, 207 F.3d 1039, 1052 (8th Cir. 2000) (recognizing that "each new sale by a Sherman Act price fixing defendant" is a "separate new overt act").

Defendants argue *Wholesale Grocery* does not apply because "the anticompetitive nature of the wholesalers' agreement was not revealed until

several years after the asset exchange." ***Wholesale Grocery***, 752 F.3d at 736. But, knowledge of anticompetitive conduct is not relevant to the continuing violation analysis. As the Supreme Court says, "each sale to the plaintiff, starts the statutory period running again, *regardless of the plaintiffs' knowledge of the alleged illegality at much earlier times*." ***Klehr***, 521 U.S. at 189 (emphasis added) (internal quotation marks omitted).

Defendants rely on *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004) to argue that continued anticompetitive conduct, without more, does not restart the limitations period. There, the defendants induced the plaintiffs to take out a loan based on false information. ***Varner***, 371 F.3d at 1014-15. More than four years later, the plaintiffs sued for antitrust "tying" violations under a continuing violation theory. ***Id.*** at 1015. This court rejected the theory, holding that "[p]erformance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period," because "[a]cts that are merely unabated inertial consequences of a single act do not restart the statute of limitations." ***Id.*** at 1019-20 (internal quotation marks omitted).

This case is distinguishable. *Varner* is about a tying arrangement, not "a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years." ***Klehr***, 521 U.S. at 189. Unlike the vertical restraint in *Varner*, the horizontal restraint here is a *per se* antitrust violation. *Compare* ***Leegin Creative Leather Prods., Inc. v. PSKS, Inc.***, 551 U.S. 877, 886, 888 (2007) ("Restraints that are *per se* unlawful include horizontal agreements among competitors to fix

prices. . . . . Our recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements."), *with* ***Business Elecs. Corp. v. Sharp Elecs. Corp.***, 485 U.S. 717, 735-36 (1988) ("[A] vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels."). *See* **P. Areeda & H. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶ 320c(1)** (4th ed. 2016) (noting that application of the continuing violation doctrine in the antitrust context depends on the nature of the violation and whether it involves a "cartel, vertical agreement or refusal to deal, monopolization, or merger") (citations omitted). As a *per se* violation, the horizontal restraint has "manifestly anticompetitive effects, and lack[s] . . . any redeeming virtue." ***Leegin***, 551 U.S. at 886 (citation and internal quotation marks omitted). Defendants' horizontal price-fixing agreement gave them "unlawfully acquired market power to charge an elevated price." ***Wholesale Grocery***, 752 F.3d at 736. Each time Defendants used that power (*i.e.*, each sale), they committed an overt act, inflicting new and accumulating injury. *See* ***id.*** *See also* ***Klehr***, 521 U.S. at 189.

This case also is distinguishable from *Midwestern Machinery Co., Inc. v. Northwest Airlines, Inc.*, 392 F.3d 265 (8th Cir. 2004), another case on which Defendants rely. *Midwestern Machinery* involved a merger claim brought under Section 7 of the Clayton Act. There, this court distinguished between merger and conspiracy cases:

> Unlike a conspiracy or the maintaining of a monopoly, a merger is a discrete act, not an ongoing scheme. A continuing violation theory based on overt acts that further the objectives of an antitrust conspiracy in violation of § 1 of the Sherman Act or that are designed to promote a monopoly in violation of § 2 of that act cannot apply to mergers under § 7 of the Clayton Act.

Midwestern Mach., 392 F.3d at 271. *Midwestern Machinery* did not announce a rule for price-fixing conspiracies. To the contrary, the opinion expressly disavows any modification to the *Klehr* continuing violation doctrine as applied in price-fixing conspiracies. ***Id.*** at 269 ("Midwestern, however, cites no appellate decisions applying [the continuing violation] principle to § 7 claims. Rather, it attempts to analogize this case to other areas of antitrust law where such a theory has in fact been recognized.").

Finally, Defendants contend the *Klehr* rule encourages plaintiffs to sleep on their rights. The Supreme Court rejects this contention as irrelevant: "[E]ach sale to the plaintiff starts the statutory period running again regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *See* ***Klehr***, 521 U.S. at 189 (internal quotation marks omitted). *See also* ***Hanover Shoe***, 392 U.S. at 502 n.15 (noting, in the case of a continuing violation under the Sherman Act, "Although [plaintiff] could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955"). At any rate, the *Klehr* rule does not discourage timely filed suits because a "plaintiff cannot use an independent, new predicate act as a

bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period." **Klehr**, 521 U.S. at 190. Instead, the rule prevents companies from "agree[ing] to divide markets for the purpose of raising prices, wait[ing] four years to raise prices, then reap[ing] the profits of their illegal agreement with impunity because any antitrust claims would be time barred." ***Wholesale Grocery***, 752 F.3d at 736.

Klehr's definition of a continuing violation under antitrust law is consistent with Supreme Court precedent and the leading antitrust treatise and has been applied by this court to a price-fixing conspiracy. It controls here. *See* ***id.*** ("The timeliness question in this case is controlled by *Klehr*."). Under *Klehr*, "each sale to the plaintiff[s]" in a price-fixing conspiracy "starts the statutory period running again." ***Klehr***, 521 U.S. at 189.

B.

The other issue is whether the amended complaint adequately pleads a continuing violation sufficient to restart the statute of limitations. Under *Klehr,* Plaintiffs must allege: (1) "a price-fixing conspiracy;" (2) "that brings about a series of unlawfully high priced sales" during the class period; and (3) "sale[s] to the plaintiff[s]" during the class period. ***Id.*** In paragraph 111 of the amended complaint, Plaintiffs allege all three necessary elements:

> Plaintiffs purchased Filled Propane Exchange Tanks from Blue Rhino or AmeriGas on multiple occasions during the Class Period. On each occasion, Plaintiffs purchased Filled Propane Exchange Tanks containing only 15

> pounds of propane, pursuant to the conspiracy, but sold at the price they would have been charged for 17-pound tanks but for the conspiracy. As Defendants kept prices constant despite the fill level reduction, this amounted to an effective price increase of 13%.

Amended Complaint, at ¶111. Standing alone, this "formulaic recitation of the elements of a cause of action" may be insufficient. ***Twombly***, 550 U.S. at 555. While the complaint "does not need detailed factual allegations," it does require "more than labels and conclusions." ***Id.*** Rather, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." ***Id.***

Defendants argue that the amended complaint fails to allege a price-fixing conspiracy because it does not "plausibly suggest that either Defendant's decision to reduce fill levels was the result of an agreement." The district court did not rule on this issue. Rather, it assumed the existence of an agreement: "Unlike in *Wholesale Grocery Products*, the anticompetitive nature of Defendants' agreement was not revealed years later during the limitations period;" "Plaintiffs make no allegations that Defendants ever made any changes or modifications to their agreement during the limitations period;" and "[C]ommunications were mere reaffirmations of the prior agreement."

The allegations of a price-fixing conspiracy are sufficient. Plaintiffs plead that Defendants "conspired and acted in concert to eliminate competition by reducing the amount of propane they would put in their tanks, thereby raising the per-pound price of propane across the country as well as

by dividing the market for Filled Propane Exchange Tanks in violation of federal antitrust law." ***Amended Complaint***, at ¶1. Even more specifically, they plead that "Blue Rhino's President, Tod Brown, and AmeriGas's Director of National Accounts, Ken Janish, exchanged seven phone calls on June 18 and 19, 2008, during which AmeriGas agreed that if Blue Rhino reduced its fill levels to 15 pounds per tank, AmeriGas would follow suit." ***Id.*** at ¶9. Defendants later "engaged in dozens of calls, emails, and in-person meetings to coordinate a unified front that would leave the largest retailers and then the entire industry with no choice but to accept their demands." ***Id.*** at ¶8. "[N]o later than spring 2008," Defendants "reduced their fill levels from 17 pounds per tank to 15 pounds per tank while maintaining the same price per 'full' tank, for the purpose of increasing their margins on the sale of propane exchange tanks." ***Id.*** at ¶7. "This collusion effectively raised the prices charged to Plaintiffs by more than 13% per pound." ***Id.***

"[S]howing parallel conduct or interdependence, without more," "falls short of conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." ***Twombly***, 550 U.S. at 553-54 (alterations in original) (internal quotation marks omitted). However, "[a]n allegation of parallel conduct . . . gets the complaint close to stating a claim." ***Id.*** at 557. With "further factual enhancement," plaintiffs can "nudge[] their claims across the line from conceivable to plausible." ***Id.*** at 557, 570. The allegations here state enough factual enhancements to show more than parallel conduct. Plaintiffs plead facts showing Defendants acted collusively, pursuant to a collective interest to

reduce the amount of propane in each tank sold, while maintaining the price. *See* ***Amended Complaint***, at ¶¶1, 7-11, 66, 134. These allegations sufficiently allege a price-fixing conspiracy.

Next, Plaintiffs must allege the conspiracy "brings about a series of unlawfully high priced sales" during the class period. In their motion to dismiss, Defendants argue Plaintiffs fail to allege a continuing conspiracy, "invok[ing] continuing violations in name only and offer[ing] no factual allegations indicating any continued conduct within the limitations period." They assert that Plaintiffs' "bare assertions that the conduct at issue continued 'until at least late 2010,' are conclusory and fail to meet the *Twombly* standard of plausibility."

The allegations that the conspiracy continued into the class period are sufficient. Plaintiffs plead that "Defendants' anticompetitive conduct lasted at least from July 21, 2008 through January 9, 2015" and "as a result of the[ir] anticompetitive conduct . . . Defendants have charged Plaintiffs and members of the proposed Class supracompetitive prices for Filled Propane Exchange Tanks throughout the Class Period." ***Amended Complaint***, at ¶¶120-21. *See* ***id.*** at ¶¶122-23. Despite the settlement agreement with indirect purchasers in 2010, they plead that "Defendants maintained their illegally agreed-upon fill levels rather than resuming competition, preserving the unlawfully inflated prices that their conspiracy had produced." ***Id.*** at ¶108. *See* ***id.*** at ¶124. Plaintiffs also plead that "[t]hrough at least the end of 2010, Defendants regularly communicated to assure compliance with the conspiracy," "monitor[ing] the market to ensure that neither cheated on their anticompetitive agreement by

offering a price reduction or competing for one another's customers or geographic markets." ***Id.*** at ¶92. *See* ***id.*** at ¶125. More specifically, they plead that in 2008, AmeriGas's Director of National Accounts Ken Janish told Blue Rhino's President Tod Brown that "it would follow closely behind Blue Rhino if it successfully implemented its fill reduction, and that it would not sell both 15-pound and 17-pound tanks" and "Janish had similar conversations with employees of Blue Rhino on numerous occasions from at least as early as 2007 until at least late 2010." ***Id.*** at ¶60. Additionally, "during calls and meetings with AmeriGas executives occurring at least as late as 2010, Janish repeatedly dismissed concerns that Blue Rhino might undercut AmeriGas on price or fill levels with words to the effect of, 'I talked to Blue Rhino, and that's not going to happen.'" ***Id.*** at ¶13. *See* ***id.*** at ¶62.

Some of these allegations are "naked assertion[s] devoid of further factual enhancement," ***Iqbal***, 556 U.S. at 678 (internal quotation marks omitted), that do not "raise a right to relief above the speculative level." ***Twombly***, 550 U.S. at 555. *See, e.g.,* ***Amended Complaint***, at ¶¶120, 125. Others, however, list relevant individuals, acts, and conversations, providing "factual content" to support "the reasonable inference that the defendant is liable for the misconduct alleged." ***Iqbal***, 556 U.S. at 678. *See, e.g.*, ***Amended Complaint***, at ¶¶13, 60, 92. Defendants argue these allegations are "impermissibly vague and conclusory." But Plaintiffs "need not provide *specific facts* in support of their allegations." ***Schaaf v. Residential Funding Corp.***, 517 F.3d 544, 549 (8th Cir. 2008)

(emphasis added), *citing* ***Erickson v. Pardus***, 551 U.S. 89, 93 (2007) (per curiam). Rather, they need only provide "sufficient factual information to provide the 'grounds' on which the claim rests, and to raise a right to relief above a speculative level." *Id.*, *quoting* ***Twombly***, 550 U.S. at 555, 555 n.3. "[C]onstru[ing] the complaint liberally in the light most favorable to" Plaintiffs, *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 806 (8th Cir. 2008), these allegations "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

According to Defendants, Plaintiffs' allegation that "the propane conspiracy succeeded," ***Amended Complaint***, at ¶ 10, made the maintenance of fill levels and prices mere "unabated inertial consequences" and not overt acts continuing the conspiracy. But the question here is not whether the amended complaint alleges other overt acts in addition to sales to the Plaintiffs; the issue is whether the amended complaint alleges that the conspiracy continued when the sales took place. If so, under *Klehr*, "each sale to the plaintiff," is an overt act that restarts the statute of limitations. *Klehr*, 521 U.S. at 189. *See* ***United States v. Socony-Vacuum Oil Co.***, 310 U.S. 150, 253 (1940) ("[T]he conspiracy contemplated and embraced, at least by clear implication, sales to jobbers and consumers in the Mid-Western area at the enhanced prices. The making of those sales supplied part of the 'continuous cooperation' necessary to keep the conspiracy alive.").

In any event, this court has never applied the "unabated inertial consequences" test to a horizontal price-fixing conspiracy, let alone one where Plaintiffs allege that "sales pursuant to the conspiracy

continued throughout the Class Period," and "Defendants continued to have regular communications regarding pricing, fill levels, and market allocation until at least late 2010." ***Amended Complaint***, at ¶¶ 123, 109. *See, e.g.*, ***Concord Boat***, 207 F.3d at 1052 ("Continuing violations typically arise in the context of Sherman Act . . . claims where multiple defendants are alleged to be part of an ongoing conspiracy."). In context, Defendants' conspiracy "succeeded" in "forc[ing] Walmart and other large retailers to accept the fill reduction" and raising the "wholesale prices at which [they] sold propane in Filled Propane Exchange Tanks to retailers throughout the United States." ***Amended Complaint***, at ¶10. This success did not end the conspiracy, but rather was a precondition to the price-fixing scheme Plaintiffs allege continued into the class period.

Finally, the amended complaint must allege "sale[s] to the plaintiff[s]" during the class period. Defendants do not dispute the sufficiency of these allegations: Since 2008 and continuing through the class period, Plaintiffs "purchased Filled Propane Exchange Tanks from one or more of the Defendants and . . . paid inflated per-pound prices due to Defendants' unlawful conspiracy." ***Amended Complaint***, at ¶¶18-21.

The amended complaint alleges "sufficient factual matter, accepted as true," to show a continuing violation to restart the statute of limitations, and, therefore, "to state a claim to relief that is plausible on its face." ***Iqbal,*** 556 U.S. at 678, *quoting* ***Twombly***, 550 U.S. at 570. Because it is not "clear from the face of the complaint that the action is barred by the applicable limitations period," ***Varner***,

371 F.3d at 1016, the district court erred in granting the motion to dismiss.

* * * * * * *

The judgment is reversed.

SHEPHERD, Circuit Judge, with whom WOLLMAN and LOKEN, Circuit Judges, join, dissenting, and with whom KELLY, Circuit Judge, joins Parts I.B and II of the dissent.

Today's opinion incorrectly interprets Supreme Court precedent, fails to hold the plaintiffs' complaint to the plausibility standard of Twombly and Iqbal, and ignores the purposes of the antitrust statute of limitations. For these reasons, I respectfully dissent.

I.

First, the opinion interprets the antitrust discussion in Klehr completely divorced from the facts and issues confronting the Supreme Court in that case. As a result, the majority fails to apply antitrust law correctly to the case before us. Had the majority considered Klehr in context, it would have found that plaintiffs must show a live, ongoing conspiracy within the limitations period to survive a motion to dismiss.

A.

Klehr v. A.O. Smith Corp. was a RICO case that rejected the Third Circuit's "last predicate rule" for tolling claims brought under that statute. 521 U.S. 179, 187 (1997). Because "Congress consciously patterned civil RICO after the Clayton Act," the Supreme Court employed a "Clayton Act *analogy*" to explain why the Third Circuit had erred. Id. at 189 (emphasis added). In its attempt to explain the

tolling requirements of RICO, the Court offered the following restatement of antitrust law:

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

Id. (emphasis added) (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 338b, at 145 (rev. ed. 1995)).

Klehr was a RICO case, not an antitrust case. The parties in Klehr litigated RICO issues, not antitrust issues. The Supreme Court's short discussion of antitrust law served only to illuminate the discussion of tolling RICO claims.[3] The Court was neither announcing some new standard in antitrust law nor redefining a continuing violation. It simply used established principles of antitrust law to "help . . . make[] clear" the RICO issue. Id.

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[3] Judge Posner has described dicta as "any statement made by a court for use in argument, illustration, analogy or suggestion. It is a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication." United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988) (internal quotation marks omitted). Because I believe the discussion of antitrust in Klehr falls under the category of dicta, I do not believe it deserves the lofty position of authority afforded to it by the majority's opinion. But I will proceed in my analysis as if the language is binding authority on us.

With the excerpted language from Klehr in its proper context, we can better understand the antitrust principles it espouses. For its analogy, the Supreme Court turned to the leading treatise on the subject—Areeda and Hovenkamp's Antitrust Law. The original quote from Areeda reads, "In the case of a continuing violation, each overt act that is part of the violation and that injures the plaintiff starts the statutory period running again." 2 Areeda & Hovenkamp, supra, at 145. Areeda says nothing about "each sale to the plaintiff" constituting an overt act at this point. But Areeda does reach the issue just a few sentences later where it explains that, "*so long as an illegal price-fixing conspiracy was alive*, each sale at the fixed price [started the four-year statute of limitation anew]." Id. (emphasis added) (citing Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 502 n.15 (1968)). Therefore each sale to the plaintiff can start the statutory period running again *so long as* an illegal price-fixing conspiracy is alive and ongoing.

B.

Klehr is fully consonant with this interpretation. The antitrust analogy presumes that "a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years" continues to exist. Klehr, 521 U.S. at 189. Further, the excerpted language states that "each sale to the plaintiff" must be "part of the violation." Id. (internal quotation marks omitted). So the plaintiffs must show that the sales occurred as a result of a live, ongoing conspiracy. See Midwestern Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265, 269 (8th Cir. 2004) ("The typical antitrust continuing violation

occurs in a price-fixing conspiracy . . . when conspirators continue to meet to fine-tune their cartel agreement."). This interpretation in no way "limit[s] Supreme Court opinions precisely to the facts of each case." See Jones v. St. Paul Cos., 495 F.3d 888, 893 (8th Cir. 2007) (internal quotation marks omitted). Instead, it gives meaning to an isolated excerpt by considering the broader factual context from which the excerpt came.

The other two Supreme Court cases cited in the majority opinion—Hanover Shoe and Zenith Radio—also support the proposition that plaintiffs must make a plausible showing of a live, ongoing conspiracy. In Hanover Shoe, Hanover alleged "that United's practice of leasing and refusing to sell its more complicated and important shoe machinery" violated antitrust law. 392 U.S. at 483. In its defense, United argued that "because the earliest impact on Hanover of United's lease only policy occurred in 1912, Hanover's cause of action arose during that year and is now barred by the . . . statute of limitations." Id. at 502 n.15. The Court rejected this argument because United's conduct was a continuing violation. Id. Importantly, the underlying conspiratorial activity (United's lease-only policy) was ongoing from 1912 through 1955. Id. This continued conspiratorial activity is what rendered each lease—and refusal to sell—an overt act that restarted the limitations period. See 2 Areeda & Hovenkamp, supra, at 145. Just as with Hanover Shoe, so too with Zenith Radio. Zenith sued Hazeltine Research over Hazeltine's "participation in patent pools" that violated the Sherman Act. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 323 (1971). Zenith

sought to recover damages suffered during the limitations period, even though Hazeltine entered the patent pools long before the limitations period. Id. at 338. The Court held that Zenith could recover damages, noting that Hazeltine was engaging in a "*continuing conspiracy* to violate the antitrust laws," and so each act harmful to Zenith restarted the limitations period. Id. (emphasis added). In Klehr, Hanover Shoe, and Zenith Radio, the Supreme Court understood that a necessary requirement for a continuing violation of antitrust laws is the existence of a live, ongoing conspiracy. Without such a requirement, plaintiffs could sue many years after an antitrust violation occurred and seek damages for subsequent sales without tying the prior antitrust violation to the subsequent sales.

II.

Accordingly, the plaintiffs must sufficiently allege that the defendants engaged in a live, ongoing conspiracy sometime in the limitations period to survive a motion to dismiss. The plaintiffs can accomplish this task by alleging "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The plausibility standard demands "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). The plaintiffs have failed to make a plausible claim if all they offer are "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked

assertion[s]" devoid of "further factual enhancement." Twombly, 550 U.S. at 555-57.

In determining whether the plaintiffs have pled a plausible cause of action, the majority relies heavily on paragraph 111 of the amended complaint:

> Plaintiffs purchased Filled Propane Exchange Tanks from Blue Rhino or AmeriGas on multiple occasions during the Class Period. On each occasion, Plaintiffs purchased Filled Propane Exchange Tanks containing only 15 pounds of propane, pursuant to the conspiracy, but sold at the price they would have been charged for 17-pound tanks but for the conspiracy. As Defendants kept prices constant despite the fill level reduction, this amounted to an effective price increase of 13%.

Amended Complaint ¶ 111, ECF No. 102. The majority takes these assertions, together with paragraphs 7 through 9, which allege facts occurring in 2008, and holds that the plaintiffs have "sufficiently allege[d] a price-fixing conspiracy."

The majority's holding flies in the face of Twombly and Iqbal. Paragraph 111 is, at best, a "formulaic recitation of the elements of a cause of action" insufficient under the plausibility standard. See Twombly, 550 U.S. at 555. And paragraphs 7 through 9 deal only with facts from 2008, well outside the limitations period. The majority opinion fails to discuss one factual allegation from within the limitations period in concluding that the plaintiffs have sufficiently alleged a conspiracy. This is perhaps not surprising, since virtually all of the amended complaint comprises either factual

allegations from before the limitations period or naked assertions and conclusions.[4]

At oral argument, plaintiffs' counsel essentially conceded that the plaintiffs lack any factual allegations of a live, ongoing conspiracy during the limitations period. In response to a question asking whether there have been any overt acts to maintain the conspiracy during the limitations period, counsel could only identify paragraph 92 of the complaint. But paragraph 92 simply makes naked assertions—devoid of factual enhancements—that the defendants "regularly communicated" and "monitored the market" to ensure compliance. Pressed further about whether plaintiffs had alleged an ongoing price-fixing conspiracy, plaintiffs' counsel directed the court to paragraph 111—a mere recitation of the elements of the cause of action.

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[4] There is but one possible exception: paragraph 13, which alleges that "during calls and meetings with AmeriGas executives occurring at least as late as 2010, Janish repeatedly dismissed concerns that Blue Rhino might undercut AmeriGas on price or fill levels with words to the effect of, 'I talked to Blue Rhino, and that's not going to happen.'" But even this allegation falls short of the Twombly standard. The complaint does not allege whether the conversations between AmeriGas and Blue Rhino occurred during the limitations period, only that comments from those alleged conversations were purportedly shared in a later retelling of the conversations. And the retelling can only report on "words *to the effect of*" whatever was said. The dates of the conversations are left to the widest range of time, though curiously late enough to just reach into the limitations period. To be sure, the complaint names one individual employed by AmeriGas. But naked assertions of misconduct, combined with a name discovered from a company directory, are not enough to survive a motion to dismiss under Twombly and Iqbal.

After a thorough review of the amended complaint, I find no plausible allegation of a live, ongoing conspiracy occurring within the limitations period. Indeed, the only factual allegations within the limitations period concern the fill levels of the propane tanks. Taking the factual allegations as true, the defendants conspired in 2008 to reduce the fill levels from 17 to 15 pounds.[5] The fill levels for propane tanks sold by all defendants remain at 15 pounds today. But allegations that fill levels remain at the same levels cannot suffice. Showing parallel conduct, without more, "falls short of conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." Id. at 553 (alterations in original) (internal quotation marks omitted). "Even conscious parallelism, a common reaction of firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions[,] is not in itself unlawful." Id. at 553-54 (first and second alterations in original) (internal quotation marks omitted). In the end, there is a simple question before us: Have the plaintiffs plausibly pled a live, ongoing conspiracy among these competitors? The answer to this question is likewise simple: No.

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[5] In fact, the FTC, whose 2014 lawsuit precipitated this case, disagrees with the plaintiffs' allegations. "The Commission's Complaint *does not allege* that [the defendants'] initial decisions to reduce fill levels to 15 pounds were the result of an agreement." In re Ferrellgas Partners, L.P., FTC Docket No. 9360, 2014 WL 5787605, at *6 (Oct. 31, 2014) (emphasis added).

III.

Today's opinion runs counter to the purposes that underlie the imposition of a limitations period in private antitrust actions. The first purpose is to limit the public harm incurred by the conspiracy. See Z Techs. Corp. v. Lubrizol Corp., 753 F.3d 594, 603 (6th Cir. 2014) ("By encouraging parties to bring suits earlier, the statute of limitations attempts to minimize the public harm that might arise from harmful monopolies . . . ."). Permitting parties like the plaintiffs to bring antitrust suits reflects a "congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices." Rotella v. Wood, 528 U.S. 549, 557 (2000) ("The object . . . is thus not merely to compensate victims but turn them into prosecutors, 'private attorneys general' . . . ."). Because "private suits under the antitrust laws are allowed to correct public wrongs, it is appropriate to encourage suits as soon as possible to stop (or at least compensate) harm to the public." Midwestern Mach., 392 F.3d at 272. Congress did not intend for plaintiffs to sit back, with full knowledge of the 2008 conspiracy, and wait six years before finally correcting a public harm.[6] See Rotella, 528 U.S. at 559 (describing the antitrust enforcement scheme as "aimed at rewarding the swift who undertake litigation in the public good").

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[6] The majority opinion offers this small comfort to defendants: a plaintiff cannot recover for injuries suffered outside the four-year limitations period. But I see nothing in this opinion preventing a new lawsuit against the defendants four (or 40) years from now so long as fill levels remain at 15 pounds, even if price fluctuates. Small comfort indeed.

Beyond a concern for limiting public harm, a limitations period also provides repose to defendants and avoids the unnecessary defense of stale claims. The antitrust limitations period provides finality and certainty to business transactions. 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 320a, at 325 (4th ed. 2014). It saves defendants from the specter of perpetual litigation. And the need for timely prosecution of claims is especially great in antitrust law. "Antitrust liability depends not only on the parties' acts but also on many surrounding circumstances, including the behavior of rival firms and general market conditions—matters that may be hard to reconstruct long afterwards." Id. at 326. Allowing suits to be brought many years after the antitrust violation occurred may well deprive defendants the opportunity to present a proper defense.

IV.

In today's opinion, the majority has morphed Klehr into a sledgehammer and then reared that hammer to shatter the antitrust statute of limitations. I do not believe that was the Supreme Court's intent in Klehr, nor do I believe the law permits such a result. I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15-2789

In re: In Re: Pre -Filled Propane Tank Antitrust Litigation

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Hartig Drug Company; Jason Moore's Texaco, L.L.C., doing business as Moore's Texaco; Mario Ortiz; Stephen Morrison; Steven Tseffos; Glenville Shell, LLC; Zarco USA, Inc.; AQ Investments, LLC; LJax Enterprises, Inc.; J & V Management, LLC; Butch's Central Coastal, Inc.; Zerka's Party Store, Inc.; OM Commercial Neenah Oil, Inc.; CCLAS, Inc.; Hopewell Exxon, LLC; Tuban Petroleum, LLC; 33 and a Third, LLC; Tuban 610, LLC; Highway 182, LLC; West Main Street, LLC; Roth's Country Corner, Inc.; 1919 Airline Hwy., LLC; East Airline, LLC; Gramercy Cheap Smokes, LLC; Conti's Service Center, Inc.;
Route 49 Gas & Go, Inc.; Surinder Kaur, Inc.

Plaintiffs

Morgan-Larson, LLC

Plaintifff - Appellant

Ashville General Store, Inc.; Sean Venezia; Michael S. Harvey; Gregory Ludvigsen; Arthur Hull; Alan Rockwell; James Halgerson; Thomas R. Clark; Bryce Mander; Alex Chernavsky; Arrow Hardware, LLC; Birdie's, Inc.; Alex Chernavsky; Lochraven Sunoco, Inc.; American Auto Repair

Plaintiffs

Johnson Auto Electric, Inc.

Plaintifff - Appellant

Cedar Holly Investments, LLC; Tuckerton Lumber Company; Ace High Auto Repair & Propane; CEFO Enterprise Corp.; Jon Wall, Inc.; RC Gasoline

Plaintiffs

Speed Stop 32, Inc.

Plaintifff - Appellant

Zarco USA, Inc.; Dunmore Oil Co., Inc.; JoJo Oil Co., Inc.; Ekonomy Enterprises, Inc.

Plaintiffs

Yocum Oil Company, Inc.

Plaintifff - Appellant

v.

Ferrellgas Partners, L.P. a limited partnership; Ferrellgas, L.P. a limited partnership, doing business as Blue Rhino; AmeriGas Partners, LP a limited partnership; UGI Corporation; AmeriGas Propane, Inc., doing business as AmeriGas Cylinder Exchange; AmeriGas Propane, LP

Defendants - Appellees

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: March 16, 2016
Filed: August 25, 2016 (Corrected August 25, 2016)

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834 F.3d 943

Before WOLLMAN, BENTON, SHEPHERD, and KELLY, Circuit Judges.

SHEPHERD, Circuit Judge.

Plaintiffs Morgan-Larson, LLC, Johnson Auto Electric, Inc., Speed Stop 32, Inc., and Yocum Oil Company, Inc. (collectively "Plaintiffs" or "Plaintiff-Appellants") appeal the district court's[1] dismissal of their claims for damages in their action against Defendants Ferrellgas[2] and AmeriGas[3] under Section 1 of the Sherman Act, see 15 U.S.C. § 1. For the reasons stated below, we affirm the judgment of the district court.

I.

In the United States, Ferrellgas and AmeriGas (together, "Defendants") are the largest distributors of pre-filled propane exchange tanks, which are portable steel cylinders containing propane that are used primarily to power outdoor grills and heaters. The tanks come in a standard size and are capable of being filled with up to 20 pounds of propane. Before 2008, the tanks were filled with 17 pounds of propane. From 2006 to 2008, the cost of propane rose and in 2008, Defendants reduced the fill level of the tanks from 17 to 15 pounds of propane per tank while maintaining the same price per tank.

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[1] The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri.

[2] Ferrellgas Partners, L.P. and Ferrellgas, L.P. will be collectively referred to as "Ferrellgas." Ferrellgas does business under the name Blue Rhino.

[3] AmeriGas Partners, LP; AmeriGas Propane, Inc.; and AmeriGas Propane, LP will be collectively referred to as "AmeriGas."

In 2009, a group of plaintiffs ("2009 Plaintiffs") filed a class action lawsuit against Defendants alleging that Defendants had acted in concert to reduce the amount of propane contained within the tanks while maintaining the same price per tank, and thus artificially increasing the price of the tanks. Amended Complaint at ¶¶ 1-4, In re Pre-Filled Propane Tank Mktg. & Sales Practices Litig., No. 09-2086, 2010 WL 2008837 (W.D. Mo. May 19, 2010) (hereinafter "In re Propane I"). The 2009 Plaintiffs claimed that the actions of Defendants violated Section 1 of the Sherman Act, as well as state antitrust and consumer protection laws. The named plaintiffs in In re Propane I were all indirect purchasers, individuals who purchased the pre-filled propane exchange tanks from companies to whom Defendants initially sold the tanks. However, in their amended complaint, the 2009 Plaintiffs defined their class as "[a]ll persons who purchased a Propane Tank sold, marketed, or distributed by any Defendant during the applicable limitations period."

On December 8, 2009, the 2009 Plaintiffs moved for preliminary approval of settlement agreements. The class action settlement agreements were finally approved by the district court on October 6, 2010. The AmeriGas settlement agreement defined the settlement class as "all people who purchased or exchanged one or more of AmeriGas's pre-filled propane gas cylinders in the United States not for resale, between June 15, 2009 and November 30, 2009." The Ferrellgas settlement agreement defined the settlement class as "all people who purchased or exchanged one or more of Ferrellgas's pre-filled propane gas cylinders in the United States not for resale, between June 15, 2009 and the date of

Preliminary Approval." The date of preliminary approval was October 13, 2011.

On March 27, 2014, the Federal Trade Commission ("FTC") issued a complaint against Defendants alleging that they had restrained price competition because of their 2008 decision to decrease the fill level of the propane tanks. Shortly thereafter, in October 2014, Plaintiffs and other direct and indirect purchasers filed the present suit. Plaintiff-Appellants are all direct purchasers, that is purchasers who purchased tanks directly from Defendants for resale. In their complaint, Plaintiffs allege that the 2008 reduction in fill level was the product of improper collusion between Defendants, and despite the settlement agreements, Defendants continue to conspire and maintain their illegally agreed upon fill levels in violation of Section 1 of the Sherman Act.

The district court determined that Plaintiffs' claims are barred by the statute of limitations. The court concluded that none of the tolling theories advanced by Plaintiffs were sufficient to adjust or toll the statute of limitations. Accordingly, the district court granted Defendants' Motion to Dismiss Plaintiffs' claims for damages.[4] Plaintiffs timely appealed. On appeal, Plaintiffs argue that the district court erred in failing to find that the continuing violations theory, which has the effect of restarting the limitations period, prevented the dismissal of Plaintiffs' claims. No other issues are raised on appeal.

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[4] The district court did not dismiss indirect purchaser plaintiffs' claims for injunctive relief.

II.

"We review a district court's grant of a motion to dismiss de novo." Christiansen v. W. Branch Cmty. Sch. Dist., 674 F.3d 927, 933-34 (8th Cir. 2012). We take the facts alleged in the complaint as true. Bradley Timberland Resources v. Bradley Lumber Co., 712 F.3d 401, 406 (8th Cir. 2013). Whether a party's claim is barred by the statute of limitations is a question of law that we review de novo. McDonough v. Anoka Cnty., 799 F.3d 931, 939-40 (8th Cir. 2015).

Actions brought under Section 1 of the Sherman Act must be filed within four years of the accrual of the cause of action or they are barred by the Sherman Act's statute of limitations. 15 U.S.C. § 15b. "Generally, a cause of action [under the Sherman Act] accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971) (citations omitted). Where a plaintiff's interests are repeatedly invaded, a continuing violation occurs. Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987) (citation omitted). "However, even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." Varner v. Peterson Farms, 371 F.3d 1011, 1019 (8th Cir. 2004) (internal quotation marks and citation omitted). "An overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff." Id. (citing Pace Indus., 813 F.2d at 238). "Acts that are merely unabated inertial

consequences of a single act do not restart the statute of limitations." Id. (internal quotation marks and citation omitted).

Plaintiffs have alleged two distinct types of overt acts that occurred within the limitations period: (1) Defendants' sales to Plaintiffs at artificially inflated prices; and (2) conspiratorial communications between Defendants regarding pricing and fill levels. Plaintiffs argue that either of these activities is sufficient for a continuing violation under the Sherman Act.

Plaintiffs contend that the Supreme Court held in Klehr that each sale the defendant makes to the plaintiff pursuant to a price-fixing conspiracy restarts the statutory limitations period. See Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997) ("Antitrust law provides that, in the case of a 'continuing violation,' say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'" (citing Phillip Areeda & Herbert Hovenkamp, ANTITRUST LAW, ¶ 338b, at 145 (rev. ed. 1995))). Although Plaintiffs assert that this language in Klehr decides the issue in this case, upon a review of the issue presented and reasoning in Klehr, Plaintiffs' contention fails.

Klehr was a Racketeer Influenced and Corrupt Organizations Act ("RICO") case that rejected the Third Circuit's last predicate act rule, under which a RICO action accrued when the plaintiff knew or reasonably should have known of the last predicate

act that was a part of the same pattern of racketeering activity. Id. at 186 (citing Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1130 (3d Cir. 1988)). The last predicate act did not have to result in injury but must have been part of the same pattern. Id. (citing Keystone, 863 F.2d at 1130). The Supreme Court compared the overt-act requirement under a price-fixing conspiracy in violation of antitrust laws to the last predicate act rule under RICO. Id. at 188-190. The primary purpose of the above-quoted language was to clarify that, unlike under the last predicate act rule applied by the Third Circuit to RICO claims, "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." Id. at 189 (citations omitted). The Court concluded that the Third Circuit's last predicate act rule was not a proper interpretation of RICO because it created a limitations period longer than that envisioned by Congress, allowing plaintiffs "who know of the defendant's pattern of activity to simply wait, sleeping on their rights, as the pattern continues and treble damages accumulate." Id. at 187 (internal citation and quotation marks omitted). A rule that dramatically lengthened the limitations period "thereby conflict[ed] with a basic objective—repose—that underlies limitations periods." Id. The last predicate act rule permitted plaintiffs to recover for injuries that occurred outside the limitations period, but the Court determined that "as in the antitrust cases, the plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period."

Id. at 190. Thus, the language regarding overt acts in a price-fixing conspiracy merely illustrated where the Third Circuit's last predicate rule had gone too far. Id. at 189. The Court did not pronounce a new principle with respect to what constitutes a continuing violation under the Sherman Act.

Plaintiffs further argue that in Wholesale Grocery, we relied on the Klehr language in determining that the plaintiffs' claims were not untimely under 15 U.S.C. § 15b. In re Wholesale Grocery Prods. Antitrust Litig., 752 F.3d 728, 736 (8th Cir. 2014), cert. denied, 135 S.Ct. 2805 (2015). However, the facts of Wholesale Grocery are easily distinguishable from the facts in the instant case. In Wholesale Grocery, two grocery wholesalers entered into an asset exchange agreement that included a non-compete provision for former customers in certain geographic regions. Id. at 735. Ultimately, wholesale prices increased as a result of the non-compete provision. Id. We explained that under the plaintiff's theory of the case, "the anticompetitive nature of the wholesalers' agreement was not revealed until several years after the asset exchange" and that although the non-compete agreement allowed the wholesalers to compete for new customers, "it was not apparent until later that the wholesalers' real agreement was . . . a blatant market division." Id. at 736. Further, we reasoned, "Under Klehr, a monopolist commits an overt act each time he uses unlawfully acquired market power to charge an elevated price." Id. (citing Klehr, 521 U.S. at 189). Thus, in Wholesale Grocery, the wholesalers committed new and independent overt acts that were more than the mere inertial consequences of the initial non-compete agreement

by raising prices. See id. (acknowledging that if the price increase was not considered a new overt act, then "two parties could agree to divide the markets for the purpose of raising prices, wait four years to raise prices, then reap the profits of their illegal agreement with impunity because any antitrust claims would be time barred"). Hence, the price increase by the wholesalers restarted the statute of limitations.

Wholesale Grocery is consistent with other decisions in which we held that in order to restart the statute of limitations, more than the mere performance or reaffirmation of an unlawful agreement is required to satisfy the overt act requirement of a continuing antitrust violation. See Varner, 371 F.3d at 1020 (citations omitted) ("Performance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period."); Midwestern Mach. Co. v. Northwest Airlines, Inc., 392 F.3d 265, 269 (8th Cir. 2004) ("The typical antitrust continuing violation occurs in a price-fixing conspiracy, actionable under § 1 of the Sherman Act . . . , when conspirators continue to meet to fine-tune their cartel agreement. These meetings are overt acts that begin a new statute of limitations because they serve to further the objectives of the conspiracy." (internal citations omitted)); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1052 (8th Cir. 2000) (noting that "acts that are merely unabated inertial consequences (of a single act) do not restart the statute of limitations" (citation omitted)); see also Z Techs. Corp. v. Lubrizol Corp., 753 F.3d 594, 600 (6th Cir. 2014) ("[O]ur decisions have repeatedly emphasized that profits, sales, and other benefits

accrued as the result of an initial wrongful act are not treated as 'independent acts.' Rather, they are uniformly viewed as 'ripples' caused by the initial injury, not as distinct injuries themselves.") (citation omitted); Aurora Enters., Inc. v. NBC, 688 F.2d 689, 694 (9th Cir. 1982) ("[T]he mere fact that defendants receive a benefit today as a result of a contract executed in 1966 . . . is not enough to restart the statute of limitations."). Accordingly, Plaintiffs' claims must be premised on "some injurious act actually occurring during the limitations period, *not merely the abatable but unabated inertial consequences of some pre-limitations action*." Al George, Inc. v. Envirotech Corp., 939 F.2d 1271, 1274 (5th Cir. 1991) (quoting Imperial Point Colonnades Condo., Inc. v. Mangurian, 549 F.2d 1029, 1035 (5th Cir. 1977)) (emphasis in Al George)).

Here, Plaintiffs allege that reduction in fill levels, and thus the effective price increase, occurred in 2008, almost immediately after Defendants reached the unlawful agreement. Plaintiffs have not alleged any overt acts within the limitations period that were new and independent acts, uncontrolled by the initial agreement. The sales of 15 pound tanks to Plaintiffs were the mere, unabated consequences of the original agreement between Defendants to lower the fill level of the propane tanks while maintaining the same price. Plaintiffs do not allege that Defendants met to fine-tune their agreement, further increased the price of the propane tanks, further reduced the fill levels without reducing the price, or took any other novel overt act in furtherance of the conspiracy within the limitations period. Continued sales pursuant to an earlier unlawful agreement, under which prices were

immediately raised, reflect mere reaffirmations of the agreement and are insufficient to restart the limitations period. See Varner, 371 F.3d at 1020 (holding that performance of an anticompetitive agreement is not sufficient to restart statute of limitations).

As for the purported communications between Defendants, these too reflect mere reaffirmations. Plaintiffs allege that through the end of 2010, Defendants regularly communicated to assure compliance with the conspiracy and monitored the market to check that neither cheated on their anticompetitive agreement. Nevertheless, Plaintiffs do not contend that Defendants changed their initial agreement or "fine-tuned" their agreement. See Midwestern, 392 F.3d at 269. The purported communications merely reaffirm and monitor the existing conspiracy but do not constitute overt acts sufficient to restart the statute of limitations.

Notably, the only specific conspiratorial acts alleged in Plaintiffs' complaint occurred in 2008, outside the limitations period in this action. Although Plaintiffs assert that Defendants' conspiracy is a continuing conspiracy, Plaintiffs only claim that Defendants continue to maintain the same fill levels and never specifically allege in their complaint that Defendants continue to conspire about prices. "Without more, parallel conduct does not suggest conspiracy." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556-57 (2007). "Even conscious parallelism, a common reaction of firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful." Id. at 553-54 (internal quotation marks

and citation omitted) (alterations in Twombly). Plaintiffs have not alleged facts after 2008 to "render a [continuing] § 1 conspiracy plausible." Id. at 556. Although Plaintiffs have sufficiently pled that Defendants reached an unlawful agreement in 2008, this occurred outside the limitations period. Without a sufficient overt act to restart the running of the statute of limitations period, Plaintiffs' claims that Defendants are engaging in a continuing antitrust violation must fail.

Finally, antitrust law reflects a "congressional objective of encouraging civil litigation not merely to compensate victims but also to turn them into private attorneys general, supplementing Government efforts by undertaking litigation in the public good." Rotella v. Wood, 528 U.S. 549, 550 (2000). Because "private suits under the antitrust laws are allowed to correct public wrongs, it is appropriate to encourage suits as soon as possible to stop (or at least compensate) harm to the public." Midwestern, 392 F.3d at 272. The limitations period plays a role in limiting the public harm. Z Techs. Corp., 753 F.3d at 603 ("By encouraging parties to bring suits earlier, the statute of limitations attempts to minimize the public harm that might arise from harmful monopolies."). Because of In re Propane I, the first class action, there was public knowledge of Ferrellgas and AmeriGas's alleged conspiracy to lower fill levels without reducing prices. Plaintiffs raise no new conspiratorial allegations – all of Plaintiffs' factual allegations of a conspiratorial agreement by Defendants occurred in 2008, before In re Propane I was filed. Plaintiffs have not pled overt acts sufficient to show a continuing conspiracy. Thus, Plaintiffs' claim of a

conspiracy in violation of § 1 of the Sherman Act is barred by the statute of limitations, and our conclusion reflects the objectives of Congress in encouraging timely lawsuits for the public good.

III.

For the foregoing reasons, we affirm the judgment of the district court.

BENTON, Circuit Judge, dissenting.

In *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), the Supreme Court describes a "continuing violation" that restarts the statute of limitations under antitrust law:

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

Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997) (internal quotations omitted). The majority tries to limit *Klehr* to its facts—that it was a RICO case. However, federal courts "are not free to limit Supreme Court opinions to the facts of each case." ***McDonough v. Anoka Cnty.***, 799 F.3d 931, 942 (8th Cir. 2015) (internal quotations omitted). The majority says *Klehr* "merely illustrated" the rule, but "federal courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is of

recent vintage and not enfeebled by any later statement." ***Id.*** (internal quotations omitted).

The rule is clear: "each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." ***Klehr***, 521 U.S. at 189. *See also* ***Oliver v. SD-3C LLC***, 751 F.3d 1081, 1086 (9th Cir. 2014) ("[T]he Supreme Court and federal appellate courts have recognized that each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act."); ***In re Cotton Yarn Antitrust Litig.***, 505 F.3d 275, 290-91 (4th Cir. 2007) (noting that the complaint would be timely "so long as plaintiffs made a purchase from the Defendants within [the limitations period]"); ***Morton's Market, Inc. v. Gustafson's Dairy, Inc.***, 198 F.3d 823, 828 (11th Cir. 1999) ("[E]ven if there were no price-fixing conversations after 1987 . . . if plaintiffs purchased milk at a fixed price after that date, the purchase would constitute an overt act that injured it. A cause of action would accrue with each purchase and a new statutory period would begin to run.").

Skirting *Klehr*, the majority relies on *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004). The defendants there induced plaintiffs to take out a loan based on false information. ***Varner***, 371 F.3d at 1011. More than four years later, they sued for antitrust "tying" violations. This court rejected plaintiffs' "continuing violations" argument because "[p]erformance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period." ***Id.*** at 1020.

The present case is distinguishable. Varner is about a tying arrangement, not "a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years." *See* ***Klehr***, 521 U.S. at 189. A horizontal price-fixing conspiracy is a per se antitrust violation. *See* ***Leegin Creative Leather Products, Inc. v. PSKS, Inc.***, 551 U.S. 877, 886 (2007). A *per se* violation is a restraint that has "manifestly anticompetitive effects and lack[s] any redeeming virtue." ***Id.*** (internal citations omitted). The horizontal price-fixing agreement gave the defendants "unlawful market power" to inflict new and accumulating injury each time defendants sell a propane tank. *See* ***Wholesale Grocery***, 752 F.3d at 736. Under *Klehr*, "each sale to the plaintiff, start[ed] the statutory period running again." *See* ***Klehr***, 521 U.S. at 189.

The majority's reliance on *Midwestern Machinery* is similarly unpersuasive. There, this court distinguished between merger and conspiracy cases. "Unlike a conspiracy or the maintaining of a monopoly, a merger is a discrete act, not an ongoing scheme. A continuing violation theory based on overt acts that further the objectives of an antitrust conspiracy . . . or that are designed to promote a monopoly . . . cannot apply to mergers. . . ." ***Midwestern Machinery Co. v. Northwest Airlines, Inc.***, 392 F.3d 265, 271 (8th Cir. 2004). Thus, "to apply the continuing violation theory to *non-conspiratorial conduct*, new overt acts must be more than the unabated inertial consequences of the initial violation." ***Id.*** at 270 (emphasis added). *See also* ***Z Techs. Corp. v. Lubrizol Corp.***, 753 F.3d 594, 599 (6th Cir. 2014) (distinguishing between conspiratorial and non-conspiratorial cases in

applying the continuing violations theory). Here, the plaintiffs allege conspiratorial conduct—illegally fixing prices—and the maintenance required to "further the objectives of an antitrust conspiracy. . . ." *See* ***Midwestern Machinery***, 392 F.3d at 271. "Under *Klehr*, [defendants here] committ[ed] an overt act each time [they] use[d] unlawfully acquired market power to charge an elevated price." *See* ***In re Wholesale Grocery Prods. Antitrust Litig.***, 752 F.3d 728, 736 (8th Cir. 2014).

The majority's concern about plaintiffs sleeping on their rights is irrelevant because the statutory period runs again "regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *See* ***Klehr***, 521 U.S. at 189. *See also* ***Hanover Shoe, Inc. v. United Shoe Machinery Corp.***, 392 U.S. 481, 502 n.15 (1968) (noting, in the case of a continuing violation under the Sherman Act, "Although [plaintiff] could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955"). At any rate, the *Klehr* rule does not discourage timely-filed suits because a "plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period." ***Id.*** at 190. Moreover, this rule prevents companies from "agree[ing] to divide markets for the purpose of raising prices, wait[ing] four years to raise prices, then reap[ing] the profits of their illegal agreement with impunity because any antitrust claims would be time barred." ***Wholesale Grocery***, 752 F.3d at 736.

Because I believe *Klehr* controls this case, I dissent.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

IN RE: PRE-FILLED PROPANE TANK ANTITRUST LITIGATION	)))))	**MDL No. 2567** **Master Case No. 14-02567-MD-W-GAF**
ALL ACTIONS	)	

ORDER

Presently before the Court is Defendants Ferrellgas Partners, L.P.; Ferrellgas, L.P.[1]; UGI Corporation; AmeriGas Partners, LP; AmeriGas Propane, Inc.; and AmeriGas Propane, LP's[2] (collectively "Defendants") Motion to Dismiss the Indirect Purchaser Plaintiffs' Consolidated Class Action Complaint (the "Indirect Purchaser Plaintiffs' CAC"). (Doc. # 135). Plaintiffs Mario Ortiz, Steven Tseffos, Stephen Morrison, Michael S. Harvey, Arthur Hull, Gregory Ludvigsen, Alan Rockwell, Alex Chernavsky, James Halgerson, Thomas R. Clark, Bryce Mander, and Sean Venezia (collectively the "Indirect Purchaser Plaintiffs") oppose. (Doc. # 149).

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[1] Ferrellgas Partners, L.P. and Ferrellgas, L.P. will be collectively referred to as "Ferrellgas." Ferrellgas does business under the name Blue Rhino. (Direct Purchaser Plaintiffs' Consolidated Class Action Complaint ("Direct Purchaser Plaintiffs' CAC") ¶ 1).

[2] AmeriGas Partners, LP; AmeriGas Propane, Inc.; and AmeriGas Propane, LP will be collectively referred to as "AmeriGas."

Also before the Court is Defendants' Motion to Dismiss the Direct Purchaser Plaintiffs' CAC. (Doc. # 137). Plaintiffs Hartig Drug Company, Inc.; Jason Moore's Texaco, L.L.C.; Glenville Shell LLC; AQ Investments, LLC; LJax Enterprises, Inc.; J & V Management, LLC; Butch's Central Coastal, Inc.; Zerka's Party Store, Inc.; OM Commercial Neenah Oil, Inc.; CCLAS, Inc.; Hopewell Exxon, LLC; Tuban Petroleum LLC; 33 and a Third, LLC; Tuban 610 LLC; Highway 182 LLC; West Main Street LLC; Roth's Country Corner, Inc; 1919 Airline Hwy LLC; East Airline LLC; Gramercy Cheap Smokes LLC; Conti's Service Center, Inc.; Route 49 Gas & Go, Inc.; Morgan-Larson, LLC; Surinder Kaur, Inc.; Ashville General Store, Inc.; Birdie's, Inc.; Lochraven Sunoco, Inc.; Arrow Hardware, LLC; American Auto Repair; Johnson Auto Electric, Inc.; Cedar Holly Investments, LLC; CEFO Enterprise Corp.; Tuckerton Lumber Company; Ace High Auto Repair & Propane; JonWall, Inc.; RC Gasoline, Speed Stop 32; Inc., Zarco USA, Inc.; Dunmore Oil Co., Inc.; JoJo Oil Co., Inc.; Ekonomy Enterprises, Inc.; and Yocum Oil Company, Inc. (collectively the "Direct Purchaser Plaintiffs") oppose.[3] (Doc. # 148). For the reasons stated below, Defendants' Motion to Dismiss the Indirect Purchaser Plaintiffs' CAC is GRANTED in part and DENIED in part and Defendants' Motion to Dismiss the Direct Purchaser Plaintiffs' CAC is GRANTED.

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[3] The Direct and Indirect Purchaser Plaintiffs are referred to collectively as "Plaintiffs."

DISCUSSION

I. FACTS

Defendants are the largest distributors of pre-filled propane exchange tanks. (Direct Purchaser Plaintiffs' CAC ¶ 1). Pre-filled propane exchange tanks are portable steel cylinders containing propane; they are used primarily to power outdoor grills and heaters. (*Id.* ¶ 2). The tanks come in a standard size and can be filled with up to twenty pounds of propane. (*Id.* ¶ 3). Before 2008, the tanks were filled with seventeen pounds of propane. (*Id.*). From 2006 to 2008 the cost of propane rose. (*Id.* ¶¶ 4-5). In 2008, Defendants reduced the fill level of the tanks from seventeen to fifteen pounds of propane per tank while maintaining the same price per tank. (*Id.* ¶ 7).

In 2009, a group of plaintiffs filed suit against Ferrellgas and AmeriGas alleging that they had acted in concert to reduce the amount of propane contained within the tanks and thus, artificially increase the price of the tanks[4]. (Case No. 09-02086-MD-W-GAF, Amended Complaint ¶¶ 1-4). The 2009 plaintiffs alleged that the actions of Ferrellgas and AmeriGas were in violation of Section 1 of the Sherman Act and state antitrust and consumer protection laws. (*Id.*). The named plaintiffs in *In re Propane I* were all indirect purchasers, individuals who purchased the pre-filled propane exchange tanks from companies to which Ferrellgas or AmeriGas initially sold them. (*Id.* ¶¶ 10-29). However, the Amended Complaint in *In re Propane I* defined their class as "[a]ll persons who purchased a

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[4] This 2009 action will be referred to as *In re Propane I*.

Propane Tank sold, marketed, or distributed by any Defendant during the applicable limitations periods." (*Id.* ¶ 77).

On December 8, 2009, the plaintiffs moved for preliminary approval of settlement agreements which included only indirect purchasers. (*Id.*, Doc. # 37). The settlement agreements were granted final approval on October 6, 2010. (*Id.*, Doc. # 166). The settlement agreements contained a release provision. (*Id.*, Docs. ## 114, 250). The release provision in the settlement with AmeriGas released AmeriGas from "any and all liabilities, claims, rights, suits, and causes of action, of any kind whatsoever, that [the plaintiffs] may have or may have had . . . whether known or unknown . . . that could have been alleged." (*Id.*, Doc. # 114-4, p. 24). The release provision in the settlement with Ferrellgas released Ferrellgas from "any and all liabilities, claims, rights, suits, and causes of action, of any kind whatsoever, that [the plaintiffs] may have or may have had . . . whether known or unknown . . . that were or could have been sought or alleged." (*Id.*, Doc. # 250-1, p. 20).

On March 27, 2014, the Federal Trade Commission issued a complaint against Defendants alleging that Defendants had restrained price competition because of their 2008 decision to decrease the fill level of the propane tanks. (Direct Purchaser Plaintiffs' CAC ¶ 16). Shortly thereafter, Plaintiffs filed the present suit. (*See id.*). Plaintiffs allege that the 2008 reduction in fill level was due to improper collusion between Defendants who conspired to force Direct Purchaser Plaintiffs to accept the fill reduction and agreed not to compete with one another. (*Id.* ¶¶ 8-11). Plaintiffs allege

that this was a violation of Section 1 of the Sherman Act. (*Id.*). Plaintiffs in this action include both direct purchasers, those that purchased the tanks directly from Defendants for resale, and indirect purchasers. (*See* Docket Sheet).

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint that fails to state a claim upon which relief may be granted. When considering a Rule 12(b)(6) motion to dismiss, a court treats all well-pleaded facts as true and grants the non-moving party all reasonable inferences from the facts. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). However, courts are "not bound to accept as true a legal conclusion couched as a factual allegation" and such "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal quotation marks omitted). A Rule 12(b)(6) motion should be granted only if the non-moving party fails to plead facts sufficient to state a claim "that is plausible on its face" and would entitle the party to the relief requested. *Twombly*, 550 U.S. at 570.

III. ANALYSIS

A. Release Provision

Defendants first argue that the Indirect Purchaser Plaintiffs' CAC should be dismissed because the settlement agreements in *In re Propane I* released these claims. (Doc. # 136, p. 8). "Plaintiffs in a class action may release claims that were or could have been pled in exchange for settlement

relief." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106 (2d Cir. 2005). "Settlement agreements . . . are viewed in light of governing contract principles." *Harris v. Brownlee*, 477 F.3d 1043, 1047 (8th Cir. 2007). "[T]he basic rule of the law of contracts [is] that the purpose of every contract is to bind *the parties* to performance." *Pac. Trading Co. v. Mouton Rice Milling Co.*, 184 F.2d 141, 147 (8th Cir. 1950) (emphasis added). "Parties to a contract are ordinarily bound by its terms; strangers are not." *Davidson v. Enstar Corp.*, 848 F.2d 574, 578-79 (5th Cir. 1988). Thus, the release provisions from the *In re Propane I* settlement agreements bind only those individuals who were parties to the settlement agreements.

The AmeriGas settlement agreement defined the settlement class as "all people who purchased or exchanged one or more of AmeriGas's pre-filled propane gas cylinders in the United States not for resale, between June 15, 2005 and November 30, 2009." (Case No. 09-02086-MD-W-GAF, Doc. # 114-4, p. 12). The Ferrellgas settlement agreement defined the settlement class as "all people who purchased or exchanged one or more of Ferrellgas's pre-filled propane gas cylinders in the United States not for resale, between June 15 2005 and the date of Preliminary Approval." (*Id.*, Doc. # 250-1, p. 9). The date of preliminary approval was October 13, 2011. (*Id.*, Doc. # 254). Thus, to have been a party to the *In re Propane I* AmeriGas settlement agreement, an individual must have purchased a pre-filled propane tank before November 30, 2009, and to have been a party to the Ferrellgas settlement agreement a purchase must have been made before October 13, 2011.

"When considering a motion to dismiss for failure to state a claim, a court must accept the factual allegations in the complaint as true, and may not consider evidence outside the complaint." *Penn v. Iowa State Bd. of Regents*, 999 F.2d 305, 307 (8th Cir. 1993). The Indirect Purchasers' Plaintiffs CAC defines the class as individuals who purchased pre-filled propane tanks from AmeriGas after December 1, 2009 and from Ferrellgas after October 14, 2011. (Indirect Purchaser Plaintiffs' CAC ¶ 99). Further, the named Indirect Purchaser Plaintiffs do not allege that they made any purchases before December 1, 2009. (*Id.* ¶¶ 93-98). Defendants allege that this group "almost certainly includes indirect purchasers who were" parties to the *In re Propane I* settlements. (Doc. # 136, p. 9). However, Defendants point to nothing in the Indirect Purchaser Plaintiffs' CAC, or elsewhere, that indicates this is so. (*See* Docs. ## 136, 158). Accordingly, at this point the Court is unable to conclude that any members of the current case were included in the *In re Propane I* settlement agreement and thus bound by its release provision. Therefore, the Court believes it would be premature to examine the validity and scope of the release provision at this time.

B. Statute of Limitations

Defendants next assert that Plaintiffs' claims should be dismissed because they are barred by the statute of limitations. (Doc. # 138, p. 11). "[A] motion to dismiss may be granted when a claim is barred under a statute of limitations." *Varner v. Peterson Farms*, 371 F.3d 1011, 1016 (8th Cir. 2004). Plaintiffs raise claims under Section 1 of the

Sherman Act.[5] (Direct Purchaser Plaintiffs' CAC ¶ 134; Indirect Purchaser Plaintiffs' CAC ¶ 147). Claims under the Sherman Act have a four year statute of limitations. 15 U.S.C. § 15b. "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Plaintiffs allege that Defendants agreed to reduce the fill level in the pre-filled propane tanks no later than June of 2008 and all Defendants began selling fifteen pound tanks by August 1, 2008. (Direct Purchaser Plaintiffs' CAC ¶ 66; Indirect Purchaser Plaintiffs' CAC ¶ 60). Thus, absent any tolling theories, the statute of limitations expired on August 1, 2012, almost two years before the first claim was filed in this case.

1. Administrative Complaint Theory

Plaintiffs first allege that the FTC's March 27, 2014 filing of an administrative complaint against Defendants suspended the statute of limitations. (Doc. # 149, p. 25).

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect to every private or State right of action arising under said laws and

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[5] The Indirect Purchaser Plaintiffs also raise a claim for injunctive relief under Section 1 of the Sherman Act. (Indirect Purchaser Plaintiffs' CAC ¶ 139). The timeliness of this claim will be addressed separately below. Additionally, the Indirect Purchaser Plaintiffs assert claims for violation of state antitrust laws. (*Id.* ¶¶ 156, 164-185).

> based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter.

15 U.S.C. § 16(i). The FTC instituted a proceeding against Defendants that challenged the same conduct Plaintiffs challenge in this matter. (Indirect Purchaser Plaintiffs' CAC ¶ 136). The action was filed on March 27, 2014. (*Id.*). Thus, the filing of the administrative complaint moved the statute of limitations period back to March 27, 2010; four years prior to the administrative complaint. *See City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 460 (2d Cir. 1974) ("[T]he statute of limitations in private antitrust suits generally cuts off claims that arise more than four years before the inception of the government enforcement action."). However, the challenged conduct occurred in the summer of 2008. (Direct Purchaser Plaintiffs' CAC ¶ 66; Indirect Purchaser Plaintiffs' CAC ¶ 60). Thus, the challenged conduct does not fall within the adjusted limitations period. Accordingly, this theory alone does not save Plaintiffs' claims from being barred by the statute of limitations.

2. Continuing Violation Theory

Plaintiffs next argue that the statute of limitations should be tolled pursuant to the continuing violations theory. (Doc. # 148, p. 6). "Under the so-called continuing-violation theory, each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again." *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004) (omission in original) (quoting *Klehr v. A.O. Smith*

Corp., 521 U.S. 179, 189 (1997)) (internal quotation marks omitted). "An overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff. Acts that are merely 'unabated inertial consequences' of a single act do not restart the statute of limitations." *Varner*, 371 F.3d at 1019 (internal citations omitted). "[T]he statute runs from the last overt act." *Varner*, 371 F.3d at 1019 (quoting *Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990)) (internal quotation marks omitted). Thus, for the continuing violations theory to apply, an overt act must have occurred after March 27, 2010, the beginning of the adjusted limitations period.

Plaintiffs first argue that each time Defendants sold the propane exchange tanks filled with only fifteen pounds of propane, an overt act was committed that satisfied the continuing violations theory. (Doc. # 148, p. 8). Plaintiffs rely primarily on *Klehr* and *In re Wholesale Grocery Products Antitrust Litigation*, 752 F.3d 728 (8th Cir. 2014) to support their contention. (*See* Doc. # 148). In *Klehr*, the Supreme Court stated that "in the case of a 'continuing violation,' say, a price–fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.,* each sale to the plaintiff, 'starts the statutory period running again.'" 521 U.S. at 189 (quoting P. Areeda & H. Hovenkamp, Antitrust Law ¶ 338b, p. 145 (rev. ed. 1995)). However, in *Klehr*, the plaintiffs alleged that the defendants had engaged in mail and wire fraud in violation of RICO and sought

damages twenty years after the alleged violations occurred. *Id.* at 183-84. The plaintiffs contended that the last predicate act rule saved their claim from being barred by the statute of limitations and the Court was evaluating the rule's lawfulness. *Id.* at 186. The rule allowed a plaintiff to recover, "as long as [a defendant] committed one predicate act within the limitations period . . . not just for any added harm caused them by that late-committed act, but for all the harm caused them by all the acts that make up the total pattern." *Id.* at 186-86. In analyzing the law, the Court turned to the statute of limitations in the context of the Clayton Act as a useful analogy. *Id.* at 188. It was in that context that the aforementioned quote occurred. Further, the primary purpose of that language was to explain that, unlike with the last predicate act rule, "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Id.* at 189. Thus, *Klehr* never ruled that each time a sale is made at a steady supra-competitive price, the overt act requirement of the continuing violations theory in the context of an alleged price fixing conspiracy is met.

This becomes even clearer when considered in conjunction with *Wholesale Grocery Products*. In *Wholesale Grocery Products*, two grocery wholesalers agreed in 2003 to divide the market leaving each with a monopoly in their territories. 752 F.3d at 730. The plaintiffs filed their claim in 2008. *Id.* The Eighth Circuit evaluated whether the four year statute of limitations barred the plaintiffs' claim and found that the case was controlled by *Klehr*. *Id.* at 736. The Eighth Circuit reaffirmed the need for a

"'separate new overt act'" to satisfy the continuing violation theory. *Id.* (quoting *Klehr*, 521 U.S. at 189-90). The court determined that "the anticompetitive nature of the wholesalers' agreement was not revealed until several years" later, when, during the four years preceding suit, the wholesalers increased their fees. *Id.* The Eighth Circuit stated that "a monopolist commits an overt act each time he uses unlawfully acquired market power to charge an *elevated* price." *Id.* (emphasis added). The Eighth Circuit reasoned that without such a rule, "two parties could agree to divide markets for the purpose of raising prices, wait four years to raise prices, then reap the profits of their illegal agreement with impunity because any antitrust claims would be time barred." *Id.* Thus, the key fact in *Wholesale Grocery Products* was that a price elevation occurred within the limitations period.

Unlike in *Wholesale Grocery Products*, the anticompetitive nature of Defendants' agreement was not revealed years later, during the limitations period. Instead, Plaintiffs allege that the anticompetitive nature of Defendants' agreement was apparent in 2008 when Defendants decreased the amount of propane in the exchange tanks without a corresponding decrease in price. (Direct Purchaser Plaintiffs' CAC ¶ 7). Further, unlike in *Wholesale Grocery Products*, there has been no allegation of a new, separate overt act during the limitations period because there has not been any allegation that Defendants further elevated the relative price of the exchange tanks by further decreasing the fill level. (*See id.*). Because no such price elevation occurred within the limitations period, the overt act requirement is not met.

The plaintiffs in *Insulate SB, Inc. v. Advanced Finishing Systems, Inc.*, Civil No. 13-2664 ADM/SER, 2014 WL 943224 (D. Minn. Mar. 11, 2014) attempted to use the same argument that Plaintiffs are alleging in this case. In *Insulate SB*, the plaintiffs alleged that the defendants bought out their existing competitors and conspired to exclude new competitors which allowed them to raise prices. 2014 WL 943224, at *1. The plaintiffs argued that their claim was not barred by the statute of limitations because, the defendants "committed an overt act each time a supra-competitive price was changed." *Id.* at *7. In rejecting their argument, the court looked to *Klehr* and *Wholesale Grocery Products* and determined that "[w]here a defendant's continued sales under an anticompetitive arrangement merely enforce the initial, unabated arrangement, the sales do not constitute a continuing violation." *Id.* Because there were no allegations that "the initial price-fixing agreement was abated" the court determined that continuing to charge a stable supra-competitive price was insufficient to constitute an overt act. *Id.*

Plaintiffs' argument was also contemplated and rejected in *Southeast Missouri Hospital v. C.R. Bard, Inc.*, No. 1:07CV0031 TCM, 2008 WL 4104534 (E.D. Mo. Aug. 27, 2008). In *Southeast Missouri Hospital*, the plaintiffs alleged that the defendants developed an anticompetitive scheme using exclusionary and market share maintenance contracts in the sale of urological catheters to prevent competition. 2008 WL 4104534, at *1. The plaintiffs alleged that their claims were not barred by the statute of limitations because "each sale of the urological catheters at unlawful prices and each unknowing remittance for

payment [we]re continuing violations." *Id.* at *3. The court rejected the argument and stated that "[s]ales of a product pursuant to an allegedly illegal arrangement are not new, overt acts." *Id.*

Accordingly, it is not the law that each time a sale is made at a stable supra-competitive price the overt act requirement is met. "To hold otherwise would effectively abrogate the statute of limitations in situations such as the one now at issue because each sale of a product pursuant to the underlying agreement would start the statu[t]e of limitations running anew." *Id.* This would make such a defendant indefinitely subject to suit and would undermine the policies behind the statutes of limitation which insure "the defense is [not] hampered by lost evidence, faded memories, . . . disappearing witnesses, and . . . unfair surprise." *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 473 (1975). Thus, each time Defendants sold the propane exchange tanks filled with only fifteen pounds of propane, an overt act was not committed that satisfied the continuing violations theory.

Plaintiffs next argue that they sufficiently alleged that Defendants committed other overt acts sufficient to satisfy the continuing violations theory. (Doc. # 148, p. 17). In their complaint, Plaintiffs alleged that "as late as 2010, [Ken] Janish[6] repeatedly dismissed concerns that Blue Rhino might undercut AmeriGas on price or fill levels with words to the effect of, 'I talked to Blue Rhino, and that's not going to happen.' AmeriGas and Blue

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[6] Ken Janish is AmeriGas's Director of National Accounts. (Direct Purchaser Plaintiffs' CAC ¶ 9).

Rhino continued to have discussions regarding pricing for contracts at least through 2010." (Direct Purchaser Plaintiffs' CAC ¶ 13). Plaintiffs further alleged that "[e]mployees from Blue Rhino and AmeriGas participated in regular calls to discuss their co-packing agreements, presenting ample opportunities for conspiratorial communications." (*Id.* ¶ 47). Plaintiffs additionally alleged that "Janish had similar conversations with employees of Blue Rhino on numerous occasions . . . until at least late 2010" and that "[t]hrough at least the end of 2010, Defendants regularly communicated to assure compliance with the conspiracy . . . Defendants communicated with each other to reassure each other of their compliance." (*Id.* ¶¶ 60, 92, 125).

"The typical antitrust continuing violation occurs in a price-fixing conspiracy . . . when conspirators continue to meet to fine-tune their cartel agreement." *Midwestern Mach. Co.*, 392 F.3d at 269. "These meetings are overt acts that begin a new statute of limitations because they serve to further the objectives of the conspiracy." *Id.* In contrast, mere reaffirmations of a previous act are not overt acts that restart the statute of limitations. *See Varner*, 371 F.3d at 1019. Thus, the operative question is whether Plaintiffs sufficiently alleged that these phone calls fine-tuned or furthered the conspiracy, or whether their allegations amounted to mere reaffirmations of Defendants' previous decision to collectively reduce fill levels in their propane tanks.

In *Insulate SB*, the plaintiffs alleged that a "letter from [one defendant] to [another defendant] 'reminding them' they were not to carry the Gama product line [as agreed to under their conspiracy]

was an overt act in furtherance of the conspiracy that started the limitations period running anew." 2014 WL 943224, at *7. The court rejected this argument stating that the "letter merely reflected and reaffirmed the alleged prior agreement . . . and therefore did not restart the limitations period." *Id.* The court in *Insulate SB* additionally concluded that even providing further instructions on how to carry out the conspiracy amounted to a "reflection and reaffirmation of the alleged prior refusal to deal" and thus was not an overt act. *Id.* at *7 n.5.

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

Plaintiffs cite to a number of cases from outside of the Eighth Circuit to support their argument that the alleged communications were overt acts. Plaintiffs cite to *United States v. Hayter Oil Co. of Greeneville, Tennessee*, 51 F.3d 1265 (6th Cir. 1995) for the proposition that "evidence of telephone calls between defendants with conspiratorial subject matter [was] sufficient to find existence of [a] continuing conspiracy." (Doc. # 148, p. 18 n.16). However, this Sixth Circuit case involved a criminal conspiracy action under the Sherman Act where "[p]roof of an overt act is not required." *Hayter Oil*, 51 F.3d at 1270. Thus, "the government [wa]s only

required to prove that the agreement existed during the statute of limitations." *Id.* The court found only that telephone calls between the defendants were sufficient to prove that the conspiracy was still in place. *Id.* at 1271. Accordingly, *Hayter Oil* does nothing to establish that confirmation phone calls constitute overt acts.

Plaintiffs also cite to *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85 (3d Cir. 2010) for the proposition that the court "reject[ed the] argument [that the] continuing violation doctrine did not apply because injurious acts occurring during limitations were merely 'reaffirmations.'" (Doc. # 148, p. 19 n.17). However, in *West Penn*, the Third Circuit rejected the proposition that a mere reaffirmation of the injurious conduct did not meet the overt act requirement. 627 F.3d at 106. Therefore, the court made no finding on whether the alleged acts were mere reaffirmations. *See id.* Unlike the Third Circuit, the Eighth Circuit has unequivocally held that mere reaffirmations are not overt acts. *See Varner*, 371 F.3d at 1019. Thus, *West Penn* does not support Plaintiffs' argument. Accordingly, Plaintiffs have failed to allege any overt act during the limitations period sufficient to support the continuing violations theory. Therefore, the continuing violations theory does not prevent Plaintiffs' claims from being time barred in this case.

3. American Pipe Tolling

Plaintiffs finally allege that the statute of limitations should be tolled pursuant to the tolling theory from *American Pipe & Construction Co. v.*

Utah, 414 U.S. 538 (1974).[7] (Doc. # 148, p. 21). The Supreme Court in *American Pipe* held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. "The *American Pipe* rule is designed to protect the federal procedural interest by preventing duplicative litigation from purported class members during the period that certification is pending." *Great Plains Trust Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007). The Supreme Court noted that such a tolling rule is not inconsistent with the statutes of limitation, which are meant "to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983). "[T]hese ends are met when a class action is commenced. . . . [A] class complaint 'notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.'" *Id.* at 352-53 (quoting *Am. Pipe*, 414 U.S. at 555). The overarching question in determining whether *American Pipe* tolling applies is whether the previous "class action claims and the accompanying class description were sufficient to put each defendant on notice of the substantive . . . claims

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[7] Plaintiffs however, admit that this tolling theory is inapplicable to Defendant UGI Corporation. (Doc. # 148, p. 12 n.8; Doc. # 149, p. 26 n.30). Accordingly, no tolling theory is sufficient to prevent Plaintiffs' claims against UGI Corporation from being barred by the statute of limitations. Thus, Plaintiffs claims against UGI Corporation are DISMISSED.

brought in [the present case] and to inform each defendant of the 'generic identities of [the present] plaintiffs." *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 915 (8th Cir. 2004).

Defendants first allege that *American Pipe* tolling is inapplicable in this case because *American Pipe* tolling cannot be used to toll the statute of limitations for a subsequent class action. (Doc. # 138, p. 13). While Defendants may be correct that other circuits do not allow *American Pipe* tolling for subsequent class actions, the Eighth Circuit has applied *American Pipe* tolling in such a situation. *See Great Plains Trust*, 492 F.3d at 997. "Whether the *American Pipe* rule applies to subsequent class actions, however, depends on the reasons for the denial of certification of the predecessor action." *Id.* The Eighth Circuit in *Great Plains Trust* stated that *American Pipe* tolling would apply to subsequent class actions when "'class certification [in the previous action was] denied solely on the basis of the lead plaintiffs' deficiencies'" and when "the later action was not an attempt to relitigate the denial of certification or correct a procedural deficiency." *Id.* (quoting *Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004). In *Great Plains Trust*, the prior class action was voluntarily dismissed before a certification hearing was held, thus there was no denial of certification. *Id.* at 997 n.3. The Eighth Circuit "decline[d] to determine whether this fact [wa]s material . . . [and] assume[d], for the sake of discussion, that the previous class actions warrant application of the *American Pipe* rule." *Id.*

Like in *Great Plains Trust*, *In re Propane I* did not involve a denial of certification, instead the settlement classes were granted certification by this

Court. (Case No. 09-02086-MD-W-GAF, Docs. ## 253, 289). Although the Eighth Circuit has not spoken specifically about whether *American Pipe* tolling applies in such a circumstance, this Court believes that the language of *Great Plains Trust* indicates that it should apply. Specifically, the Eighth Circuit stated that *American Pipe* tolling applies when the subsequent class action is not an attempt to relitigate the denial of class certification. *Great Plains Trust*, 492 F.3d at 997; *See also Berry v. Volkswagen of Am., Inc.*, No. 09-0484-CV-W-ODS, 2009 U.S. Dist. LEXIS 65624, *6 (W.D. Mo. July 28, 2009) ("The tolling rule, however, cannot be used by plaintiffs to sequentially relitigate a denial of class certification."). As this Court has previously stated, the concern with the application of *American Pipe* to subsequent class actions is that plaintiffs would be allowed infinite "bites at the apple" to relitigate the same issues while "toll[ing] the statute of limitations indefinitely." *Farthing v. United Healthcare of the Midwest, Inc.*, No. 2:98-4262-CV-C-GAF, 2000 U.S. Dist. LEXIS 21995, *26 (W.D. Mo. Oct. 24, 2000). In this case, Plaintiffs are not seeking a second bite at the apple or attempting to relitigate certification issues that were not previously decided in their favor. Thus, this Court believes that *American Pipe* tolling applies in this type of subsequent class action.

Just because *American Pipe* tolling applies to this type of subsequent class action does not mean that all of the other requirements for *American Pipe* tolling are met in this case. Defendants allege that *American Pipe* tolling is not available to the Direct Purchaser Plaintiffs because their current claims were not asserted in *In re Propane I*. (Doc. # 138, p.

17). The theory behind *American Pipe* tolling is that the previous class action "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs." *Am. Pipe*, 414 U.S. at 555. In his concurring opinion in *Crown, Cork & Seal*, Justice Powell reflected on this rationale and stated "[w]hen thus notified, the defendant normally is not prejudiced by tolling of the statute of limitations. It is important to make certain, however, that *American Pipe* is not abused by the assertion of claims that differ from those raised in the original class suit." 462 U.S. at 355 (Powell, J., concurring). The Supreme Court has further stated that "the tolling effect given to the timely prior filings in *American Pipe* and in *Burnett* [*v. New York Central R.R. Co.*, 380 U.S. 424 (1965)] depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted." *Johnson*, 421 U.S. at 467.

District Courts within the Eighth Circuit have used this language to determine that *American Pipe* tolling does not apply to the assertion of claims different from those asserted in the previous action. *See Zarecor v. Morgan Keegan & Co.*, No. 4:11CV00824 BSM, 2013 WL 5687618, at *2 (E.D. Ark. Oct. 15, 2013) ("[T]olling is not extended to those circumstances where the later causes of action are not identical to those originally brought in the class action."); *Wells v. FedEx Ground Package Sys., Inc.*, No. 4:10CV2080 JCH, 2011 WL 1769665, at *6 (E.D. Mo. May 9, 2011) (finding that *American Pipe* tolling "does not leave[ ] a plaintiff free to raise different or peripheral claims following denial of class status.") (alteration in original) (quoting

Williams v. Boeing Co., 517 F.3d 1120, 1136 (9th Cir. 2008)) (internal quotation marks omitted); *Burns v. Ersek*, 591 F. Supp. 837, 843 (D. Minn. 1984) ("[T]he weight of authority is that [*American Pipe*] tolling applies only to causes of action raised in the first suit."). In this case, the Direct Purchaser Plaintiffs assert only one cause of action, violation of Section 1 of the Sherman Act, and seek compensatory and treble damages. (Direct Purchaser Plaintiffs' CAC ¶ 137). However, this cause of action was not asserted in *In re Propane I* or any of its underlying complaints. (*See* Case No. 09-02086-MD-W-GAF). Thus, *American Pipe* tolling does not apply to the Direct Purchaser Plaintiffs' claims.

Plaintiffs encourage this Court to ignore these district court cases and the language from the Supreme Court and instead look to precedent from the Sixth and Second Circuits that stand for the proposition that *American Pipe* tolling only requires that a subsequent claim could have been asserted in the prior action. (Doc. # 148, p. 27). However, this Court has reviewed those cases and does not find them to be persuasive in light of the statements from the Supreme Court on the issue. Further this Court finds the reasoning of the Seventh Circuit persuasive when it critiqued the ruling of the Sixth Circuit stating that it, "push[ed] *American Pipe* beyond its own rationale." *In re Copper Antitrust Litig.*, 436 F.3d 782, 796 (7th Cir. 2006). Additionally, Defendants fail to cite to any precedent within this Circuit that supports their proposition. (*See* Doc. # 148). Accordingly, the Direct Purchaser Plaintiffs have failed to establish any tolling theory sufficient to prevent their claim from being barred by the statute of limitations.

Defendants next argue that *American Pipe* tolling is insufficient to support the Indirect Purchaser Plaintiffs' claims[8] because, any *American Pipe* tolling ended on December 8, 2009, when the plaintiffs in *In re Propane I* moved for preliminary approval of their class settlement and defined the class of persons as individuals who purchased or exchanged the tanks "between August 1, 2008 and November 30, 2009." (Doc. # 136, p. 19). Thus, according to Defendants, tolling ended over three months before the adjusted limitations period began

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[8] The Indirect Purchaser Plaintiffs' state law antitrust claims are governed by the same *American Pipe* standards as their Sherman Act claim. The Indirect Purchaser Plaintiffs' bring state law claims under the antitrust laws of Kansas, Arizona, California, the District of Columbia, Florida, Iowa, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. (Indirect Purchaser Plaintiffs' CAC ¶¶ 156, 164-185). Many of these states have explicitly adopted *American Pipe*. *See e.g. Great Plains Trust Co.*, 492 F.3d at 997 ("Kansas has accordingly adopted the *American Pipe* rule."); *Albano v. Shea Homes Ltd. P'ship*, 254 P.3d 360, 364 (Ariz. 2011) (en banc); *Am. Tierra Corp. v. City of W. Jordan*, 840 P.2d 757, 762 (Utah 1992); *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167, 180 (Iowa 1977); *Maestas v. Sofamor Danek Grp., Inc.*, No. 02A01-9804-CV-00099, 1999 WL 74212, at *5 (Tenn. Ct. App. Feb. 16, 1999); *Lee v. Grand Rapids Bd. of Educ.*, 384 N.W.2d 165, 168 (Mich. Ct. App. 1986). Even for those states that have not explicitly adopted *American Pipe*, the Eighth Circuit has held that "the federal interest in 'the efficiency and economy of the class-action procedure' outweighs any state interest and therefore justifies tolling in diversity cases where the otherwise-applicable state law provides no relief." *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 391 F.3d at 915 (quoting *Adams Pub. Sch. Dist. v. Asbestos Corp., Ltd.*, 7 F.3d 717, 718-19 (8th Cir. 1993)).

on March 27, 2010. (*See* Doc. # 138, p. 27). The Indirect Purchaser Plaintiffs agree that the current class of plaintiffs was excluded from the class definition in the *In re Propane I* settlement; however, they argue that for tolling purposes they were not excluded until the class settlement was granted final approval by this Court on October 6, 2010, which is within the adjusted limitations period. (Doc. # 149, p. 27). Thus, the key question is at what point *American Pipe* tolling ended.

The United States Supreme Court determined that once the statute of limitations is tolled under *American Pipe*, "it remains tolled for all members of the putative class until class certification is denied." *Crown, Cork & Seal*, 462 U.S. at 354. For cases not involving a denial of class certification, *American Pipe* tolling ends when individuals are "notified that they [a]re no longer parties to the suit and they should have realized that they were obliged to file individual suits or intervene in the class action." *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 520 (5th Cir. 2008). *See also Choquette v. City of N.Y.*, 839 F. Supp. 2d 692, 699 (S.D.N.Y. 2012) ("[C]lass members are treated as parties to the class action 'until and unless they received notice thereof and chose not to continue.") (quoting *In re Worldcom Sec. Litig.*, 496 F.3d 245, 255 (2d Cir. 2007) (internal quotation marks omitted); *Apsley v. Boeing Co.*, No. 05-1368, 2013 WL 6440229, at *2 (D. Kan. Dec. 9, 2013) ("The filing limitations period recommences once it is no longer reasonable for plaintiffs to rely on the class to protect their rights."); *Ganousis v. E.I. du Pont de Nemours & Co.,* 803 F. Supp. 149, 155 (N.D. Ill. 1992) ("[T]he limitations clock stops ticking for the individual when the defendant is put on

notice by the filing of the class action, and then it resumes ticking when the prospective plaintiff is put on notice of noncoverage in the class action."). Therefore, the appropriate inquiry is determining when the Indirect Purchaser Plaintiffs in the present case sufficiently notified that they were no longer parties to *In re Propane I*.

The Fourth Circuit has concluded that sufficient notice occurs "when a plaintiff moves for class certification by asserting an unambiguous definition of his desired class that is more narrow than is arguably dictated by his complaint." *Smith v. Pennington*, 352 F.3d 884, 894 (4th Cir. 2003). The Tenth Circuit in *Sawtell v. E.I. du Pont de Nemours & Co., Inc.*, 22 F.3d 248 (10th Cir. 1994) also determined that when a group of plaintiffs move to certify a class based on a more narrow definition than what was asserted in the complaint, *American Pipe* no longer tolls the statute of limitations. 22 F.3d at 253-54. District courts within the Second and Seventh Circuit similarly agree. *See In re New Oriental Educ. & Tech. Grp. Sec. Litig.*, 293 F.R.D. 483, 487 (S.D.N.Y. 2013) (holding that when a class is redefined "more narrowly than [in] the prior individual complaints, and no longer asserts claims on behalf of a portion of the consolidated class, the statute of limitations is no longer tolled under *American Pipe* for that 'abandoned' subclass"); *Ganousis*, 803 F. Supp. at 155-56 (N.D. Ill. 1992).

The first filed complaint in *In re Propane I* defined the class as "[a]ll persons who purchased one or more of Defendants' pre-filled 20-pound capacity Propane Gas Tanks, during the applicable limitations period that contained under 17 pounds of propane." (Case No. 09-00924-CV-W-GAF,

Complaint, ¶ 27). This definition could be construed to include the Indirect Purchaser Plaintiff class from this case which is defined as "[a]ll persons who, in the United States, purchased a filled propane exchange tank, and whose tank was provided by [Defendants after December 1, 2009]." (Indirect Purchaser Plaintiffs' CAC ¶ 99). However, on December 8, 2009, the plaintiffs in *In re Propane I* moved for class certification using a more narrow class definition which limited the class of plaintiffs to individuals who purchased the tanks before November 30, 2009. (Case No. 09-02086-MD-W-GAF, Doc. # 37). Thus, according to precedent from the Fourth, Tenth, Second, and Seventh Circuits, *American Pipe* tolling ended at that point.

Indirect Purchaser Plaintiffs urge this Court to ignore this precedent and instead look to *Choquette* a case from the same district and the same judge, Judge Koeltl, as *Oriental Education* but decided one year previously. (Doc. # 148, p. 29). In *Choquette*, the plaintiffs were members of a previous class action involving prisoners who were strip searched and subjected to nonconsensual gynecological examinations. 839 F. Supp. 2d at 694, 698. The class that was ultimately certified and settled included their claims for unlawful strip searching but not for forced gynecological examinations. *Id.* at 694-95. The parties disagreed about when *American Pipe* tolling ended as to the claims of nonconsensual gynecological examinations. *Id.* at 698. The defendants argued that it ended when the parties in the previous action entered into a settlement agreement which failed to mention any class claims for the forced gynecological examinations, while the plaintiffs alleged that the tolling did not end until

the settlement agreement was preliminarily or finally approved by the court. *Id.* Judge Koeltl ultimately determined that the proposed settlement agreement did not trigger an end to *American Pipe* tolling. *Id.* at 703.

As an initial matter, this case is more factually similar to *Oriental Education* than it is to *Choquette*. Like in *Oriental Education*, the plaintiffs in *In re Propane I* moved to certify a settlement class using a more narrow definition than was asserted in the individual complaints. (Case No. 09-02086-MD-W-GAF, Doc. # 37). No such motion was mentioned in *Choquette*. *See* 839 F. Supp. 2d 692. Further, in *Choquette*, Judge Koeltl took issue with the fact that the position advocated by the defendants would have allowed "actions by class counsel [to] trigger an end to tolling." *Id.* at 701. Instead, Judge Koeltl believed a decision from a court was needed. *Id.* at 699 ("*American Pipe* tolling continues until a class certification decision of the court excludes the claims of the plaintiff."), 700-01, 703. This Court granted the *In re Propane I* plaintiffs' Motion for Preliminary Approval of Class Settlement and approved certification of the narrowed settlement class on March 11, 2010. (Case No. 09-02086-MD-W-GAF, Doc. # 88). Thus, even if a court order is needed to end *American Pipe* tolling, such an order came from this Court almost two weeks before the beginning of the adjusted limitations period. Accordingly, *American Pipe* tolling does not save the Indirect Purchaser Plaintiffs' claims from being barred by the statute of limitations. Therefore, the Indirect Purchaser Plaintiffs have failed to establish any tolling theory sufficient to prevent their state or

federal law antitrust claims from being barred by the statute of limitations.

4. Indirect Purchaser Plaintiffs' Injunctive Relief Claim

The Indirect Purchaser Plaintiffs' final remaining claim is a claim for injunctive relief under Section 1 of the Sherman Act. (Indirect Purchaser Plaintiffs' CAC Count I). While some circuit courts have indicated that the Sherman Act's four year statute of limitations applies to claims for injunctive relief,[9] the Eighth Circuit has analyzed a federal antitrust action for injunctive relief's timeliness under the doctrine of laches. *See Midwestern Mach.*, 392 F.3d at 277. "The doctrine of laches is an equitable defense . . . . For the application of the doctrine of laches to bar a lawsuit, the plaintiff must be guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant." *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804 (8th Cir. 1979). The running of an analogous statute of limitation is "merely one element in the congeries of factors to be considered in determining whether the length of delay was unreasonable and whether the potential for prejudice was great." *Id.* at 805. "A court should focus upon the length of the delay, the reasons therefor, how the delay affected the defendant, and the overall fairness of permitting the assertion of the claim." *Id.* at 806. Further, "[l]aches is considered an affirmative defense, and generally the burden of persuasion on an affirmative

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[9] For example, the Third Circuit in *Pennsylvania Dental Association v. Med. Service Association of Pennsylvania*, 815 F.2d 270 (3d Cir. 1987) assumed that the statute of limitations applied.

defense rests with the defendant." *Id.* (internal citation omitted).

In this case, the analogous statute of limitations has run, which weighs against Plaintiffs. However, the Indirect Purchaser Plaintiffs missed the limitations period by only three months, which weighs in their favor. Additionally, Defendants have made only conclusory allegations that they "will be prejudiced if required to expend further time and resources defending stale claims." (Doc. # 136, p. 16). "Not all prejudice to a defendant will be recognized as supporting a defense of laches." *Goodman*, 606 F.2d at 809 n.17. "There are two kinds of prejudice which might support a defense of laches: (1) the delay has resulted in the loss of the evidence . . .; or (2) the defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed." *Id.* (quoting *Tobacco Workers Int'l Union Local 317 v. Lorillard Corp.*, 448 F.2d 949, 958 (4th Cir. 1971)) (internal citations omitted)). Defendants' conclusory allegations are insufficient to establish the existence of either of these types of prejudice. Although the Indirect Purchaser Plaintiffs have not alleged any excuses or reasons to defend their delay, this Court does not believe that Defendants have met their burden to establish the existence of laches as an affirmative defense.

CONCLUSION

Defendants moved to dismiss both the Direct Purchaser Plaintiffs' and the Indirect Purchaser Plaintiffs' Consolidated Class Action Complaints. Against the Indirect Purchaser Plaintiffs, Defendants first argue that their current claims were barred by the release provisions from *In re Propane I*. However, for the release provision to apply to them, the Indirect Purchaser Plaintiffs must have been a part of the class definition in *In re Propane I* and, taking the allegations of the pleadings as true and without further evidence, it cannot be said that the Indirect Purchaser Plaintiffs in this case were parties in *In re Propane I*. Thus, at this point the release provision does not bar their claims.

Next, Defendants argue that Plaintiffs' claims are barred by the statute of limitations. Because of the administrative action, the adjusted limitations period in this case began on March 27, 2010. Neither of Plaintiffs' tolling theories were sufficient to meet the adjusted limitations period. Under the continuing violations theory, Plaintiffs needed to establish the existence of an overt act that occurred within the adjusted limitations period. However, Plaintiffs failed to allege that a sufficient overt act occurred during the limitations period. Further, *American Pipe* tolling is insufficient to save the Direct Purchaser Plaintiffs' CAC because their current claims were not alleged in *In re Propane I*. *American Pipe* tolling is also insufficient to save the Indirect Purchaser Plaintiffs' state law and federal damages claims because *American Pipe* tolling expired on December 8, 2009 when the plaintiffs in *In re Propane I* moved for class certification using a

more narrow class definition that limited the class of plaintiffs to individuals who purchased the tanks before November 30, 2009. Accordingly, for these reasons and the reasons set forth above, Defendants' Motions to Dismiss the Direct Purchaser Plaintiffs' CAC and the Indirect Purchaser Plaintiffs' Counts II-IV are GRANTED.

However, the Indirect Purchaser Plaintiffs' Count I claim for injunctive relief is governed by the doctrine of laches, not the statute of limitations. Defendants have failed to meet their burden to establish the affirmative defense of the doctrine of laches against that claim. Accordingly, for these reasons and the reasons set forth above, Defendants' Motion to Dismiss Count I of the Indirect Purchaser Plaintiffs' CAC is DENIED.

IT IS SO ORDERED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: July 2, 2015

15 U.S.C. § 15b

§ 15b. Limitation of actions

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN RE: PRE-FILLED PROPANE TANK ANTITRUST LITIGATION	Case No. 14-02567-MD-W-GAF Judge Gary A. Fenner
This Document Relates To All Direct-Purchaser Actions	Jury Trial Demanded

DIRECT PURCHASER CONSOLIDATED AMENDED COMPLAINT

Plaintiffs Morgan Larson LLC, Johnson Auto Electric, Inc., Speed Stop 32, Inc., and Yocum Oil Company, Inc., individually and on behalf of a Class of all others similarly situated, bring this action for treble damages under the antitrust laws of the United States against Defendants, and demand a jury trial. On information and belief, as a result of Plaintiffs' independent investigation and the factual allegations contained in the FTC Administrative Complaint,[1] Plaintiffs allege as follows:

[1] As alleged herein, the Federal Trade Commission ("FTC") filed an administrative complaint against Defendants on March 27, 2014. The FTC only files a complaint after determining, based on its investigation and review of information provided by the Defendants and third parties, that it has reason to believe that the law has been or is being violated.

I. Preliminary Statement

1. The two largest distributors of Blue Rhino and AmeriGas, Ferrellgas Partners, L.P and Ferrellgas, L.P. (doing business as Blue Rhino) and UGI Corporation and AmeriGas Partners, L.P. (doing business as AmeriGas) (collectively "Defendants"), conspired and acted in concert to eliminate competition by reducing the amount of propane they would put in their tanks, thereby raising the per-pound price of propane across the country as well as by dividing the market for Filled Propane Exchange Tanks in violation of federal antitrust law.

2. Filled Propane Exchange Tanks are portable steel cylinders pre-filled with propane gas, primarily used to power outdoor grills, as well as patio heaters and mosquito magnets. Defendants supply propane in Filled Propane Exchange Tanks to thousands of gas stations, convenience stores, hardware stores, grocery stores, and big box retailers ("Plaintiffs"). Consumers may exchange empty tanks for Filled Propane Exchange Tanks at Plaintiffs' retail sites, paying only for the propane. This process eliminates the need for dispensing propane at Plaintiffs' retail sites which promotes safety and convenience for Plaintiffs.

3. Filled Propane Exchange Tanks are manufactured and sold in a standard size with a maximum capacity of 25 pounds. However, due to various safety regulations, Filled Propane Exchange Tanks cannot be filled to more than 80 percent capacity (or 20 pounds). Prior to Defendants' conspiracy, Blue Rhino and AmeriGas filled their

Filled Propane Exchange Tanks with 17 pounds of propane.

4. In 2006 and 2007 Defendants' costs began to rise largely due to increasing fuel costs. Increasing costs began to squeeze Defendants' profit margins, prompting AmeriGas to begin exploring whether it could effectively raise prices. Ultimately, it determined that customers would not accept a price increase, at which point AmeriGas began to explore other options.

5. Beginning in 2006, AmeriGas executives Carey Monaghan and Ken Janish began putting out feelers to Blue Rhino to determine what course of action Blue Rhino intended to take in response to rising costs.

6. In 2008 Defendants" costs increased dramatically – both Blue Rhino and AmeriGas reported increases in costs of hundreds of millions of dollars due to increases in the price of propane, steel for the cylinders, and diesel for the transportation of the tanks. These cost increases put significant pressure on Defendants' profit margins. However, Defendants still believed their customers would not accept a price increase. Accordingly, AmeriGas began exploring another option: maintaining the price of Filled Propane Exchange Tanks but decreasing the fill level.

7. Starting no later than spring 2008, however, Blue Rhino and AmeriGas, through collusive conduct, reduced their fill levels from 17 pounds per tank to 15 pounds per tank while maintaining the same price per "full" tank, for the purpose of increasing their margins on the sale of propane exchange tanks. This collusion effectively raised the

prices charged to Plaintiffs by more than 13% per pound.

8. Blue Rhino and AmeriGas each knew that neither one could successfully force a fill-level reduction – and thus a price hike – on all retailers if the other one presented a competitive, 17-pound option at the existing price. They therefore engaged in dozens of calls, emails, and in-person meetings to coordinate a unified front that would leave the largest retailers and then the entire industry with no choice but to accept their demands.

9. Blue Rhino's President, Tod Brown, and AmeriGas's Director of National Accounts, Ken Janish, exchanged seven phone calls on June 18 and 19, 2008, during which AmeriGas agreed that if Blue Rhino reduced its fill levels to 15 pounds per tank, AmeriGas would follow suit.

10. By October 2008, the propane conspiracy succeeded. Blue Rhino and AmeriGas, acting in concert, forced Walmart and other large retailers to accept the fill reduction and ceased offering 17-pound Filled Propane Exchange Tanks to smaller retailers. This concerted action had the purpose and effect of raising the effective wholesale prices at which Blue Rhino and AmeriGas sold propane in Filled Propane Exchange Tanks to retailers throughout the United States.

11. Defendants' conduct has restrained price competition and led to higher prices for propane exchange tanks in the United States. As a result of Defendants' conduct, Plaintiffs and other members of the proposed Class (defined below) paid more for Filled Propane Exchange Tanks from at least July

21, 2008 through January 9, 2015 (the "Class Period" or "Relevant Period").

12. Defendants further ensured that prices for propane and Filled Propane Exchange Tanks would remain high by agreeing not to compete for each other's customers or geographic markets. For example, Blue Rhino secured the contract to supply one chain of grocery stores and AmeriGas another chain and neither Blue Rhino nor AmeriGas competed for the other's grocery store business.

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

14. Defendants' conduct amounts to a violation of the antitrust laws, one that has rendered Blue Rhino and AmeriGas largely immune to market forces that should have caused the prices they charged for Filled Propane Exchange Tanks throughout the Class Period to be lower.

15. As Blue Rhino stated in its 2013 Form 10-K, it has "earned relatively greater gross margin per gallon" despite declining propane prices because it has been "able to manage the decline in sales price

per gallon to a level below the corresponding decline in product prices." Such a result could not be achieved in a competitive market absent Defendants' conspiracy.

16. On March 27, 2014, the Federal Trade Commission ("FTC") issued a complaint against Blue Rhino and AmeriGas, alleging conduct similar to that alleged herein, and asserting that Blue Rhino and AmeriGas had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. As the FTC concluded, Defendants' "conduct has restrained price competition and led to higher prices for sales of propane exchange tanks in the United States."

17. Plaintiffs are direct purchasers of Defendants' filled propane exchange tanks and are thus the first payers of those illegally inflated prices. They therefore bring suit under the Sherman Act, 15 U.S.C. §§ 1, 15, seeking treble damages to compensate their losses and deter future violations.

II. PARTIES

a. Plaintiffs

18. Plaintiff Morgan Larson, LLC operates four gas stations in Mississippi. Since at least 2009 and continuing through the present, Morgan Larson has purchased Filled Propane Exchange Tanks from one or more of the Defendants and has paid inflated per-pound prices due to Defendants' unlawful conspiracy.

19. Plaintiff Johnson Auto Electric, Inc. operates an automotive service center in California. Since at least 2008 and continuing through 2012, Johnson Auto Electric, Inc. purchased Filled Propane Exchange Tanks from one or more of the Defendants

and has paid inflated per-pound prices due to Defendants' unlawful conspiracy.

20. Plaintiff Speed Stop 32, Inc. operates a chain of gas stations and food marts in Michigan. Since at least 2008 and continuing through the present, Speed Stop 32 has purchased Filled Propane Exchange Tanks from one or more of the Defendants and has paid inflated per-pound prices due to Defendants' unlawful conspiracy.

21. Plaintiff Yocum Oil Company, Inc. operated a chain of gas station and convenience stores in Minnesota. During the Class Period through May, 2014, Yocum Oil Company purchased Filled Propane Exchange Tanks from one or more of the Defendants and has paid inflated per-pound prices due to Defendants' unlawful conspiracy.

b. Defendants

22. Defendant Ferrellgas, L.P. is a Delaware limited partnership, with its principal place of business located at 7500 College Boulevard, Overland Park, Kansas. Ferrellgas, L.P. operates a nationwide propane distribution business, selling approximately 900 million gallons of propane annually. It sells propane exchange tanks nationally under the Blue Rhino name.

23. Defendant Ferrellgas Partners, L.P., is a Delaware limited partnership, with its principal place of business located at 7500 College Boulevard, Overland Park, Kansas. According to Ferrellgas Partners, L.P.'s 2013 Form 10-K, Ferrellgas, L.P. is the general partner of Ferrellgas Partners, L.P., and performs all management functions for Ferrellgas Partners, L.P. and its subsidiaries.

24. For the purposes of this complaint, "Blue Rhino" shall refer to Ferrellgas Partners, L.P., and Ferrellgas, L.P., collectively.

25. Defendant AmeriGas Propane, L.P., is a Delaware limited partnership, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania. AmeriGas Propane, L.P. operates a nationwide propane distribution business, selling nearly 1.4 billion gallons of propane annually. It sells Filled Propane Exchange Tanks nationally under the AmeriGas name, sometimes doing business as AmeriGas Cylinder Exchange. As of September 2011, AmeriGas exchange tanks were sold to more than 38,000 retail locations throughout the United States.

26. Defendant AmeriGas Partners, L.P., is a Delaware limited partnership, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania. According to AmeriGas Partners, L.P.'s 2013 Form 10-K, it conducts its business principally through its subsidiary, Defendant AmeriGas Propane, L.P. Between approximately January 12, 2012 and July 1, 2013, AmeriGas Partners, L.P. also conducted business through Heritage Operating, L.P.

27. AmeriGas Propane, Inc. is a Pennsylvania corporation, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania. AmeriGas Propane, Inc. is the general partner of both AmeriGas Partners, L.P. and AmeriGas Propane, L.P. and is responsible for managing their operations.

28. Defendant UGI Corporation is a Pennsylvania corporation, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania. UGI Corporation is the parent and sole owner of AmeriGas Propane, Inc.

29. For the purposes of this complaint, "AmeriGas" shall refer to AmeriGas Propane, L.P., AmeriGas Propane, Inc., AmeriGas Partners, L.P., and UGI Corporation, collectively.

III. JURISDICTION AND VENUE

30. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 4 and 28 U.S.C. §§ 1331, 1337.

31. This Court has personal jurisdiction over Defendants because each Defendant (a) transacted business throughout the United States, including in this District; (b) sold Filled Propane Exchange Tanks throughout the United States, including in this District; (c) had substantial contacts with the United States, including in this District; and/or (d) committed one or more overt acts in furtherance of their illegal scheme in the United States. In addition, the conspiracy alleged herein was directed at, and had the intended effect of, causing injury to persons residing in, located in, or doing business throughout the United States, including in this District.

32. Venue is proper in this judicial district under 15 U.S.C. § 22 and 28 U.S.C. § 1391(b)(1)-(2) because, throughout the Class Period, Defendants resided, transacted business, were found, or had agents within this District, and a portion of the

affected interstate trade and commerce discussed below was carried out in this District.

IV. INTERSTATE COMMERCE

33. Throughout the Class Period, Defendants manufactured, produced, sold, distributed, and shipped substantial quantities of Filled Propane Exchange Tanks in a continuous and uninterrupted flow of transactions in interstate commerce throughout the United States, including into, through, and within this District.

34. Defendants' conspiracy, as described herein, had a direct and substantial effect on interstate trade and commerce.

V. AGENTS AND CO-CONSPIRATORS

35. Defendants' acts, as alleged in this Complaint, were authorized, ordered, or done by their officers, agents, employees, or representatives, while actively engaged in the management and operation of Defendants' businesses or affairs.

36. Various persons or firms not named as Defendants have participated as co-conspirators in the violations alleged herein and have performed acts and made statements in furtherance thereof.

VI. RELEVANT MARKET

37. The relevant product market is the wholesale market for sale of propane in Filled Propane Exchange Tanks. The structure and characteristics of the market for propane in Filled Propane Exchange Tanks is particularly conducive to anticompetitive conduct.

38. Propane and Filled Propane Exchange Tanks are homogeneous, standardized products. The propane sold by Blue Rhino is interchangeable

with that sold by AmeriGas or any other propane supplier. Similarly, Filled Propane Exchange Tanks consist of a standardized tank and a standardized valve system. Markets involving standardized, homogeneous products such as propane and Filled Propane Exchange Tanks are conducive to anticompetitive conduct and create an incentive to collude because market participants typically compete on the basis of price rather than other attributes such as product quality or customer service and because it is easier for members of the cartel to monitor potential cheating on the agreed-upon inflated price.

39. Filled Propane Exchange Tanks are manufactured and sold in a standard size with a maximum capacity of 25 pounds. For practical purposes, however, the maximum capacity is somewhat smaller. Due to safety regulations, Filled Propane Exchange Tanks cannot be filled to more than 80 percent capacity. Additionally, the National Fire Protection Association required use of an overfilling protection device ("OPD") as of 2002, reducing the available capacity even further to approximately 17.5 pounds. In practice, therefore, all propane exchange tanks have a standard maximum capacity of between 17 and 17.5 pounds.

40. There are no widely used substitutes for Filled Propane Exchange Tanks that provide a similar ease of use. No other product significantly constrains the prices of Filled Propane Exchange Tanks. The lack of available substitutes for a product creates an incentive to collude and also helps facilitate an effective price-fixing conspiracy. Without substitutes, producers of the product can raise prices and maintain non-competitive prices

without losing significant sales to closely competing products.

41. Prior to the introduction of Filled Propane Exchange Tanks, the only option for consumers who needed to purchase propane for outdoor grills, patio heaters, or similar uses was to purchase an empty cylinder and bring it to a filling location. In the 1990s, Defendants began providing Filled Propane Exchange Tanks, allowing consumers to exchange their empty cylinders for prefilled tanks, paying only for the propane. Filled Propane Exchange Tanks quickly became popular due to the convenience and safety benefits for retailers in dispensing with large on-site propane tanks and training employees to perform refilling services, as well as the convenience and ease for consumers of obtaining a fresh, refurbished tank rather than refilling an old cylinder. This has led to a decline in the use of direct consumer refilling over the past ten years, such that that form of refilling does not place a constraint on the price of Filled Propane Exchange Tanks.

42. The relevant geographic market is the United States. Most propane is produced in the Gulf Coast or Midwest, but can be sold nationwide due to the relative ease of transportation. Because of the widely distributed demand, sellers of propane and Filled Propane Exchange Tanks must have national reach and nationally distributed refilling facilities to compete effectively. As Blue Rhino stated in its 2013 Form 10-K, there are "few propane distributors that can competitively serve commercial and portable tank exchange customers on a nationwide basis. . . . [I]nvestments in technology similar to ours require both a large scale and a national presence, in order

to generate sustainable operational savings to produce a sufficient return on investment." Thus, Filled Propane Exchange Tanks suppliers that lack a "large scale and a national presence" are unable to constrain the prices of Filled Propane Exchange Tanks. At all times relevant to this complaint the market for propane in Filled Propane Exchange Tanks has been highly concentrated. A high degree of concentration facilitated coordination among Defendants. Throughout the Class Period, Blue Rhino and AmeriGas were the two largest suppliers of propane and Filled Propane Exchange Tanks in the United States. Blue Rhino controlled approximately 50 percent of the national wholesale market for Filled Propane Exchange Tanks, while AmeriGas controlled approximately 30 percent. The next largest competitor, Heritage Propane Express, served less than ten percent of the market.

43. The FTC has identified the wholesale marketing and sale of Filled Propane Exchange Tanks as a product market with a national geographic scope. *See* Complaint ¶¶ 26-29, *In the Matter of Ferrellgas Partners, L.P.*, No. 9360, 2014 WL 1396496, (F.T.C. Mar. 27, 2014) (hereinafter "FTC Administrative Complaint").

VII. THE PROPANE EXCHANGE PROCESS

44. When Plaintiffs purchased Filled Propane Exchange Tanks from Defendants, they were typically offered the option of returning an empty tank to obtain a lower price. In turn, Plaintiffs sold the filled tanks to end users, offering a similar deal.

45. After receiving empty tanks from Plaintiffs, Defendants brought the empty tanks to refurbishing

and refilling facilities, where they prepared and refilled the tanks to be redistributed to Plaintiffs.

46. Beginning in or about 2006, Defendants entered into a series of "co-packing agreements." Pursuant to these agreements, each company agreed to refurbish and refill propane exchange tanks for the other company at certain of each company's facilities. Today, each Defendant processes slightly less than ten percent of the other company's used, empty tanks pursuant to co-packing agreements. Blue Rhino did and does refurbish and refill exchange tanks for AmeriGas at Blue Rhino facilities in Florida, Colorado, Washington, and Missouri. AmeriGas did and does refurbish and refill exchange tanks for Blue Rhino at AmeriGas facilities in California and New Hampshire.

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

VIII. ANTICOMPETITIVE CONDUCT

a. In the Wake of Rising Costs Defendants Explore Conspiracy

48. Prior to the conspiracy, most if not all suppliers of propane in Filled Propane Exchange Tanks, including both Defendants, filled their tanks at a standard 17 pounds.

49. Beginning in 2006 and 2007, Defendants' costs began to increase largely as a result of increases in the price of gas. Increasing costs squeezed Defendants' profit margins and, as a result, Carey Monaghan and Ken Janish of AmeriGas put feelers out to Blue Rhino to explore whether Blue Rhino would agree to increase its

prices or decrease fill levels. Monaghan and Janish indicated to Blue Rhino at that time that whatever steps Blue Rhino took in response to rising fuel costs AmeriGas would follow.

50. In early 2008, Defendants faced rapidly increasing input costs, including increases in the cost of propane, steel for the tanks, and the diesel fuel for the delivery trucks. In response to an investigation by the Federal Trade Commission, Defendants have admitted that the industry faced dramatic increases in input costs.

51. To forestall decreased profit margins, Blue Rhino and AmeriGas both considered decreasing the fill level in their propane exchange tanks to improve profitability in 2008. Each one knew, however, that it could not successfully do so if the other did not follow.

52. In 2007 and 2008, AmeriGas foresaw "only modest growth in total demand" for propane, according to its Form 10-Ks. Thus, when it considered decreasing fill levels without decreasing per-tank prices in January 2008, AmeriGas recognized that major competitors could take significant business from it by maintaining their pre-existing fill levels at pre-existing prices. Accordingly, AmeriGas concluded that it could not implement a fill reduction at that time.

53. In April 2008, Blue Rhino similarly considered a proposal to reduce its fill level from 17 pounds to 15 pounds, without a corresponding price reduction. Like AmeriGas, Blue Rhino recognized that such a move could be disastrous if it was the only supplier to make the change.

54. Blue Rhino was particularly concerned that moving alone would put it at a competitive disadvantage with Walmart, which split its business among multiple suppliers to foster competition and fight price increases. At that time, Walmart was the largest retailer of propane exchange tanks in the United States. Blue Rhino supplied approximately 60 percent of Walmart locations, while AmeriGas supplied 35 percent. The remaining five percent was supplied by Ozark Mountain Propane Company ("Ozark"), a small regional supplier.

55. As the Blue Rhino Director of Strategic Accounts responsible for Walmart reported to his manager: "[I]n my mind the 'watch out' is the competitive difference between [Blue Rhino, AmeriGas] and Ozark. We are offering less product vs. [Walmart's] other 2 suppliers. . . . Once we explain this is a done deal (and that we are not asking for [Walmart's] input or letting him decide), he may become resentful and threaten to take states. . . . Then, we need to pray that [AmeriGas] takes a similar move as soon as possible. If [AmeriGas] doesn't move, we will have a BIG issue." He elaborated: "The only thing that can make this go away is if AmeriGas goes to 15 as well, but it has to happen very soon after us to legitimize our move."

56. Blue Rhino's need to bring AmeriGas on board was even clearer after Blue Rhino broached the fill reduction with Walmart. On or about April 28, 2008, Blue Rhino's Director of Strategic Accounts informed a Walmart buyer that Blue Rhino intended to reduce its fill level. Walmart understood the proposed fill reduction to be a price increase and refused to agree. Walmart also said that it did not want to carry Filled Propane Exchange Tanks with

different fill levels, implying that it might shift all business to AmeriGas and Ozark if forced to choose between 17-pound and 15-pound tanks.

57. After this rejection, Blue Rhino began several months of communication and coordination designed to get AmeriGas to join its effort to force a fill reduction on Walmrt and other retailers.

58. On or about May 23, 2008, Blue Rhino's Vice President of Operations, Jay Werner, met with an AmeriGas vice president responsible for the Filled Propane Exchange Tanks business, ostensibly to discuss their co-packing arrangement. But, as AmeriGas's notes of the meeting reveal, Defendants used their co-packing cooperation to further anticompetitive goals. Among the topics discussed at the meeting were:

a. Blue Rhino's plan—not yet agreed to by any retailer—to reduce its fill level from 17 to 15 pounds;

b. Blue Rhino's desire to exclude Heritage Propane, a small maverick competitor, from access to refilling facilities that a third party was considering building; and

c. Each Defendant's costs of refilling at various facilities.

59. On May 29, 2008, Blue Rhino proposed the fill reduction to Lowe's, Blue Rhino's largest retail customer. Lowe's accepted the proposal, but only on the condition that Blue Rhino convert all of its other customers, including Walmart, to 15-pound tanks within 30 days of implementing the fill reduction at Lowe's.

60. From June 18 to June 19, 2008, Blue Rhino's President, Tod Brown, exchanged seven phone calls

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

61. Other AmeriGas executives were aware of and condoned Janish's unlawful conversations with Blue Rhino, as those conversations were frequently mentioned during AmeriGas business meetings and bi-weekly sales and operations conference calls. The AmeriGas executives who participated in these calls and were aware of Janish's discussions with Blue Rhino included President and CEO Gene Bissell, Director of Operations Bo Cornall, Vice President Carey Monaghan, Vice President Joe Powers, National Account Manager Michele McMahon, and National Account Manager Randy Doub.

62. During calls and meetings with these and other AmeriGas executives, Janish repeatedly dismissed concerns that Blue Rhino might undercut AmeriGas on price or fill levels with words to the effect that: "I talked to Blue Rhino, and that's not going to happen."

63. On June 20, 2008, AmeriGas management produced a draft budget incorporating a fill reduction from 17 to 15 pounds.

64. Brown again spoke with an AmeriGas executive (this time, AmeriGas's President of Sales and Marketing) about the fill reduction a few days later, on June 25, 2008. That same day, Blue Rhino

began informing its retail customers that it planned to reduce the fill level in its Filled Propane Exchange Tanks as of July 21, 2008.

65. The next day, Blue Rhino's Werner again spoke with an AmeriGas employee about the fill reduction, discussing (among other things) the timing for rolling out the fill reduction to their customers.

66. No later than the last week of June 2008, Blue Rhino and AmeriGas had agreed on both the fill reduction and a rollout plan. Blue Rhino would begin selling 15-pound Filled Propane Exchange Tanks on July 21, 2008, and AmeriGas would follow on August 1, 2008.

67. When AmeriGas announced the reduction to its employees on July 15, 2008, it made it clear that it was acting not just on its own but in collaboration with Blue Rhino. It explained: "In an attempt to offset some of these expenses, achieve desired product margins, and maintain retail prices at an attractive level for consumers, AmeriGas Cylinder Exchange *and other national providers* are transitioning to a 15 pound cylinder. This slight decrease from current 17 pound levels *will quickly become the industry standard* . . . ." (Emphasis added.)

68. Similarly, AmeriGas told its production team that "[t]he major competitors in cylinder exchange will also be moving to a 15 pound cylinder and as a result, it will become the industry standard." The only "major competitor[]" AmeriGas was referring to was its co-conspirator Blue Rhino—but as AmeriGas knew, the two of them acting

together would be sufficient to move most, if not all, of the industry to the 15-pound standard.

b. The Conspirators' Joint Effort to Force the Fill Reduction on Walmart

69. As discussed above, Lowe's, Blue Rhino's largest customer, agreed to accept the fill reduction only on the express condition that Blue Rhino converted its other customers, including Walmart, to 15-pound Filled Propane Exchange Tanks. Defendants knew that other retailers might similarly balk at the 15-pound tanks if their retail competitors were selling 17-pound tanks. Accordingly, Blue Rhino and AmeriGas knew that their efforts could not succeed if they failed to impose the fill reduction on the largest reseller-retailer, Walmart.

70. However, Walmart had resisted Blue Rhino's early effort to impose the fill reduction. As discussed above, it was clear to Blue Rhino that Walmart would not accept a fill reduction coming from Blue Rhino alone, and might even take business away from Blue Rhino if Blue Rhino pressed the issue.

71. It was thus clear to Defendants that they needed to present a united front to Walmart so that it had no choice but to accept the fill reduction. Accordingly, Defendants engaged in a concerted, coordinated effort to convert Walmart to 15-pound Filled Propane Exchange Tanks.

72. From July 2008 through October 2008, sales executives from the two Defendants communicated repeatedly by telephone and email to discuss their progress with Walmart and to maintain their joint commitment to the scheme to reduce fill levels.

73. When AmeriGas first announced its intention to reduce its fill levels to Walmart, it made clear that Walmart faced a new "industry standard" and not just a negotiable effort by AmeriGas. For example, on July 10, 2008, AmeriGas's Director of National Accounts emailed Walmart's buyer to inform him that "the *cylinder exchange industry* is planning a move to a standard weight of propane in a tank from 17 lbs. net to 15 lbs. net." (Emphasis added.)

74. Walmart initially rejected AmeriGas's proposal, as it had Blue Rhino's. The following day, July 10, 2008, Blue Rhino's Vice President of Sales and AmeriGas's Director of National Accounts discussed Walmart's position over the phone.

75. On or about July 21 and 22, 2008, the two executives again spoke at length by telephone, discussing AmeriGas's plans for overcoming Walmart's rejection of the fill reduction.

76. On or about August 11, 2008, the AmeriGas Director of National Accounts called Blue Rhino's Vice President of Sales to inform him that he was having trouble getting in touch with Walmart to discuss the reduction in fill levels.

77. Blue Rhino strategized internally as to how AmeriGas could make headway with Walmart. On or about August 13, 2008, the Blue Rhino sales executives responsible for dealing with Walmart discussed the possibility of advising AmeriGas to ensure that Home Depot, AmeriGas's largest retail customer, was visibly supplied with the reduced 15-pound Filled Propane Exchange Tanks, because Walmart would be more likely to accept the fill

reduction if it knew that Home Depot had already accepted it.

78. On August 21, 2008, Blue Rhino and AmeriGas sales executives spoke several times by telephone. Shortly after these communications, the AmeriGas sales executive and AmeriGas's operations manager directed their colleagues to do exactly what Blue Rhino had discussed internally: ensure that the Home Depot store in Rogers, Arkansas (near Walmart's Bentonville headquarters) carried only 15-pound tanks.

79. On September 2, 2008, Blue Rhino's Vice President of Sales and AmeriGas Director of National Accounts spoke by telephone again. They discussed their respective efforts to convert their various customers to 15-pound Filled Propane Exchange Tanks, as well as the current retail pricing of tanks at Lowe's.

80. On September 12, 2008, Blue Rhino's Vice President of Sales and AmeriGas's Director of National Accounts spoke by telephone again to discuss the status of their negotiations with Walmart. AmeriGas's Director of National Accounts suggested issuing an ultimatum to Walmart, to which Blue Rhino's Vice President of Sales responded by encouraging AmeriGas to "hang in there."

81. Blue Rhino's Vice President of Sales and AmeriGas's Director of National Accounts spoke by telephone at least twice more over the next two weeks.

82. On September 30, 2008, the AmeriGas Director of National Accounts emailed Blue Rhino's Vice President of Sales to inform him that Walmart

management was planning to discuss the proposed fill reduction the following day.

83. As October 2008 began, however, Walmart had still not agreed to Defendants' demands. On October 6, the Lowe's buyer reminded Blue Rhino that it had agreed to accept 15-pound Filled Propane Exchange Tanks on the condition that all other Blue Rhino customers would be converted within 30 days. Lowe's observed that Walmart was still selling 17-pound Filled Propane Exchange Tanks, putting Lowe's at a competitive disadvantage. The Lowe's buyer demanded that Blue Rhino either move all of its customers to 15-pound tanks or convert Lowe's back to 17-pound tanks at the same price it was paying for the 15-pound tanks.

84. Pressured by Lowe's demand, Blue Rhino's President forwarded the Lowe's email to his Vice President of Sales and directed him to obtain Walmart's acceptance of the fill reduction that day. The Blue Rhino Vice President of Sales took action almost immediately—by calling AmeriGas's Director of National Accounts for 16 minutes.

85. After hanging up with the AmeriGas Director of National Accounts, the Blue Rhino Vice President of Sales emailed Walmart to demand that it accept the fill reduction.

86. Early the next morning, the AmeriGas Director of National Accounts emailed Walmart in similar language, urging it to implement the fill reduction.

87. On October 10, 2008, presented with identical demands from its only two national propane exchange tank suppliers, Walmart

capitulated and accepted the fill reduction from both Blue Rhino and AmeriGas.

88. Without this coordinated action and mutually reinforced resolve, Defendants likely would not have been able to convince Walmart to accept their proposal and thus would also have lost the ability to convert Lowe's and other retailers to 15-pound tanks. Rather than prepare their facilities to fill both 15-pound and 17-pound Filled Propane Exchange Tanks, they likely would have had to abandon their scheme to reduce the amount of propane supplied to Plaintiffs (and thereby increase the price of propane). But Defendants' combined efforts succeeded in forcing Walmart and the rest of their retail customers to accept 15-pound Filled Propane Exchange Tanks at what had previously been 17-pound prices, raising and maintaining the price per pound of propane by more than 13 percent.

89. Defendants' conspiracy had the purpose and effect of restraining competition, limiting supply, and increasing and maintaining prices for Filled Propane Exchange Tanks.

c. Market Allocation

90. AmeriGas and Blue Rhino also agreed to allocate customers and markets between themselves in furtherance of their collusion to maintain prices at supracompetitive levels.

91. For example, AmeriGas took Walmart's West Coast business and Blue Rhino took Walmart's East Coast business. Similarly, Blue Rhino was allocated all of Kroger's business and AmeriGas was allocated all of Albertson's business.

92. Through at least the end of 2010, Defendants regularly communicated to assure

compliance with the conspiracy. Defendants also monitored the market to ensure that neither cheated on their anticompetitive agreement by offering a price reduction or competing for one another's customers or geographic markets. Should cheating be suspected, Defendants communicated with each other to reassure each other of their compliance with the conspiracy.

93. For example, in or about 2008, Janish approached Circle K about renewing its contract with AmeriGas. The Circle K representative told Janish that Blue Rhino had offered more favorable terms than AmeriGas was offering. Janish then contacted a Blue Rhino executive, who denied that Blue Rhino had offered more favorable terms to Circle K. After this conversation, Circle K renewed its contract with AmeriGas.

IX. GOVERNMENTAL INVESTIGATION & PRIOR CLASS ACTION

a. FTC Complaint

94. On March 27, 2014, the Federal Trade Commission issued a complaint against Ferrellgas Partners, L.P., Ferrellgas, L.P., AmeriGas Partners, L.P., and UGI Corp., alleging substantially the same conspiracy as alleged here and charging Defendants with having violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

95. According to the FTC's Complaint, Defendants' anticompetitive agreement, "restrained price competition and led to higher prices for sales of propane exchange tanks in the United States." FTC Administrative Complaint ¶ 9. More specifically, Defendants' agreed upon fill level reduction, "was in

effect a 13% increase in the price of propane." *Id.* ¶ 33.

96. On October 31, 2014, Defendants entered two consent agreements (one for the AmeriGas Defendants and another for the Blue Rhino Defendants) with the FTC in which they agreed to cease and desist and change various business practices in exchange for the FTC dismissing its complaint.

97. The consent agreements prohibit the companies from soliciting, offering, participating in, or entering or attempting to enter into any type of agreement with any competitor in the propane exchange business to raise, fix, maintain, or stabilize the prices or price levels of propane exchange tanks through any means – including modifying the fill level contained in propane tanks or coordinating communications to customers. The companies also are prohibited from sharing sensitive non-public business information with competitors except in narrowly defined circumstances. The consent agreements also require the companies to maintain antitrust compliance programs.

98. The Commission voted to accept the proposed consent orders, which were recently approved on January 9, 2015.

99. Though Defendants conduct clearly injured Plaintiffs and the proposed Direct-Purchaser Class, the FTC's Consent Decree in no way compensates Plaintiffs or the Class for their injuries.

b. Prior Class Action

100. Beginning in June 2009, purchasers of Filled Propane Exchange Tanks brought more than a dozen class action lawsuits against Defendants alleging

that the conduct described above violated deceptive marketing laws.

101. On August 6, 2009, the first antitrust class action claim was filed against Defendants in *Downs v. Ferrellgas Partners, L.P.*, No. 09-cv-2412 (D. Kan.). The *Downs* plaintiffs sought to represent a class of "[a]ll persons who purchased one or more of Defendants' pre-filled 20-pound capacity Propane Gas Tanks, during the applicable limitations period that contained under 17 pounds of propane gas." Complaint at ¶ 27, *Downs v. Ferrellgas Partners, L.P.*, No. 09-cv-2412 (D. Kan. Aug. 6, 2009), ECF No. 1. The proposed class was not limited to indirect purchasers. Plaintiffs and the other members of the proposed Direct-Purchaser Class in this case were thus putative absent class members in *Downs*.

102. The 2009 actions were transferred to the District Court for the Western District of Missouri for pretrial consolidation and coordination by the Judicial Panel on Multidistrict Litigation.

103. On February 22, 2010, counsel for the consolidated class actions filed a consolidated class action complaint, seeking to represent a class of "[a]ll persons who purchased a Propane Tank sold, marketed, or distributed by any Defendant during the applicable limitations periods" bringing claims under, *inter alia*, 15 U.S.C. § 1. Consolidated Class Action Complaint at ¶ 77, *In re Pre-Filled Propane Tank Mktg. and Sales Practices Litig.*, No 4:09-md-02086-GAF (W.D. Mo. Feb. 22, 2010), ECF No. 79. The proposed class was not limited to indirect purchasers. Plaintiffs and the other members of the proposed Direct-Purchaser Class in this case were thus putative absent class members in *Downs*.

104. On December 9, 2009, the consolidated plaintiffs filed a motion for certification of a settlement class and preliminary approval of a proposed settlement with AmeriGas. The settlement class was defined to include "all persons in the United States who purchased or exchanged an AmeriGas 20-pound propane gas cylinder, *not for resale*, between August 1, 2008 and November 30, 2009." Mot. for Order for Prelim. Approval of Class Settlement, *In re Pre-Filled Propane Tank Mktg. & Sales Practices Litig.*, No. 4:09-md-02086-GAF (W.D. Mo. Dec. 8, 2009), ECF No. 37 (emphasis added). Because Plaintiffs and the rest of the proposed Class in this case purchased Filled Propane Exchange Tanks for resale, they were not members of this settlement class.

105. On October 6, 2010, the court granted final approval to the AmeriGas class settlement. Although there were various changes made to the settlement, the class definition still excluded Plaintiffs and the rest of the proposed Class in this case.

106. On October 6, 2011, the consolidated plaintiffs filed a motion for certification of a settlement class and preliminary approval of a proposed settlement with Blue Rhino. The settlement class was defined to include [a]ll people in the United States who purchased or exchanged one or more of Ferrellgas's 20-pound propane gas cylinders, *not for resale*, between June 15, 2005, and the date of Preliminary Approval." Mot. for Prelim. Approval of Class Settlement for Certification of a Settlement Class and for Permission to Disseminate Class Notice at 1, *In re Pre-Filled Propane Tank Mktg. & Sales Practices Litig.*, No. 4:09-md-02086-

GAF (W.D. Mo. Oct. 6, 2011), ECF No. 249 (emphasis added). Because Plaintiffs and the rest of the proposed Class in this case purchased Filled Propane Exchange Tanks for resale, they were not members of this settlement class.

107. On May 31, 2012, the court granted final approval to the Blue Rhino class settlement.

108. Despite their settlements, Defendants maintained their illegally agreed-upon fill levels rather than resuming competition, preserving the unlawfully inflated prices that their conspiracy had produced.

109. Moreover, in furtherance of the conspiracy, Defendants continued to have regular communications regarding pricing, fill levels, and market allocation until at least late 2010.

X. INJURY TO PLAINTIFFS AND CLASS MEMBERS

110. As described herein, as a result of Defendants' conspiracy, during the Class Period Plaintiffs and other Class members paid a higher price per pound for Filled Propane Exchange Tanks than they would have paid in a competitive market.

111. Plaintiffs purchased Filled Propane Exchange Tanks from Blue Rhino or AmeriGas on multiple occasions during the Class Period. On each occasion, Plaintiffs purchased Filled Propane Exchange Tanks containing only 15 pounds of propane, pursuant to the conspiracy, but sold at the price they would have been charged for 17-pound tanks but for the conspiracy. As Defendants kept prices constant despite the fill level reduction, this amounted to an effective price increase of 13%.

XI. CLASS ACTION ALLEGATIONS

112. Plaintiffs sue on behalf of themselves and pursuant to Federal Rule of Civil Procedure 23(b)(3) on behalf of the following nationwide Class of persons ("Class"):

> All entities in the United States who purchased for resale Filled Propane Exchange Tanks directly from Defendants, or paid to exchange a previously purchased Filled Propane Exchange Tanks directly with Defendants, between July 21, 2008, and January 9, 2015. Excluded from the Class are Defendants, their affiliates, subsidiaries, and parents, and their respective directors, officer, employees, legal representatives, and agents. Any judge to whom this case is assigned and any other person described in 28 U.S.C. § 455(b)(4)-(5) is also excluded.

113. The Class contains thousands if not tens of thousands of members, as Defendants supply Filled Propane Exchange Tanks to tens of thousands of retail locations. The Class is so numerous that individual joinder of all members is impracticable.

114. The Class is ascertainable either from Defendants' records or through self-identification in a claims process.

115. Plaintiffs' claims are typical of the claims of other Class members as they arise out of the same course of conduct and the same legal theories, and Plaintiffs challenge Defendants' conduct with respect to the Class as a whole.

116. Plaintiffs have retained able and experienced class action litigators as its counsel. Plaintiffs have no conflicts with other Class

members and will fairly and adequately protect the interests of the Class.

117. The case raises common questions of law and fact that are capable of Class-wide resolution, including:

a. whether Blue Rhino and AmeriGas violated section 1 of the Sherman Act by conspiring and acting in concert to reduce the fill level in Filled Propane Exchange Tanks from 17 pounds to 15 pounds, without a corresponding price reduction;

b. whether Blue Rhino and AmeriGas violated section 1 of the Sherman Act by conspiring and acting in concert to force the fill reduction on Walmart and other retailers;

c. whether Blue Rhino and AmeriGas violated section 1 of the Sherman Act by engaging in an anticompetitive exchange of sensitive information, including their plans regarding fill reductions and negotiations with retailers;

d. whether Blue Rhino and AmeriGas violated section 1 of the Sherman Act by agreeing to allocate customers and markets;

e. whether Class members have suffered antitrust injury;

f. the extent to which Defendants' conduct inflated prices for Filled Propane Exchange Tanks above competitive levels;

g. the nature and scope of injunctive relief necessary to restore a competitive market; and

h. the effect of the previous class action on the statute of limitations for Plaintiffs' claims.

118. These common questions predominate over any questions affecting only individual Class members.

119. A class action is superior to any other form of resolving this litigation. Many Class members, including Plaintiffs, suffered damages that are too small individually to justify embarking on expensive, protracted antitrust litigation against Defendants. If this case does not proceed as a Class action, it is likely that few if any Plaintiffs would bring suit based on Defendants' unlawful conduct. Additionally, separate actions by individual Class members would be enormously inefficient and would create a risk of inconsistent or varying judgments, which could establish incompatible standards of conduct for Defendants and substantially impede or impair the ability of Class members to pursue their claims.

XII. STATUTE OF LIMITATIONS

a. Continuing Violation

120. As alleged herein, Defendants' anticompetitive conduct lasted at least from July 21, 2008 through January 9, 2015.

121. As a result of the anticompetitive conduct challenged in this Complaint, Defendants have charged Plaintiffs and members of the proposed Class supracompetitive prices for Filled Propane Exchange Tanks throughout the Class Period.

122. Plaintiffs and members of the proposed Class purchased Filled Propane Exchange Tanks

directly from Defendants at prices artificially inflated by the conduct challenged in this Complaint throughout the Class Period.

123. Defendants' sales pursuant to the conspiracy continued throughout the Class Period and, accordingly, Plaintiffs and members of the proposed Class may recover for damages they suffered at any point in the conspiracy.

124. Despite settling with indirect purchasers in the prior class action, Defendants have continued to offer only 15-pound Filled Propane Exchange Tanks to Plaintiffs and the Class, continuing their conspiracy to inflate prices and suppress competition on fill level and pricing.

125. Defendants' unlawful communications regarding pricing, fill levels, and market allocation continued until at least late 2010.

b. *American Pipe* Tolling

126. As described above, a putative class action antitrust suit, eventually known as *In re Pre-Filled Propane Tank*, was brought against Defendants on August 6, 2009. At the time it was brought, Plaintiffs and the other Class members in this case were part of that putative nationwide class.

127. Plaintiffs and the other Class members remained part of the putative *In re Pre-Filled Propane Tank* class against all Defendants until at least October 6, 2010, when the court granted final approval of the settlement with AmeriGas that excluded direct purchasers of Filled Propane Exchange Tanks for resale.

128. After disclosing the AmeriGas settlement, the plaintiffs in the prior litigation filed a consolidated complaint against Blue Rhino that

continued to seek to represent a nationwide class of all purchasers of Filled Propane Exchange Tanks, including direct purchasers such as Plaintiffs and the other Class members in this case.

129. Plaintiffs and the other Class members remained part of the putative *In re Pre-Filled Propane Tank* class against Blue Rhino until at least May 31, 2012, when the Court granted final approval of the settlement class with Blue Rhino that excluded direct purchasers of Filled Propane Exchange Tanks for resale.

130. Accordingly, the claims of Plaintiffs and other Class members were tolled against AmeriGas from at least August 6, 2009 to at least October 6, 2010, and against Blue Rhino from at least August 6, 2009 to May 31, 2012.

c. FTC Action

131. As described above, the FTC filed an administrative complaint against Defendants on March 27, 2014, alleging substantially the same course of anticompetitive conduct.

132. The FTC action is a civil proceeding "instituted by the United States to prevent, restrain, or punish violations of . . . the antitrust laws," and therefore suspends the statute of limitations for Plaintiffs' action from March 27, 2014 until one year after the resolution of that action. 15 U.S.C. § 16(i).

XIII. CAUSE OF ACTION—VIOLATION OF SECTION 1 OF THE SHERMAN ACT

133. Plaintiff incorporates by reference the allegations in the above paragraphs as if fully set forth herein.

134. Blue Rhino and AmeriGas, by and through their officers, directors, employees, agents, or other representatives, have entered into an unlawful agreement, combination, conspiracy and concert of action in restraint of trade, in violation of 15 U.S.C. § 1. Specifically, Blue Rhino and AmeriGas unlawfully agreed to reduce the fill levels of their tanks without reducing the price of Filled Propane Exchange Tanks, thereby effectively raising the price charged for propane in those tanks. Blue Rhino and AmeriGas further agreed, in violation of 15 U.S.C. § 1, to allocate customers and markets.

135. Defendants distribute, sell, ship, and refill Filled Propane Exchange Tanks nationwide and across state lines, such that the conduct alleged herein affected interstate commerce.

136. Defendants' conduct injured Class members by depriving them of wholesale competition over price and terms and raising the per-pound price of Filled Propane Exchange Tanks.

XIV. PRAYER FOR RELIEF

137. WHEREFORE, Plaintiffs, on behalf of themselves and a Class of all others similarly situated, requests that the Court enter an order or judgment against Defendants including the following:

a. Certification of the Class described in ¶ 112 pursuant to Rule 23 of the Federal Rules of Civil Procedure;

b. Appointment of Plaintiffs as Class Representatives and their counsel of record as Class Counsel;

c. Compensatory damages in an amount to be proven at trial and trebled thereafter;

d. Pre-judgment and post-judgment interest as provided for by law or allowed in equity;

e. The costs of bringing this suit, including reasonable attorneys' fees and expenses;

f. Incentive awards to compensate Plaintiffs for their efforts in pursuit of this litigation; and

g. All other relief to which Plaintiffs and the Class may be entitled at law or in equity.

XV. JURY DEMAND AND DESIGNATION OF PLACE OF TRIAL

138. Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by jury on all issues so triable. Pursuant to Local Rule 38.1, Plaintiffs hereby designate Kansas City, Missouri as the place of trial in this action.

Dated: January 29, 2015

Respectfully submitted,

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