UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

NEW ENGLAND CARPENTERS HEALTH BENEFITS FUND; PIRELLI ARMSTRONG RETIREE MEDICAL BENEFITS TRUST; TEAMSTERS HEALTH & WELFARE FUND OF PHILADELPHIA AND VICINITY; PHILADELPHIA FEDERATION OF TEACHERS HEALTH AND WELFARE FUND; DISTRICT COUNCIL 37, AFSCME - HEALTH & SECURITY PLAN; JUNE SWAN; BERNARD GORTER; SHELLY CAMPBELL and CONSTANCE JORDAN,

Plaintiffs,

v.

McKESSON CORPORATION, a Delaware corporation,

Defendant.

Civil Action: 1:07-CV-12277-PBS

Judge Patti B. Saris

MCKESSON CORPORATION'S MOTION TO DISMISS COMPLAINT

Pursuant to Federal Rules of Civil Procedure 8(a) and 12(b), defendant McKesson Corporation respectfully moves this Court for dismissal of all claims asserted in plaintiffs' complaint. The grounds for this motion are set forth in the concurrently-filed Memorandum in Support of McKesson Corporation's Motion to Dismiss ("Memorandum").

WHEREFORE, for the reasons set forth in the Memorandum, McKesson Corporation respectfully requests that that the Court grant its motion to dismiss all claims and enter an Order:

a. dismissing all claims with prejudice; and

b. providing such other and further relief as the Court deems just and proper.

REQUEST FOR ORAL ARGUMENT

Defendant McKesson Corporation believes that oral argument will assist the Court in deciding this motion and respectfully requests that the Court hear oral argument on this motion.

Respectfully submitted,

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Dated: January 31, 2008

CERTIFICATION PURSUANT TO LOCAL RULE 7.1

I, Stephen Hughes, counsel of record for defendant McKesson Corporation, hereby certify that McKesson's counsel conferred with counsel for plaintiffs in an effort to resolve the issues referred to in this motion, and that the parties have not been able to reach agreement with respect to those issues.

/s/ Stephen E. Hughes
Stephen E. Hughes

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on January 31, 2008.

/s/ Stephen E. Hughes
Stephen E. Hughes

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NEW ENGLAND CARPENTERS HEALTH BENEFITS FUND; PIRELLI ARMSTRONG RETIREE MEDICAL BENEFITS TRUST; TEAMSTERS HEALTH & WELFARE FUND OF PHILADELPHIA AND VICINITY; PHILADELPHIA FEDERATION OF TEACHERS HEALTH AND WELFARE FUND; DISTRICT COUNCIL 37, AFSCME - HEALTH & SECURITY PLAN; JUNE SWAN; BERNARD GORTER; SHELLY CAMPBELL and CONSTANCE JORDAN,

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C.A. No. 1:07-CV-12277-PBS

PLAINTIFFS' OPPOSITION TO MCKESSON'S MOTION TO DISMISS

TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. FACTS 3

III. ARGUMENT 4

A. Plaintiffs Have Properly Pled Their Price Fixing Claim Under Sherman Act § 1..4

1. Plaintiffs' price fixing allegations establish a violation of Sherman Act § 1..4

2. As a matter of law, Plaintiffs need not plead and prove a relevant market for its Section 1 claim 7

3. Plaintiffs satisfy the antitrust injury requirement..8

a. Plaintiffs have alleged antitrust injury by alleging they paid inflated prices for the Subject Drugs..9

(1) Courts have long acknowledged that paying inflated prices due to a horizontal price-fixing conspiracy constitutes antitrust injury 11

(2) McKesson's argument that Plaintiffs must allege an *additional* injury to competition incorrectly relies on authority analyzing different types of anti-competitive conduct..12

(3) The Complaint alleges harm to competition..14

b. Plaintiffs have alleged they were injured by McKesson's conduct..15

4. Plaintiffs satisfy the standing requirement because they were directly harmed by the price fixing conspiracy..17

5. U&C Plaintiffs properly allege proximate cause 19

B. Plaintiffs Also Properly Pled Their Alternative Claim for Relief Under the Cartwright Act..19

C. Plaintiffs' Alternative Claim for Relief Under Other States' Antitrust Statutes are Also Properly Pled..21

IV. CONCLUSION.....22

TABLE OF AUTHORITIES

PAGE

CASES

Addamax Corp. v. Open Software Found.,
152 F.3d 48 (1st Cir. 1998)....8

Alvarado Aguilera v. Negron,
509 F.3d 50 (1st Cir. 2007)....4

American Ad Mgmt., Inc. v. General Tel. Co.,
190 F.3d 1051 (9th Cir. 1999)....9

Arista Records, LLC v. Does 1-27,
2008 U.S. Dist. LEXIS 6241 (D. Me. Jan. 25, 2008)....4

Arizona v. Shamrock Foods Co.,
729 F.2d 1208 (9th Cir. 1984)....17

Associated Gen. Contractors, Inc. v. California State Council of Carpenters,
459 U.S. 519 (1983)....17

Atlantic Richfield Co. v. USA Petro. Co. ("ARCO"),
495 U.S. 328 (1990)....9

Baum Research & Dev. Co. v. Hillerich & Bradsby Co.,
31 F. Supp. 2d 1016 (E.D. Mich. 1998)....16

In re Beef Indus. Antitrust Litig.,
600 F.2d 1148 (5th Cir. 1979)....18

Bell Atlantic Corp. v. Twombly,
___ U.S. ___, 127 S. Ct. 1955 (2007)....14

Blue Shield of Virginia v. McCready,
457 U.S. 465 (1982)....13

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 U.S. 477 (1977)....9, 10

Bunker Ramo Corp. v. United Bus. Forms, Inc.,
713 F.2d 1272 (7th Cir. 1983)....16

California v. ARC Am. Corp.,
490 U.S. 93 (1989)....19

Car Carriers, Inc. v. Ford Motor Co.,
745 F.2d 1101 (7th Cir. 1984) 14, 16

Chicago Prof'l Sports Ltd. P'Ship v. NBA,
95 F.3d 593 (7th Cir. 1996) 13

Continental Airlines, Inc. v. United Airlines, Inc.,
277 F.3d 499 (4th Cir. 2002) 7

Diamond Multimedia Sys. Inc. v. Superior Court,
19 Cal. 4th 1036 (1999) 21

Dickson v. Microsoft Corp.,
309 F.3d 193 (4th Cir. 2002) 2, 17

In re Dynamic Random Access Memory Antitrust Litig.,
516 F. Supp. 2d 1072 (N.D. Cal. 2007) 20

E&L Consulting, Ltd. v. Doman Indus., Ltd.,
472 F.3d 23 (2d Cir. 2006), *cert. denied*, 128 S. Ct. 97 (2007) 16

Eastman Kodak Co. v. Image Tech. Servs., Inc.,
504 U.S. 451 (1992)....................5

Fontana Aviation, Inc. v. Cessna Aircraft Co.,
617 F.2d 478 (7th Cir. 1980) 18

FTC v. Indiana Fed. of Dentists,
476 U.S. 447 (1986)....................8

Glen Holly Entm't, Inc. v. Tektronix, Inc.,
352 F.3d 367 (9th Cir. 2003) 13

Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.,
998 F.2d 391 (7th Cir. 1993) 10, 16

Hewlett-Packard Co. v. Boston Scientific Corp.,
77 F. Supp. 2d 189 (D. Mass. 1999) 14

Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.,
424 F.3d 363 (3d Cir. 2005)....................18

HyPoint Tech., Inc. v. Hewlett-Packard Co.,
949 F.2d 874 (6th Cir. 1991) 17

In re Hypodermic Prods. Antitrust Litig.,
2007 U.S. Dist. LEXIS 47438 (D.N.J. June 29, 2007) 13

Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc.,
253 F. Supp. 2d 262 (D. Conn. 2003)..12

Illinois Brick Co. v. Illinois,
431 U.S. 720 (1977)..17

Jacobs v. Tempur-Pedic Int'l, Inc.,
2007 U.S. Dist. LEXIS 91241 (N.D. Ga. Dec. 11. 2007)...14

Kansas v. Utilicorp United Inc.,
497 U.S. 199 (1990)..19

Kinderstart.com, LLC v. Google, Inc.,
2007 U.S. Dist. LEXIS 22637 (N.D. Cal. Mar. 16, 2007)..13

Knevelbaard Dairies v. Kraft Foods, Inc.,
232 F.3d 979 (9th Cir. 2000) 11

Korea Kumho Petrochemical Co. v. Flexsys Am. LP,
2007 U.S. Dist. LEXIS 61373 (N.D. Cal. Aug. 7, 2007)..20

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
___ U.S. ___, 127 S. Ct. 2705 (2007)..8, 15

Lowell v. American Cyanamid Co.,
177 F.3d 1228 (11th Cir. 1999) 18

McCarthy v. Recordex Serv.,
80 F.3d 842 (3d Cir. 1996)...19

McGlinchy v. Shell Chem. Co.,
845 F.2d 802 (9th Cir. 1988) 16

Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984)..7

National Collegiate Athletic Ass'n v. Board of Regents,
468 U.S. 85 (1984)..7, 8, 11

National Soc'y of Prof'l Eng'rs v. United States,
435 U.S. 679 (1978)..8

NYNEX Corp. v. Discon,
525 U.S. 128 (1998)....................13

In re New Motor Vehicles Canadian Exp. Antitrust Litig.,
2006 U.S. Dist. LEXIS 10240 (D. Me. Mar. 10, 2006)....................11

Paper Sys. v. Nippon Paper Indus. Co.,
281 F.3d 629 (7th Cir. 2002)....................18

Parikh v. Franklin Med. Ctr.,
940 F. Supp. 395 (D. Mass. 1996)....................7

Paycom Billing Servs. v. MasterCard Int'l, Inc.,
467 F.3d 283 (2d Cir. 2006)....................19

Phoung Luc v. Wyndham Mgmt. Corp.,
496 F.3d 85 (1st Cir. 2007)....................4, 16

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979)....................11

In re Relafen Antitrust Litig.,
225 F.R.D. 14 (D. Mass. 2004)....................19

SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.,
48 F.3d 39 (1st Cir. 1995)....................16

Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield,
373 F.3d 57 (1st Cir. 2004)....................7

In re Terazosin Hydrochloride Antitrust Litig.,
160 F. Supp. 2d 1365 (S.D. Fla. 2001)....................19

Texaco Inc. v. Dagher,
547 U.S. 1 (2006)....................7

Thompson Everett, Inc. v. National Cable Advertising, L.P.,
57 F.3d 1317 (4th Cir. 1995)....................10

Todorov v. DCH Healthcare Auth.,
921 F.2d 1438 (11th Cir. 1991)....................16

Turner v. Johnson & Johnson,
809 F.2d 90 (1st Cir. 1986)....................16

United States Gypsum Co. v. Indiana Gas Co.,
350 F.3d 623 (7th Cir. 2003) 12

United States v. McKesson & Robbins,
351 U.S. 305 (1956)..5

United States v. Socony-Vacuum Oil Co.,
310 U.S. at 223...1, 5

United States v. Trenton Potteries Co.,
273 U.S. 392 (1927)..11

U.S. Healthcare, Inc. v. Healthsource, Inc.,
986 F.2d 589 (1st Cir. 1993)...7

Valley Products Co. v. Landmark,
128 F.3d 398 (6th Cir. 1997) 16

Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko, LLP,
540 U.S. 398 (2004)..13

In re Vitamins Antitrust Litig.,
2001 U.S. Dist. LEXIS 12114 (D.D.C. July 2, 2001)...19

Wershba v. Apple Computer, Inc.,
110 Cal. Rptr. 2d 145 (Cal. Ct. App. 2001)..21

STATUTES

CAL. BUS. & PROF. CODE § 16750(a)...19

D.C. CODE § 28-4502...21

MICH. COMP. LAWS § 445.772...22

MINN. STAT. § 325D.51 22

MISCELLANEOUS

Phillip E. Areeda, *et al.*, *Antitrust Law: IIA An Analysis of Antitrust Principles and Their Application* ¶ 345 (3d ed. 2007)...10, 12, 15, 16

RESTATEMENT OF THE LAW (2D) OF CONFLICT OF LAWS § 145 20

I. INTRODUCTION

McKesson argues that antitrust laws "do not authorize litigants to seek recovery on the basis of high prices set by market forces." Plaintiffs agree. But the Complaint does not allege that "market forces" raised retail prices of brand drugs over the course of the 2001-2005 period. In detail, the Complaint alleges that it was McKesson's profoundly anti-competitive exploitation of market imperfections that allowed it to enter into an agreement with FDB to drive up retail prices. The fact that McKesson is a wholesaler and FDB a publisher is therefore not remotely fatal to Plaintiffs' price fixing claim. The essential element of the agreement between McKesson and FDB is an agreement to raise prices. Agreements to raise prices are the very essence of an antitrust violation. Moreover, the scheme had anticompetitive effects on McKesson's competitors, giving McKesson an unfair advantage over them in the competition for pharmacy customers due to the goodwill generated by the illegal scheme and on manufacturers who lost sales or market share due to unwarranted and unanticipated increases in the retail price of their drugs.[1] While this agreement does not fit neatly into a horizontal or vertical category, the restraint squarely fits the long-standing Sherman Act Section 1 prohibition against ". . . a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity . . ." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

Secondly, contrary to McKesson's assertions, raising market prices by means of an illicit agreement is precisely the type of injury that antitrust laws are intended to remedy. McKesson's argument that Plaintiffs' lack an antitrust injury relies on a series of cases refusing to grant competitors standing to complain of injuries borne by consumers. Here, consumers and TPPs

[1] *See* Complaint, ¶¶ 149-50 (creation of goodwill), 155 (manufacturers recognizing the negative impact of scheme on their business).

were directly harmed by McKesson's conduct and have suffered the precise type of injury the antitrust laws are designed to prevent.

Nor does *Illinois Brick* bar Plaintiffs' federal antitrust claim. An indirect purchaser has standing when he or she "is the only party who has paid any overcharge."[2] In this case, Plaintiffs are the parties that paid the overcharge. Others in the distribution chain such as pharmacies and PBMs, benefited from the price fix. Plaintiffs are the only parties directly injured by virtue of McKesson's AWP "normalization plan."

In the event that the Court determines that neither federal law, nor the law of California (which allows for claims by indirect purchasers) applies to the class as a whole, Plaintiffs have standing to bring claims under the other state statutes because they have suffered an antitrust injury recognized in each of these states.

Finally these claims are not an "after thought" as McKesson asserts. After full discovery Plaintiffs concluded that this was also a price fix type of case that warranted antitrust allegations. And, after listening to McKesson harp about RICO reliance and the difficulties in prosecuting RICO claims, Plaintiffs decided to go the more straight forward antitrust route, where issues of reliance in any form cannot be raised, where courts have routinely certified aggregate damages when a price fix raises the benchmark, and where the class period is longer because the damage continues beyond the announced discontinuance of FDB's "survey" process. The antitrust claim is a powerful tool that fits the crime committed here.

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[2] *Dickson v. Microsoft Corp.*, 309 F.3d 193, 215 (4th Cir. 2002) (quoting 2 PHILLIP E. AREEDA, HERBERT HOVENKAMP & ROGER D. BLAIR, ANTITRUST LAW ¶ 346h, at 369-70 (2d ed. 2000)).

II. FACTS

Although the Court is familiar with the facts from the related RICO/consumer fraud litigation, Plaintiffs briefly summarize facts relevant to establishing their antitrust claim. In late 2001, FDB Data and McKesson reached a secret agreement on how the WAC to AWP markup would be established for hundreds of brand-name drugs. The two companies agreed to artificially raise and fix the price on brand-name drugs and therefore artificially raise prices in that market. ¶ 8.[3]

Thus, as part of their agreement and conspiracy, McKesson and FDB, without any legitimate economic justification, raised the WAC-to-AWP spread to 25% for over four hundred brand-name drugs that previously had received only the 20% markup amount. To conceal the scheme, McKesson and FDB agreed to typically effectuate price changes only when some other WAC-based price announcement was made by a drug manufacturer. This camouflaged both the associated increase in the WAC-to-AWP markup and WAC-to-AWP spread and McKesson as the source of the increased markup. ¶ 86.

Health and welfare funds, insurance companies and thousands of third-party payors have contracts that expressly tie their payment for pharmaceuticals to FDB's published AWPs. Cash payors' prices are also tied to AWP. ¶ 16. As a result of this artificial increase in the markup of the WAC-to-AWP spread from 20% to 25%, third-party payors and consumers have had their drug prices increased by the scheme. ¶ 17.

Before 2000 McKesson estimated that only 20% of the prescription drug manufacturers were 25% mark-up companies. By early 2002, however, McKesson estimated that through defendant's efforts 90% of the industry had turned to the 25% markup. By late 2002, McKesson

[3] References are to the Complaint, Docket No. 1.

estimated that the number had increased to 95%. In 2004, McKesson estimated that 99% of the prescription drugs were set at a 25% markup. McKesson acknowledged that without its efforts, "the AWP's most likely would not change."[4] ¶ 144.

III. ARGUMENT

In ruling on a motion to dismiss under Rule 12(b)(6), a court must accept as true all the factual allegations in the Complaint and construe all reasonable inferences in favor of the plaintiffs. *Phoung Luc v. Wyndham Mgmt. Corp.*, 496 F.3d 85, 88 (1st Cir. 2007). "To survive a motion to dismiss, a complaint must establish 'a plausible entitlement to relief.'" *Alvarado Aguilera v. Negron*, 509 F.3d 50, 53 (1st Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967, 167 L. Ed. 2d 929 (2007)). "Nothing in *Twombly* forbids lower courts from drawing inferences or accepting conclusory recitations as true for purposes of a motion to dismiss, so long as the factual content that is supplied in the complaint demonstrates the plausibility of any necessary inferences." *Arista Records, LLC v. Does 1-27*, 2008 U.S. Dist. LEXIS 6241, at *13-14 (D. Me. Jan. 25, 2008).

A. Plaintiffs Have Properly Pled Their Price Fixing Claim Under Sherman Act § 1

1. Plaintiffs' price fixing allegations establish a violation of Sherman Act § 1

McKesson argues that Plaintiffs fail to allege either a horizontal price fixing claim or a vertical claim because McKesson and FDB are neither competitors in the same market, nor members of the same chain of distribution. This argument elevates form over substance. The essential element of the agreement between McKesson and FDB is an agreement to raise prices. Agreements to raise prices are the very essence of an antitrust violation. This agreement does not fit neatly into a "horizontal" or "vertical" category, but the restraint squarely fits the long-

[4] MCKAWP 0069732.

standing Sherman Act Section 1 prohibition against ". . . a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity . . ." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 223.

It is beyond dispute that if McKesson had conspired with one of its competitors, *i.e.* Cardinal or AmeriSource Bergen, to raise AWPs, the *per se* rule applicable to horizontal price-fixing cases would apply. For example, in *United States v. McKesson & Robbins*, 351 U.S. 305 (1956), the Court found that McKesson's agreement with competing wholesalers to sell drugs it manufactured at prices fixed by McKesson constituted a *per se* violation of Section 1 of the Sherman Act:

> [McKesson concedes that the antitrust laws do] not exempt a contract between two competing independent wholesalers fixing the price of a brand product produced by neither of them. Yet it urges that what would be illegal if done between competing independent wholesalers becomes legal if done between an independent wholesaler and a competing wholesaler who is also the manufacturer of the brand product. . . . But the statutes provide no basis for sanctioning the fiction of McKesson, the country's largest drug wholesaler, acting only as a manufacturer when it concludes "fair trade" agreements with competing wholesalers.

Id. at 312.

In the ordinary, non-monopoly case, companies do not have the ability to set interbrand prices for an entire market unless they enter into an agreement with other producers. But the prescription drug industry is defined by profound market imperfections that enabled McKesson to set retail prices of all brand drugs at FDB without collaboration of either its competitors or (in the case of a vertical restraint) its suppliers. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 473-78 (1992) (holding that existing imperfections in the copier market, including information and switching costs, prevented consumers from discovering, as they were shopping

for equipment, that the Kodak brand would include a *de facto* commitment to consume only supracompetitively priced Kodak-brand service contracts.). These features include:

> Industry-wide reliance on AWPs to set retail prices of brand drugs ¶¶ 2-4, 42, 63-79);
>
> Industry-wide reliance on First DataBank to calculate and disseminate AWPs (¶¶ 33, 85, 88-111, 130);
>
> First DataBank's secretive survey process to calculate AWPs (¶ 86);
>
> pre-scheme stability of and industry-wide reliance on established manufacturer markups (¶¶ 7, 46-48); and
>
> AmeriSource Bergen and Cardinal's private refusal to participate in the survey process (¶¶ 122-23).

As a practical matter, the distinction between this case, involving an agreement between McKesson and FDB to set retail prices and the hypothetical collusion of wholesalers to accomplish the same result is a distinction without a difference. Much as the distributors in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984)[5] needed the manufacturer to terminate competing price-cutting distributors in order to carry out their price-fixing conspiracy,

[5] In *Monsanto* the manufacturer terminated its relationship with some of its distributors, allegedly on the ground that the distributors cut prices. The underlying question of the plaintiffs' illegal boycott claim was whether there was an understanding or agreement between the manufacturer and one or more distributors not to undercut its prices. 465 U.S. at 767. Plaintiffs note that *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, ___ U.S. ___, 127 S. Ct. 2705 (2007) requires vertical (intrabrand) price restraints, such as that alleged in *Monsanto* to be judged according to the rule of reason. Horizontal price restraints remain governed by the *per se* rule. *Id.* at 2717. However, *Leegin* explains that the rule of reason is appropriate to vertical restraints because they restrict intrabrand competition, which may have pro-competitive benefits. *Id.* at 2717-19. McKesson's price fixing scheme did not limit itself to a particular brand, but rather affected the retail prices of hundreds of brand drugs manufactured by numerous competing manufacturers and therefore is not entitled to the presumption of possible pro-competitive benefits. Further, there is absolutely no pro-competitive effect of this restraint, and McKesson does not attempt to invent one. This fact takes the case out of the *Leegin* vertical analysis quagmire. The Court in *Leegin* overturned a century of application of *per se* rules because recent economics scholarship demonstrated that vertical restraints often have pro-competitive effects. Raising prices 5% here provided no benefits whatsoever to the Class.

McKesson needed FDB in order to carry out its price-fixing scheme. The fact that McKesson and FDB are not competitors in the rivalrous sense does not take away from the fact that they shared "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id*. at 764.

2. As a matter of law, Plaintiffs need not plead and prove a relevant market for its Section 1 claim

In the event that the Court declines "to condemn McKesson's price fixing agreement *per se*, Plaintiffs maintain that it requires "only the briefest inspection (the cited 'quick look')[6] for the Court to reject the excuses and strike down the agreements." *U.S. Healthcare, Inc. v. Healthsource, Inc*., 986 F.2d 589, 595 (1st Cir. 1993).[7] As the Supreme Court has long held, some restraints of trade are so obviously anticompetitive and lacking in pro-competitive justification that a "quick look" under the Rule of Reason is all that is required to condemn the

[6] Contrary to McKesson's representation of the case, *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499 (4th Cir. 2002) does not hold that the quick look analysis only applies to challenged conduct, which in other factual contexts would warrant a *per se* treatment. *See* McKesson Br. at 5 n.2. In fact, the Fourth Circuit expressly recognized that "'there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment'" and counseled that "the three methods are best viewed as a continuum, on which the 'amount and range of information needed' to evaluate a restraint varies depending on how 'highly suspicious' and how 'unique' the restraint is." *Id.* at 509 (quoting *California Dental Ass'n v. FTC*, 526 U.S. 756, 780-81, 143 L. Ed. 2d 935, 119 S. Ct. 1604 (1999)). *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006) is distinguishable because the Court did not find that the alleged misconduct was so "plainly anticompetitive that [the Court] need undertake only a cursory examination before imposing antitrust liability." Plaintiffs contend that McKesson's misconduct does fit this category.

[7] The First Circuit follows *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447 (1986), and *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984) to apply the quick look analysis to naked restraints on trade. *U.S. Healthcare, Inc. v. Healthsource, Inc*., 986 F.2d at 594. *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57 (1st Cir. 2004), cited by McKesson, did not apply a quick look analysis because it dealt with an exclusive dealing claim, which is not treated as a naked restraint on trade and generally requires a rule of reason analysis. *Parikh v. Franklin Med. Ctr.*, 940 F. Supp. 395, 401 (D. Mass. 1996) ("As a general rule, exclusive arrangements are not easily susceptible to this sort of 'quick look' condemnation.")

conduct under the Sherman Act. Some restraints are so facially anticompetitive that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 n.2 (1978). Where there is a naked restriction on price or output, the Supreme Court has never "required proof of market power in such a case." *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 110 (1984). This analysis, sometimes referred to as the "quick look" Rule of Reason analysis, has also been applied to restraints that only indirectly affect price, such as an agreement among dentists not to provide x-rays to insurers. *FTC v. Indiana Fed. Of Dentists*, 476 U.S. 447 (1986). Under this "quick look" analysis, there is no need for plaintiffs to "establish monopoly power in any precisely defined market." *Board of Regents*, 468 U.S. at 110 n.42. The agreement between McKesson and FDB to raise prices is plainly a naked restraint. Further it is hardly conceivable that raising the prices on hundreds of top-selling brand drugs had any pro-competitive effects and McKesson advances none.[8]

Finally, even if the Court declines to apply either the *per se* or quick look analyses, Plaintiffs have alleged facts sufficient to withstand the Rule of Reason analysis, *i.e.*, McKesson's power to set prices, its illicit purpose and the anticompetitive effect of its agreement with FDB. *See Addamax Corp. v. Open Software Found.*, 152 F.3d 48, 51-52 (1st Cir. 1998).

3. Plaintiffs satisfy the antitrust injury requirement

By cutting and pasting language from cases that bear no resemblance to the case at hand, McKesson next argues that Plaintiffs have failed to allege "antitrust injury." First, McKesson argues that paying inflated prices is not enough to prove antitrust injury and that Plaintiffs must ***in addition*** allege some other type of harm to competition, such as reduced output or decreased

[8] *See supra* n.5 (discussing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007)).

quality. Not only is McKesson wrong as a matter of law, it also fails to address the anticompetitive effect of its price fixing scheme on other wholesalers or on drug manufacturers.[9] Second, although argued under the guise that Plaintiffs have failed to allege antitrust injury, McKesson in fact argues that Plaintiffs have not properly alleged causation because Plaintiffs would have purportedly been harmed even absent McKesson's participation in the scheme. Both arguments ignore the vast body of law acknowledging harm to consumers and to competition caused by price-fixing.

a. Plaintiffs have alleged antitrust injury by alleging they paid inflated prices for the Subject Drugs

As McKesson admits, the Complaint alleges that Plaintiffs have suffered antitrust injury in the form of paying or reimbursing for higher prices for the Subject Drugs.[10] This is precisely the type of injury the antitrust laws are designed to prevent. *See*, *e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) and *Atlantic Richfield Co. v. USA Petro. Co.*, 495 U.S. 328 (1990) (hereinafter "*ARCO*"), two cases relied on by McKesson, s*ee also American Ad Mgmt., Inc. v. General Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999) (citing *ARCO*, 495 U.S. at 334).

The dismissals ordered by the Supreme Court in *Brunswick* and *ARCO* are not required here. In *Brunswick*, the Court affirmed entry of a JNOV where the plaintiff bowling centers challenged defendant's acquisition of financially-failing competitors on the basis that defendant's acquisitions would injure plaintiffs by preventing them from being able to charge higher prices to consumers. 429 U.S. at 484. The Court dismissed plaintiffs' claim and held that

[9] *See* ¶¶ 149-50 (alleging good will), 155 (alleging impact on manufacturers). On a motion to dismiss Plaintiffs are entitled to all reasonable inferences in their favor.

[10] *See*, *e.g.*, ¶¶ 8, 17-18, 134-35, 165, 205-06, 218 and 240; McKesson Br. at 10 ("the complaint in this case alleges that prices (or reimbursements) for prescription drugs increased as a result of the alleged agreement between McKesson and FDB").

"[p]laintiffs must prove ***antitrust*** injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id*. at 489 (emphasis in original). In essence, the Court held that the antitrust laws could not ***be used to protect a competitor where that competitor sought to charge consumers higher prices***. Similarly, in *ARCO*, the Court held that an independent gasoline station had not incurred antitrust injury when it lost sales to a competitor charging non-predatory prices pursuant to a vertical maximum price-fixing scheme. The Court noted that, although the plaintiff might have been injured by defendants' actions, ***it had not proven injury to consumers***. 495 U.S. at 336 (distinguishing *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) on this basis). The Court therefore held that "***[l]ow prices*** benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Id*. at 339 (emphasis added).

Plaintiffs do not challenge low prices, nor are they competitors of McKesson seeking the Court's blessing to charge high prices.[11] Instead, they are consumers or end payors that have paid inflated drug prices imposed by McKesson's price-fixing scheme with FDB. Thus, Plaintiffs have not only alleged antitrust injury; they are also the best and only plaintiffs able to challenge McKesson's wrongdoing. *See* Phillip E. Areeda, *et al.*, *Antitrust Law: IIA An Analysis of Antitrust Principles and Their Application* ¶ 345, at 156 (3d ed. 2007) (hereinafter "Areeda & Hovenkamp") ("Because protecting consumers from monopoly prices is the central concern of antitrust, buyers have usually been preferred plaintiffs in private antitrust litigation. . .

[11] Plaintiffs therefore are not situated like the plaintiffs in two additional cases cited by McKesson either. In *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317 (4th Cir. 1995), the court affirmed summary judgment against a plaintiff "would-be competitor" (*id.* at 1325) who alleged it had been harmed because defendant cable companies would not sell air time for spot advertising unless plaintiff agreed to an exclusive contract. In *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 393 (7th Cir. 1993), the court affirmed dismissal of a Section 2 claim that claimed plaintiff was injured by virtue of losing its exclusive distributorship.

. 'Consumer' in the sense used here generally means the end-use purchaser, who most typically sues for overcharge damages resulting from illegal price fixing.").

(1) Courts have long acknowledged that paying inflated prices due to a horizontal price-fixing conspiracy constitutes antitrust injury

The Supreme Court long ago held that "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). "Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *Board of Regents*, 468 U.S. at 107-08. Thus, a consumer who pays higher prices due to a price-fixing conspiracy had been injured in her business or property. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979) ("The essence of the antitrust laws is to ensure fair price competition in an open market. Here, where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated by reason of respondents' anti-competitive conduct, she has alleged an injury in her 'property' under § 4 [of the Clayton Act]."); *see also In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 2006 U.S. Dist. LEXIS 10240, at *17 (D. Me. Mar. 10, 2006) ("Higher prices for consumers resulting from antitrust violations are antitrust injuries.") (citations omitted); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) ("When horizontal price fixing causes buyers to pay more . . . than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs.")[12]; *Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc.*, 253 F. Supp. 2d 262, 272 (D. Conn. 2003)

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[12] The *Knevelbaard* court said that "[i]t is competition – not the collusive fixing of prices at levels either low or high – that these statutes recognize as vital to the public interest" (*id.*), but this was in response to the defendants' argument that the plaintiff ***sellers***, who had received lower prices for their goods as a result of defendants' conspiracy, were not injured. The *Knevelbaard* Court did not, therefore, impose a requirement that a plaintiff must allege higher, anti-competitive prices as well as a separate injury to competition.

("plaintiff claims to have been forced to pay prices not set by free market competition, but rather by defendants' price-fixing scheme. The injury alleged by plaintiff is the type of injury the Sherman Act, which seeks to preserve free and unfettered competition, was designed to prevent.") (citation omitted).

(2) McKesson's argument that Plaintiffs must allege an *additional* injury to competition incorrectly relies on authority analyzing different types of anti-competitive conduct

McKesson's argument that Plaintiffs must allege "reduced competition" ***in addition to*** allegations of higher prices relies on a host of cases whose facts have no relevance here.[13] These cases fall into two categories. First, they are cases, like *ARCO*, brought by a competitor where the court held that allegations of injury to that competitor were not sufficient absent allegations of harm to competition as a whole.[14] Those cases do not apply here because Plaintiffs are not competitors of McKesson.

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[13] It likewise ignores a fundamental economic principle that higher prices do, in fact, injure competition as a whole. Areeda & Hovenkamp explain that:

> Direct purchasers from cartels have long had standing to recover any collusive overcharges. ***Such overcharges constitute antitrust injury***. This is consistent with the Supreme Court's *Brunswick* prescription, because an overcharge reflects the anticompetitive effect of the price-fixing conspiracy. Moreover, the overcharge is the type of injury the antitrust laws were intended to prevent. When rivals agree on a price above the competitive level, it is clear that they are agreeing not to compete on that dimension. The elevated price, therefore, is the anticompetitive consequence of the business practice in question.

Areeda & Hovenkamp, ¶ 391b, at 321 (emphasis added). Higher prices cause a shift in the demand curve that likewise reduces output. That is a classic injury to competition.

[14] *See United States Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 627 (7th Cir. 2003) (vacating district court's dismissal of antitrust complaint that alleged two defendants had attempted to monopolize market for gasoline in Indiana and holding that "[t]he antitrust-injury doctrine was created to filter out complaints by competitors and others who may be hurt by productive efficiencies, higher output, and lower prices, all of which the antitrust laws are designed to encourage.") (citations omitted).

Second, McKesson cites to cases brought under Section Two of the Sherman Act where, of course, because an element of a Section Two violation includes that the defendant engaged in anti-competitive conduct committed in furtherance of a monopoly, increased prices could not be the sole anti-competitive conduct alleged.[15] Because Plaintiffs have not brought a monopoly claim under Section Two, these cases are likewise irrelevant. McKesson also relies *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 374 (9th Cir. 2003), but that decision actually supports Plaintiffs' position. Importantly, in finding that the plaintiff had, in fact, alleged antitrust injury by alleging only a reduction in output, the court implicitly recognized no further allegations of antitrust injury were required. Indeed, the court felt that the district court's view of antitrust injury, which held that antitrust injury could only result from (1) artificially increased prices ***or*** (2) artificially less innovative products was too restrictive. *See id*. at 374. Later in the opinion, relying on the Supreme Court's decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the court again made the point that an increase in price is only one type of competition. *Id*. at 375. This holding, again, impliedly recognizes that a plaintiff need not allege an injury to all types of competition (increased prices, reduction in output, or decreased product quality), but instead that an allegation of one of those types of injury is sufficient. That is exactly what Plaintiffs have done here. *Glen Holly* did not, as McKesson suggests, require that a plaintiff prove each and every type of antitrust injury.[16]

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[15] *See Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (monopolization by regulated utility); *Chicago Prof'l Sports Ltd. P'Ship v. NBA*, 95 F.3d 593 (7th Cir. 1996) (monopolization by NBA); *In re Hypodermic Prods. Antitrust Litig.*, 2007 U.S. Dist. LEXIS 47438 (D.N.J. June 29, 2007) (where plaintiffs alleged defendant had entered into exclusive agreements to further its monopoly of hypodermic products); *Kinderstart.com, LLC v. Google, Inc.*, 2007 U.S. Dist. LEXIS 22637 (N.D. Cal. Mar. 16, 2007) (where plaintiff challenged monopoly perpetrated by internet service provider).

[16] McKesson also cites *NYNEX Corp. v. Discon*, 525 U.S. 128 (1998). In that case the Court dismissed a complaint challenging a buyer's decision to buy from a single seller. Even though

Even if Plaintiffs have to allege harm to competition the complaint does so. McKesson further claims that Plaintiffs have merely labeled its conduct as anti-competitive without alleging injury to competition. But the cases on which McKesson relies are inapposite. In *Bell Atl. Corp. v. Twombly,* ___ U.S. ___, 127 S. Ct. 1955 (2007), the plaintiffs only alleged parallel conduct without any facts sufficient to establish that the defendants had entered into an "agreement" required by Section 1. Plaintiffs here have not only alleged an agreement between McKesson and FDB, but have cited to numerous documents establishing the existence of the agreement. *See*, *e.g.*, Compl., ¶¶ 130, 138-9, 143, 149, 187. The other cases to which McKesson cites for the purported deficiencies in Plaintiffs' Complaint are similarly inapplicable.[17]

(3) The Complaint alleges harm to competition

McKesson claims that Plaintiffs allege higher prices but fail to allege additional harm to competition. Assuming that such allegations are required, which as explained above they are not, McKesson fails to account for the anticompetitive effect of its scheme on other wholesalers and on manufacturers, whose prices were increased due to the scheme. McKesson ignores the unfair advantage it had in its competition with other wholesalers for retail pharmacies' business. Because it did not have to compete fairly, McKesson believed it could offer fewer incentives to

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the Court acknowledged that there might have been ancillary price effects from the agreement challenged in that case, the agreement challenged was not, as here, ***an agreement to fix prices***. Therefore, the price effect the court ignored was not as direct as the one alleged here.

[17] *See Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1110 (7th Cir. 1984) (affirming dismissal of plaintiff's antitrust claims "[w]hen stripped to its essential allegations, the complaint does not more than state plaintiffs' commercial disappointment at losing [defendant's] patronage."); *Jacobs v. Tempur-Pedic Int'l, Inc.*, 2007 U.S. Dist. LEXIS 91241 (N.D. Ga. Dec. 11. 2007) (dismissing claim that defendants had engaged in minimum RPM agreement where plaintiff had failed to allege facts sufficient to support a rule of reason analysis). Indeed, in *Hewlett-Packard Co. v. Boston Scientific Corp.*, 77 F. Supp. 2d 189 (D. Mass. 1999) (Saris, J.), this Court ***denied*** defendants' motion to dismiss, rejecting their argument that the plaintiffs had failed to allege antitrust injury.

its customers than in an unrestrained market.[18] By the same token, manufacturers have an interest in the efficient distribution of their products. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, __ U.S. __, 127 S. Ct. 2705, 2718 (2007). McKesson disrupted this process by unilaterally changing the price structure of hundreds of brand drugs, thereby subjecting manufacturers to potential lost sales and/or market share. And of course Class members were injured because they were forced to pay higher prices without any benefit in terms of better products or better service.

b. Plaintiffs have alleged they were injured by McKesson's conduct

McKesson next argues that Plaintiffs have not alleged antitrust injury because Plaintiffs would have suffered the same injury even if McKesson had not participated in the Scheme. McKesson's entire argument is based on the false premise that "the injury plaintiffs allege here is one that flows from the allegedly fraudulent conduct of First DataBank's misrepresenting how its AWPs were derived." McKesson Br. at 7. This either deliberately misstates or entirely ignores that Plaintiffs' injury flows from McKesson's agreement to increase the WAC-to-AWP mark-up for thousands of brand drugs.[19] Therefore, as an initial matter, McKesson's argument is simply a non-sequitur.[20] Additionally, McKesson relies on cases in which plaintiffs attempted to convert

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[18] *See*, *e.g.*, MCKAWP 0065895 (Bob James e-mail discussing how McKesson could avoid giving year end deals to one of its customers if it explained how McKesson's price fixing had benefited the customer, and relating James' discussions with other customers about its price fixing activities: "In my discussions, one of the comments that was made was 'this would certainly be a good reason to renew our agreement with McKesson when its time.' Talk about being good partners, wow!").

[19] *See*, *e.g.*, ¶¶ 16-17.

[20] Indeed, McKesson's argument is not about antitrust injury at all, but whether Plaintiffs have alleged injury-in-fact. As Areeda & Hovenkamp have explained:

> While some courts speak of "antitrust injury" comprehensively to include injury-in-fact caused by the defendant or lack of any impact on competition, we use that term in the precisely focused

garden variety business torts into antitrust claims. Those cases, which each involve disappointed competitors, are wholly inapplicable.[21]

> sense of *Brunswick.* To say that the plaintiff has not alleged or shown any injury-in-fact requires dismissal on grounds of causation or lack of injury. To say that the plaintiff has not shown any injury to competition is to conclude that the antirust laws have not been violated at all. ***Neither of these is "antitrust injury" in the sense that Brunswick used the term, where the Court assumed both injury-in-fact and an antitrust violation.***

Areeda & Hovenkamp ¶ 337a, at 83-84 (emphasis added). This distinction is important: on a motion to dismiss this Court must accept Plaintiffs' allegations as true. *Phoung Luc v. Wyndham Mgmt. Corp.*, 496 F.3d at 88. Plaintiffs have alleged they were injured by McKesson's conduct; therefore, McKesson's causation argument, masquerading as an antitrust injury argument, must be rejected.

[21] *See E&L Consulting, Ltd. v. Doman Indus., Ltd.*, 472 F.3d 23, 31 (2d Cir. 2006) (dismissing complaint where plaintiff challenged termination of distribution agreement), *cert. denied*, 128 S. Ct. 97 (2007); *Valley Prods. Co. v. Landmark*, 128 F.3d 398, 403-04 (6th Cir. 1997) (where plaintiff challenged loss of exclusive distributorship); *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39 (1st Cir. 1995) (affirming dismissal of antitrust suit alleging defendant had wrongfully refused to comply with a contract that would have allowed plaintiff access to the pay phone market in Puerto Rico);[21] *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d at 393 (affirming dismissal of Section 2 claim that claimed plaintiff was injured by virtue of losing its exclusive distributorship); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 813-12 (9th Cir. 1988) (affirming summary judgment for defendants where plaintiffs alleged nothing more than injury to their own competing business); *Turner v. Johnson & Johnson*, 809 F.2d 90 (1st Cir. 1986) (affirming entry of judgment for defendant where plaintiffs alleged that defendant defrauded plaintiffs when it purchased their business but did not tell them that it wanted to do so in order to eliminate plaintiffs as a competitor to a business in which defendant had an interest); *Car Carriers*, 745 F.2d at 1110 (finding that "[w]hen stripped to its essential allegations, the complaint does not more than state plaintiffs' commercial disappointment at losing [defendant's] patronage."); *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983) (dismissing claim that alleged defendants had engaged in a scheme to defraud plaintiff by falsifying purchase orders, invoices and delivery receipts for business forms that were never delivered but were still paid for by plaintiff); *Baum Research & Dev. Co. v. Hillerich & Bradsby Co.*, 31 F. Supp. 2d 1016, 1023 (E.D. Mich. 1998) (granting defendants' motion to dismiss where plaintiff manufacturer alleged defendants had conspired to manipulate the standard for baseball bats in college baseball to exclude the type of bats plaintiff manufactured because the plaintiff had only alleged "an injury to a single competitor."). Indeed, in two of the cases cited by McKesson, the court did not even grant dismissal on the grounds of antitrust injury, but instead on the entirely different doctrine of antitrust standing. *See Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1454 (11th Cir. 1991) (affirming dismissal in favor of defendants where plaintiff radiologist challenged defendants' denial of his application for

4. Plaintiffs satisfy the standing requirement because they were directly harmed by the price-fixing conspiracy

To bring an antitrust claim the plaintiff must be directly injured by the alleged anti-competitive conduct. *Associated Gen. Contractors, Inc. v. California State Council of Carpenter*s, 459 U.S. 519, 542 (1983). As part of the development of this standing requirement, courts hold that indirect purchasers generally lack standing to bring an antitrust claim because they are harmed indirectly, not by the anticompetitive conduct, but rather by means of a pass-through from the direct purchaser. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). ***Nonetheless an indirect purchaser has standing when he or she "is the only party who has paid any overcharge***," for example "[w]hen a dealer has illegally conspired with a manufacturer with respect to the price paid by a consumer." *Dickson v. Microsoft Corp.*, 309 F.3d 193, 215 (4th Cir. 2002) (quoting 2 PHILLIP E. AREEDA, HERBERT HOVENKAMP & ROGER D. BLAIR, ANTITRUST LAW ¶ 346h, at 369-70 (2d ed. 2000)). The rationale of *Illinois Brick* is absent in such cases because the plaintiffs incur harm directly and not as a result of a pass-on. 309 F.3d at 215. Indeed, in this case there is no pass-on as the pharmacies benefitted from the price increase.

McKesson concedes that there are numerous cases, including decisions from the Fourth, Fifth, Ninth and Eleventh Circuits, recognizing the exception to the indirect purchaser rule when the purchaser is the only party to pay the overcharge. McKesson Br. at 14 n.7. For example, *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1211 (9th Cir. 1984) holds:

> The consumers argue that because they allege that the retail price was the one fixed, their theory of recovery does not depend on pass-on of damages; thus *Illinois Brick* does not apply.

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privileges to their hospitals); *HyPoint Tech., Inc. v. Hewlett-Packard Co.*, 949 F.2d 874, 877 (6th Cir. 1991).

> We agree. . . . In these circumstances, *Illinois Brick* is no bar since there would be no wholesale overcharge to be passed on to the consumers.

Similarly, in *Fontana Aviation, Inc. v. Cessna Aircraft Co*., 617 F.2d 478 (7th Cir. 1980), the Seventh Circuit allowed the plaintiff to sue the manufacturer even though it had purchased the aircraft from the dealer (and not the manufacturer) because the plaintiff did not seek damages for unlawful indirect overcharges passed on to it. *Id*. at 480.[22]

Thus, it is disingenuous of McKesson to argue that Plaintiffs seek to create "a new exception to *Illinois Brick* for a purchaser who is 'the only party to pay the overcharge.'" McKesson Br. at 14. Instead, it is McKesson, who would have the Court artificially limit the reasoning of these decisions to situations in which the plaintiff purchases a product from a member of the conspiracy simply because this is the situation in which direct harm most often arises. But the indirect purchaser rule is not a separate standing requirement, but merely a general application of the direct injury requirement. The decisions on which Plaintiffs rely, that allow the plaintiff to sue an upstream seller therefore do not turn on the ***status*** of the seller from whom the purchaser makes its purchase, but on the ***nature of the harm*** inflicted on the purchaser.

McKesson directed its price-fixing scheme at retailer purchasers and for the benefit of its pharmacy clients. There is no pass through in this case because retailers purchased drugs from McKesson (and others) on the basis of WAC, while Plaintiffs purchased the Subject Drugs on

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[22] *See also Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 376 (3d Cir. 2005); *Paper Sys. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 632 (7th Cir. 2002); *Lowell v. American Cyanamid Co*., 177 F.3d 1228, 1231 (11th Cir. 1999); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1163 (5th Cir. 1979).

the basis of AWPs.[23] Because the scheme directly impacted Plaintiffs, they meet the standing requirement of direct injury.

5. U&C Plaintiffs properly allege proximate cause

McKesson further contends that McKesson's scheme to raise AWPs did not proximately cause injury to the U&C Plaintiffs because there is no correlation between AWP and U&C prices. As set forth more fully in Plaintiffs' surreply opposing McKesson's motion to dismiss and for judgment on the pleadings,[24] which Plaintiffs incorporate by reference. McKesson's contention is wrong not only as alleged in the Complaint, but as explained in the opposition to the motion to dismiss the U&C case, McKesson's own business provides a service to its customers to help them set U&C prices based on AWP.

B. Plaintiffs Also Properly Pled Their Alternative Claim for Relief Under the Cartwright Act

McKesson argues that if Plaintiffs' price-fixing allegations do not meet the federal standing requirement of an antitrust injury, they also fail to establish a claim under the Cartwright Act. State law injury requirements largely track federal requirements, except that Plaintiffs' standing as "indirect purchasers" is irrelevant under California law. CAL. BUS. & PROF. CODE § 16750(a). For the reasons set forth above, Plaintiffs contend that they have

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[23] McKesson's reliance on *Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 207 (1990); *California v. ARC Am. Corp.*, 490 U.S. 93, 103 (1989); *Paycom Billing Servs. v. MasterCard Int'l, Inc.*, 467 F.3d 283, 292 (2d Cir. 2006); *McCarthy v. Recordex Serv.*, 80 F.3d 842, 844 (3d Cir. 1996); *In re Relafen Antitrust Litig.*, 225 F.R.D. 14 (D. Mass. 2004); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 12114 (D.D.C. July 2, 2001); and *In re Terazosin Hydrochloride Antitrust Litig.*, 160 F. Supp. 2d 1365 (S.D. Fla. 2001) is also unavailing because these cases involve pass-on damages.

[24] Docket No. 455 (*New England Carpenters, et al. v. First Databank, et al.*, No. 05-11148).

alleged the existence of an antitrust injury, for which Plaintiffs are entitled to relief under both federal and California law.[25]

Relying on the Court's order in *AWP*, McKesson next argues that the law of Plaintiffs' states of residence applies. But the Court has not yet ruled on the applicable state law in the *FDB* case. Like that litigation, this case is factually distinguishable from *AWP* and requires a different analysis. Unlike *AWP*, which involved scores of defendants from numerous different states, McKesson, a California resident, is the sole defendant in this case, and all of the alleged misconduct occurred in California. Moreover, comments to RESTATEMENT OF THE LAW (2D) OF CONFLICT OF LAWS § 145 provide that

> the place where the conduct occurred is given particular weight in the case of . . . unfair competition (see Comment f), since in the case of such torts there is often no one clearly demonstrable place of injury. Likewise, when the primary purpose of the tort rule involved is to deter or punish misconduct, the place where the conduct occurred has peculiar significance (see Comment c).

Id., § 145, comment e; *see also* comments f and c. The treble damages provision of the Cartwright Act is a clear indication of the punitive purpose of the Cartwright Act. California courts routinely certify national classes based on California statutes to protect "out-of-state

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[25] The decisions McKesson relies on to support its contention that Plaintiffs have not established an antitrust injury pursuant to the Cartwright Act, *Korea Kumho Petrochemical Co. v. Flexsys Am. LP*, 2007 U.S. Dist. LEXIS 61373 (N.D. Cal. Aug. 7, 2007) and *In re Dynamic Random Access Memory Antitrust Litig*., 516 F. Supp. 2d 1072 (N.D. Cal. 2007), are inapposite. In *Korea Kumho* the court dismissed the claim because there were no allegations that the defendant directed its conduct to the plaintiff; there were no facts alleging that plaintiff had standing to sue on behalf of harm to a third-party joint venture and even allegations concerning the third party indicated that the various threats and demands made of it were ineffectual because it was able to find other suppliers. 2007 U.S. Dist. LEXIS 61373, at *13-14. In *Dynamic Random Access* the court concluded that plaintiffs who purchased DRAM as a component of other products – such as computers – were not participants in the alleged market for DRAM, but in separate, albeit related, markets for products that include DRAM. 516 F. Supp. 2d 1090. Plaintiffs have provided sufficient detailed allegations that they were directly harmed by McKesson's scheme to fix retail prices.

parties when they are harmed by wrongful conduct occurring in California." *Wershba v. Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 161 (Cal. Ct. App. 2001) (citation, internal quotations omitted).[26] Moreover, McKesson has not shown that if California law were applied, the laws of the other affected states would not be effectuated.

C. Plaintiffs' Alternative Claim for Relief Under Other States' Antitrust Statutes are Also Properly Pled

Finally, in the event that the Court rejects Plaintiffs' Sherman Act claim and declines to apply California law to the class as a whole, Plaintiffs have alleged causes of action under the states that allow indirect purchaser claims. McKesson argues that Plaintiffs are not entitled to bring some of these claims because there are no representative plaintiffs who were injured or reside in these states.[27] However, TPP plaintiffs have suffered injuries in states where their beneficiaries reside or otherwise make purchases. For example, Plaintiff District 37 has beneficiaries in all 50 states and the District of Columbia and reasonably believes it has overpaid for one or more of the Subject Drugs in each state or district, under whose law relief is sought.[28]

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[26] As explained by the California Supreme Court:

> California . . . has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices. California business depends on a national investment market to support our industry. The California remedy for market manipulation helps [advance this interest].

Diamond Multimedia Sys., Inc. v. Superior Court, 19 Cal. 4th 1036, 1064 (1999) (affirming certification of a national class action pursuant to California securities statute).

[27] As to the laws of the Plaintiffs' states of residence, McKesson argues that Plaintiffs fail to allege an antitrust injury. But McKesson concedes that these states follow federal law regarding the requirement of an antitrust injury. As set forth in Plaintiffs' discussion of its Sherman Act claim, Plaintiffs properly allege an antitrust injury.

[28] McKesson also notes Plaintiffs' scrivener errors, whereby they erroneously cited to monopoly, as opposed to conspiracy provisions of the antitrust statutes of the District of Columbia, Michigan and Minnesota. With leave of Court, Plaintiffs will amend at the next available opportunity to provide the following corrections: D.C. CODE § 28-4502 ("Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or

IV. CONCLUSION

For the foregoing reasons the Court should deny McKesson's motion to dismiss.

Dated: February 14, 2008

By **/s/ Steve W. Berman**

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commerce all or any part of which is within the District of Columbia is declared to be illegal."); MICH. COMP. LAWS § 445.772 ("A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.") and MINN. STAT. § 325D.51 ("A contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful.").

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on February 14, 2008.

/s/ Steve W. Berman
Steve W. Berman

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NEW ENGLAND CARPENTERS HEALTH BENEFITS FUND, et al., Plaintiffs,	)
v.	) CIVIL ACTION NO. 07-12277-PBS
McKESSON CORPORATION, Defendant.	)

MEMORANDUM AND ORDER

August 26, 2008

Saris, U.S.D.J.

INTRODUCTION

In this proposed national class action, Plaintiffs allege that defendant McKesson Corporation ("McKesson"), a drug wholesaler, engaged in unlawful price-fixing by entering into an agreement with First DataBank,[1] a publishing company, to inflate the "average wholesale price" ("AWP") for numerous prescription pharmaceuticals beginning in late 2001. Plaintiffs allege that McKesson's price-fixing scheme violates Section 1 of the Sherman Act and various state antitrust laws. See 15 U.S.C. § 1. The proposed class includes third party payors and consumers that paid for the drugs.

McKesson moves to dismiss the action on the ground that Plaintiffs fail to allege any anticompetitive effects from the

[1] First DataBank is not a party to this action.

conspiracy to increase prices.[2] Plaintiffs tepidly oppose. After hearing, and a review of the submissions, the motion is **ALLOWED**.

FACTUAL ALLEGATIONS

The allegations in the Complaint are based on "the same set of operative facts" as those alleged in the Plaintiffs' civil RICO suit. (Compl. ¶ 1). The facts are fully set forth in New England Carpenters Health Benefits Fund v. First DataBank, Inc., 244 F.R.D. 79 (D. Mass. 2007).

Plaintiffs allege that defendant McKesson, a drug wholesaler, and First DataBank, a drug pricing publisher, reached a "continuing agreement" to raise the AWP spread from 20% to 25% for over four-hundred brand-name, self-administered drugs (the "Marked Up Drugs"). (Compl. ¶ 176). Plaintiffs allege that the "price fixing conspiracy" was intended to "cause over-

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[2] McKesson also contends that plaintiffs lack standing to assert claims under the federal antitrust laws because they did not directly purchase the Marked Up Drugs. As such, they contend that their federal antitrust claims are foreclosed by the direct purchaser rule set forth in Illinois Brick v. Illinois, 431 U.S. 720 (1977). Plaintiffs counter by arguing that the Illinois Brick rule does not apply here because the Plaintiffs are the only ones hurt by the overcharges. See Dickson v. Microsoft Corp., 309 F.3d 193, 215 (4th Cir. 2002) (holding that an indirect purchaser has standing under the co-conspirator exception to the direct purchaser rule because he or she "is the only party who has paid any overcharges"). Since this presents a thorny issue of statutory jurisdiction, see California v. ARC Am. Corp., 490 U.S. 93, 102-03 (1989) (direct purchaser rule is matter of statutory construction), the court will bypass the issue since, as set forth below, "the outcome on the merits is foreordained." See Royal Siam Corp. v. Chertoff, 484 F.3d 139, 144 (1st Cir. 2007) (permitting bypassing of thorny issues of statutory jurisdiction where "precedent clearly adumbrates the result on the merits.") (citations omitted).

reimbursement . . . and thereby increase retail pharmacy profit margins on the sales of the Marked Up Drugs to the detriment of the Classes," all in violation of Section 1 of the Sherman Act and California state antitrust law. (See id. ¶¶ 177 (Count I, federal law), 187 (Count II, California state law)). In the alternative, Plaintiffs also assert a violation of various state antitrust laws "[i]n the event that the Court finds that the Plaintiffs in all Classes lack standing under Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)." (Id. ¶ 192).

DISCUSSION

I. Standard of Review

In order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a plaintiff's complaint must allege "a plausible entitlement to relief." In re Citigroup, Inc., Nos. 06-2565, 07-11502008, 2008 WL 2840601, at *4 (1st Cir. July 24, 2008) (quoting Bell Atl. Corp. v. Twombly, ___ U.S. ___, 127 S. Ct. 1955, 1967 (2007)). While this Court will take all of the complaint's well-pleaded facts as true and draw all reasonable inferences therefrom in the plaintiff's favor, it is free to disregard "bald assertions, unsupportable conclusions, and opprobrious epithets." Citigroup, 2008 WL 2840601, at *4 (quoting Ruiz v. Bally Total Fitness Holding Corp., 496 F.3d 1, 4 (1st Cir. 2007)).

II. Per Se or Rule of Reason

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in

restraint of trade or commerce among the several States." 15 U.S.C. § 1. Ordinarily, "antitrust claims under section 1 of the Sherman Act . . . require a burdensome multi-part showing . . . [through] the so-called rule of reason calculus." Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004). However, "[t]he rule of reason does not govern all restraints. Some types 'are deemed unlawful per se.'" Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2713 (2007) (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)). The "per se" rule deems certain specific categories of restraints necessarily illegal and thus "eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." Leegin, 127 S. Ct. at 2713.

As an initial matter, Plaintiffs contend that the alleged "conspiracy" in this case qualifies as a "per se" unreasonable restraint on trade. To qualify for "per se" treatment, a defendant's conduct must fall into a category recognized by the courts to have "manifestly anticompetitive effects." Leegin, 127 S. Ct. at 2713 (quotation marks omitted). Application of the "per se" standard is only appropriate where "courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." Id. (citations omitted). Because of this rigorous standard, there are "only a couple of 'serious candidates' for "per se" treatment," and the offenses falling under that

classification are an "ever narrowing . . . niche." Addamax Corp. v. Open Software Found., Inc., 152 F.3d 48, 51-52 (1st Cir. 1998) (quoting U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993)). "Per se" treatment has thus predominantly (if not exclusively) been applied to horizontal restraints in which the anticompetitive effects are "immediately obvious," such as with "horizontal agreements among competitors to fix prices or divide markets." Leegin, 127 S. Ct. at 2713 (citations omitted).

While acknowledging that McKesson and First DataBank are not competitors, Plaintiffs argue that this is a "distinction without a difference" because the harm resulting from the alleged price-fixing conduct is logically similar to that caused by the traditional horizontal restraints which trigger the "per se" treatment. However, the very reason that horizontal price-fixing agreements among competitors have specifically been viewed as "per se" violations of Section 1 of the Sherman Act is because the courts have had enough experience with them to know that they "always or almost always tend to restrict competition and decrease output." Leegin, 127 S. Ct. at 2713 (quoting Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 723 (1988). In contrast, Plaintiffs at hearing conceded that the alleged conspiracy is a "unique case" and that their proposed application of the "per se" standard rests on a "novel theory" that has not yet been brought before the courts. As such, McKesson's alleged conduct does not fall within one of the narrowly recognized

categories warranting "per se" analysis under Section 1 of the Sherman Act.

III. Quick Look Analysis

As a fallback, Plaintiffs argue that their claims, while novel, merit the application of a "quick look" analysis under the rule of reason. The Supreme Court has held that a "quick look" analysis may be applied to claims that do not fit neatly into one of the requisite categories meriting "per se" treatment but nonetheless present allegations that give rise to an "intuitively obvious inference of an anticompetitive effect." Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 780-81 (1999) (holding that a "quick look" was not sufficient to justify the conclusion that an advertising restriction adopted by a trade association violated the antitrust laws). Some conspiracies are so facially anticompetitive that "no elaborate industry analysis is required to demonstrate the anti-competitive character of such . . . agreement[s]." Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978). When faced with such a conspiracy, the Court will evaluate "the alleged justification[]" by the defendant and "only the briefest inspection" is required to "reject the excuses and strike down the agreements." U.S. Healthcare, 986 F.2d at 595. Significantly, this "quick look" analysis has primarily been applied to horizontal agreements among competitors, the anticompetitive effects of which were obvious to the Court. See, e.g., FTC v. Indiana Fed. of Dentists, 476 U.S. 447 (1986); NCAA v. Board of Regents, 468 U.S.

85 (1984); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

Upon review of the allegations in the Complaint, and with extensive knowledge of the fraud litigation which forms the foundation of this suit, this Court disagrees that McKesson's alleged conduct was so facially anticompetitive as to warrant a "quick look" analysis. Indeed, Plaintiffs do not explain how there are any anticompetitive effects at all, other than to say in conclusory fashion that McKesson gained an unfair advantage over competitors due to the "good will" generated by the illegal scheme. The alleged conspiracy involves an agreement between non-competitors (a publisher and a wholesaler) to state fraudulent drug prices so that pharmacies will have a better profit margin, and the injured parties are the third party payors that made reimbursements and the consumers that had to pay higher co-insurance payments for their drugs. This was not a horizontal conspiracy among wholesalers or pharmacies to inflate prices. The anticompetitive effects of this agreement are not obvious to this Court, making a "quick look" analysis inappropriate.

IV. Rule of Reason Analysis

Plaintiffs finally contend that even if their claims do not fall into the "per se" category or warrant a "quick look" analysis, they have pleaded facts sufficient to establish a plausible Sherman Act Section 1 violation under the rule of reason. The First Circuit has held that the rule of reason requires an onerous multi-part showing:

> [1] that the alleged agreement involved the exercise of power in a relevant economic market;
> [2] that this exercise had anti-competitive consequences;
> [3] and that those detriments outweighed efficiencies or other economic benefits.

Stop & Shop Supermarket Co., 373 F.3d at 61 (emphasis added). "In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." Leegin, 127 S. Ct. at 2713.

In analyzing Plaintiffs' claim under the rule of reason, there is no allegation that McKesson reduced competition in any relevant economic market. The Complaint merely gives the blanket assertion that "[p]laintiffs . . . paid higher prices for the Marked Up Drugs than they would have paid but for Defendant's anticompetitive conduct," without going any further to allege how the conduct resulted in a reduction of competition in a relevant market. (Compl. ¶ 179). But Plaintiffs are mistaken in flagging pricing effects without the concomitant showing of anticompetitive conduct. Leegin, 127 S. Ct. at 2718. Such a "bald assertion" is insufficient to withstand a motion to dismiss. Citigroup, 2008 WL 284061, at *4; see Twombly, 127 S. Ct. at 1967-1969. In fact, Plaintiffs have all but conceded that their claim fails if they are required to demonstrate anticompetitive effects resulting from McKesson's alleged conduct. (Hr'g Tr. at 16.)

McKesson's conspiracy to charge higher prices is not itself sufficient to establish "antitrust injury." While "both

antitrust and ordinary contract or tort claims may sometimes arise out of the same body of conduct," antitrust claims are concerned "with conduct that stifles competition." Eastern Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc., 357 F.3d 1, 4 (1st Cir. 2004) (citations omitted); see also Turner v. Johnson & Johnson, 809 F.2d 90, 102 (1st Cir. 1986) (upholding dismissal of antitrust claims where alleged injury to plaintiffs "unquestionably flowed from the alleged fraud and not from suppressed competition in the electronic thermometer market"). When presented with a conspiracy between a telephone carrier and a telephone equipment removal service to artificially increase prices for consumers, the Supreme Court affirmed the dismissal of the antitrust complaint holding that while the defendant's conduct "hurt consumers by raising telephone service rates," the increased rates did not result from "a less competitive market for removal services." NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136 (1998). Plaintiffs have thus failed to plausibly allege a claim under Section 1 of the Sherman Act.

V. State Law Claims

The parties seem to concede that the state antitrust laws follow federal law regarding the requirement of an antitrust injury. (Docket No. 15 at 21 n.27). Accordingly, these claims fail as well.

ORDER

The motion to dismiss is **ALLOWED** (Docket No. 12).

S/PATTI B. SARIS
United States District Judge