UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

MOSAIC HEALTH, INC. and CENTRAL VIRGINIA HEALTH SERVICES, INC., individually and on behalf of all those similarly situated, Plaintiffs, v. SANOFI-AVENTIS U.S., LLC, ELI LILLY AND COMPANY, LILLY USA, LLC, NOVO NORDISK INC., and ASTRAZENECA PHARMACEUTICALS LP, Defendants.	No. 6:21-cv-06507-EAW

DEFENDANTS' REPLY IN SUPPORT OF THEIR JOINT MOTION TO DISMISS

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Plaintiffs' opposition confirms that their "price fixing" conspiracy complaint must be dismissed. Plaintiffs repeatedly insist that "[t]his is a price-fixing case." *E.g.*, Opp. (Dkt. 58) at 19, 36. They then contradictorily assert they are pursuing a "refusal to sell" or "group boycott" theory, which appears nowhere in their complaint. *Id.* at 44. Plaintiffs' flip-flopping highlights that their complaint does not actually articulate any plausible cause of action—antitrust or otherwise. Instead, Plaintiffs have dressed this suit in antitrust clothes to vindicate their favored interpretation of Section 340B—requiring Defendants to ship their 340B statutorily priced drugs to unlimited commercial pharmacies without condition, the exact issue Defendants are litigating directly with the government. But the Supreme Court does not permit Plaintiffs to sue to enforce Section 340B. *Astra USA, Inc. v. Santa Clara Cnty.*, 563 U.S. 110, 113 (2011). Plaintiffs' lawsuit has nothing to do with free-market prices or discounts; it seeks an injunction requiring Defendants to stop charging their independent market prices and instead revert to government-set prices. This type of regulatory dispute cannot use the antitrust laws to circumvent *Astra*'s express restrictions.

Regardless how Plaintiffs define or redefine their allegations, their complaint fails to state a claim. ***First***, Plaintiffs do not contest that they are indirect purchasers. This fact dooms their federal antitrust damages claim under the bright-line rule of *Illinois Brick*, regardless of any of the labels they use. ***Second***, Plaintiffs do not dispute that they do not allege a direct conspiracy. They also do not (and cannot) allege parallel conduct ***or*** any plausible plus factors leading to the inference of concerted action. Plaintiffs' opposition does not point to any plausible motive, reason, or discussion suggesting that Defendants' unique policies were anything but independently developed and deployed. Equally important, the numerous obvious alternative explanations on the face of Plaintiffs' complaint defeat their claims. ***Third***, Plaintiffs concede that *Astra* bars them from bringing a private 340B enforcement action. Despite attempts to show how the antitrust laws

salvage their claims, Plaintiffs cannot avoid the reality that their claims are "hopelessly intertwined" with the 340B statute, and therefore, their suit fails as a matter of law. ***Fourth***, Plaintiffs' scattershot state-law claims are thinly pled and do not save their lawsuit. For these reasons, the Court should dismiss Plaintiffs' complaint in its entirety, with prejudice.

I. PLAINTIFFS ARE INDIRECT PURCHASERS WHO LACK STANDING TO RECOVER FEDERAL ANTITRUST DAMAGES.

Illinois Brick bars Plaintiffs' federal antitrust damages claim because Plaintiffs are indirect purchasers. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *see* Mem. (Dkt. 47-1) at 15–20. Plaintiffs' response does not contest—and in some cases expressly concedes—critical facts that require dismissal on this basis:

- Plaintiffs do not contest that they are indirect purchasers of Defendants' drugs. *See* Opp. at 40; *see also* Mem. at 16–20 (explaining presence of intermediary distributors and wholesalers).
- Plaintiffs concede "that *Illinois Brick* bars indirect purchasers from recovering overcharge damages under the Clayton Act." Opp. at 40.
- Plaintiffs do not dispute that *Illinois Brick* applies even if indirect purchasers bear 100% of an alleged price increase. *See* Mem. at 18.

Moreover, Plaintiffs cite no authority upholding a damages claim by an indirect purchaser in a federal price-fixing suit. *See* Opp. at 43–45. This should be the end of the matter.

Plaintiffs nevertheless raise three arguments seeking to avoid *Illinois Brick*: (1) *Illinois Brick* does not apply because they claim damages based on "lost 340B Savings revenue" rather than "overcharges," (2) *Illinois Brick* does not apply to "Defendants' concerted refusal to sell at contract pharmacies," and (3) Plaintiffs' "lost 340B Savings revenue" damages "do not implicate any of the concerns animating *Illinois Brick*." Opp. at 40–45. None can avoid dismissal here.

First, Plaintiffs' labeling of their damages as "lost revenue" rather than "overcharges" does not evade *Illinois Brick*. Opp. at 40–45. The Supreme Court has explained that *Illinois Brick* is a

"bright-line rule" from which courts do not and should not "carve out exceptions." *See Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216 (1990) ("[A]mple justification exists for our stated decision not to 'carve out exceptions to the [indirect purchaser] rule.'"). Courts consistently apply this binding precedent to preclude indirect purchasers from seeking any damages, whether labeled as overcharges or otherwise. *E.g.*, *Drug Mart Pharm. Corp. v. Am. Home Prods. Corp.*, 2002 WL 31528625, at *10 (E.D.N.Y. Aug. 21, 2002) (precluding indirect purchaser from bringing action labeled as "lost profits"); *Howard Hess Dental Lab'ys Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363 (3d Cir. 2005) (upholding dismissal precluding indirect purchaser from seeking lost profits); *see also Warren Gen. Hosp. v. Amgen Inc.*, 2010 WL 2326254, at *4 (D.N.J. June 7, 2010) (dismissing action because indirect purchaser was precluded from recovery under *Illinois Brick*). Plaintiffs argue that all of Defendants' cases "addressed harm flowing from an overcharge following a sale," Opp. at 41–43, which is not only incorrect since it ignores the above-mentioned cases, but also improperly posits (without authority) that there must be a "sale" for *Illinois Brick* to apply. *See* Mem. at 18–19. As courts have explained, the "Supreme Court has strictly adhered to the bright-line rule established in *Illinois Brick*, holding that the possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 505 (S.D.N.Y. 1996); *see also Spinner Consulting LLC v. Stone Point Cap. LLC*, 623 B.R. 671, 676 (D. Conn. 2020) (*Illinois Brick* does not create "any 'carve out exceptions'").

Plaintiffs are not the first to try to end-run *Illinois Brick* by purporting to distinguish their "lost revenue" damages from "overcharge" damages.[1] In *Howard Hess*, denture laboratories

[1] Plaintiffs assert the "court need not address" Defendants' argument with respect to their "lost revenue" damages because it was "asserted in a footnote." Opp. at 43. But Defendants directly

unsuccessfully sued prosthetic teeth suppliers for anticompetitive conduct, part of which included prohibiting third-party distributors from selling other, third-party suppliers' teeth. 424 F.3d at 367. The laboratories bought teeth through a distributor, making them indirect purchasers of defendants' teeth. *Id.* As here, the *Howard Hess* plaintiffs claimed (1) overcharge damages for the teeth they purchased, and (2) "lost profits damages" for teeth from other suppliers they could not sell because of the defendant's restrictions (and ***not*** their allegedly inflated prices). *Id.* at 373. The court explained that in any price fixing case, damages come "in two forms: (1) overcharges paid for goods actually purchased; and (2) lost profits resulting from the lost opportunity to buy and resell a greater volume of goods." *Id*. *Illinois Brick* barred both: "Plaintiffs may not recover [overcharge or] lost profits damages because they are indirect purchasers." *Id.* at 375. Otherwise, any indirect purchaser could recover "if only they had framed their claim as one for lost profits rather than for overcharge damages," eviscerating *Illinois Brick*. *Id.* at 376.

Plaintiffs' single-sentence attempt to distinguish *Howard Hess*—by claiming that the *Howard Hess* plaintiffs' "lost profit" damages were "measured by overcharges"—is wrong. Opp. at 45. The Third Circuit explicitly noted that "[p]laintiffs ***do not seek*** in their lost profits claim the component of their lost profits that includes the overcharge paid minus the overcharge passed on for teeth they actually purchased and resold." *Howard Hess*, 424 F.3d at 373 n.6 (emphasis added). Just as in *Howard Hess*, the Court should reject Plaintiffs' attempt to end-run *Illinois Brick*'s bright-line rule.[2]

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addressed lost revenues in their memorandum's ***text***, as well as an explanatory footnote. Mem. at 19 & n.9. Regardless, the Court may, in its discretion, address points made in footnotes. *See United States v. Bin Wen*, 2019 WL 364571, at *4 (W.D.N.Y. Jan. 30, 2019) (Wolford, J.).

[2] Indeed, Plaintiffs ask the Court to endorse a "lost revenue" theory of damages that is based on a transaction (Plaintiffs' re-sale of Defendants' drugs) that is even more indirect than their indirect purchase of Defendants' products that they concede are barred by *Illinois Brick*. *See* Opp. at 40.

Second, Plaintiffs are wrong that "[f]ederal law allows Plaintiffs to pursue damages from Defendants' concerted refusal to sell at Contract Pharmacies." Opp. at 44. Their only authority is dicta in a 25 year-old, out-of-circuit decision, *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997). There, the Seventh Circuit hypothesized a situation where the defendants "refus[ed] to enter into direct contractual relations" with an imaginary buying collective. *Id.* at 606. The court speculated that ***if*** the buying collective sued over this "steadfast [ ] refus[al]" to sell, that boycott claim would fall outside of *Illinois Brick*, "provided [the plaintiffs] weren't seeking to recover overcharges, for that would entail the very incidence analysis that *Illinois Brick* bars." *Id.* Tellingly, Plaintiffs cite no case actually applying that supposed exception or allowing a federal indirect antitrust damages claim. The Court should not do so here.

In any event, no "boycott" exception to *Illinois Brick*'s bright-line rule could ever apply here for two independent reasons. To begin, it would violate the Supreme Court's "bright-line rule" without "carve-out exception." *UtiliCorp*, 497 U.S. at 216; *see also Drug Mart*, 2002 WL 31528625, at *10 (refusing to "endorse an *Illinois Brick* exception"); *Warren Gen. Hosp.*, 2010 WL 2326254, at *4–6 (similar); Mem. at 16.

Moreover, Plaintiffs have not alleged—and cannot allege—a "steadfast refusal" to sell any drugs. The phrases "refusal to sell," "refusal to deal," and "boycott" appear ***nowhere*** in Plaintiffs' complaint. In fact, Plaintiffs' allegations are flatly inconsistent with a refusal-to-sell case:

- Statutorily defined covered entities, including Plaintiffs, "have purchased Defendants' drugs." First Am. Compl. ("FAC") (Dkt. 41) ¶ 238.
- Covered entities like Plaintiffs can purchase Defendants' drugs at the 340B price in unlimited quantities. *See id.* ¶¶ 117–24; *see also* Mem. at 19 n.7, 36.
- Covered entities can have Defendants' drugs shipped to contract pharmacies at the 340B discount rate so long as certain parameters are met. FAC ¶¶ 117–24.

- Novo's policy allows Plaintiffs and other similar non-hospital covered entities to have 340B-priced drugs shipped to an unlimited number of pharmacies without any other requirement. *See id.* ¶ 124; Mem. at 19 n.7.

- Sanofi's policy does not limit the number of contract pharmacies that covered entities can use so long as they provide minimal claims data for the 340B sales at issue. FAC ¶ 120.

Plaintiffs' own authorities explain that a "boycott" or refusal to sell involves a "concerted refusal to serve a[] . . . customer" ***at all***. *FTC v. Super. Ct. Trial Laws. Ass'n*, 493 U.S. 411, 422–23 (1990). Thus, as in *Drug Mart*, there is "no such refusal to engage in any commercial relationship at all with the plaintiffs. There [i]s rather an unwillingness to engage in such a relationship upon terms the plaintiffs desired." *Drug Mart*, 2002 WL 31528625 at *7 n.12; *All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740, 748 (11th Cir. 1998) (no refusal to deal because "[a]ll agencies were able to participate in the bidding"). Plaintiffs' hypothetical "boycott" theory therefore fails for the additional reason that the "case does not involve a 'boycott' in the true sense of the word." *Drug Mart*, 2002 WL 31528625 at *5, *7.

Third, Plaintiffs' *Illinois Brick* policy arguments are irrelevant. Opp. at 45. Plaintiffs argue that there was "no sale at all" with regard to their lost revenue damages, and therefore, those damages do not "implicate any of the concerns animating *Illinois Brick*." Opp. at 45.[3] But as the Supreme Court recently explained, "the bright-line rule of *Illinois Brick* means that there is ***no***

[3] Plaintiffs mistakenly point to statements Defendants have made in disputes with the government over the 340B Program about what does and does not constitute an "overcharge." Opp. at 43–44. That refers to a ***regulatory*** term of art, which is different from the ***antitrust*** term and thus has no bearing here. *Compare* 42 C.F.R. § 10.11(b)(4) ("An instance of overcharging may occur at the time of initial purchase or when subsequent ceiling price recalculations due to pricing data submitted to CMS or new drug price estimations as defined in § 10.10(c) result in a covered entity paying more than the ceiling price due to failure or refusal to refund or credit a covered entity.") *with Howard Hess*, 424 F.3d at 374 (defining "overcharge" as "the difference between the price paid for goods actually purchased and the price that would have been paid absent the illegal [anti-competitive] conduct" (citing 2 Phillip E. Areeda, Herbert Hovenkamp & Roger D. Blair, *Antitrust Law* ¶ 394, at 521 (2d ed. 2000))).

reason to ask whether the rationales of *Illinois Brick* apply with equal force in every individual case." *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1524 (2019) (emphasis added). Regardless, to calculate their alleged "lost 340B Savings revenue," Plaintiffs would need to account for both the lost volume of 340B drugs ***and*** how the "lost" 340B discounts would affect profitability of those lost sales for covered entities and distributors (*i.e.*, how Defendants' government-mandated discounts would have flowed through the distribution chain). *See* FAC ¶ 239.[4] This exercise implicates the concerns underlying *Illinois Brick*, which—as the Second Circuit has held—rest on "the ***possibility*** of allocation difficulties, not their imminence or likelihood," even if there is "100%" pass through of discounts. *Simon v. KeySpan Corp.*, 694 F.3d 196, 203–04 (2d Cir. 2012) (emphasis added). Binding precedent thus precludes the policy arguments Plaintiffs advance here.

In sum, Plaintiffs' own allegations confirm they are indirect purchasers. The Court should apply *Illinois Brick*'s bright-line rule and dismiss their federal damages claims.

II. PLAINTIFFS FAIL TO ALLEGE A PLAUSIBLE CONSPIRACY.

The crux of any Section 1 claim is an agreement among defendants. Yet Plaintiffs' opposition does not dispute that they have alleged no direct evidence of any conspiracy. Opp. at 21–22. Their circumstantial case fails too because their complaint fails to plausibly plead (1) parallel conduct among Defendants or (2) any critical plus factors—that Defendants' policies were against their unilateral interest or that Defendants had a motive to conspire.

[4] Plaintiffs misunderstand Defendants' statement that "Plaintiffs' purported lost 'savings' revenue is really the same as purported overcharges." Opp. at 43; *see* Mem. at 19 n.9. The point is that both categories of alleged damages stem from the 340B discounts and therefore require tracing those discounts.

A. Plaintiffs do not allege actionable parallel conduct, particularly in light of the obvious alternative explanations on the face of their complaint.

Plaintiffs' complaint establishes that there are fundamental differences among Defendants' policies: they apply to different drugs, different covered entities, and different numbers of contract pharmacies. *See* Mem. at 23. In addition, Defendants collectively implemented their policies at different times. *Id.* at 24–26. Finally, Plaintiffs' own complaint establishes "obvious alternatives explanations" for the conduct and the timing that Plaintiffs allege was parallel. With respect to conduct, Plaintiffs' complaint concedes each Defendants' unilateral interest in limiting deeply discounted 340B sales to those required by the 340B statute. With respect to timing, Plaintiffs' complaint sets out that some of Defendants' changes occurred shortly after the Executive Order, which followed legitimate lobbying efforts related to 340B sales. Plaintiffs cannot dispute these critical admissions.

At bottom, Plaintiffs ask the Court to squint to infer a conspiracy from what they label "unlikely" coincidental behavior. Opp. at 35. But their theory is even more implausible: Plaintiffs assert that the timing of two Defendants' entirely different 340B policies "strongly suggests" collusion between those ***two*** Defendants, and therefore, a conspiracy must exist among all ***four***. *Id.*; *see also* FAC ¶ 27. There is no *res ipsa* theory of conspiracy, and Plaintiffs' threadbare claims are insufficient as a matter of law. *See NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 458 (6th Cir. 2007) (en banc) ("*res ipsa loquitur* is not a theory of antitrust injury, and it surely is not one after the Supreme Court's decision in [*Twombly*], which set out to eliminate this kind of loose antitrust pleading.").

1. *Plaintiffs cannot ignore the fundamental differences among Defendants' policies.*

As Defendants' opening memorandum explained, each of their 340B policies is "entirely distinct," and therefore, the Court cannot infer parallel conduct. Because Plaintiffs cannot contest

the material differences among Defendants' policies, they argue that Defendants' conduct does not need to be "identical" because Defendants' "different approaches" have the "same aim" and achieve "common anticompetitive ends." Opp. at 22–24. This argument fails for two reasons.

First, Plaintiffs do not allege that Defendants' actual conduct here is parallel. Instead, their own complaint establishes the vastly different approaches each Defendant took in its 340B policy:

Sanofi. Plaintiffs do not deny that Sanofi's policy does ***not*** limit the number of contract pharmacies able to obtain 340B-priced drugs, requiring only minimal claims data in return. Opp. at 25. They insist that the data policy, however, includes "commercially unreasonable terms." Opp. at 25; FAC ¶ 120. That legal conclusion, though, is unsupported by any facts in the complaint and belied by Sanofi's actual communication to covered entities, which forms the basis of Plaintiffs' allegations: the data requested "takes ~ 5 minutes" to upload and is required only "every two weeks." D'Antonio Aff. at Ex. D (Dkt. 47-6), July 2020 Sanofi Letter to Covered Entities. In addition, covered entities only need to provide "data for 340B claims that originate[d] from contract pharmacies," not "their own outpatient pharmacies." *Id.* Despite Plaintiffs' protestation, Opp. at 25, the Court may consider the letter now because it is "integral" to, and indeed quoted in, Plaintiffs' complaint. *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995); *see Matusovsky v. Merrill Lynch*, 186 F. Supp. 2d 397, 400 (S.D.N.Y. 2002) (dismissing case and relying on document "explicitly referenced" in complaint). Nor can Plaintiffs sustain their conclusory "commercially unreasonable" allegation based on their refusal to participate in Sanofi's program. Opp. at 25. These Plaintiffs may have chosen to limit their ability to use contract pharmacies rather than take five minutes every two weeks to upload minimal claims data. But that choice hardly implies that Sanofi's program is "commercially unreasonable" or that Sanofi's policy is not distinct from the policies of the other Defendants.

Novo. Plaintiffs acknowledge that Novo's policy uniquely applies ***only*** to hospitals, not clinics. Opp. at 9, 16. They claim this is irrelevant because "[h]ospitals are the market-share prize, making up roughly 90% of sales." *Id.* at 29. This allegation is not even asserted in the complaint, and the Court need not credit assertions made for the first time in Plaintiffs' opposition. *See Walsh v. Maryland Bank, N.A.*, 806 F. Supp. 437, 442 nn.2 & 3 (S.D.N.Y. 1992). More importantly, the named Plaintiffs are clinics, not hospitals. They cannot establish parallel conduct by arguing that Novo's policy, which has ***no*** application to them, is the same as policies that allegedly do.

Lilly. Plaintiffs concede that Lilly's policy provides its own unique exceptions. FAC ¶ 122. Unlike the other Defendants' policies, Lilly allows unlimited contract pharmacies if certain requirements are met. *See* Opp. at 9 & n.3; Mem. at 24. Plaintiffs also acknowledge that Lilly's policy changes affect its entire drug portfolio. FAC ¶ 121.

AstraZeneca. In contrast to the others' policies, AstraZeneca's policy allows a single contract pharmacy for many facilities and impacts only some AstraZeneca drugs. FAC ¶ 118.

These fundamental differences foreclose Plaintiffs from establishing parallel conduct. *See* Mem. at 22–24. Plaintiffs try to distinguish Defendants' case law by claiming that the conduct at issue in those cases had "no discernible similarities." Opp. at 24. This mischaracterizes the facts in those cases, but more critically, ignores their underlying holdings—conduct is not "parallel" if it differs in ways that are meaningful to the alleged conspiracy. *See, e.g.*, *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 228 (3d Cir. 2011) (no parallel conduct in alleged conspiracy to limit plaintiff's access to "credit at approximately the same time" because the defendants "were choosing to decline, decrease, and even increase credit to [the plaintiff] at different time periods"); *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 956, 962 (N.D. Cal. 2007) (no parallel conduct to "maintain a price floor for late fees" where "defendants' fee levels have all followed

different pricing paths at different times"); *see also Pro Music Rights, LLC v. Apple, Inc.*, 2020 WL 7406062, at *4 (D. Conn. Dec. 16, 2020) (conduct was not parallel when rationales for each defendants' conduct were "distinct").[5] These courts concluded the plaintiffs had not alleged parallel conduct because the substantive differences among the defendants' conduct went to the heart of the alleged conspiracy. The same is true here. Plaintiffs have alleged a vague conspiracy to limit the availability of 340B discounts through contract pharmacies. But they concede that Defendants' policies apply to different drugs, different covered entities, and different numbers of contract pharmacies, *see* Opp. at 22–25, and some policies do not limit availability at all.[6]

Second, Plaintiffs cannot allege parallel conduct by asserting that Defendants' policies have the "same aim." Opp. at 23–24. If the "same aim" were enough, any antitrust plaintiff could allege parallel conduct merely by alleging that all defendants had the "same aim" to make a profit. *See In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d at 964 ("[I]f 'a motive to achieve higher prices' were sufficient, every company in every industry could be accused of conspiracy because they all 'would have such a motive.'"). More fundamentally, the case law rejects high-level allegations of common objectives that gloss over concrete policy differences. For example, in *Allen v. Verizon Communications, Inc.*, the court did not credit plaintiffs' allegation that

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[5] Plaintiffs try to distinguish *Pro Music Rights* because the court "was not considering whether the conduct was parallel but only if it was 'consciously' so." Opp. at 25 n.13. However, "conscious parallelism" is how the Second Circuit describes the circumstantial evidence needed to infer a conspiracy—the exact question presented here. *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013).

[6] The cases Plaintiffs rely on merely hold that conduct can be parallel where the court concludes there are only differences in degree, rather than substantive differences in the conduct itself. *See, e.g.*, *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46, 69 (D.D.C. 2016) (plaintiff established parallel conduct where defendants reduced or limited capacity, just not in "identical amounts"); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412 (4th Cir. 2015) (the "uniform actions alleged [were] obvious" in a boycott case where "none of the defendants ultimately" dealt with the plaintiff). As explained, that is not the case here.

defendants' "parallel conduct had a common goal: 'raising, fixing, maintaining or stabilizing prices in the market for wireless communication services by reducing competition.'" 2019 WL 399922, at *4 (D.N.J. Jan. 31, 2019) (quoting complaint). Instead, the court analyzed the actual policies themselves (and their obvious alternative rationales) to conclude that "plaintiff's allegations could reasonably be seen as the independent actions." *Id.* at *5. The same result is required here: Plaintiffs' own allegations undermine their argument that the aim of Defendants' policy changes was to end "nearly all" 340B discounts. FAC ¶ 181. Plaintiffs do not dispute that Sanofi implemented its data requirements to "address duplicate discounts," *i.e.*, providing Medicaid rebates on top of the already 340B-discounted drugs—an aim that has nothing to do with limiting 340B discounts. Mem. at 11; *see* D'Antonio Aff. at Ex. D. And Novo's hospital-only policy cannot possibly have or intended to have the same aim as the other Defendants' policies when it does not even apply to the same set of covered entities (including Plaintiffs). *See supra* at 10. Plaintiffs' conclusory allegations of a "common aim," therefore, cannot save their complaint. *See In re Managed Care Litig.*, 2006 WL 8440832, at *6 (S.D. Fla. Feb. 1, 2006) (dismissing claims where plaintiff's attempt to "argue for an extremely broad definition of the overall objective of the alleged conspiracy" actually revealed that "there is no evidence of parallel conduct").

2. *Plaintiffs have not alleged parallel timing of Defendants' policy changes.*

Plaintiffs also cannot establish parallel conduct with respect to the timing of Defendants' policy changes. They do not deny that Defendants' policy changes occurred months apart. *See* Opp. at 23 n.12. Nor do they dispute that the changes were part of a broader (and public) dispute over the requirements of the 340B statute. Moreover, Plaintiffs ignore the fact that Lilly announced its initial 340B policy change (related to Cialis) in May 2020. FAC ¶ 123. They therefore incorrectly quibble over how Defendants (appropriately) calculated the seven months across which Defendants announced their 340B policy changes. Opp. at 23 n.12.

Plaintiffs' concession that Defendants' remaining 340B policy changes were announced at various points between July and December, paired with Defendants' lack of similar actions, further refutes any inference of parallel conduct. *See Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 105 (2d Cir. 2018) (defendants' "varying courses of action" occurring "within a span of three business days" were not parallel); *LaFlamme v. Société Air France*, 702 F. Supp. 2d 136, 151 (E.D.N.Y. 2010) (no conspiracy claim where conduct was unique and imposed just weeks apart); *Kleen Prod. LLC v. Int'l Paper*, 276 F. Supp. 3d 811, 824–25 (N.D. Ill. 2017) (pattern of pricing announcements "within days, closer to one or two weeks, or in about a month's time" was "less suggestive of 'lockstep,' parallel behavior than that found in other price-fixing cases").

To be sure, Plaintiffs focus on the timing of just two of the Defendants: AstraZeneca's July 24, 2020 "private announcement" to regulators and Sanofi's July 27, 2020 "public announcement." *See, e.g.*, Opp. at 35.[7] But this argument ignores half of the alleged co-conspirators. It also ignores Plaintiffs' own allegations that Defendants adopted their policies in response to the anticipated Executive Order, which was issued "the very same day" as AstraZeneca's announcement and just one business day prior to Sanofi's announcement. FAC ¶¶ 6, 118, 120. Plaintiffs' own allegations explain the non-collusive timing of AstraZeneca's and Sanofi's policy announcements: AstraZeneca and Sanofi followed the same precipitating event. *Id.* ¶¶ 6, 116. Finally, Plaintiffs are wrong that AstraZeneca's and Sanofi's July 2020 policy changes were "as-of-then-unheard-of." Opp. at 2, 35. Lilly's Cialis policy change was publicly

[7] Plaintiffs also emphasize that both policies took effect the same day—October 1, 2020. But that was the first day of Q4 2020, a logical date for implementing any company's corporate policy changes.

known months before. FAC ¶ 123. Plaintiffs' cherry-picked "example" provides no viable evidence—circumstantial or otherwise—of any conspiracy.[8]

3. *The obvious alternative explanations pled in Plaintiffs' complaint require dismissal.*

Twombly is clear: a conspiracy claim based on parallel conduct should be dismissed if there is an "obvious alternative explanation" for Defendants' behavior. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567–69 (2007). Courts regularly dismiss antitrust conspiracy cases on this basis. *E.g.*, *Relevent Sports, LLC v. Fed'n Internationale de Football Ass'n,* 2021 WL 3077550, at *4 (S.D.N.Y. July 20, 2021) (dismissing "where there is an obvious alternative explanation to the facts underlying the alleged conspiracy among the defendants"); *Cenedella v. Metro. Museum of Art*, 348 F. Supp. 3d 346, 359 (S.D.N.Y. 2018) (similar). Here, *Twombly* precludes Plaintiffs' claims because their own allegations establish obvious alternative explanations for Defendants' policy changes—the unprofitable 340B sales and the issuance of the Executive Order—rendering their theory of conspiracy implausible. *See* Mem. at 27–30.

Plaintiffs respond by arguing (1) their complaint does not concede these alternative explanations, and (2) it would be improper for the Court to rely on them to dismiss Plaintiffs' complaint. Opp. at 27, 33. Both fail.

First, Plaintiffs' own allegations establish obvious alternative explanations for both the substance and timing of Defendants' policy changes. Regarding the substance, complaint paragraph 102 explains why Defendants did what they did: they lose money on 340B transactions.

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[8] Likewise, it makes no sense why "sophisticated parties" like AstraZeneca and Sanofi would time their announcements and effective dates as they did if they were really trying to forestall "red flags" and "avoid detection," as Plaintiffs claim. Opp. at 23, 35. Unlike in *De Jong Packing Co. v. USDA* (a case decided decades before *Twombly*), not all Defendants' policies had the same effective date, which that court concluded lent "credence" to plaintiff's conspiracy allegations. 618 F.2d 1329, 1334 (9th Cir. 1980).

Defendants' independent decisions to limit abuses of the 340B Program therefore made perfect autonomous business sense. Similarly, complaint paragraphs 103, 110, 116, and 117 affirmatively allege a reason why Defendants' timing made unilateral sense: the "limited" Executive Order led Defendants to "turn[] to" the policies Plaintiffs now challenge, and the policy changes "began as soon as the President's executive order was released."

Plaintiffs' opposition claims that "Defendants stretch the facts" to argue Defendants "were losing money across their Contract Pharmacy sales." Opp. at 27. Not so. Paragraph 102 alleges that "while the list price for a single vial of insulin today is often more than $250, many of these products may be purchased under the 340B Program at a price of ***one penny per unit of measure***." That Defendants lost money on products they sold at or below cost for a penny (not including Defendants' shipping costs) is not a "smuggle[d]"-in allegation. Opp. at 27. Instead, it is the only logical inference, which the Court is entitled to draw. *Sharpe v. City of New York*, 2013 WL 2356063, at *8 (E.D.N.Y. May 29, 2013) ("clear inference from the allegations in the amended complaint" supported dismissal).

With respect to timing, Plaintiffs try to downplay the Executive Order. They argue there is a disconnect between the alleged obvious alternative explanation for the timing of some of the Defendants' conduct—the issuance of the Executive Order—and Defendants' "contemporaneous public remarks" regarding their "well-publicized" concern of "abuses" by contract pharmacies in 340B sales. Opp. at 32. But the complaint does not plead a disconnect, nor is there one. Far from it: Plaintiffs affirmatively tie (1) Defendants' attempts to lobby the federal government to curb 340B-Program abuses involving contract pharmacies to (2) the Executive Order, which declined to do so. Here, the complaint speaks for itself:

1. 340B Program abuses involving the use of contract pharmacies had been a well-documented problem with "myriad [] issues" resulting in significant dollars being

diverted away from patients for benefit of pharmacies and "prohibit[ing] 340B from [] functioning as it was intended," leading to "global concerns" (FAC ¶¶ 115, 123; *see also* D'Antonio Aff. at Exs. B–E (Dkts. 47-4–47-7));

2. Manufacturers, including Defendants, "as part of long-running lobbying by drug companies," sought to obtain a legislative or executive branch solution through protected "lobbying" activity (FAC ¶¶ 100, 108);

3. In the course of those efforts, the executive branch made clear that the "steep" 340B discounts "are not always passed through to low-income Americans at the point of sale" at contract pharmacies, but did not expressly address abuses and issued its "limited" Executive Order (*id.* ¶¶ 102–03; *see id.* ¶ 106); and

4. Manufacturers, including Defendants, responded "as soon as the President's executive order was released" by "turn[ing] to" implement 340B policies (*id.* ¶¶ 100, 116, 117; *see also* D'Antonio Aff. at Exs. B–F).

What is more, the complaint concedes it was not just Defendants whose self-interest aligned with implementing 340B policy changes shortly after the Executive Order. While Plaintiffs' opposition argues that Defendants were the "sole drug makers" to make policy changes and "cut discounts," Opp. at 33, their complaint itself alleges that at least ***four other*** manufacturers announced or implemented such policy changes in the same timeframe. FAC ¶¶ 130–31; Mem. at 28–29. Plaintiffs are therefore wrong that only "miraculous coincidence" or "collu[sion]" can explain the decision of Defendants to enact their own 340B policy changes. Opp. at 11. Instead, "the pleadings [themselves] supply good reason, as a matter of 'rational and competitive business strategy,' for any individual [defendant to act] independently" after the Executive Order to limit their losses and curb 340B Program abuses. *In re Int. Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 464 (S.D.N.Y. 2017); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 326 (3d Cir. 2010) ("common economic experience . . . is an obvious alternative explanation for defendants' common behavior").

Second, the pleading standard does not shield Plaintiffs from dismissal based on their allegations of these obvious alternative explanations. Plaintiffs mischaracterize Defendants'

argument as insisting that the Court weigh competing inferences to decide which is more likely on this motion to dismiss. Opp. 20–21. Not so. The point is that where Plaintiffs' own complaint establishes obvious alternative explanations for parallel conduct, then those allegations of parallel conduct cannot constitute circumstantial evidence of a conspiracy. That is not a matter of weighing inferences, but instead goes to "whether there are sufficient factual allegations to make the complaint's claim plausible." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 189 (2d Cir. 2012). Plausibility is absent where, as here, the complaint itself alleges an obvious alternative explanation for defendants' conduct.[9] *See Garfinkle v. Conf. on Jewish Material Claims Against Germany, Inc.*, 2020 WL 6323462, at *5 (S.D.N.Y. Oct. 28, 2020) (obvious alternative explanations rendered plaintiff's competing explanation "conceivable but not plausible").

Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129 (2d Cir. 2013), is particularly instructive. *See* Mem. at 27. That complaint alleged the defendants were collusively exiting a relevant market that was "collapsing." *Citigroup*, 709 F.3d at 138. The Second Circuit affirmed dismissal, concluding that the failing market made it "unsurprising" and "expected" that defendants would independently choose to exit the market at the same time. *Id.* Plaintiffs' only response to this binding precedent is that *Citigroup* ***cites*** a case decided on summary judgment, *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir. 1987). Opp. at 21 n.11. But that does not matter. *Citigroup* is a factually indistinguishable Second Circuit opinion, decided on a motion to dismiss. It squarely forecloses Plaintiffs' claim here.

[9] That Plaintiffs affirmatively allege obvious alternative explanations and the fundamental differences among Defendants' policies distinguish this case from *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 782 (2d Cir. 2016), cited at Opp. at 21.

4. *Novo's hospital-only policy highlights the flaws in Plaintiffs' claims.*

Plaintiffs argue that Novo must stay in this case because "antitrust liability is joint and several." Opp. at 39. But Plaintiffs cannot state a claim against Novo since Novo did not cause (and could not have caused) injury to the named Plaintiffs. *See In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 206 (E.D.N.Y. 2003) (rejecting plaintiffs' argument that "the antitrust laws [impose] joint and several liability on members of a conspiracy" because certain defendants "***could not have caused*** the plaintiff's antitrust injury") (emphasis added).

More fundamentally, that Novo's policy does not apply to Plaintiffs underscores the lack of any viable theory as to ***any*** Defendant. Plaintiffs' opposition suggests a hospital-only conspiracy to explain away Novo's policy, but that appears nowhere in the complaint, and the named Plaintiffs could not bring such a lawsuit because they are not hospitals. *See* Opp. at 29. Their actual allegations of a conspiracy as to all covered entities is incompatible with Novo's hospital-only policy. FAC ¶ 243; *accord* Opp. at 16 ("Plaintiffs and the Class have been losing much needed 340B Savings on drugs manufactured by Lilly, Sanofi, and AstraZeneca, and hospital covered entities with Contract Pharmacies have further been losing 340B Savings on Novo Nordisk drugs."). Plaintiffs' theory is fatally flawed, and "joint and several liability" solves nothing.

B. Plaintiffs do not allege plausible plus factors.

Plaintiffs devote much of their opposition to trying to defending their "plus factor" allegations, which are required as part of their circumstantial conspiracy case. The Court need not even reach "plus factors," however, because Plaintiffs have not plausibly alleged parallel conduct. Even so, Plaintiffs' opposition cannot remedy the two central flaws identified in Defendants' memorandum—(1) an implausible story of financial motivation, and (2) no allegations of actual

inter-firm communications. *See* Mem. at 31–35. Nor are their arguments on the remaining plus factors sufficient to make their alleged indirect conspiracy "plausible." *Twombly*, 550 U.S. at 570.

1. *Defendants lacked motive to conspire and instead had independent self-interest for their policy changes.*

Acts "contrary to an alleged conspirator's economic interest" are the "strongest plus factor indicative of a conspiracy." *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 201 F.3d 436 (4th Cir. 1999).[10] Plaintiffs' allegations establish the opposite. They plead that Defendants sell "most" of their diabetes products under the 340B Program at a mere "penny per unit"—significantly less than both the "$2 a vial" Plaintiffs claim could be profitable and the alleged commercial list price. FAC ¶ 102; Opp. at 27. Losing "market share" of these government-price-controlled sales (not actually warranted under the 340B statute) would thus be in each Defendant's unilateral self-interest. *See* Opp. at 26–27.

Indeed, Plaintiffs allege facts about Defendants' other drugs ***and*** about other manufacturers that establish each Defendant's unilateral interest in limiting 340B sales to those required by statute. Plaintiffs concede that Lilly independently changed its 340B policy for Cialis months before any other drug manufacturer. FAC ¶ 123.[11] Lilly's decision—made despite Plaintiffs'

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[10] *Accord* ABA Section of Antitrust Law, 1-1 Antitrust Law Developments 1B(1)(b)(2) (8th ed. 2016) ("***Among the most important plus factors*** are those that tend to show that the conduct would be in the parties' self-interests if they all agreed to act in the same way, but would be contrary to their self-interests if they acted alone." (emphasis in original)).

[11] Plaintiffs misconstrue Lilly's Cialis change. Opp. at 13. Even if Lilly had "considered restricting Contract Pharmacy 340B Drug Discounts" and only decided to change its policies regarding Cialis at first, Opp. at 13, 27; FAC ¶ 207, it waited to expand those changes just a handful of weeks later to all of its drugs once it received confirmation from the government. *See* FAC ¶ 121. Indeed, Lilly's Cialis-related letter to the government specifically noted that it would stop offering 340B discounts on certain drugs "[u]nless HRSA objects and states that it believes our proposed discontinuation of voluntary contract pharmacy 340B discounts is unlawful." D'Antonio Aff. at Ex. A (Dkt. 47-3) at 1; *see also* FAC ¶ 123 (citing May 18, 2020 Lilly letter to HRSA). "HRSA concluded that . . . [Lilly's] plan did not give rise to any

conjecture that a manufacturer would be concerned about losing market share and profits to competitors—precludes Plaintiffs from establishing that narrowing a 340B policy is against a manufacturer's unilateral interest. *See id.* ¶¶ 185, 192, 196, 207. So do Plaintiffs' similar allegations that Defendants' policies apply to far more than just diabetes products—the only object of the purported conspiracy, and that other manufacturers also made changes to their 340B policies. *See id.* ¶¶ 118, 121, 130–31. Plaintiffs ignore these affirmative allegations completely. Instead, they make four arguments, none of which can cure their pleading deficiency.

First, as explained above, try as they might, Plaintiffs cannot run from their penny-pricing concession. They insist they did not concede that Defendants' "drugs were ***all*** penny-priced." Opp. at 27 (emphasis added). Fair enough; they alleged "***many*** of these products" were sold at a "penny per unit." FAC ¶ 102 (emphasis added). That is a distinction without a difference: Plaintiffs admit Defendants received almost no revenue for "many" 340B sales, and thus could not have profited (or even broken even) from the 340B Program. The inescapable conclusion is that each Defendant had an independent interest to provide 340B discounts only where required by statute and to limit waste and abuse within the 340B Program. *See also* Mem. at 31–32. It is also implausible that fear of a "loss in market share" drove Defendants to act together since no business wants high market share for unprofitable sales. Opp. at 12, 26, 28. These allegations thus preclude any argument that each Defendant's action is inconsistent with unilateral interest.

Second, Plaintiffs contend that no Defendant would act alone because doing so "would have opened itself up to potential loss of Medicare and Medicaid coverage of their drugs." Opp. at 12, 27, 29–30. To begin, Plaintiffs never alleged this (or anything like it) in their complaint.

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enforceable violation of the 340B statute," incenting Lilly to apply its policy changes to all its drugs—not just its diabetes drugs, and without regard to what other diabetes treatment manufacturers were doing. D'Antonio Aff. at Ex. B (Dkt. 47-4) at 1.

This argument therefore cannot sustain Plaintiffs' pleading burden here. *See Walsh*, 806 F. Supp. at 442 nn. 2 & 3. In any event, the supposed threat of complete removal from government programs unless Defendants "join[ed] together" is implausible on its face. Opp. at 13. It is contradicted by Plaintiffs' allegations regarding Lilly's independent Cialis 340B change and their concession that four ***other*** drug manufacturers also changed their policies. FAC ¶¶ 118, 121, 123, 130–31. Plaintiffs make no attempt to reconcile these affirmatively-pled facts with their newfound "safety in numbers" theory. Opp. at 13, 30. For good reason: any company—whether a Defendant or non-Defendant—faced the same repercussions no matter whether they acted alone or together.

Indeed, Plaintiffs' theory makes no sense because, even after their 340B policy changes, each Defendant filed its own individual lawsuit against the government seeking relief ***for itself***. Each Defendant took these steps due to, among other things, the ***individual*** risks each faced from lingering uncertainty (including the risk of Medicare and Medicaid revocation or steep civil monetary penalties, any of which, if imposed, would be imposed upon them individually), and to obtain clarification about what the 340B statute requires one way or the other. *See* Feldman Decl. at Exs. 2–5 (Dkt. 53-3–53-6) (Defendants expressing concern about Medicare and Medicaid revocation); FAC ¶¶ 136–46. Tellingly, non-Defendant drug manufactures who enacted their own 340B policy changes similarly filed ***individual*** lawsuits against the government. Mem. at 14 n.4 (listing non-Defendant lawsuits). That all these entities were willing to make 340B policy changes in the face of potential individual sanctions (and were willing to invite individual judicial and government scrutiny) does not support a common motive among Defendants.

Third, and relatedly, Plaintiffs try to discount the relevance of the other drug manufacturers that adopted similar policies. Opp. at 28. They do not deny that Defendants make up only ***half*** of

the manufacturers discussed in their complaint that changed their 340B policies.[12] *Id.*; FAC ¶¶ 130–31. Nor do they deny that these other manufacturers are not part of the alleged diabetes markets. FAC ¶¶ 79, 84, 87. Instead, Plaintiffs assert that these other manufacturers made their policy changes later in time. Opp. at 28. They do not and cannot explain why that distinction would matter under their theory of conspiratorial timing. *Id.* at 23–24. And in all events, Plaintiffs' complaint establishes the opposite: Novo announced its policy change in December 2020, and Plaintiffs acknowledge that Merck and Novartis also announced their policy changes in 2020. FAC ¶ 130.

Finally, Plaintiffs argue that no Defendant would have acted alone because Plaintiffs would then "steer" their 340B prescriptions to another Defendant. Opp. at 29. Plaintiffs' own allegations again rebut this argument. Plaintiffs do not dispute that Novo's policy change allowed them, as non-hospitals, to steer prescriptions to at least Novo for the 340B-discount price. This argument also reveals the absurdity of Plaintiffs' conjecture that Defendants agreed on their 340B policies: if the four Defendants were in fact conspiring, Lilly, AstraZeneca, and Sanofi would never allow Novo to undercut them and obtain all non-hospital providers' "steered" 340B prescriptions at the expense of their own drugs (assuming, counterfactually, that these 340B sales were desirable in the first place). Likewise, if all Defendants were colluding, Lilly, AstraZeneca, and Novo would never allow Sanofi to implement a policy that allows covered entities to make unlimited use of contract pharmacies merely by providing claims data. Not only do these facts disprove a motive to conspire, they also highlight the non-parallel conduct at issue.

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[12] Moreover, additional drug manufacturers have joined this trend. Pfizer recently announced it was adopting its own 340B policy reforms, making it the thirteenth drug manufacturer to do so. *See* "News Alert: Pfizer Becomes the 13th Drug Maker to Limit 340B Contract Pharmacies," available at https://340breport.com/news-alert-pfizer-becomes-the-13th-drug-maker-to-limit-340b-contract-pharmacy/, last visited February 4, 2022.

For each of these reasons, Plaintiffs cannot establish either of the most important plus factors—common motive and incentive against independent action.

2. *Plaintiffs have not alleged any inter-firm communications sufficient to support this plus factor.*

Nor do Plaintiffs come close to alleging sufficient inter-firm communications necessary to raise the specter of a conspiracy. All Plaintiffs allege is that Defendants: (1) independently hired the same firms to lobby the government on 340B issues, and (2) are members of a trade association. These allegations do not amount to even an opportunity to conspire, let alone create an inference of conspiracy. *See* Mem. at 33–34. Plaintiffs' response does not cite any actual communications among Defendants—for good reason: the complaint contains none.

Lobbying. Plaintiffs' opposition focuses almost exclusively on their allegations that Defendants used "the same lobbying firms." Opp. at 31. But hiring the same lobbying firm (even on the same issues) does not allow a court to infer conspiratorial communications. Moreover, Plaintiffs' assertion that the complaint alleges "specific meetings" among Defendants—"***when*** discussions took place," "***who*** participated," and "***what*** they were talking about"—is belied by the allegations Plaintiffs cite for support. *Id.* (citing FAC ¶¶ 108–16) (emphasis added).

- **"When."** Plaintiffs contend they plead discussions that "took place" from April 1, 2020 through September 30, 2020. Opp. at 31. But this timeframe solely refers to the regulatory reporting periods when each Defendant independently lobbied. FAC ¶ 109 ("In the reporting periods that encompassed lobbying in advance of the President's executive order (*i.e.*, April 1 through June 30, and July 1 through September 30), Defendants spent significant resources lobbying the Federal Government.").[13]

- **"Who."** Plaintiffs say their complaint "identifies" "each Defendant and named lobbying firms" as "participa[nts]" in such "discussions." Opp. at 31. But the complaint only alleges that all Defendants "used the lobbying firm, Tarplin, Downs & Young LLC" and that some used W Strategies, LLC and Williams and Jensen, PLLC.

[13] This paragraph also purports to list how much money each Defendant spent on lobbying during the reporting period. FAC ¶ 109. Plaintiffs cite no authority establishing the relevance of this information, and Defendants are aware of none.

The complaint does not allege a single discussion between two or more Defendants (with or without "common lobbyists"), nor who participated in any such discussions.

- **"What."** Plaintiffs claim they have alleged Defendants were talking about the "same issues"—"340B discounts and diabetes medications"—"with the same lobbying firms" at the "same time." Opp. at 31. But the only allegations regarding these "issues" relate to public disclosure of topics by individual Defendants or lobbying firms; they do not reference any joint discussion among or between Defendants. *See* FAC ¶¶ 110–12.[14]

In sum, Plaintiffs have not alleged ***a single*** meeting or discussion among Defendants (or any subset of them) and/or any lobbyist, let alone when meetings allegedly occurred, which individuals participated, or what was discussed at those meetings. FAC ¶¶ 108–16; *see* Opp. at 31. Such general allegations that Defendants "shar[ed] a lobbyist" cannot support an inference of conspiracy. *See, e.g.*, *PharmacyChecker.com, LLC v. Nat'l Ass'n of Boards of Pharmacy*, 530 F. Supp. 3d 301, 336–37 (S.D.N.Y. 2021) (explaining that general allegations of "shar[ing] a lobbyist" would be insufficient, but permitting an inference of conspiracy based on specific and detailed "meeting notes" showing that multiple defendants met to discuss "cutting off websites that promote online international pharmacy sales"); *see also Gamm v. Sanderson Farms, Inc.*, 944 F.3d 455, 466 (2d Cir. 2019) ("mere opportunity to conspire" does not "support the inference that [] an illegal combination actually occurred").[15]

PhRMA. Similarly, Plaintiffs' cursory allegations about Defendants' participation in PhRMA (a trade association) also fall far short. As Defendants explained, Plaintiffs' complaint

[14] Instead, Plaintiffs speculate: "Given the common lobbying firms working for each Defendant," "***it is most likely*** that Defendants would have been on common calls to discuss strategy." FAC ¶ 113 (emphasis added).

[15] *Accord K & S Assocs., Inc. v. Am. Ass'n of Physicists in Med.*, 2013 WL 2177938, at *16 (M.D. Tenn. May 20, 2013) (lobbying efforts not "probative evidence to conclude that [defendants] acted in concert" because "mere contacts and communications, or the mere opportunity to conspire" is insufficient evidence of conspiracy); *Alexander v. Phoenix Bond & Indem. Co.*, 149 F. Supp. 2d 989, 1006 (N.D. Ill. 2001) ("[J]oin[ing] a lobbying group is merely some evidence that [the defendants] had the opportunity to conspire, it is not a plus factor.").

cites no instances of any meeting where communications supposedly occurred, and instead, simply pleads that conversations were "likely," which is insufficient to infer even communication, much less a conspiracy. Mem. at 34 (quoting FAC ¶ 113). Plaintiffs do not dispute these points. Rather, they conclusorily assert that the complaint "explains how Defendants used their control of the PhRMA board to discuss restricting the 340B Program" and "under Defendants' leadership, PhRMA prioritized Contract Pharmacy 340B Drug Discounts as its most prominent public advocacy issue." Opp. at 31–32. That is not true. All the complaint alleges is: (1) each Defendant "is a member of PhRMA and on its Board of Directors," (2) PhRMA shows 340B as an issue in need of reform on its website, and (3) "Defendants, as PhRMA Board members, ***likely communicated*** among themselves about PhRMA's most prominent advocacy issue, 340B Drug Discounts, including Contract Pharmacy 340B Drug Discounts." FAC ¶ 219 (emphasis added). These allegations are nothing more than opportunity plus speculation, and are thus insufficient to infer concerted action. *See Yellow Page Solutions, Inc. v. Bell Atl. Yellow Pages Co.*, 2001 WL 1468168, at *9, 13 (S.D.N.Y. November 19, 2001) ("[A] conspiracy will not be inferred from participation in a trade association."); *In re Elevator Antitrust Litig.*, 2006 WL 1470994, at *11 (S.D.N.Y. May 30, 2006) ("attend[ing] trade, industry, or social functions together is clearly insufficient to state a claim").

This case presents an even stronger one for dismissal than *Citigroup*, where the Second Circuit upheld dismissal because "references to isolated discussions among only three defendants" were "not enough plausibly to allege a 'high level' of interfirm communications." 709 F.3d at 140. Indeed, Defendants are not aware of any court that has ever sustained a conspiracy complaint despite the total absence of inter-firm communications alleged here.

3. *Plaintiffs' additional plus factors and extraneous arguments are deficient.*

Plaintiffs' remaining "plus factors" and purported "additional evidence" cannot overcome their pleading deficiencies. Opp. at 25–36. Specifically, Plaintiffs overstate the importance of market share, ignore the Executive Order in claiming that Defendants' policy changes were an "abrupt shift," cite unrelated government investigations, and try to rely on "circumstances as a whole" to excuse the paucity of plausible allegations. *Id.* Each fails.

First, Plaintiffs use market share as their leading plus factor. It is well settled, though, that market concentration is insufficient to infer a conspiracy. *See In re Elevator Antitrust Litig.*, 2006 WL 1470994, at *10 (dismissing Section 1 conspiracy complaint since "courts have repeatedly stated that allegations of oligopoly are insufficient to state a claim under the antitrust laws"); *accord E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) ("The mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws.").

Second, Plaintiffs point to an alleged "abrupt shift from precedent" regarding Defendants' policy changes. Opp. at 3, 32. This, however, ignores their own allegations regarding the mounting 340B abuses and the Executive Order that prompted Defendants to act, *see supra* at 15–16. Far from "conceding this significant plus factor," as Plaintiffs claim, Opp. at 32, Defendants have repeatedly explained Plaintiffs' allegations establish "obvious alternative explanations" that undermine both an inference of conspiracy and any supposed abrupt shift. Mem. at 29–30 & n.12.

Third, Plaintiffs rely on pending government actions against three of the four Defendants on topics unrelated to the 340B Program and unrelated to the "elimination" 340B discounts. Opp. at 34; FAC ¶¶ 221–22. Plaintiffs provide no "linkage" connecting any of these investigations to the claims here. *See In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007); *see also* Mem. at 35 n.15. Nor do their cases support such broad guilt-by-association logic. *See, e.g.*, *In re GSE*

Bonds Antitrust Litig., 396 F. Supp. 3d 354, 363 (S.D.N.Y. 2019) (considering the "ongoing Department of Justice investigation into ***the same alleged misconduct***" (emphasis added)).

Finally, Plaintiffs cite out-of-circuit cases to claim that "circumstantial evidence as a whole" permits their case to go forward. Opp. at 35–36. Plaintiffs claim that "while plus factors 'are certainly helpful in guiding a court in its assessment of the plausibility of [an] agreement in a § 1 case,' 'other, more general allegations informing the context of an agreement may be sufficient.'" Opp. at 22 (quoting *Evergreen Partnering Grp. v. Pactiv Corp.*, 720 F.3d 33, 47 (1st Cir. 2013)). The Second Circuit disagrees. *See, e.g.*, *Apex Oil*, 822 F.2d at 253 ("Since mere parallel behavior can be consistent with independent conduct, courts have held that a plaintiff ***must show*** the existence of additional circumstances, often referred to as ***'plus' factors***." (emphases added)). *Evergreen*'s "no-plus-factor-necessary" view has not been cited or relied on in this Circuit, and Plaintiffs cite no examples of a Second Circuit court sustaining a circumstantial conspiracy claim without plus factors. In any event, Plaintiffs' "circumstantial evidence" of "highly suspicious behavior" is a red herring. Opp. at 34–35. As explained above, the content and timing of AstraZeneca and Sanofi's dissimilar policies makes sense, including given Plaintiffs' allegations. *See supra* at 13.

At bottom, the obvious explanations on the face of Plaintiffs' complaint and the differences among the Defendants' policies make a conspiracy implausible. When paired with the weakness of Plaintiffs' plus factors, the result is clear: this is an exceptionally weak antitrust complaint with a textbook *Twombly* problem, and no amount of pleading can rectify it. It should be dismissed.

III. PLAINTIFFS' CLAIMS ARE AN INAPPROPRIATE ATTEMPT TO CIRCUMVENT *ASTRA* AND OBTAIN 340B STATUTORY RELIEF.

Plaintiffs concede that the Supreme Court's decision in *Astra* "prevents private enforcement of Section 340B's statutory terms." Opp. at 38. They argue, however, that their

"antitrust" case "stands alone," and is not barred by *Astra* because it "does not turn in any way on whether [Defendants'] restrictions are legal or illegal under Section 340B." *Id.* at 36, 39. This argument fails for three reasons: (1) Plaintiffs have not and cannot allege a "stand alone" price-fixing antitrust claim; (2) Plaintiffs have not and cannot allege a "stand alone" boycott claim; and (3) the antitrust laws do not provide a vehicle for Plaintiffs to impose their favored interpretation of 340B. Because their only possible claim must arise under Section 340B, *Astra* precludes it.

First, Plaintiffs' price-fixing claims are no more than a thinly veiled 340B claim. Mem. at 36–38. Plaintiffs repeatedly insist "[t]his is a price-fixing case," Opp. at 19, 36, but never point to a market "price" that Defendants allegedly limited or "fixed," which is the "essence of price fixing." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring). Nor do they dispute that this case has nothing do with competitive market prices or discounts that the antitrust laws protect. Instead, Plaintiffs seek unlimited access to Defendants' government-mandated 340B ceiling prices for all drugs shipped to any contract pharmacy, not Defendants' free-market prices or discounts. That runs headlong into *Astra*.

Indeed, Plaintiffs' entire argument is that Defendants improperly limited covered entities' ability to access a ***statutory*** 340B discount. Opp. at 37. Whether Plaintiffs are entitled to access that discounted price turns on what the 340B statute requires. Plaintiffs have no authority for the proposition that they can hold Defendants liable for a *per se* price-fixing conspiracy to limit a statutory discount under the antitrust laws. *Id.* at 19. Instead, they cite three inapposite cases, which (1) deal with agreements to prevent the ***creation*** of private discounts or (2) involve the ***government*** as the defendant.[16] Put simply, no authority suggests this is a true price-fixing case.

[16] Plaintiffs cite a fourth case, *Catalano, Inc. v. Target Sales, Inc.*, which has very little to do with discounts, much less the regulatory discounts at issue here. The issue there was whether a

In *Freeman v. San Diego Ass'n of Realtors*, the plaintiffs sued over various pricing-related rules adopted by a group of real estate associations and related entities, including a rule that banned the offering of discounts. 322 F.3d 1133, 1141, 1146–47 (9th Cir. 2003). Unlike in *Freeman*, the private-market prices and discounts that are the "essence of price fixing" are entirely absent from Plaintiffs' complaint here. *Major League Baseball*, 542 F.3d at 335.

In *Hertz Corp. v. City of New York* and *TFWS, Inc. v. Schaefer*, the plaintiffs sued city and state governments claiming that their discount-related regulations unlawfully fixed prices under the antitrust laws. *Hertz Corp.*, 1 F.3d 121, 124 (2d Cir. 1993) (suit by car-rental company challenging New York City law prohibiting them to charge more to residents of different boroughs); *TFWS*, 242 F.3d 198, 209 (4th Cir. 2001) (suit by liquor store challenging Maryland state law that prohibited volume discounts). This suit is not one against the government, nor is it a suit to challenge a statute as anticompetitive. Rather, it challenges drug manufacturers' policies regarding the shipping of 340B-discounted drugs to contract pharmacies, which in Plaintiffs' view, limits the availability of discounts required by Section 340B. That is the classic purview of a regulatory action, not a price-fixing suit. *See Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 130 (2d Cir. 2020) ("When [government] agencies fail to [take action], the [Administrative Procedure Act] . . . gives aggrieved parties a cause of action to enforce compliance" through a regulatory action); *Regeneron Pharms., Inc. v. HHS*, 510 F. Supp. 3d 29, 37–38, 51 (S.D.N.Y. 2020) (granting preliminary injunction where private plaintiffs brought regulatory suit against government over drug pricing in light of different 2020 Executive Order).

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group of purely private beer distributors could "eliminate short-term trade credit formerly granted on beer purchases." 446 U.S 643, 643 (1980). In dicta, the Court compared these credit terms to "discounts," but did not consider whether the plaintiffs could use the antitrust laws to enforce a regulatory pricing provision—credit, discount, or otherwise. *Id.* at 648.

Second, recognizing that their claims do not fit the price-fixing mold, Plaintiffs now try to relabel their complaint as a "group boycott" or "refusal to sell" claim. *See* Opp. at 4, 18, 44–45. But that is not what Plaintiffs allege—nor could they. *See supra* at 5–6; *Drug Mart*, 2002 WL 31528625, at *7 n.12. If anything, Plaintiffs' inability to affix any antitrust label to the conduct they complain of confirms that Plaintiffs are in fact seeking to enforce Section 340B itself.

Third, Plaintiffs do not dispute that they seek an injunction with the same effect as a suit to enforce their favored interpretation of 340B. *See* Mem. at 37. Both would "order Defendants to transfer their 340B-discounted drugs to contract pharmacies." *Id.* Plaintiffs assert that "the antitrust laws—not Section 340B"—allow them to seek such a remedy. Opp. at 37–38. But Plaintiffs ignore that they are only entitled to Defendants' 340B discounts under strict statutory terms. Indeed, many aspects of Plaintiffs' theory make little sense unless the Court interprets Section 340B and then finds Defendants violated it. Specifically, Plaintiffs' entire theory of liability falls apart unless the Court concludes covered entities have a right to 340B prices ***and*** an attendant right under the statute to force Defendants to transfer their 340B-discounted drugs to contract pharmacies. That directly implicates *Astra* and its ban against private enforcement.

In addition, Plaintiffs' case law does not support granting the affirmative injunction Plaintiffs request. Plaintiffs rely on *Wilk v. Am. Med. Ass'n*, where the district court found that the AMA committed an antitrust violation when it adopted a rule prohibiting its doctor members from associating with chiropractors. 895 F.2d 352, 355 (7th Cir. 1990). The Seventh Circuit upheld an injunction ordering the AMA to revise its rule and issue a corrective mailing. *Id.* at 366. The court ***did not***, however, order the doctor members to affirmatively deal with chiropractors. That is the equivalent of what Plaintiffs seek here. They seek to force each Defendant to ship their 340B-discounted drugs to contract pharmacies. Neither *Wilk* nor any other authority shows that the

antitrust laws permit an injunction effectively imposing their preferred interpretation of a statute. More fundamentally, *Wilk* did not involve overarching Supreme Court precedent, like *Astra*, that expressly barred the plaintiffs from seeking their desired outcome. Plaintiffs here can only secure their desired relief for unencumbered 340B discounts—which is the true nature of their case—by asserting claims under the 340B statute, which is barred under *Astra*. 563 U.S. at 113.

Plaintiffs' remaining scattershot arguments are equally unavailing. To begin, Plaintiffs contend that "adjudicating this case would not interfere with pending government litigation over what 340B requires." Opp. at 38. Relatedly, Plaintiffs claim that their complaint "is agnostic as to Section 340B's requirements." Opp. at 37.[17] Neither is correct. The Court cannot enter Plaintiffs' requested injunction without requiring Defendants to ship their 340B-discounted drugs to contract pharmacies without limitation. But the Court may not mandate that Defendants provide statutory discounts outside the bounds of 340B. *Accord Conboy v. AT&T Corp.*, 241 F.3d 242, 254 (2d Cir. 2001) ("Federal courts generally have inherent power to grant injunctive relief, but this power can be limited by statute"); *Authenticom, Inc. v. CDK Glob., LLC*, 874 F.3d 1019, 1026 (7th Cir. 2017) (district court could not enter an injunction "forcing [the defendant] to do business with [the plaintiff] on terms to which they did not agree"). Therefore, the Court will need to determine whether shipping discounted drugs to unlimited contract pharmacies falls within the

[17] Plaintiffs cite the 1912 *Reading* case to argue that the antitrust laws "prevent competitors from working together to impose otherwise lawful practices." Opp. at 36–37 (citing *United States v. Reading Co.*, 226 U.S. 324, 352–53 (1912)). *Reading* does not support that proposition. *See Reading*, 226 U.S. at 353 (discussing whether antitrust laws may apply "irrespective of how the legal title to the shares is held"). Nor does it take account of modern Supreme Court case law considering context and procompetitive benefits before condemning collaboration. *See State Oil Co. v. Khan*, 522 U.S. 3 (1997) (recognizing procompetitive benefits of previously condemned practices); *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006) (declining to condemn price fixing by competitors in a joint venture).

purview of the 340B statute. Moreover, Plaintiffs would have this Court award relief related to 340B that the government itself may not obtain.[18] Opp. at 39 (recognizing Defendants "may win their battles with the Government").

In sum, Plaintiffs do not allege any antitrust claim—price-fixing, group boycott, or otherwise, let alone one that "stands alone" from a 340B violation claim. Instead, their "antitrust" theories and requested relief are "hopelessly intertwined" with their desired interpretation of 340B. *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 21 (2d Cir. 1994). Plaintiffs do not contest that parties cannot employ novel legal theories to enforce statutes that do not provide a private right of action. *See* Mem. at 38–40. And they do not engage with a single case Defendants cite for this proposition, including *Conboy*—binding authority showing that attempts to couch a claim based on a statutory provision with no private right of action are unavailing. *Id.* (quoting *Conboy*, 241 F.3d at 257–58). The Court should reject Plaintiffs' attempt to do just that here. Their claims must be seen for what they really are: an attempt to use the antitrust laws to circumvent *Astra* and pursue an otherwise barred 340B claim. These invalid claims should be dismissed with prejudice. *See Conboy*, 241 F.3d at 257–58; *Astra*, 563 U.S. at 113.

IV. PLAINTIFFS' STATE-LAW CLAIMS SHOULD ALL BE DISMISSED.

Finally, Plaintiffs' opposition confirms that Counts II and III—Plaintiffs' kitchen sink of undeveloped antitrust and unjust enrichment claims under state law—fail on multiple grounds.

[18] Plaintiffs attempt to distinguish the government litigation by claiming that "those cases do not examine how Defendants came to impose their restrictions but only if the restrictions violate Section 340B." Opp. at 8. In either event, the proposed relief is to reverse Defendants' policy changes and force them to ship their drugs to pharmacies.

A. Plaintiffs' state antitrust claims fail because Plaintiffs have not plausibly alleged a conspiracy.

Plaintiffs do not dispute that each of their state antitrust claims fails in the absence of a plausibly alleged conspiracy to restrain trade. *See* Mem. at 40; Opp. 46. Because Plaintiffs have not plausibly alleged such a conspiracy, the Court should dismiss all of the state antitrust claims.[19]

B. Plaintiffs' common-law unjust enrichment claims also fail.

Defendants' opening memorandum provides five independent reasons why Plaintiffs' unjust enrichment claims fail. Mem. at 41–46. Plaintiffs' opposition offers no effective response.

First, Plaintiffs' boilerplate pleading—asserting a long list of claims under the unjust enrichment laws of 47 states and the District of Columbia—does not satisfy basic pleading requirements. *See* Mem. at 41–42; *Miami Prods. & Chem. Co. v. Olin Corp.*, 2021 WL 2588090, at *13 (W.D.N.Y. June 24, 2021) (Wolford, J.) ("conclusory allegations of unjust enrichment do not comply with the relevant pleading standards"). Plaintiffs respond that they supposedly recited the "elements required by each state," and they do not "present[] a single consolidated paragraph." Opp. at 47. But Plaintiffs ignore the well-established principle that "a formulaic recitation of the elements of a cause of action will not do." *Miami Prods.*, 2021 WL 2588090, at *2; *see also In re Aggrenox Antitrust Litig.*, 94 F. Supp. 3d 224, 255 (D. Conn. 2015). Plaintiffs try to distinguish these cases on form-over-substance grounds because those complaints asserted their unjust enrichment claims in a "single consolidated paragraph," while Plaintiffs here used more line

[19] Moreover, as Defendants explained, Plaintiffs' antitrust claim under Illinois law should be dismissed for the additional reason that the Illinois Antirust Act ("IAA") bars antitrust class actions by indirect purchasers. Mem. at 41 n.18. While courts have split on applying the IAA to federal diversity suits, the majority of courts, including those in this Circuit, preclude indirect purchasers from suing under Illinois law. *See In re Novartis & Par Antitrust Litig.*, 2019 WL 3841711, at *7 (S.D.N.Y. Aug. 15, 2019); *accord In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 415–16 (S.D.N.Y. 2011); *see also In re Effexor Antitrust Litig.*, 337 F. Supp. 3d 435, 459 (D.N.J. 2018). This Court should do the same.

breaks. Opp. at 47; FAC ¶ 275. That changes nothing; Plaintiffs' "formulaic recitation[s]" fail here as well. *See Miami Prods.*, 2021 WL 2588090, at *2.

Second, Plaintiffs have failed to rebut Defendants' argument that their unjust enrichment claims improperly duplicate their antitrust claims, much less distinguish the many cases that dismissed on this basis. Mem. at 42–43; Opp. at 47–48. Plaintiffs' rejoinder, that they may plead unjust enrichment claims "in the alternative" to antitrust claims, Opp. at 47, is unsupported by their complaint, which does not do so. *See* FAC ¶¶ 273–79. In any event, "even pleaded in the alternative, claims for unjust enrichment will not survive a motion to dismiss where plaintiffs fail to explain how their unjust enrichment claim is not merely duplicative of their other causes of action"—and here, Plaintiffs offer no such explanation. *Nelson v. MillerCoors, LLC*, 246 F. Supp. 3d 666, 679 (E.D.N.Y. 2017) (dismissing unjust enrichment claims because they relied "on the same facts as [the] other causes of action"). Plaintiffs cannot bring unjust enrichment claims that merely "rel[y] upon the same factual predicates as" their primary antitrust theory because that is not a "true alternative theory of relief." *In re Ford Tailgate Litig.*, 2014 WL 1007066, at *5 (N.D. Cal. Mar. 12, 2014); *Kloppel v. Sears Holdings Corp.*, 2018 WL 1089682, at *6 & n.8 (W.D.N.Y. Feb. 28, 2018) ("courts within the Second Circuit" hold that "alternative unjust enrichment claims should be dismissed if they are based on the same facts as other claims"). Indeed, Plaintiffs admit that their complaint does not articulate a theory of recovery other than one premised on their alleged antitrust conspiracy. *See* Opp. at 38 ("[T]he complaint is based wholly on Defendants' collusion"). Their unjust enrichment claims should therefore be dismissed as "merely duplicative" of their antitrust claims. *Nelson*, 246 F. Supp. 3d at 679.

Third, the complaint does not adequately plead that Plaintiffs conferred a benefit on Defendants—which Plaintiffs do not dispute is an indispensable element for each of their unjust

enrichment claims. *See* Mem. at 43–44; Opp. at 47–48. Plaintiffs do not contest that, even if reciting the conferral element sufficed, they have not done so for Alabama, Arkansas, Connecticut, the District of Columbia, Massachusetts, and Michigan. *See* Mem. at 44; Opp. at 47; FAC ¶ 275(a), (d), (g), (h), (u), (v). Instead, Plaintiffs argue that "money" may qualify as a benefit. Opp. at 48. But Plaintiffs' state-specific allegations do not plead the ***conferral*** of such a benefit, whether money or anything else. Mem. at 44 (citing FAC ¶ 275(a), (d), (g), (h), (u), (v)). Plaintiffs' new theory is also inconsistent with their insistence that they ***have not transacted*** with Defendants. *See, e.g.*, Opp. at 16–17. Thus, there is no basis to conclude that Plaintiffs conferred any overpayments or other money on Defendants, especially given their indirect purchaser status.

Relatedly, Plaintiffs' allegations simply "parrot" elements of unjust enrichment instead of adequately pleading them. Mem. at 44. Plaintiffs protest that they did not "parrot" the benefit element "between States" because the elements are "similar in every state." Opp. at 48. The point is not that Plaintiffs copied their allegations "***between*** States," *id.* (emphasis added), but that Plaintiffs (at most) parroted the element ***from*** each state's unjust enrichment law. *See* Mem. at 44. Basic pleading rules demand much more. *Miami Products*, 2021 WL 2588090, at *13.

Fourth**,** Plaintiffs' unjust enrichment claims also fail for state-specific reasons. Mem. at 44–45. In particular, Defendants argued that Plaintiffs' claims failed because California, Illinois, Mississippi, and New Hampshire did not permit independent unjust enrichment actions. *Id.*[20]

- **California**. Plaintiffs do not attempt to distinguish Defendants' authority; regardless of whether unjust enrichment is a freestanding cause of action, Plaintiffs may not pursue such equitable relief under California law unless they plead that there is no adequate remedy at law available, which they have not. *Philips v. Ford Motor Co.*, 2015 WL 4111448, at *16

[20] Plaintiffs urge this Court to not "delve into" any state-specific arguments because variations in state law are not "material" at "this stage." Opp. at 47. This attempt to wave away state-specific arguments has no legal basis and underscores that Plaintiffs are engaging in impermissible bulk pleading. The federal rules require that Plaintiffs plausibly allege each claim at the 12(b)(6) stage. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

(N.D. Cal. July 7, 2015) ("A plaintiff seeking equitable relief in California must establish that there is no adequate remedy at law available").

- **Illinois**. Plaintiffs cite *In re Pork Antitrust Litigation*, 495 F. Supp. 3d 753, 791 (D. Minn. 2020), whose Illinois law analysis relies entirely on *Cleary v. Philip Morris*, 656 F.3d 511, 516 (7th Cir. 2011). But *Cleary* holds that when the improper conduct forms the basis of another claim, the unjust enrichment claim is tied to that other claim, not independent. *Id*.
- **Mississippi**. Plaintiffs' Mississippi case recognized an unjust enrichment claim when there was no remedy available at law, which Plaintiffs have not pled. *Hughes v. Shipp*, 324 So. 3d 286, 290, 293 (Miss. 2021) (unjust enrichment claim allowed when breach of contract claim was unavailable).
- **New Hampshire**. Likewise, under New Hampshire law, an unjust enrichment claim cannot stand unless there is no adequate remedy of law—which is, again, unpled here. *See Mangiardi Bros. Trucking v. Dewey Envtl., LLC*, 2013 WL 1856338, at *3 (D.N.H. Aug. 30, 2013) (unjust enrichment claim was unavailable when remedy at law was available).

Fifth, Plaintiffs lack standing to bring their unjust enrichment claims in states that follow *Illinois Brick*. Mem. at 45; Opp. at 49–50 (listing states). They counter that "*Illinois Brick* does not foreclose unjust enrichment." Opp. at 49. That is wrong. Plaintiffs do not distinguish Defendants' in-Circuit authority, which explains that "indirect purchasers may not employ unjust enrichment to skirt the limitation on recovery imposed by *Illinois Brick*." *Sergeants Benevolent Assoc. Health & Welfare Fund v. Actavis, plc*, 2018 WL 7197233, at *57 (S.D.N.Y. Dec. 26, 2018) (collecting cases). Their cases address only whether states ***can*** repeal *Illinois Brick*, not what the law is in each state. *See, e.g.*, *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989).

Additionally, Plaintiffs do not deny that states without express *Illinois Brick* repealer legislation and states that have not interpreted their law as overriding *Illinois Brick* are "presumed to have decided to follow federal law, ***including*** the *Illinois Brick* limitation on indirect purchaser claims." *In re DDAVP Indirect Purchaser Antitrust Litig.*, 903 F. Supp. 2d 198, 232 (S.D.N.Y. 2012) (emphasis added). Indeed, the only states falling in this category that Plaintiffs try to dispute are Florida and Arkansas, but neither case they cite concludes that *Illinois Brick* does not apply to unjust enrichment claims. *See Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 110 (Fla. Dist.

Ct. App. 1996) (*Illinois Brick* did not apply to Florida's pre-*Illinois Brick* Deceptive Trade Practices because it would not "imply a repeal . . . [in a] cause of action expressly established by the legislature"); *Smith v. Whitener*, 42 Ark. App. 225, 229 (1993) (not addressing *Illinois Brick*).

Even states with an *Illinois Brick* repealer statute should not be presumed to allow indirect purchasers to bring common-law unjust enrichment claims. For example, Michigan courts have held recovery under an unjust enrichment is only available when the defendant "receive[s] a ***direct*** benefit" from the plaintiff. *See Smith v. Glenmark Generics, Inc., USA*, 2014 WL 4087968, at *1 (Mich. Ct. App. Aug. 19, 2014) (emphasis added). At bottom, the Court should not accept Plaintiffs' loose pleading here and permit their 48-jurisdiction unjust enrichment claims to survive.

C. Mosaic and CVHS cannot bring individual claims under the laws of states other than New York and Virginia.

In response to Defendants' opening argument, Plaintiffs concede that Mosaic and CVHS cannot bring individual suits under the laws of states other than their home states. Opp. at 51. While Plaintiffs purport to assert class claims under the laws of other states, that will pose a significant "class certification problem" if the case ever proceeds, which it should not. *Langan v. Johnson & Johnson Consumer Co., Inc.*, 897 F.3d 88, 93 (2d Cir. 2018).[21]

CONCLUSION

For all these reasons, as well as those in Defendants' opening memorandum, the Court should dismiss this case with prejudice.

[21] In response to Defendants' argument that there is no plausible source for a federal unjust enrichment claim—and thus Plaintiffs cannot represent a nationwide unjust enrichment class, Mem. at 42 n.19—Plaintiffs argue that they are not confined to federal common law or a single state's law. Opp. at 51. Plaintiffs yet again miss the point. A nationwide class is implausible, and Plaintiffs have not pled statewide classes for each of the individual states.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendants' Reply In Support of Their Joint Motion to Dismiss was filed electronically with the United States District Court for the Western District of New York through the Court's ECF System on February 4, 2022.

/s/ Daniel E. Laytin