IN RE CARBON BLACK ANTITRUST LITIGATION

2005 | Cited 0 times | D. Massachusetts | January 18, 2005

MEMORANDUM AND ORDER

The plaintiffs Alco Industries, Inc. ("Alco"), Cardinal Color,Inc. ("Cardinal"), Ceradyne Corporation ("Ceradyne"), ParkerHannifin Corporation ("Parker"), Polymerics ("Polymerics"),Schlegel Corporation ("Schlegel"), and Technical Industries, Inc.("Technical") bring this action on their own behalf and as aclass action of purchasers against defendants Cabot Corporation("Cabot"), Columbian Chemicals Company ("Columbian"), DegussaEngineered Carbons, LP ("DEC"), Degussa AG, and DegussaCorporation ("Degussa") for violation of the Sherman Act,15 U.S.C. § 1, based upon alleged price-fixing in the carbon blackmarket. Before me are defendants' motion to dismiss andplaintiffs' motion for class certification.

I. BACKGROUND

Carbon black is used in the manufacturing of many products, including tires, rubber hoses, inks, and paints.[1] (Compl.¶ 18.) The defendants manufacture and sell carbon black, (Compl.¶¶ 3-7.), and, at times relevant to this action, the plaintiffspurchased Carbon Black from one or more of the defendants.(Compl. ¶¶ 8-14.) The plaintiffs seek to represent a classcomprising over five hundred members who purchased carbon blackfrom the defendants.[2] (Compl. ¶¶ 21-22.)

According to the plaintiffs, one must consider conditions inthe carbon black market going back to the mid-1980's in order tounderstand the alleged collusion in this case. (Compl. ¶ 32.) Itwas at that time that the industry began to consolidate in theface of decreasing demand for their products. (Comp. ¶¶ 33-34.)Two proposed acquisitions — one by Columbian and the other byCabot — were opposed by the government and enjoined by JudgeWhite of the Northern District of Ohio. (Compl. ¶¶ 36-38.) Theacquisitions were prevented because the carbon black industry wasrelatively concentrated and carbon black was deemed by Judge White to be a homogeneous product without practical substituteshaving a national market evidencing uniform price movements.(Compl. ¶¶ 38a-c, f.) In addition, Judge White noted thelongstanding use of price listing in the carbon black industry.(Compl. ¶ 38d.) Those qualities eased coordination betweencompanies producing and selling carbon black. (Compl. ¶ 38e.)Judge White also referenced the relatively inelastic demand forcarbon black and the apparent industry effort to implementdiscipline in the pricing of the product. (Compl. ¶ 38g, h.)Further consolidation would therefore have increased theincentives and ability to collude. (Compl. ¶ 38g.) Finally, hefound that prices for carbon black had increased and stabilizedas of 1984. (Compl. ¶ 38i.) In the wake of Judge White'sdecision, prices dropped. (Compl. ¶ 39.)

The plaintiffs allege that the defendants began colluding in orabout late 1992, resulting in a substantial price increase.(Compl. ¶ 32, 40.) Although the defendants claimed the pricechange was necessary due to increased costs and demand as well asthe need for capital investments, the plaintiffs allege that noneof these things occurred at the time. (Compl. ¶ 40.) Despiteconsistent market conditions, defendants Cabot and Columbian"announced basically identical price increases effective January1993." (Compl. ¶ 41.) The collusion allegedly continued atindustry conferences held annually beginning in February of 1993.(Compl. ¶ 42.) Communication was also maintained by use of third-party conduits. (Compl. ¶ 44.) Efforts to increase pricesby closing down two plants during the class period are alleged tobe circumstantial evidence of collusion. (Compl. ¶ 43.) In sum,as costs remained steady, the prices charged for carbon blackrose considerably during 1992-1996, a phenomenon the plaintiffsassert can only be explained by collusive conduct by thedefendants. (Compl. ¶ 47-48.) The plaintiffs also point tocoordination of contractual terms with certain categories ofbuyers. For instance, they allege that the defendants all beganto use similar long-term contracts for their larger buyers,(Compl. ¶ 53.), and all significantly overcharged their smallerbuyers. (Compl. ¶ 54.)

This was all possible due to the overarching market conditions,claim the plaintiffs. They emphasize that carbon black is aunique product with no practical substitutes; that demand for theproduct is relatively inelastic; that the market is highlyconsolidated and has significant barriers to entry; and that thedefendants had a controlling share of the market for carbon blackin the United States.[3] (Compl. ¶¶ 56-59.)

The effect of this collusive conduct has been a series of coordinated price increases since 1992, resulting in themaintenance of supra-competitive prices in the carbon blackmarket. (Compl. ¶¶ 61-65.) The plaintiffs offer as examples ofcoordinated price increases the following: (1) Cabot andColumbian announced "substantially identical price increases" inlate 1992 and ECI followed suit; (2) the defendants all raisedtheir prices in 1994 by approximately 6%; (3) then, in Februaryof 1995, all the defendants announced that they would be changingthe terms under which carbon black would be sold, resulting inprice increases; (4) an announcement of "nearly identical priceincreases" by all defendants was made in June of 2000; (5) thiswas followed by announcements by all defendants over a two-weekperiod at the beginning of 2002 that they were raising prices by5%, eliminating energy surcharges, and increasing the premiums onpackaging; (6) yet another price increase, this time ofapproximately 10%, was announced in November of 2002; and (7) inFebruary of 2003, the defendants announced an increase in priceof roughly 19%.

The plaintiffs are not the only ones who have taken an interestin possible price-fixing agreements by one of the defendants,Degussa. In or around November of 2002, American and Europeanofficials began a joint investigation into the conduct ofdefendants in the carbon black market. (Compl. ¶ 73.) Theinvestigation resulted in surprise raids by Europeaninvestigators. (Compl. ¶ 73.) The conspiracy alleged by the plaintiffs overlapped in time with four other conspiracies inwhich defendant Degussa was allegedly involved. (Compl. ¶ 48.)European and American antitrust authorities have beeninvestigating Degussa for alleged price-fixing agreements inother product markets, which has

led to admissions and proof ofparticipation in certain agreements. (Compl. ¶ 48.)

II. MOTION TO DISMISS

A. Statute of Limitations

The defendants contend that even assuming that the allegedfacts were adequate to state a claim, the claim would be barredby the statute of limitations. The purpose of a limitationsperiod is to provide a measure of repose; and, "[r]epose isespecially valuable in antitrust, where tests of legality areoften rather vague, where many business practices can besimultaneously efficient and beneficial to consumers but alsochallengeable as antitrust violations, where liability doctrineschange and expand, where damages are punitively trebled, andwhere duplicate treble damages for the same offense may bethreatened." 2 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 320a(2002) (hereafter Areeda). The Clayton Act provides that anyaction brought to enforce the antitrust laws "shall be foreverbarred unless commenced within four years after the cause ofaction accrued." 15 U.S.C. § 15b. The plaintiffs claim that thealleged conspiracy in this case dates back to 1992. The initial complaint, however, was not filed until January 30, 2003. Thedefendants assert that the unlawful acts alleged by theplaintiffs occurred before January 30, 1999 and, therefore, theirclaim is time-barred.

This case, however, involves a claim that the defendants tookpart in an ongoing price-fixing conspiracy. As the Supreme Courthas observed: 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) (quoting 2P. Areeda & H. Hovenkamp, Antitrust Law ¶ 338b, at 145 (rev. ed.1995)); see 2 Areeda ¶ 320b & c; see also Zenith RadioCorp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971) ("Inthe context of a continuing conspiracy to violate the antitrustlaws . . . each time a plaintiff is injured by an act of thedefendants a cause of action accrues to him to recover damagescaused by that act and . . . as to those damages, the statute oflimitations runs from the commission of the act."); HanoverShoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 502 n. 15(1968) (where the Court permitted the plaintiffs to recoverdespite the fact that the conspiracy began long before theapplicable statute of limitations because the "conduct . . .constituted a continuing violation of the Sherman Act and . . . inflictedcontinuing and accumulating harm").[4]

As Professors Areeda and Hovenkamp observe, "[t]he continuingviolation issue arises only when the initial act violating theantitrust laws (a) has not been improperly concealed and (b)causes sufficient injury early on." 2 Areeda ¶ 320c (emphasis inoriginal). Both elements are present here.

The plaintiffs apparently no longer claim that the statute oflimitations should be tolled due to fraudulent concealment inthis case. In fact, the plaintiffs did not respond to the statuteof limitations

issue raised in the Defendant's Reply. Theplaintiffs raised the issue of fraudulent concealment in theiroriginal complaint, (see Consolidated Class Action Compl. ¶ 25(F) ("Questions of law and fact common to the class include: . . .(F) Whether Defendants and their co-conspirators fraudulently concealed the contract, combination or conspiracy."), but haveapparently abandoned it in their amended complaint. Theyconceivably could have argued that the defendants fraudulentlyconcealed the nature and extent of the conspiracy and that theydid not know and had no reason to know of the conspiracy, therebytolling the statute of limitations. In fact, "courts often tollthe limitation period in the case of secret conspiracies." 2Areeda ¶ 320e. On the other hand, from the facts pled, ultimatelythey may be deemed to have had reason to know or at leastadequate suspicion to warrant further inquiry.

In any event, the plaintiffs would be required to plead: "(1)wrongful concealment of their actions by the defendants; (2)failure of the plaintiff to discover the operative facts that arethe basis of his cause of action within the limitations period;and (3) plaintiff's due diligence until discovery of the facts."Berkson v. Del Monte Corp., 743 F.2d 53, 55 (1st Cir. 1984)(citations and internal quotation marks omitted). They have notpled those elements and "the burden rests squarely on the partypleading fraudulent concealment." Id.; see Grand RapidsPlastics, Inc. v. Lakian, 188 F.3d 401, 406 (6th Cir. 1999)(finding that it is upon plaintiff as "the party seeking to avoidthe statute of limitations [to] bear? the burden of proof.");In re Compact Disc Minimum Advertised Price AntitrustLitigation, 138 F. Supp. 2d 25, 28-29 (D. Me. 2001) (statingthat the "heightened requirements of Rule 9(b) do apply" to aclaim of fraudulent concealment and thus must be pled with particularity);2 Areeda ¶ 320e (commenting on fraudulent concealment doctrinethat "[b]ecause of its exceptional character, the plaintiff hasthe burden of establishing the requisite elements of thedoctrine"); see also Akron Presform Mold Co. v. McNeilCorp., 496 F.2d 230, 233 (6th Cir. 1974) ("All presumptions areagainst [the party seeking the benefit of exceptions to thestatute of limitations], since [their] claim to exemption isagainst the current of the law and is founded on exceptions.").

Nor is this a scenario — such as that described in Zenith —where the injury caused by the unlawful acts would not be feltfor some time or "is excessively speculative in the early years."2 Areeda ¶ 320c. Therefore, the plaintiffs must be able todemonstrate that there exist "predicate acts" substantiatingtheir conspiracy claim occurring after January 30, 1999. Id.("The idea of the continuing conspiracy or violation is that thedefendant continues to commit acts in furtherance of theviolation and each of these additional acts causes additionalinjury. The statute is said to be tolled as long as suchqualifying acts continue to be committed.")

The defendants claim that "virtually all of [the plaintiff's]factual allegations involve events well outside the statute oflimitations period," citing the plaintiff's oppositionmemorandum. That, however, is not the case. The plaintiffs plead in their complaint that there were coordinated priceincreases in June 2000, January 2002, November 2002, and Februaryof 2003. The plaintiffs also refer to trade association meetingswhere the agreement was facilitated that began in 1993 and "wereheld on an annual basis thereafter." (Compl. ¶ 42.) In addition,the plaintiffs allege that the

defendants used third-partyconduits to maintain the conspiracy, (Compl. ¶ 44), which alongwith the claims of coordinated price increases after January 30,1999 can be read to allege that the practice continued after thatdate.

With each agreed-upon, coordinated price increase, thedefendants would have violated the Sherman Act anew and,consequently, kept "the cause of action alive for those injuriesthat occur within four years prior to the filing of an antitrustcomplaint." 2 Areeda ¶ 320c2. Therefore, the alleged unlawfulacts occurring prior to January 30, 1999, while probative of theconspiracy, may not form the basis of recovery. See Klehr,521 U.S. at 189 ("[T]he commission of a separate new overt actgenerally does not permit the plaintiff to recover for the injurycaused by old overt acts outside the limitations period.")(collecting cases). That, however, does not prevent theplaintiffs from bringing a claim for damages incurred fromunlawful acts taken by the defendants after January 30, 1999.Whether the plaintiffs have pled sufficient facts to raise a claim that the defendants were engaged in an ongoing antitrustconspiracy is a separate question that I take up in the nextsection.

B. Failure to State a Claim

1. Standard of Review

In considering a motion to dismiss pursuant to Fed.R.Civ.P.12(b)(6), a court must take well-pled factual allegations in thecomplaint as true and must make all reasonable inferences infavor of the plaintiff. Watterson v. Page, 987 F.2d 1, 3 (1stCir. 1993). The court, however, need not credit "bald assertions,unsupportable conclusions, or opprobrious epithets." Chongris v.Bd. of Appeals, 811 F.2d 36, 37 (1st Cir. 1987). Dismissal underRule 12(b)(6) is only appropriate if the complaint, so viewed,presents no set of facts justifying recovery. Cooperman v.Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999).

In an antitrust action, a court, in deciding a motion todismiss, applies no special pleading requirements. See NewYork Airlines, Inc. v. Dukes County, 623 F. Supp 1435, 1451 n.14 (D. Mass 1985) (citing Corey v. Look, 641 F.2d 32, 38 (1stCir. 1981)). Nevertheless, "plaintiff must do more than assertconclusory allegations." CCBN.Com, Inc. v. Thomson Financial,Inc., 270 F. Supp 2d 146, 154 (D. Mass 2003). "[I]t is notenough merely to state that a conspiracy has taken place." The Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213,220-21 (4th Cir. 1994); see Eastern Food Services, Inc. v.Pontifical Catholic Univ. Services Assoc., Inc., 357 F.3d 1, 9(1st Cir. 2004) ("[T]he cases . . . say that it is not enoughmerely to allege a violation in conclusory terms, that thecomplaint must make out the rudiments of a valid claim, and thatdiscovery is not for fishing expeditions."); Car Carriers, Inc.v. Ford Motor Co., 745 F.2d 1101, 1110 (7th Cir. 1984)("[I]nvocation of antitrust terms of art does not confer immunityfrom a motion to dismiss."); see also Boston & Maine Corp.v. Town of Hampton, 987 F.2d 855, 863 (1st Cir. 1993); New YorkAirlines, 623 F. Supp at 1451 n. 14. Therefore, "when therequisite elements are lacking, the costs of modern federalantitrust litigation and the increasing caseload of the federalcourts counsel against sending the parties into discovery whenthere

is no reasonable likelihood that the plaintiffs canconstruct a claim from the events related in the complaint." CarCarriers, Inc., 745 F.2d at 1106. With that said, a complaintshould be dismissed only if it appears "beyond doubt that theplaintiff can prove no set of facts in support of his claim whichwould entitle him to relief." Conley v. Gibson, 355 U.S. 41,45-46 (1957); see Hospital Building Co. v. Trustees of RexHosp., 425 U.S. 738, 746 (1976) ("[I]n antitrust cases where`the proof is largely in the hands of the alleged conspirators,'dismissals prior to giving the plaintiff ample opportunity fordiscovery should be granted very sparingly.") (quoting Poller v. ColumbiaBroadcasting, 368 U.S. 464, 473 (1962)).

2. Discussion

Section 1 of the Sherman Act prohibits "every contract,combination . . . or conspiracy in restraint of trade orcommerce." 15 U.S.C. § 1. In order to state a claim under Section1, the plaintiffs must allege (1) the existence of a contract,combination, or conspiracy (2) that unreasonably restrains tradeeither per se or under the rule of reason and (3) that effectsinterstate trade or commerce. See Lee v. Life Ins. Co of N.Am., 829 F. Supp. 529, 535 (D.R.I. 1993), aff'd 23 F.3d 14(1st Cir. 1994). Section 1 prohibits unreasonably anticompetitiveagreements and, therefore, absent such an agreement, there can beno violation of the section.[5] Certain agreements — suchas the price-fixing agreement alleged here — are considered perse unlawful.[6] See Eastern Food, 357 F.3d at 4 (notingthat "[a]lmost the only important categories of agreements thatreliably deserve this label today are those among competitorsthat amount to `naked' price fixing", among others). The questionbefore me, then, is whether the plaintiffs have sufficientlyalleged, for purposes of rebutting a motion to dismiss, that thedefendants took part in an agreement to fix prices in violationof Section 1 of the Sherman Act. See DM Research, Inc. v.Coll. of Am. Pathologists, 170 F.3d 53, 55 (1st Cir. 1999) ("Theissue is whether the complaint states a claim under the ShermanAct, assuming the factual allegations to be true and indulging toa reasonable degree a plaintiff who has not yet had anopportunity to conduct discovery."); Compact Disc,138 F. Supp. 2d at 26 (answering the question: "How much evidence of anillegal agreement must antitrust plaintiffs plead to avoiddismissal for failure to state a claim?").

Simply claiming a conspiracy by pointing to parallel conduct,is not sufficient to plead a Section 1 case. Parallel conduct "isa common and often legitimate phenomenon," see Twombly v. BellAtlantic Corp., 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003), and,consequently, the plaintiffs must plead some facts that wouldsubstantiate their claim that an unlawful agreement existsbetween the defendants. See DM Research, 170 F.3d at 56 (noting that pleading a "conspiracy" or "agreement""might well be sufficient in conjunction with a more specificallegation — for example, identifying a written agreement or evena basis for inferring a tacit agreement — but a court is notrequired to accept such terms as a sufficient basis for acomplaint") (internal citation to Interstate Circuit v. UnitedStates, 306 U.S. 208, 221-25 (1939) omitted). They must providethe court with something "more than unlikely speculations," DMResearch, 170 F.3d at 56, with something that would make itsclaim of "conspiracy more plausible." Id. at 56-57.

The hurdle at the motion to dismiss stage in a notice pleadingsetting such as this is relatively low, because there exist latermechanisms for determining factual disputes: "[C]laims lackingmerit may be dealt with through summary judgment under Rule 56.The liberal notice pleading of Rule 8(a) is the starting point ofa simplified pleading system, which was adopted to focuslitigation on the merits of a claim." Swierkiewicz v. SoremaN.A., 534 U.S. 506, 515 (2002) (holding that an employmentdiscrimination claim, governed by Rule 8(a), is not subject to aheightened pleading requirement). The plaintiffs have so focusedthe litigation.

Here, as in Compact Disc, the conclusory allegations do not stand alone; a factual predicate is provided. When a plaintiff's case depends upon inference, the test is "`when the suggested inferences rise to what experience indicates is an acceptable level of probability.'" Cooperman, 171 F.3d at 47-48 (quoting Dartmouth Review v. Dartmouth Coll., 889 F.2d 13, 16 (1st Cir. 1989) in a securities case). Although the alleged agreements here do rest largely on inference, the pattern of activity alleged meets the "acceptable level of probability" test at this pleading stage.138 F. Supp. 2d at 28 (footnote omitted). For instance, theplaintiffs allege (1) a series of coordinated price increases nottied to changes in input costs beginning in 1992 and continuingthrough the Class Period; (2) the beginning of annual conferenceswhere the plaintiffs contend the collusion was aided; (3) thecoordinated tightening of supply through the closing of two NorthAmerican plants; (4) the use of third party conduits to sharepricing information; (5) defendant Cabot's use of such conduitsand other forms of signaling to maintain the pricing agreements;(6) the defendants' use of long-term contracts for their largestbuyers in an attempt to aid in that collusion; (7) that thesmaller volume buyers were charged such inflated prices thatnothing but collusion could account for them; (8) that carbonblack is a standardized product; (9) that carbon black is aunique product with no readily available substitutes; (10) thatdemand for carbon black is relatively inelastic; (11) that themarket for carbon black is highly consolidated with high barriersto entry; (12) that the defendants control a majority of themarket; and (13) that maintenance of the agreement is facilitatedby the facts that (a) "anticipated sales to major accounts were established annually" (Compl. ¶ 60(a).), (b) carbon black is notsold in tandem with other products, and (c) price changes dependon certain known economic events.

The defendants contend that the plaintiffs' pleadings do notsupply a sufficient basis to justify a reasonable inference of anunlawful agreement. In essence, the defendants claim that thecircumstances described by the plaintiffs could just as likely bepresent in a lawful setting and that the substantiating factspresented by the plaintiffs are not relevant "plus factors." Inaddition, the defendants insist that the plaintiffs have offeredno factual underpinnings to their claim, describing theplaintiffs offerings as "conclusory assertions." That is not anaccurate depiction. The defendants, in essence, are contestingthe inferences to be drawn from the circumstances and eventsdescribed by the plaintiffs.[7] At this stage of theproceedings, however, drawing inferences in favor of the plaintiffs, it seemsquite clear that the plaintiffs have presented a number ofcircumstances and events that, especially when looked at in sum,can lead to a reasonable inference of collusion.

The complaint undeniably relies on circumstantial evidence, butto the extent the defendants'

argument is based on the notionthat circumstantial evidence is an insufficient basis forpleading a Section 1 claim, it is unpersuasive. Courts haverecognized that it would be unfair to require direct evidencebecause it "is often impossible to obtain . . . and so an illegalagreement must often be inferred from circumstantial evidence,including public conduct and `business behavior' of competitors,as well as market facts." Twombly, 313 F. Supp. 2d at 179(citing Theatre Enterprises, Inc. v. Paramount Film Distrib.Corp., 346 U.S. 537, 540 (1954)); see also In re CommercialExplosives Litigation, 945 F. Supp 1489, 1492 (D. Utah 1996)("Requiring detailed facts at the pleading stage is `contrary tothe substantive law of antitrust conspiracy' because `conspiracymay be proven by circumstantial evidence.'") (quoting MonumentBuilders v. Amer. Cemetary Ass'n, 891 F.2d 1473, 1481 (10th Cir.1989)).

The defendants are in essence arguing that the plaintiffs failto prove the antitrust claims they bring, rather than contending that they fail to put the defendants on notice of aclaim based on reasonable inferences to be drawn from a series ofobserved actions, business practices, and market conditions.See Swierkiewicz, 534 U.S. at 515 ("`Indeed it may appear onthe face of the pleadings that a recovery is very remote andunlikely but that is not the test.'") (quoting Scheuer v.Rhodes, 416 U.S. 232, 236 (1974)).

The defendants argue that dismissal is warranted because theplaintiffs have already had ample discovery in this case, whichmitigates any unfairness that would result from dismissing a caseat this stage. Lack of discovery plainly informs the decisions ofcourts denying motions to dismiss in antitrust cases. See,e.g., Compact Disc, 138 F. Supp. 2d at 27 (concluding thatliberal notice pleading applies after noting that "[t]hese stillare motions to dismiss at the beginning of discovery");Commercial Explosives, 945 F. Supp. at 1492 (permitting acomplaint to survive motion to dismiss despite its lack ofdetailed facts partly because "many of the facts to support aclaim of conspiracy may be unknown to plaintiffs until they havean opportunity to conduct some discovery"). I cannot find at thisstage of the litigation that the plaintiffs have had sufficientopportunity to conduct discovery. Although the defendants claimthey have produced "a significant amount of documents, data, andinformation to Plaintiffs (including a combined total of approximately three million pages of documents,the majority in an electronically searchable form)", fulldiscovery will likely be quite extensive and it would bepremature to conclude that sufficient discovery — for thatmatter, to conclude how much discovery — has occurred to warrantmore specificity in the pleadings. The plaintiffs are onlyrequired to provide the defendants with sufficient notice throughtheir complaint; they need not provide exquisite detail.

The defendants claim that the purpose of the motion to dismissis to save them the need to go through needless discovery. Theymake this contention, while also pointing to the voluminousdiscovery already conducted, as a reason to dismiss the claim. Tothe extent discovery has already occurred, it actually makes thesurvival of the claim less burdensome on the defendants. They aresimply that much closer to the next step in the process.

The standards at this stage are intended to prevent "fishingexpeditions." Eastern Food, 357 F.3d at 9. It cannot be said,however, that "no relief could be granted under any set of factsthat could be proved consistent with the allegations." Hishon v.King & Spalding, 467 U.S. 69, 73 (1984). The plaintiffs haveprovided sufficient circumstantial evidence to put the defendanton notice of their claims and to permit me to find that there isa plausible set of facts under which they could prove their case. Discovery will not require plaintiffs to search for grounds onwhich to rest their claim; it is rather for substantiation forthe grounds they have already presented. That type of informationis of the sort, unlike "information about market definition,"Eastern Food, 357 F.3d at 9, which is only available to theplaintiffs through such discovery. In sum, the defendants'contention that the facts could also easily describe lawfulactivity is not dispositive at this stage of the proceedings.

In fact, the plaintiffs describe a relatively straightforwardprice-fixing agreement, one which courts have addressed in thecontext of Sherman Act cases for many decades. Whether the recordwill substantiate the plaintiffs' contentions after beingsupplemented by more complete discovery, one cannot say. But thatis a question for a later date and, if appropriate, can beresolved at that time on a more developed factual record. Atpresent, I must draw inferences in favor of the plaintiffs. Theyhave alleged that price increases were coordinated throughunlawful communication via a third-party conduit and at tradeassociation meetings. In addition, the plaintiffs allege that thedefendants agreed to limit supply through the closing of plantsin order to raise prices in the industry, while also institutinguniform contractual practices by agreement. The plaintiffs havealleged information regarding market conditions that would facilitate the maintenance of thealleged agreement. All these allegations may not be borne out inthe end, but they are pled, are plausible and, if believed, wouldform the basis of a valid Section 1 claim. I therefore will denythe defendants' motion to dismiss the complaint.

III. MOTION FOR CLASS CERTIFICATION

The plaintiffs seek to represent a class comprising

All persons or entities who purchased Carbon Black directly from Defendants or their co-conspirators in the United States between January 1, 1999[8] and the present (the "Class Period"). Excluded from the class are (1) Defendants and their affiliates, subsidiaries and co-conspirators and (2) any federal, state, and local government purchasers.Pursuant to Section (a) of Fed.R.Civ.P. 23, a representativemay sue on behalf of a class if

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.In addition to the numerosity, commonality, typicality, andadequacy requirements, the class must also fall within one of theRule 23(b) subsections. The plaintiffs here contend that theirclaim satisfies the "predominance" and "superiority" requirements of 23(b)(3).[9] The

burden of proof on these questionsrests squarely on the plaintiffs. See Smilow v. SouthwesternBell Mobile Systems, Inc., 323 F.3d 32, 38 (1st Cir. 2003)"([T]he plaintiff must establish the . . . elements. . . ."); Inre Relafen Antitrust Litigation, 218 F.R.D. 337, 341 (D. Mass2003); Guckenberger v. Boston Univ., 957 F. Supp. 306, 325 (D.Mass. 1997).

When deciding a motion for class certification, "[a] districtcourt must conduct a rigorous analysis of the prerequisitesestablished by Rule 23 before certifying a class." Smilow,323 F.3d at 38.[10] Therefore, although the defendants challenge certification only on the basis of a failure to meetthe requirements of 23(a)(4) and (b)(3), I will analyze all therequirements of 23(a) in turn. See McLaughlin v. LibertyMutual Ins. Co., 224 F.R.D. 304, 307 (D. Mass. 2004) (addressingeach requirement in turn even though the defendant onlychallenged certification on two grounds); see also McAdamsv. Mass. Mut. Life Ins. Co., 99-30284, 2002 WL 1067449, at *3(D. Mass. May 15, 2002) ("Although the defendants do notchallenge the numerosity requirement, `the Court must considereach factor.'") (quoting In re Cardizem CD Antitrust Litig.,200 F.R.D. 297, 303 (E.D. Mich. 2001)).

I will do so recognizing the interplay between the policy objectives of both the antitrust provisions and of classcertification. The allowance for treble damages in antitrustactions "was designed to encourage private enforcement of theantitrust laws by offering generous recompense to those harmed bythe proscribed conduct and simultaneously to erect a deterrent tothose contemplating similar conduct in the future." In reVitamins Antitrust Litig., 209 F.R.D. 251, 258 (D.D.C. 2002).Courts have noted that class actions are a particularlyappropriate mechanism for achieving such enforcement, see id.(collecting cases), and, therefore, "courts resolve doubts infavor of certifying the class." In re Playmobil AntitrustLitig., 35 F. Supp. 2d 231, 238 (E.D.N.Y. 1998).

A. Rule 23(a) Requirements

(1) Numerosity

The numerosity requirement boils down to a question ofpracticability of joinder. See McLaughlin, 224 F.R.D. at 307("The first requirement of Rule 23(a)(1) is often referred to as`numerosity,' but it might more properly be called the`impracticability' requirement, because the inquiry called for byRule 23(a)(1) often involves more than merely counting noses.").Although courts may consider a number of factors in decidingwhether 23(a)(1) has been satisfied, class size is "[t]he mostobvious consideration." 7A Wright, Miller & Kane, FederalPractice and Procedure § 1762 (2004). "The numerosity requirement of Rule 23(a), moreover, `is not a difficult burdento satisfy. . . .'" McAdams, 2002 WL 1067449, at *3 (quotingIn re Cardizem, 200 F.R.D. at 303).

The plaintiffs do not yet know the exact size of their proposedclass. That, however, does not prevent the numerosity prong frombeing satisfied. "Although the party instituting the action neednot show the exact number of potential members in order tosatisfy this prerequisite, he does bear the burden of showingimpracticability and mere speculation as to the number of partiesinvolved is not sufficient

to satisfy Rule 23(a)(1)." 7A Wright &Miller § 1762. The plaintiffs attempt to represent "[a]ll personsor entities who purchased Carbon Black directly from Defendantsor their co-conspirators in the United States between January 1,1999 and the present," estimating that group to contain"approximately five hundred geographically dispersed Classmembers."

Whether the plaintiffs' proposed class satisfies the otherclass certification requirements will be addressedbelow,[11] but for purposes of the numerosity requirement, it is obvious thathundreds of purchasers throughout the country could not bepracticably joined in this action. See Relafen,218 F.R.D. at 342 (noting that a class of 40 claimants is "generally found toestablish numerosity"); see also McAdams, 2002 WL 1067449,at *3 (finding that it would be impracticable to join 117geographically diverse claimants); Guckenberger,957 F. Supp. at 325 (coming to the same conclusion in regard to 480 studentsenrolled at the same university).

The impracticability of joinder is exacerbated by thegeographic diversity of the class. See Andrews v. BechtelPower Corp., 780 F.2d 124, 131-32 (1st Cir. 1985) ("Joinder isconsidered more practicable when all members of the class arefrom the same geographic area."). Courts also consider whetherthe members of the class are easily identifiable, because whenthey are, "joinder is more likely to be practicable." Andrews,780 F.2d at 132. Here, one would assume, the members of the classwould be relatively easy to identify. But, the large numbers andgeographic diversity of the class would outweigh thisconsideration. Therefore, I find that the first requirement ofRule 23 has been met in this case. (2) Commonality

To satisfy the second requirement under 23(a), the plaintiffsmust show that the class members' claims share common questionsof law or fact. The plaintiffs are not required, however, todemonstrate strict uniformity. See In re Polymedica Corp.Securities Litig., 224 F.R.D. 27, 35 (D. Mass 2004) (noting thatwhile class members must share common questions, not everyquestion must be common); McAdams, 2002 WL 1067449, at *3 ("Thepresence of some factual differences in the claims of the class . . .does not preclude a finding of commonality.") (citing 5Moore's Federal Practice § 23.23[2], at 23-77). In fact, courtshave even found that "[t]he commonality test is met when there isat least one issue, the resolution of which will affect all or asignificant number of the putative class members." Lightbourn v.County of El Paso, 118 F.3d 421, 426 (5th Cir. 1997); seeColeman v. Pension Benefit Guar. Corp., 196 F.R.D. 193, 198(D.D.C. 2000) (quoting Lightbourn). It is not surprising,therefore, that "[t]he commonality requirement is often easilymet." Vitamins, 209 F.R.D. at 259; see In re LinerboardAntitrust Litig., 203 F.R.D. 197, 205 (E.D. Pa. 2001) (notingthat the commonality "requirement is easily met because it may befulfilled by a single common issue").

All the class members here will have to prove a violation ofSection 1 of the Sherman Act and will do so referencing analleged conspiracy by the defendants. The plaintiffs identify "numerous major issues common to the Class." These include (1)whether the defendants conspired to fix prices; (2) the durationand extent of that scheme; (3) whether the scheme was successful;(4) what its impact was; (5) the appropriate damages; and (5)whether injunctive relief will be required.

Likewise, the plaintiffs in Vitamins identified common issuesthat included, among others, whether the defendants conspired tofix prices; the duration of any horizontal agreements; whetherthe named defendants took part in the conspiracy; whether theconspiracy injured the plaintiffs; the appropriate measure ofdamages; and whether the plaintiffs were entitled to injunctiverelief. The Vitamins court concluded that the plaintiffs hadsatisfied the commonality requirement, noting that "[s]imilarissues have been found to satisfy the commonality requirement inother antitrust cases." 209 F.R.D. at 259 (citing In reLorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12, 27(D.D.C. 2001); In re Ampicillin Antitrust Litig.,55 F.R.D. 269, 273 (D.D.C. 1972); and In re NASDAQ Market-Makers AntitrustLitig., 169 F.R.D. 493, 510 (S.D.N.Y. 1996)); see In reAuction Houses Antitrust Litig., 193 F.R.D. 162, 164 (S.D.N.Y.2000) ("The issues of the existence and scope of a price fixingconspiracy frequently have been held to satisfy the requirementof common questions."); see also In re Flat Glass AntitrustLitig., 191 F.R.D. 472, 478 (W.D. Pa. 1999) (citing 4 HubertNewberg and Alba Conte, Newberg on Class Actions § 18.05, at 18:15 (3d ed. 1992)). The plaintiffs have sufficientlydemonstrated at this stage. — and the defendants do not directlycontest — that there exist common questions of law and fact inthis case.[12]

(3) Typicality

In order to permit a class action to proceed, Rule 23(a)(3)requires that "the claims or defenses of the representativeparties are typical of the claims or defenses of the class." Thetypicality element is an unstable one, 7A Wright & Miller § 1764("There is some doubt about the exact meaning of the `typicality'requirement."), principally because it tends to intertwine withother Rule 23 requirements, such as commonality, see Martensv. Smith Barney, Inc., 181 F.R.D. 243, 258 (S.D.N.Y. 1998)("Commonality and typicality `tend to merge into one another, sothat similar considerations animate analysis.'") (quotingMarisol A. v. Guiliani, 126 F.3d 372, 376 (2d Cir. 1997));Guckenberger, 957 F. Supp. at 325 (describing typicality asbeing "[c]losely related to commonality"), and adequacy. SeeMeredith v. Mid-Atlantic Coca-Cola Bottling Co.,129 F.R.D. 130, 133 (E.D. Va. 1989) (finding that typicality may be found"so long as the claims are based on the same legal or remedialtheory and no conflict of interest exists between the namedplaintiff and the class members").

As a general proposition, however, a representative's claimwill be deemed typical when its "injuries arise from the sameevents or course of conduct as do the injuries that form thebasis of the class claims" and "are based on the same legaltheory" as those of the absent class members. In re Bank ofBoston, 762 F. Supp. 1525, 1532 (D. Mass. 1991); see alsoAuction Houses, 193 F.R.D. at 164-65 (asking "whether othermembers of the class have the same or similar injury, whether theaction is based on conduct not special or unique to the namedplaintiffs, and whether other class members have been injured bythe same course of conduct"); Davis v. Northside Realty Assoc.,Inc., 95 F.R.D. 39, 43 (N.D. Ga. 1982); see alsoLinerboard, 203 F.R.D. at 207 ("A finding of typicality willgenerally not be precluded even if there are `pronounced factualdifferences' where there is a strong similarity of legaltheories.").

The typicality requirement is satisfied here. The plaintiffsclaim, as purchasers of carbon black from the defendants, thatthey were injured due to artificial price increases caused by thedefendants' unlawful price-fixing agreement. The "course ofconduct" pled in this case is the agreement to fix prices and thelegal theory will be a Section 1 violation for all class members.

In arguing that 23(b)(3) requirements are not met, thedefendants contend that the class members are diverse in size and that they paid for diverse products pursuant to a variety ofdifferent agreements. The contention arguably speaks totypicality also, because the plaintiffs may not have purchasedcarbon black pursuant to the same terms or in the same volumes asother members of the class. That, however, is not sufficient todeny certification on the typicality prong: [T]he named class members' claims, as well as the claims of the proposed classes, arise from the alleged price-fixing scheme perpetrated by defendants. The overarching scheme is the linchpin of plaintiffs' amended complaint, regardless of the product purchased, the market involved or the price ultimately paid. Furthermore, the various products purchased and the different amount of damage sustained by individual plaintiffs do not negate a finding of typicality, provided the cause of those injuries arises from a common wrong.Flat Glass, 191 F.R.D. at 480; see Vitamins,209 F.R.D. at 261 ("The typicality requirement does not mandate that productspurchased, methods of purchase, or even damages of the namedplaintiffs must be the same as those of the absent classmembers."); In re Catfish Antitrust Litig., 826 F. Supp. 1019,1035 (N.D. Miss. 1993) ("[I]n instances wherein it is allegedthat the defendants engaged in a common scheme relative to allmembers of the class, there is a strong assumption that theclaims of the representative parties will be typical of theabsent class members."); see also 1 ABA Section of AntitrustLaw, Antitrust Law Developments 932 (5th ed. 2002) (noting thattypicality is normally satisfied in price-fixing conspiracyclaims "even though the plaintiff followed different purchasing procedures, purchased in different quantities or at differentprices, or purchased a different mix of products than did themembers of the class").[13] So too here. The representativeplaintiffs seek only to represent others who bought carbon blackat artificially inflated prices as a result of a coordinatedprice-fixing agreement by the named defendants. The fact that incertain regards their claims may have distinctions does not makethem atypical. I therefore find that the requirements of 23(a)(3)have been met.

(4) Adequacy

In order to satisfy the 23(a)(4) requirement, the plaintiffs"must show first that the interests of the representative partywill not conflict with the interests of any of the class members,and second, that counsel chosen by the representative party isqualified, experienced and able to vigorously conduct theproposed litigation." Andrews, 780 F.2d at 130; seeRelafen, 218 F.R.D. at 343 (quoting Andrews); Bank ofBoston, 762 F. Supp. at 1534 (describing the relevant adequacy inquiries as "whether any potential conflicts exist between thenamed plaintiffs and the prospective class members" and "whetherthe named plaintiffs and their counsel will prosecute their casevigorously.") I take up this analysis in light of the fact that,unlike in regard to the first three elements of 23(a), thedefendants explicitly argue that the adequacy requirement has notbeen satisfied.[14]

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Aware of the potential due process concerns inherent in a classaction, I note that [u]nless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs.Dierks v. Thompson, 414 F.2d 453, 456 (1st Cir. 1969); seealso 7A Wright & Miller § 1765 ("If the absent members are tobe conclusively bound by the result of an action prosecuted ordefended by a party alleged to represent their interests, basicnotions of fairness and justice demand that the representationthey receive be adequate."). The defendants contend — withoutoffering any case law in support of their adequacy arguments —that is what is happening here, arguing: The named Plaintiffs will have a clear interest in arguing that the effect of the alleged conspiracy was to impose higher prices on them, while the largest purchasers protected themselves through the exercise of their countervailing negotiating leverage. The unrepresented tire companies, on the other hand, would have the opposite interest in arguing that, absent the alleged conspiracy, they would have used their negotiating leverage to obtain even lower prices, and thus should receive the bulk of the damages.Even if this is true, however, it does not provide a sufficientbasis to find that the representative parties will not "fairlyand adequately protect the interests of the class" in this case.Fed.R.Civ.P. 23(a)(4).

The antagonism described by the defendants might raise adequacyconcerns in a case where there was a limited fund available fordivvying up. See 1 Antitrust Law Developments (Fifth) 935 ("Aplaintiff may not be able to adequately represent a class of itscompetitors where the nature of the violation alleged is suchthat the amount of damages available to the class is limited andconflicts could develop as to the allocation of those damagesbetween the plaintiff and the other class members.") That is notthis case. To the extent there is a dispute about the extent ofthe overcharge for different sized class members, the problem issimply one of the calculation of damages as to each, not a zerosum game requiring a comparable subtraction from the damages ofother class members.

The overarching question here is the conduct of the defendants,not the specific damage calculation or relevant bargaining poweramong the plaintiffs. Therefore, the named plaintiffs and their counsel have the same core objectives aswould absent class members. See Fears v. Wilhemina ModelAgency, Inc., No. 02 Civ. 4911, 2003 U.S. Dist. LEXIS 11897, at*18 (S.D.N.Y. July 15, 2003) (noting when addressing the adequacyrequirement that "[a]ll the class members share a common interestin proving the existence, scope and effect of defendants' ongoingprice fixing"); Vitamins, 209 F.R.D. at 262 ("[B]ecause theplaintiffs have alleged an overarching single conspiracy . . .all named plaintiffs will have the same incentive to the case asan absentee class member. This incentive is in no way diminishedby the fact that . . . the named representatives may have useddifferent methods of purchase."); see also HedgesEnterprises, Inc. v. Continental Group, Inc., 81 F.R.D. 461, 466(E.D. Pa. 1979) (recognizing that the "mere fact that arepresentative plaintiff stands in a different factual posture"does not warrant denial of certification; rather, the"atypicality or conflict must be clear and must be such that theplaintiff's interests are placed in significant jeopardy")(quoting Sley v. Jamaica Water & Util., Inc., 77 F.R.D. 391,394 (E.D. Pa. 1977)).

Moreover, the plaintiff representatives need not have purchasedproducts from all or most of the defendants in order to beadequate representatives. As the Linerboard court pointed out,"because antitrust law `provides for joint and several liabilityof co-conspirators, each Plaintiff will have an equal incentiveto generally prove the Defendants' participation in the alleged conspiracy.'" 203 F.R.D. at 208 (quoting NASDAQ,169 F.R.D. at 519). I find that "the antagonism postulated hereappears . . . more speculative than realistic." Paper SystemsInc. v. Mitsubishi Corp., 193 F.R.D. 601, 607 (E.D. Wis. 2000).In the event that such speculation is borne out, there aremechanisms are available to address any such conflicts.

With respect to the representative plaintiffs' knowledge of thecase, all that is required is "[g]eneral knowledge and aparticipation in discovery". Kriendler v. Chemical WasteManagement, Inc., 877 F. Supp. 1140, 1159 (N.D. Ill. 1995);see also Vitamins, 209 F.R.D. at 262 ("Classrepresentatives are not required to have detailed understandingof the nature and facts of their case, rather they must bewilling and able `to vigorously prosecute the interests of theclass through qualified counsel.'") (quoting Nat'l Ass'n ofReg'l Med. Programs, Inc. v. Mathews, 551 F.2d 340, 345 (D.C.Cir. 1976)).

Finally, the defendants do not contend that the plaintiffs'counsel are not capable advocates for their clients. There is noindication that class counsel are not competent and willing torepresent the entire class with vigor. Therefore, I find that therepresentatives and their counsel have satisfied the adequacyrequirement. If conflicts develop or come to the attention of thecourt, remedies exist. "Adequacy of representation issuesimplicate due process, and may be addressed throughout the litigation." Lyons v. Georgia-Pacific Corp. Salaried EmployeesRet. Plan, 221 F.3d 1235, 1253 n. 32 (11th Cir. 2000) (internalcitations omitted) (citing 7A Charles Alan Wright & Arthur R.Miller, Federal Practice and Procedure § 1765, at 293 (2d ed.1986): "[A] favorable decision under Rule 23(a)(4) is notimmutable. If later events demonstrate that the representativesare not adequately protecting the absentees, the court may takewhatever steps it thinks necessary under Rule 23(c) or Rule 23(d)at that time.")

B. Rule 23(b)(3) Requirements

While the plaintiffs have sufficiently shown that they have metthe requirements of Rule 23(a), they must also satisfy therequirements of Rule 23(b). The plaintiffs attempt to bring thisclaim under Rule 23(b)(3) — pursuant to which "[m]ost classaction damage suits are filed," 2 Areeda ¶ 331a — which providesin pertinent part that "[a]n action may be maintained as a classaction if. . . . (3) the court finds that the questions of law orfact common to the members of the class predominate over anyquestions affecting only individual members, and that a classaction is superior to other available methods for the fair andefficient adjudication of the controversy."[15] These "predominance" and "superiority" requirements will be taken up inturn.

(1) Predominance

The plaintiffs, in order to recover on their price-fixingconspiracy claim, "will have to prove the existence of thealleged price-fixing conspiracy, that the members of the classwere injured in their business or property by reason of thatconspiracy (the `impact' question), and the amount of theirdamages." Auction Houses, 193 F.R.D. at 165-66. The firstrequirement is met here. In fact, it has been noted that thecommon question of the existence of a horizontal price-fixingconspiracy has almost invariably been found to satisfy Rule23(b)(3). See NASDAQ, 169 F.R.D. at 517 ("Courts repeatedlyhave held that the existence of a conspiracy is the predominantissue in price fixing cases, warranting certification of theclass even where significant issues are present."); 4 Newberg onClass Actions § 18:25 ("The [23(b)(3)] requirement has been metwith relative ease by the great majority of antitrust classaction plaintiffs. Although the Committee seems to suggest acase-by-case analysis . . ., common liability issues such asconspiracy or monopolization have, almost invariably, been held topredominate over individual issues."); 7B Wright & Miller § 1781("In short, whether a conspiracy exists is a common question thatis thought to predominate over the other issues in the case andhas the effect of satisfying the first prerequisite in Rule23(b)(3).") .

Nevertheless, the defendants contend that the questions ofimpact and damages are too individualized to warrant classcertification in this case. Courts have generally found, however,that "[p]rice fixing conspiracies, at least to the extent theysucceed in fixing prices, almost invariably injure everyone whopurchases the relevant goods or services."[16] Auction Houses, 193 F.R.D. at 166. I see no reason to findotherwise in this case.

a. Impact

The plaintiffs' expert, Dr. John C. Beyer, contends "that thealleged conspiracy would have impacted all members of theproposed Class through the payment of higher prices for carbonblack than would have otherwise prevailed in the marketplace."(Beyer Aff. ¶ 8.) Dr. Beyer came to this conclusion by assessingthe effect of such a conspiracy in the carbon blackmarket,[17] considering, for example, the concentration inand high barriers to entry into the carbon black market.[18] The defendantsclaim that Dr. Beyer simply assumed impact here. As alreadynoted, in a price-fixing conspiracy case, that is often a fairassumption. The defendants, through their expert, contest this by pointingto the diversity in products and in volumes and prices paid forthem by the class members, implying that some may not have beenimpacted. That argument, however, is best saved for their damagescontentions, because, for purposes of the impact determination,"[t]he allegedly agreed rate schedules probably raised the basefrom which the negotiations began and may well have resulted inindividually negotiated buyer's premiums, to the extent theyexisted, higher than would have been agreed upon in the absenceof the conspiracy."[19] Auction Houses,193 F.R.D. at 166.

The defendants disagree, contending that "[c]ourts have notfound predominance of common issues where, as here, the productsare not fungible and their prices and manner of purchase varyfrom customer to customer." (Def.'s Opp., at 11 (citing DryCleaning & Laundry Inst. of Detroit v. Flom's Corp., No.91-CV-76072, 1993 WL 527928, at *3 (E.D. Mich. Oct. 19, 1993);Burkhalter Travel Agency v.

MacFarms Int'l, Inc.,141 F.R.D. 144, 154 (N.D. Cal. 1991); Moore v. Southeast Toyota Dist., Inc.,1982 U.S. Dist. LEXIS 12790, at *11 (N.D. Ala., Feb. 4, 1982)).In Dry Cleaning, for example, where the plaintiffs allegedprice-fixing by the defendants in relation to three separateproducts, "thousands of transactions were involved over manyyears; each transaction was different; various plaintiffs mayhave purchased the dry cleaning supplies, which vary by brand andtype, at different prices and varying quantities, in differentways under different credit terms." Id. at *4. The court,therefore, declined to certify the proposed class. Likewise, inBurkhalter, the court would not find that the predominancerequirement had been met in a situation where "there aresignificant differences between the markets for macadamia nuts onHawaii and on the mainland, between large and small purchasers,and between bulk and retail purchasers." 141 F.R.D. at 154.Individualized negotiations and a diversity of prices paid,however, do not automatically foreclose class action treatment.NASDAQ, 169 F.R.D. at 523 ("Neither a variety of prices nornegotiated prices is an impediment to class certification if itappears that plaintiffs may be able to prove at trial that, ashere, the price range was affected generally."); see alsoFears, 2003 U.S. Dist. LEXIS 11897, at *22 (quoting NASDAQ).

The plaintiffs have alleged an overarching conspiracy to fixprices and have sufficiently shown for present purposes that —assuming the conspiracy took place — generalized impact would have been felt by all those taking part in the market. It seemsfair, especially at this stage of this proceeding, to find thatif the plaintiffs "prove that the alleged conspiracy resulted inartificially inflated list prices, a jury could reasonablyconclude that each purchaser who negotiated an individual pricesuffered some injury." See In re Industrial Diamonds AntitrustLitig., 167 F.R.D. 374, 383 (S.D.N.Y. 1996); In re Glassine andGreaseproof Paper Antitrust Litig., 88 F.R.D. 302, 305 (E.D. Pa.1980) (finding no "significance in the fact that plaintiffspurchased at list prices, whereas volume buyers negotiated theirprices" because the "market conditions" created by the allegedconspiracy "would affect the prices paid by both type ofpurchasers"). In sum, the need for individualized assessments ofhow much each member was impacted does not warrant an automaticfinding that there was no class wide impact.

Finding that class wide impact is sufficiently generalizeddespite many individualized negotiations and contractualprovisions regarding different carbon black products does not endthe inquiry. While the plaintiffs have sufficiently shown at thisstate that negotiated prices were impacted by list prices in amanner susceptible to common proof, the showing does notnecessarily reach the question of those carbon black productsthat were not included on the price lists. The defendantscorrectly point out that courts have required that the plaintiffsat least demonstrate that the prices paid depended in some way on the price-fixed list prices. See, e.g., In re PolypropyleneCarpet Antitrust Litig., 996 F. Supp. 18, 25 (N.D. Ga. 1997)(finding that because there were "price lists for custom-madecarpet containing nylon fiber" but not for custom-made carpetcontaining polypropylene, only the evidence regarding the formersatisfies the predominance requirement); Industrial Diamonds,167 F.R.D. at 383 (finding "that despite the wide range ofproducts and prices involved, common proof of impact is possibleon behalf of purchasers who bought list-price products" but "isnot possible . . . on behalf of

those . . . who bought non-listprice products"). As already noted, this is relatively easy to doat the class certification stage for products appearing on pricelists subjected to the alleged collusion.

But for those not on the price lists, the plaintiffs wouldarguably have to prove individually how each product was boughtand any impact of possible collusion. The plaintiffs' expert, Dr.Beyer, claims that there is sufficient evidence in the record tofind common impact in this case. The defendants' expert, Mr.Kaplan, draws the opposite conclusion from his analysis of thecarbon black market. Although I have considered these divergentviews[20] when discussing the defendants' contentions,"[t]o the extent that this discussion involves a battle ofexperts, it [is] not appropriate for the Court to determine which expert is morecredible at this time." Linerboard, 203 F.R.D. at 217 n. 13(proceeding to discuss In re Visa Check/Mastermoney AntitrustLitig., 192 F.R.D. 68 (E.D.N.Y. 2000), aff'd 280 F.3d 124 (2dCir. 2001), where the court found that an expert report shouldnot be excluded at the motion for class certification stageunless the "opinion is the kind of `junk science' that a Daubertinquiry at this preliminary stage ought to screen"). As inLinerboard, "[n]o limiting motions were filed in the presentcase although the parties have raised questions about theopposing experts. On the present state of the record, the Court,where appropriate, will use plaintiffs' experts' reports tosupport the allegations contained in plaintiffs' classcertification motion." Id. This is appropriate, because thequestion before me "is whether plaintiffs' expert evidence issufficient to demonstrate common questions of law and factwarranting certification of the proposed class, not whether theevidence will ultimately be persuasive." In re VisaCheck/MasterMoney Antitrust Litig., 280 F.3d 124, 135 (2d Cir.2001) (2-1 decision).

Dr. Beyer, in his reply affidavit, correctly contends thatdiscovery is not complete and that more price lists might befound. Dr. Beyer also contends that the "`off-list price'products identified by [the defendants' expert] Mr. Kaplanaccount for . . . an insignificant portion of the overall volumeof products sold." Nevertheless, the issue is worth addressing in the event there exist purchasers whose sole purchases ofcarbon black in the class period were products not appearing onany price lists.

Dr. Beyer first points out that the price of at least oneproduct not on a price list was contractually tied to the priceof a product on a price list. Such contractual ties aresufficient to bring a purchase into the ambit of generalizedimpact. Dr. Beyer, however, also attempts to include thoseproducts not appearing on price lists but deemed comparablepursuant to "comparator" charts or "crosswalks" produced bydefendants. While it may be true that such products arecomparable and that, as Dr. Beyer asserts, they have similarpricing trends, the impact of such purchases is not so clearlysusceptible to common proof. It could be argued that after theconspiracy portion of the case is tried and the impact proofregarding the effect on list prices is presented, each purchaserof such non-list price products not tied in some documented wayto a price list would have to present the comparison charts andother evidence in order to prove that it was impacted as to thespecific product that it bought. Otherwise, there would be noclear connection — unlike those who purchased products on theprice lists, subject to discounts and negotiations off the pricelists, or pursuant to contractual provisions or formulasexplicitly tied to price lists — between the alleged conspiracyand

its impact on these purchasers. Each purchaser would, in essence, have an additional step to make a showing that itsproduct is comparable for pricing purposes with list priceproducts. This argument, however, takes what is in essence adamages argument and turns it into one regarding impact.

The plaintiffs have alleged that the list price increasesinflated the prices paid by all purchasers of carbon black.Through reference to list price changes, to contract provisionstied to such list prices, to comparison charts produced by thedefendants, and the opinion of their expert regarding the overallpricing structure of similar grades of carbon black, theplaintiffs have sufficiently demonstrated a common impact onpurchasers of carbon black who purchased carbon black productstied in one of the above mentioned ways to list prices during theclass period. Certainly questions of scale will beindividualized, but that may be addressed at the damages stage.In addition, as discovery progresses, it may become apparent thatfurther refinements of the class will be necessary, includingpotentially severing the impact and damages determinations fromthe overall liability portion of the litigation.

In sum, while I recognize that the class may ultimately onlycomprise those purchasers who purchased products that depended insome way on the list prices,[21] I do not think thisrequires drawing at this time what would amount to an artificial linebetween those products that appeared on a price list and thosethat did not. For present purposes, the plaintiffs havesufficiently shown that those who purchased products thatappeared on a price list — whether by contractual provision ornot — were impacted generally by the alleged conspiracy. Inaddition, the plaintiffs proffer that since many products werecomparable, as delineated by charts drafted by the defendants,price lists would and did impact the prices of comparableproducts. This is based on the plaintiffs' contention that carbonblack is a commodity-like product and that the pricefixingpermeated all aspects of pricing. To the extent class memberspurchased products comparable to those on a price list, but notactually on one, the fact of impact would still be amenable tocommon proof, even if each class member's damages are not.

b. Damages

A finding of overarching impact on the class, however, does notresolve the question of how much each class member was impacted.On that issue, the defendants also argue that because manypurchasers negotiated their own prices and purchased differentproducts in varying volumes, the damages calculations will be tooindividualized. "Courts have routinely held, however, that the need for individualized determinations of theputative class members' damages does not, without more, precludecertification of a class under Rule 23(b)(3)." IndustrialDiamonds, 167 F.R.D. at 382 (so finding in a case where one ofthe defendants "offered more than 8000 distinct industrialdiamond products" and "individual customers negotiated a varietyof discounts, rebates, credits or special service arrangements").

Nevertheless, it is worth asking whether there is a classwide,manageable method of proving the

damage amounts. In addressingthat question, it should be remembered that "[n]o precise damageformula is needed at the certification stage of an antitrustaction; the court's inquiry is limited to whether the proposedmethods are so unsubstantial as to amount to no method at all."Paper Systems Inc. v. Mitsubishi Corp., 193 F.R.D. 601, 615(E.D. Wis. 2000) (citing In re Potash Antitrust Litig.,159 F.R.D. 682, 697 (D. Minn. 1995, and In re Indus. Gas AntitrustLitig., 100 F.R.D. 280, 306 (N.D. Ill. 1983)). In PaperSystems, the defendants contended that "[t]he price charged ineach sale . . . was set by an individualized bargain. . . ."Id. at 612-13. In addition, the defendants argued that largevolume buyers were able to negotiate larger discounts, creating asituation where the "plaintiffs' proof of injury wouldnecessarily require determining whether each of thousands ofdifferent sales over the class period was affected by theconspiracy." Id. at 613. This factual situation, as alreadynoted, is not sufficient to deny certification. Consequently, the Paper Systems court took athorough look at the methods proposed for proving damages offeredby the plaintiffs' expert, and found that "[i]f accepted by thefactfinder at the appropriate stage of litigation, themethodology promises to provide precisely the kind of singlemathematical formula which can establish each class member'sdamages."[22] Id. at 616.

The same could be said here. Dr. Beyer applies what he terms a"before-during-after" approach to assessing damages, and proposesto calculate damages for tire and non-tire customers separately.(Beyer Aff. ¶ 44. ("[T]ire manufacturers, because of the volumeand frequency of purchases, may have been damaged to a differentdegree than non-tire manufacturers.")) Dr. Beyer's methodinvolves calculating a "benchmark" price drawn from "the periodbefore, after, or both before and after the conspiracy period,"which is then compared to prices during the conspiracy period tocome to the "percentage overcharge." (Id. ¶ 42.) The"percentage overcharge" is then applied to each of the Classmembers' purchases during the Class period. (Id. ¶ 46.) "Thiswill provide a dollar estimate of the amount by which each Classmember was overcharged for carbon black." (Id.) One of the challenges in applying such a method is the calculation of thebenchmark price, according to Dr. Beyer. (Id. ¶ 47.) He assertsthat "[t]he availability of data sufficient to calculate anappropriate benchmark often cannot be determined until after fulldiscovery of Defendants has occurred." (Id.) Dr. Beyer addsthat "other factors affecting the price of carbon black, such aschanges in the costs of inputs or changes in demand, can beaccounted for using multiple regression analysis." (Beyer Aff. ¶48.)

There is no requirement that the plaintiffs choose one methodnow, as long as they offer a methodology that is generallyaccepted. See Linerboard, 203 F.R.D. at 217-18 (E.D. Pa.2001). "Plaintiffs' expert, Dr. Beyer, has presented two possiblemeans of assessing impact on a class wide basis — multipleregression analysis, and the benchmark or yardstick approach. . ., which are methods of showing `antitrust impact bygeneralized proof.'" Id. at 218 (citing In re Plastic CutleryAntitrust Litig., No. 96-CV-728, 1998 WL 135703, at *7 (E.D.Pa. March 20, 1998), and Flat Glass, 191 F.R.D. at 485-86).

Even if the damage assessments end up being too individualizedto resolve as a class, that does not

warrant denial of theplaintiffs' motion at this stage. The purpose of class actions isto resolve such disputes in the most efficient, manageable way.Resolving the common legal question (i.e., the nature andextent of the alleged conspiracy) and the resulting overarching impact on the class of purchasers lends itself toclass-wide resolution and saves the judicial system the strain ofnumerous actions addressing identical questions. See 7B Wright& Miller § 1781 ("Since antitrust actions typically present manycomplicated issues, the courts should utilize these provisions tosettle the common issues on a representational basis to avoidcongesting the courts with separate actions requiring therepetitive adjudication of the same matters.").

If the damage calculations end up not lending themselves toresolution in this manner, appropriate alternatives exist. Asnoted already, diversity in damages suffered does not itselfrender the certification of a class unwarranted. To address thatproblem, the question of damages can be severed from that of liability and tried on an individual basis. Allowing split proceedings furthers the Rule 23 purpose of promoting judicial economy since the main issue will be tried only once, rather than for each class member, and damage claims only need be determined in the event liability is found.7B Wright & Miller § 1781 (internal footnotes omitted). Theprospect of doing so at some later date does not itself mean thecommon questions do not predominate. "Although calculatingdamages will require some individualized determinations, itappears that virtually every issue prior to damages is a commonissue." Bertulli v. Indep. Ass'n of Cont'l Pilots,242 F.3d 290, 298 (5th Cir. 2001); see Fed.R.Civ.P. 23(b)(3) advisorycommittee's notes to 1966 Amendments ("[A] fraud perpetuated on numerous persons by the use of similar misrepresentations may bean appealing situation for a class action, and it may remain sodespite the need, if liability is found, for separatedeterminations of the damages suffered by individuals within theclass.").

I find that the common issues of law and fact in this casepredominate. To find that they do not due to individualizeddamage assessments would mark the end of almost all antitrustclass actions. See Visa Check/MasterMoney, 280 F.3d at 139-40(quoting In re Alcoholic Beverages Litig., 95 F.R.D. 321,327-28 (E.D.N.Y. 1982), and citing Catfish,826 F. Supp at 1044, and In re Fine Paper Antitrust Litig.,82 F.R.D. 143, 154 (E.D. Pa. 1979)).

(2) Superiority

Many of the considerations already addressed also warrant afinding that a class action is a superior mechanism for resolvingthis case. For that reason, "[i]f common questions are found topredominate, then courts also generally have ruled that thesecond prerequisite of Rule 23(b)(3) — that the class suit besuperior to any other available means of settling the controversy— is satisfied in the context of an antitrust action." 7B Wright& Miller § 1781. In this case, there has yet to be — to thecourt's knowledge — any attempt by other potential class members fully to represent their own interests in this case.[23]See In re Bromine Antitrust Litig., 203 F.R.D. 403, 415-16(S.D. Ind. 2001) (considering that the defendant "offered noargument that the class members are interested in controllinglitigation separately, and no other class members have filedrelated suits"). A showing of such an interest, in

any event,would not automatically preclude certification. The Vitaminscourt found a class action superior in a case where "numerousactions are already pending;" there was a "desire of some classmembers to control the prosecution of the case individually;" andthere was a "need for `mini-trials'" to resolve questions ofimpact and damages. Vitamins, 209 F.R.D. at 270.

As already noted, the size of the class and the predominance ofcommon questions of law and fact warrant class action treatmentat this stage. At least as to resolving the question ofliability, a class action seems the most efficient, manageablemethod. See Paper Systems, 193 F.R.D. at 616 (concluding thata class action satisfies the superiority requirement because"[r]epeatedly litigating the same issues in individual suits, ifcertification were denied, would consume many more judicialresources than addressing them at a single blow in theseconsolidated actions"). The superiority of a class action here is further substantiatedby the many relatively small purchasers that will be a part ofthis class. Antitrust class actions are expensive endeavors andjoining forces with other similarly situated plaintiffs is oftenthe only way to effectuate a case. See Bromine,203 F.R.D. at 416 (noting that many of the class members' "minor stakes makethe case especially suitable for class proceedings") (citingAlexander v. Q.T.S. Corp., 1999 WL 573358, at *13 (N.D. Ill.July 30, 1999) ("In light of the great costs of discovery andtrial, class certification is particularly important where manysmall and medium sized claimants are involved who would nototherwise be able to secure relief.")).

Here, as in Auction Houses, This case appears at this stage to involve large numbers of defendants' customers who allegedly were overcharged pursuant to a common scheme and mechanism and who have relatively small stakes. "Multiple lawsuits would be costly and inefficient, and the exclusion of class members who cannot afford separate representation would be neither `fair' nor an `adjudication' of their claims." The superiority of the class action device in such circumstances is clear. Indeed, defendants do not seriously dispute this. [The defendant] rests its contention that a class action would not be a superior means of resolving this controversy solely on the premise that individual issues relating to impact would predominate over common issues, a premise that the Court rejects.193 F.R.D. at 168 (quoting NASDAQ, 169 F.R.D. at 527).

Due to the size of the class, the common issues involved, andthe fact that none of the class members have attempted separatelyto represent their own interests as yet, I find that a class action will provide a superior mechanism for adjudicatingthe issues in this case. Again, if this finding comes intoquestion at a later date, appropriate measures may be takenpursuant to Rule 23(c).

IV. CONCLUSION

For the reasons set forth more fully above, the motion todismiss is hereby DENIED.

The plaintiffs have at this stage satisfied the classcertification requirements. Therefore, their motion for classcertification is GRANTED. I emphasize, the certification of aclass is not a final order "and

may be altered or amended beforethe decision on the merits." Fed.R.Civ.P. 23(c)(2). As thiscase proceeds, I will make any necessary modifications to theclass if they become necessary. For present purposes, however, Icertify a class comprising: All persons or entities who purchased carbon black products from Defendants or their co-conspirators in the United States between January 30, 1999 and the present (the "Class Period"). Excluded from the class are (1) Defendants and their affiliates, subsidiaries and co-conspirators and (2) any federal, state, and local government purchasers.

1. Except where otherwise noted, the following facts are takenfrom the First Amended Consolidated Class Action Complaint. Thefactual allegations found there are assumed true for purposes ofthis motion.

2. The plaintiffs define the class as: All persons or entities who purchased Carbon Black from Defendants or their co-conspirators, in the United States between January 1, 1999 to the present (the "Class period"). Excluded from the class are (1) Defendants and their affiliates, subsidiaries and co-conspirators and (2) any federal, state and local government purchasers.(Compl. ¶ 21.)

3. The plaintiffs allege additional facts regarding the marketthat they believe made it easier for the defendants to colludesuch as the periodic, predictable nature of sales and theeconomic forces that affect them. As will be noted below, theseconditions also could explain uniformity of price in the absenceof collusion. For the purposes of the pending motion to dismiss,however, I draw inferences in favor of the non-moving party,here, the plaintiffs.

4. The entire footnote is informative: United has also advanced the argument 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 applicable Pennsylvania statute of limitations. . . . 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.Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481,502 n. 15 (1968) (citation omitted).

5. Anti-competitive behavior in the absence of an agreement —depending on its nature — may fall under Section 2 of the ShermanAct, which provides that "[e]very person who shall monopolize, orattempt to monopolize, or combine or conspire with any otherperson or persons, to monopolize any part of the trade orcommerce among the several States, or with foreign nations shallbe deemed guilty of a felony. . . ." 15 U.S.C. § 2.

6. "There is a closely related but analytically distinct typeof claim, also based on § 1 of the Sherman Act, where theviolation lies in the information exchange itself — as opposed tousing the information exchange as evidence upon which to infer aprice-fixing agreement. This exchange of information is notillegal per se, but can be found unlawful under a rule ofreason analysis." Todd v. Exxon Corp., 275 F.3d 191, 198 (2dCir. 2001). The plaintiffs, however, have not pled an"information exchange" violation of the Sherman Act.

7. In so doing, the defendants cite the Third Circuit opinionin In re Baby Food Antitrust Litig., where the court appliedthe Supreme Court holding "that conduct as consistent withpermissible competition as with illegal conspiracy,

does not,standing alone, support an inference of antitrust conspiracy."166 F.3d 112, 124 (3d Cir. 1999) (quoting Matsushita ElectricIndus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986)).Even assuming Baby Food is persuasive, the defendants fail tonote that the Baby Food court was reviewing the lower court'sdecision at the motion for summary judgment stage. The obstaclesfacing the nonmoving party at summary judgment are of a differentdimension. Accordingly, here I rely for the most part ondecisions dealing with the core question before me, "[h]ow muchevidence of an illegal agreement must antitrust plaintiffs pleadto avoid dismissal for failure to state a claim?" In re CompactDisc Minimum Advertised Price Antitrust Litigation,138 F. Supp. 2d 25, 26 (D. Me. 2001). The answer is certainly some quantumless than will be required at later stages of this litigation.

8. For the reasons stated above, only purchasers of carbonblack after January 30, 1999 may recover as members of theclass.

9. Rule 23(b)(3) provides: (b) . . . An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: * * * (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.Fed.R.Civ.P. 23(b)(3).

10. There is an open question, however, regarding to whatextent courts may examine the merits of the plaintiffs' claim andmake factual inquiries when deciding a motion to certify a class.The Second Circuit, for instance, does not permit its districtcourts to look further than the allegations presented in thecomplaint. See Caridad v. Metro-North Commuter R.R.,191 F.3d 283, 291-93 (2d Cir. 1999). The Third, Fourth, and SeventhCircuits, on the other hand, "require a district court to makefactual and legal inquiries beyond the allegations in thecomplaint if such inquiries are necessary to an informed rulingon class certification." In re Polymedica Corp. SecuritiesLitig., 224 F.R.D. 27, 35 (D. Mass 2004). Recently, in asecurities case, Judge Keeton observed that while "[t]he FirstCircuit has not addressed the issue squarely . . . it appears tofavor a more searching inquiry." Id. at 34. In any event, allcourts seem to agree that whatever the inquiry, it may only go sofar as necessary to resolve the questions raised by the Rule 23requirements. It is not entirely clear, therefore, where thelines of the debate are actually drawn. For present purposes, Iassess the allegations in the complaint in light of the entirerecord presented to me on the motion for class certification.Therefore, while the plaintiffs' allegations and expert opinionswill be given considerable weight and will benefit fromreasonable inferences, my conclusions are informed by the recordsubmissions of the defendants as well.

11. The size of the class will be relevant to the remaininganalysis: The interrelationship of the numerosity prerequisite and some of the other class action requirements should be noted. For example, the requirement in subdivision (a)(4) that the representatives adequately protect the interests of all members of the class is a peculiarly significant requirement when the class is very large. Furthermore, because of the mandatory notice requirement applicable in actions brought under Rule 23(b)(3) and the binding effect of the judgment on all class members, a few courts have suggested that concerns about size may have increased importance. Again, however, the concern these courts are expressing is not whether Rule 23(a)(1) has been satisfied but whether it is proper to bind all members of the class and whether it is feasible

to give them all proper notice.7A Wright, Miller & Kane, Federal Practice and Procedure § 1762(2004) (footnotes omitted).

12. That does not, however, resolve the question under23(b)(3) whether these common issues predominate; the defendantscontend they do not. That question will be addressed below.

13. See also In re Catfish Antitrust Litig.,826 F. Supp. 1019, 1036 (N.D. Miss. 1993): [T]here is nothing in Rule 23(a)(3) which requires the named plaintiffs to be clones of each other or clones of other class members. The diversity of named plaintiffs who differ in their methods of operation and conduct is often cited by defendants as an impediment to class certification. However, as long as the substance of the claim is the same as it would be for other class members, then the claims of the named plaintiffs are not atypical.

14. The defendants, however, do not concede that the otherelements of 23(a) have been met. Rather, they emphasize correctlythat it is the plaintiff's burden to make an adequate showing oneach of the pertinent Rule 23(a) and (b) requirements.

15. The Rule continues: The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.Fed.R.Civ.P. 23(b)(3).

16. A different approach taken by courts on the question ofimpact was summarized by the court in In re Industrial DiamondsAntitrust Litig., 167 F.R.D. 374 (S.D.N.Y. 1996): Some courts have held that common questions predominate because "as a general rule, an illegal price-fixing scheme presumptively impacts upon all purchasers of a price-fixed product in a conspiratorially affected market." Other courts have stressed the need for a careful examination of the facts of each case in order to determine whether common proof of impact is possible. As the Bogosian court put it: [W]hen an antitrust violation impacts upon a class of persons . . ., there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual. Whether or not [impact] can be proven on a common basis therefore depends upon the circumstances of each case. As a practical matter, it often makes little difference which view the court espouses. The presumption [that a price-fixing scheme impacts all purchasers] . . . is, at most, a general rule. Antitrust defendants are free to argue, as many of them do, that their cases are exceptional because too many variables enter into setting prices in their industries to permit common proof of impact. Id. at 382 (citations and footnote omitted). In this case, I do not apply an automatic presumption, but the reasoning behind its application by some courts — namely, that an overarching pricefixing conspiracy likely has an impact on all purchasers — informs the analysis of the Rule 23(b)(3) requirement.

17. (See 9/02/04 Beyer Dep., at 177-78: I'm taking the conspiracy as alleged by the Plaintiffs as true. But the causal relationship between the conspiracy and the behavior of prices is outside the realm of examining the question would all customers be affected if this conspiracy were true. The cause — actual causal relationship between the conspiracy, if it existed, and prices that would be different in that condition than they actually were is something to be examined later. And the question that you've posed would probably be an important question to be addressed. But I — it is not necessary

to address that question to arrive at an answer that seems to me relevant with respect to impact, namely, have all consumers of carbon black been adversely affected by — or would they be by this conspiracy as alleged. And I set you the reasons in my report of why I believe — and the whole source of consideration — economic theory from the Defendants about the purchasers and from the transaction database why I believe that to be the case.)

18. "This conclusion is based on the following economicconsiderations: A. The Defendants jointly enjoy market power, thus preventing purchasers of carbon black from avoiding the effect of coordinated pricing. — The Defendants jointly control a substantial portion of both the production capacity and total sales of carbon black in the U.S. — There are significant barriers to new firms entering the market to produce carbon black. — There are no substitutes for carbon black. Hence the demand for carbon black is price inelastic. B. Carbon black is a commodity-like product. In economic terms, carbon black is an undifferentiated product, and hence price is the principal basis on which Class members make their decisions concerning the suppliers from which to purchase carbon black. C. The commodity nature of carbon black is reinforced by a formal grading system for rubber-grade and industry `crosswalks' for industrial grade carbon black. D. All Defendants make and sell most grades of carbon black, or have the capacity to do so. The degree of product overlap means Class members would have benefited from more active price competition in the absence of the alleged coordinated price behavior. E. All Defendants sell carbon black throughout the United States. This geographic reach and overlap means all Class members would have benefited from more active price competition in the absence of the alleged coordinated price behavior. F. During the period of the alleged conspiracy, the carbon black industry was operating with excess capacity. The existence of excess capacity implies that, in the absence of the alleged coordinated price behavior, Class members would have benefited from more competitive pricing. G. My empirical analysis of Defendants' sales transactions indicates a similarity in movement of carbon black prices over time. This demonstrates that carbon black prices are affected by similar forces, such as the alleged coordinate price behavior of the Defendants."(Beyer Aff. ¶ 8A-G.)

19. The court later added that it could not exclude the possibility that there will be some individualized questions pertaining to impact. It perhaps even is likely that the prices paid by some class members will have to be compared to a construct of the prices that would have prevailed absent the alleged conspiracy in order to determine whether they in fact were injured by it. But the Court is persuaded, at least on the present record, that the impact question is quite predominantly a common question.Auction Houses, 193 F.R.D. 167.

20. The plaintiffs' expert, Dr. Beyer, submitted an affidavitas well as a reply affidavit. Mr. Kaplan, the defendants' expert,also submitted an initial affidavit as well as an affidavit filedwith the defendants' sur-reply.

21. Excluded under this scenario would be those who purchasednon-list price products that were neither deemed comparable byreference to one of the defendant's comparison charts nor weretied to the price of a list price product pursuant to acontractual provision or formula.

22. The expert in Paper Systems applied an econometricregression technique, "a commonly accepted tool to make[assessments regarding whether prices were higher than theyotherwise would have been] and to evaluate whether there iscommon impact from an alleged price-fixing conspiracy." Id. at615.

23. I do note, however, that on May 5, 2004 I permitted onetire manufacturer, Goodyear Tire and Rubber, to intervene for

thelimited purposes of gaining access to discovery. To date,Goodyear has sought no broader intervention.