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# [***In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=)

United States District Court for the District of Massachusetts

August 14, 2015, Decided; August 16, 2015, Filed

Civil Action No. 14-md-02503-DJC

**Reporter**

2015 U.S. Dist. LEXIS 125999 \*; 2015 WL 5458570

IN RE SOLODYN (MINOCYCLINE HYDROCHLORIDE) ***ANTITRUST*** LITIGATION

**Prior History:** [*In re Solodyn (Minocycline Hydrochloride)* ***Antitrust*** *Litig., 999 F. Supp. 2d 1383, 2014 U.S. Dist. LEXIS 23354 (J.P.M.L., Feb. 25, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BKV-P1M1-F04T-8088-00000-00&context=)

**Core Terms**

purchasers, generic, patent, ***Antitrust***, payors, allegations, unjust enrichment, settlement, manufacturer, consumer protection, anticompetitive, indirect, state law, consumers, motion to dismiss, unjustified, products, End-Payor, License, ***antitrust*** claim, infringed, class action, reverse-payment, certification, conspiracy, Plaintiffs', brand-name, launched, parties, named plaintiff

**Case Summary**

**Overview**

HOLDINGS: [1]-Purchasers of a branded prescription drug sufficiently alleged that settlements in patent litigation between a pharmaceutical company and competitors had anticompetitive effects since the purchasers showed that the company's settlement payments were large and unjustified, substantially exceeded estimates of the company's saved litigation costs, and only served to delay generic competition; [2]-The purchasers failed to show that an agreement with a competitor delayed competition from the competitor's generic drug since the competitor only delayed release of its drug until the competitor received the necessary FDA approval to market its drug; [3]-The purchasers failed to show that the company engaged in sham patent litigation to enter the anticompetitive settlements since the company had an objectively reasonable chance of showing infringement of its valid patent.

**Outcome**

Motion to dismiss allowed in part and denied in part.

**LexisNexis® Headnotes**

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

[***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc1)[] **Motions to Dismiss, Failure to State Claim**



In considering a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to [*Fed. R. Civ. P. 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), the court will dismiss a pleading that fails to plead enough facts to state a claim to relief that is plausible on its face. To state a plausible claim, a claim need not contain detailed factual allegations, but it must recite facts sufficient to at least raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact). A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. At bottom, a claim must contain sufficient factual matter that, accepted as true, would allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The evaluation of the sufficiency of a complaint is a two-step process. First, the court must distinguish the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited). The court then must determine whether the factual allegations are sufficient to support the reasonable inference that the defendant is liable.

***Antitrust*** & Trade Law > ***Regulated*** Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

***Antitrust*** & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

[***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc2)[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**



Rule-of-reason analysis demands a determination as to whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition. Under the rule-of-reason burden shifting regime, a plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. If the plaintiff meets this initial burden, the defendant can come back with evidence that the agreement was formed for legitimate business purposes which outweigh any anti-competitive effects. Finally, the plaintiff can prevail by showing that the legitimate ends of the agreement could have been accomplished through less restrictive alternatives.

***Antitrust*** & Trade Law > ***Regulated*** Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

***Antitrust*** & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

[***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc3)[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**



The U.S. Supreme Court has set forth five considerations to support the application of the rule of reason to a reverse-payment settlement: (1) whether the payment has the potential for genuine adverse effects on competition; (2) whether the payment is unjustified in light of a rough approximation of the litigation expenses saved through the settlement and compensation for other services that the generic has promised to perform; (3) whether the payment indicates that the patentee held sufficient market power to work unjustified anticompetitive harm; (4) the patent holder's belief in the strength or weakness of its patent; and (5) the reasons given for the settlement agreement. The risk of anticompetitive consequences is particularly acute where the reverse payment is large and unjustified. The likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.

***Antitrust*** & Trade Law > Sherman Act > Defenses

[***HN4***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc4)[] **Sherman Act, Defenses**



***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.

***Antitrust*** & Trade Law > ***Regulated*** Practices > Private Actions > Sherman Act

[***HN5***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc5)[] **Private Actions, Sherman Act**



A plaintiff has suffered an ***antitrust*** injury sufficient to confer standing only if the defendant's conduct was the substantial cause of the injury.

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

[***HN6***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc6)[] **Actual Monopolization, Claims**



*Section 2* of the Sherman Act makes it unlawful for a firm to monopolize any part of the trade or commerce among the several states. *15 U.S.C.S. § 2*. The elements of monopolization are: (1) possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Attempted monopolization requires proof that: (1) the defendant has engaged in predatory or anticompetitive conduct; with (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. Courts refer to unlawful methods of acquiring or maintaining monopoly power as exclusionary conduct.

***Antitrust*** & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

[***HN7***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc7)[] **Noerr-Pennington Doctrine, Sham Exception**



Under the Noerr-Pennington doctrine, filing a lawsuit is protected under the *First Amendment* unless the lawsuit is a sham. To plead the sham litigation exception, a plaintiff must allege that the lawsuit was: (1) objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits; and (2) subjectively motivated by a desire to interfere directly with the business relationships of a competitor, through the use of the governmental process — as opposed to the outcome of that process — as an anticompetitive weapon.

Patent Law > Statutory Bars > On Sale Bar > Elements

[***HN8***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc8)[] **On Sale Bar, Elements**



An on-sale bar renders an invention unpatentable if, more than one year before the patent application: (1) the product was the subject of a commercial offer for sale; and (2) the invention was reduced to practice, or the inventor must have disclosed prepared drawings or descriptions sufficiently specific to enable a person skilled in the art to practice the invention.

Patent Law > ... > Defenses > Inequitable Conduct > Elements

[***HN9***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc9)[] **Inequitable Conduct, Elements**



To prevail on a claim of inequitable conduct, the accused patent infringer must prove by clear and convincing evidence that the patentee acted with the specific intent to deceive the Patent and Trademark Office, something more than mere negligence or even gross negligence.

***Antitrust*** & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

[***HN10***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc10)[] **Exemptions & Immunities, Noerr-Pennington Doctrine**



The Noerr-Pennington doctrine protects against ***antitrust*** liability on the basis of filing a citizen petition with the Food and Drug Administration (FDA). Like litigation, a citizen petition is protected unless it is objectively baseless and subjectively motivated by a desire to interfere directly with the business relationships of a competitor through the use of governmental process. A citizen petition is objectively baseless only when no reasonable drug manufacturer could have realistically expected the FDA to grant the relief sought.

***Antitrust*** & Trade Law > ***Regulated*** Practices > Private Actions > Sherman Act

[***HN11***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc11)[] **Private Actions, Sherman Act**



When alleged instances of misconduct are not independently anti-competitive, they are not cumulatively anti-competitive either.

Constitutional Law > ... > Case or Controversy > Standing > Elements

[***HN12***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc12)[] **Standing, Elements**



U.S. Const. art. III contains a requirement of justiciability which limits the jurisdiction of U.S. Const. art. III courts to active cases and controversies. *U.S. Const. art. III, § 2, cl. 1*. U.S. Const. art. III standing presents a threshold question in every federal case. To establish standing, a plaintiff must allege an injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State ***Regulation***

[***HN13***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc13)[] **Deceptive & Unfair Trade Practices, State Regulation**



The Kansas Consumer Protection Act is intended, in part, to protect consumers from suppliers who commit deceptive and unconscionable practices. [*Kan. Stat. Ann. § 50-623(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BY4-SXF1-DYB8-31D1-00000-00&context=). A "consumer" is defined as an individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property or services for personal, family, household, business, or agricultural purposes. [*Kan. Stat. Ann. § 50-624(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BY4-SXF1-DYB8-31D2-00000-00&context=).

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State ***Regulation***

[***HN14***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc14)[] **Deceptive & Unfair Trade Practices, State Regulation**



Michigan's consumer protection law prohibits unfair, unconscionable, or deceptive methods, acts, or practices, including charging the consumer a price that is grossly in excess of the price at which similar property or services are sold. *Mich. Comp. Laws Ann. § 445.903(1)*.

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State ***Regulation***

[***HN15***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc15)[] **Deceptive & Unfair Trade Practices, State Regulation**



Tennessee consumer protection laws contain a list of unfair and deceptive acts and also a catch-all section that prohibits engaging in any other act or practice which is deceptive to the consumer or to any other person. [*Tenn. Code Ann. § 47-18-104(b)(27)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4WV6-KPC0-R03N-Y4F9-00000-00&context=).

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State ***Regulation***

[***HN16***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=LNHNREFclscc16)[] **Deceptive & Unfair Trade Practices, State Regulation**



Under Vermont law consumer protection law, a seller is defined as a person regularly and principally engaged in a business of selling goods or services to consumers. [*Vt. Stat. Ann. tit. 9, § 2451a*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SDC-H3B0-004G-G3MW-00000-00&context=) (2011).

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For Sheet Metal Workers Local No. 25 Health & Welfare Fund, Movant: JEFFREY S. ISTVAN, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, Phila, PA USA; Michael Coren, LEAD ATTORNEY, Cohen, Placitella & Roth, P.C., Philadelphia, PA USA; PAUL COSTA, Roberta D. Liebenberg, LEAD ATTORNEYS, Fine, Kaplan and Black, RPC, Philadelphia, PA USA; Stewart L. Cohen, LEAD ATTORNEY, PRO HAC VICE, Cohen, Placitella & Roth, P.C., Philadelphia, PA USA; Glen DeValerio, Berman DeValerio, Boston, MA USA; Nathaniel L. Orenstein, Berman DeValerio Pease Tabacco Burt & Pucillo, Boston, MA USA.

For Local 274 Health & Welfare Fund, Movant: PAUL COSTA, LEAD ATTORNEY, FINE, KAPLAN & BLACK, RPC, Philadelphia, PA USA; Glen DeValerio, Berman DeValerio, Boston, MA USA; Nathaniel L. Orenstein, Berman DeValerio Pease Tabacco Burt & Pucillo, Boston, MA USA.

For Neca-Ibew Welfare Trust Fund, Movant: Nathaniel L. Orenstein, Berman DeValerio Pease Tabacco**[\*10]** Burt & Pucillo, Boston, MA USA; Theodore M. Hess-Mahan, Hutchings, Barsamian, Cross and Mandelcorn, LLP, Wellesley Hills, MA USA.

For Allied Services Division Welfare Fund, Movant: David B. Franco, LEAD ATTORNEY, PRO HAC VICE, The Dugan Law Firm, APLC, New Orleans, LA USA; Douglas R. Plymale, James R. Dugan, II, LEAD ATTORNEY, The Dugan Law Firm, New Orleans, LA USA; Thomas G. Shapiro, LEAD ATTORNEY, Shapiro Haber & Urmy LLP, Boston, MA USA; Nathaniel L. Orenstein, Berman DeValerio Pease Tabacco Burt & Pucillo, Boston, MA USA.

**Judges:** Denise J. Casper, United States District Judge.

**Opinion by:** Denise J. Casper

**Opinion**

**MEMORANDUM AND ORDER**

**CASPER, J.**

**I. Introduction**

Putative classes of Direct Purchaser Plaintiffs ("DPP" or "direct purchasers") and End-Payor Plaintiffs ("EPP" or "end payors") of Solodyn (collectively, "Plaintiffs") have filed this lawsuit against Defendants Medicis Pharmaceutical Corporation ("Medicis"), Valeant Pharmaceuticals International, Inc. ("Valeant"), Impax Laboratories, Inc. ("Impax"), Sandoz Inc. ("Sandoz") and Lupin Limited and Lupin Pharmaceuticals, Inc. (collectively, "Lupin") (collectively, "Defendants") alleging violations of the Sherman Act, *15 U.S.C. §§ 1-2*, and various state laws. D. 91, D. 92. Defendants**[\*11]** have moved to dismiss. D. 110. For the reasons stated below, the Court **ALLOWS** in part and **DENIES** in part the motion.

**II. Standard of Review**

[***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc1)[] In considering a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to [*Fed. R. Civ. P. 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), the Court will dismiss a pleading that fails to plead "enough facts to state a claim to relief that is plausible on its face." [*Bell Atl. Coro, v. Twombly. 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). To state a plausible claim, a claim need not contain detailed factual allegations, but it must recite facts sufficient to at least "raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." [*Twombly. 550 U.S. at 555*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=) (internal citations omitted). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" [*Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (quoting [*Twombly. 550 U.S. at 555*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement."' Id. (quoting [*Twombly. 550 U.S. at 557*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)) (alteration in original). At bottom, a claim must contain sufficient factual matter that, accepted as true, would allow the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The evaluation of the sufficiency**[\*12]** of a complaint is a two-step process. [*Cardigan Mountain School v. New Hampshire Ins. Co., 787 F.3d 82, 84 (1st Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G32-SKG1-F04K-H06X-00000-00&context=). First, the Court must "distinguish 'the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited).'" [*García-Catalán v. United States. 734 F.3d 100, 103 (1st Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59RR-RC41-F04K-H09R-00000-00&context=) (quoting [*Morales-Cruz v. Univ. of Puerto Rico. 676 F.3d 220, 224 (1st Cir. 2012))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55CH-YG01-F04K-H003-00000-00&context=). The Court then must "determine whether the factual allegations are sufficient to support 'the reasonable inference that the defendant is liable.'" [*García-Catalán 734 F.3d at 103*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59RR-RC41-F04K-H09R-00000-00&context=) (quoting [*Haley v. City of Boston. 657 F.3d 39,46 (1 st Cir. 2011))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:8373-89C1-652P-Y06B-00000-00&context=).



**III. Factual Background**

**A. Solodyn**

Solodyn, a minocycline hydrochloride extended release tablet, is a brand-name prescription drug for the treatment of inflammatory acne lesions. D. 91, Direct Purchaser Plaintiffs' Consolidated Amended Complaint ("DPP CAC")[[1]](#footnote-0)1¶ 53. Solodyn is the flagship product sold by its manufacturer, Medicis. Id. ¶ 60. In 2011, Medicis announced that Solodyn was the "#l dermatology medication by dollars in the world and the #1 most prescribed branded dermatology product in the U.S. by prescriptions and dollars." Id. ¶ 59.

**B. *Regulatory* Framework**

Under the Federal Food, Drug, and Cosmetic Act, [*21 U.S.C. §§ 301-392*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVH1-NRF4-425X-00000-00&context=) ("FDCA"), manufacturers that create a new drug must**[\*13]** obtain approval from the Food and Drug Administration ("FDA") to sell the new drug by filing a New Drug Application ("NDA"). D. 91, DPP CAC ¶ 30. An NDA must include submission of data concerning the safety and effectiveness of the drug, as well as information regarding any applicable patents. Id. After approval, the FDA lists the patents identified in the NDA as covering the drug product in its publication known as the "Orange Book." Id. ¶ 36.

Under the Hatch-Waxman Amendments of 1984 ("Hatch-Waxman"), a manufacturer seeking to market a generic version of a brand-name drug in the same dosage can file an Abbreviated New Drug Application ("ANDA") demonstrating that the generic is therapeutically equivalent to the brand-name drug and relying upon the NDA's data for the brand-name drug. D. 91, DPP CAC ¶¶ 32-33. ANDAs must contain a certification that any Orange Book-listed patents for the brand-name drug do not prevent approval of the ANDA on one of four possible bases. Id. ¶ 37. One possible basis is a Paragraph IV certification, which asserts that the patent that is listed is invalid or will not be infringed by the proposed generic drug. Id; see [*21 U.S.C. § 355(j)(2)(A)(vii)(IV)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNC1-NRF4-4393-00000-00&context=). NDA holders have standing to sue an ANDA filer who files a Paragraph**[\*14]** IV certification for patent infringement. See *35 U.S.C. § 271(e)(2)(A)*. If the brand-name manufacturer files suit within 45 days of receiving notice of the generic manufacturer's Paragraph IV certification, FDA approval of the ANDA is automatically stayed for 30 months in certain circumstances. D. 91, DPP CAC ¶ 40. The first ANDA filer to challenge the patent through a Paragraph IV certification is eligible for 180 days of marketing exclusivity protected from competition from other generic manufacturers. Id. ¶ 41.

On October 8, 2008, the passage of the Q1 Program Supplemental Funding Act ("QI Act") extended this ***regulatory*** framework to certain antibiotic drugs that had not previously been covered. D. 91, DPP CAC ¶ 43; see Pub. L. No. 110-379, 122 Stat. 4075 (2008) (codified in relevant part at [*21 U.S.C. § 355(v)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNC1-NRF4-4393-00000-00&context=)). The QI Act brought minocycline-based drug products within this ***regulatory*** scheme as of October 1, 2009, Pub. L. No. 110-379 § 3(b)(1), and contained transitional provisions that governed from October 2008 to October 2009. See id. § 4(b). Under these transitional rules, holders of existing patents in these products were required to submit relevant patent information to the FDA by December 2008, and generic companies with already-pending ANDAs would be eligible for shared exclusivity for 180**[\*15]** days if they amended their ANDAs to include a Paragraph IV certification prior to February 2009. D. 91, DPP CAC ¶ 44. Upon receipt of notice of the ANDA filer's Paragraph IV certification, the brand-name drug manufacturer would then be able to sue the ANDA filer for patent infringement. See [*21 U.S.C. § 355(j)(5)(B)(iii)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNC1-NRF4-4393-00000-00&context=).

**C. Solodyn Patent and Launch**

On February 19, 1998, Medicis applied for a patent to cover the treatment method that would become Solodyn. D. 91, DPP CAC ¶ 61. The claimed invention in Medicis' patent application was "a method for the treatment of acne . . . which results in the reduction of vestibular side effects following administration of oral tetracycline antibiotics" and was based upon achieving a slower dissolution rate than typical for tetracyclines. Id. Prior to the Solodyn patent application, Medicis had sold another acne treatment under the trade name Dynacin. Id. In 1997, Medicis had published a study of Dynacin (the "Dynacin Study") that compared Dynacin with Vectrin, another minocycline hydrochloride product. Id. 63, 66. The Solodyn patent application contained information from the Dynacin Study, but did not disclose the study itself. Id. ¶¶ 70, 72.

On June 1, 1999, the United States Patent and**[\*16]** Trademark Office ("PTO") issued U.S. Patent No. 5,908,838 (the "'838 Patent\*') to Medicis. D. 91, DPP CAC ¶ 73. This patent covers the Solodyn treatment method and expires on February 18, 2018. Id. In 2006, the FDA approved Medicis' NDA for three Solodyn dosages: 45 mg, 90 mg and 135 mg (the "Legacy Strengths"). Id. ¶ 77. Because the active ingredient in Solodyn is minocycline, an antibiotic that has been marketed since the early 1970s, the periods of marketing exclusivity afforded by the Hatch-Waxman ***regulatory*** scheme did not apply to Solodyn at the time it was granted FDA approval. Id. ¶ 78. Furthermore, Medicis could not use the '838 Patent to trigger an automatic 30-month stay by initiating patent litigation against would-be generic manufacturers. Id. Medicis launched Solodyn in the three Legacy Strengths in 2006. D. 91, DPP CAC U 1. Starting in 2009, Medicis introduced additional strengths of Solodyn: 65 mg and 115 mg (in 2009), and 55 mg, 80 mg and 105 mg (in 2010) (collectively, the "Subsequent Strengths"). Id. ¶ 182.

In August 2008, the PTO opened a re-examination proceeding for the '838 Patent upon the request of an anonymous third party. D. 91, DPP CAC ¶ 92. During the re-examination proceeding, Medicis included the Dynacin Study**[\*17]** among the materials submitted to the PTO, but, as alleged, "buried" it among other references that it supplied to the examiner. Id. ¶ 144. Medicis moved during the re-examination to cancel several claims in the '838 Patent, amended others and added new claims. Id. 1157. On June 1, 2010, the PTO reaffirmed the validity of the '838 Patent, containing at that time four amended and sixteen new claims. Id. ¶ 162.

During this time, Medicis filed two petitions requesting that the FDA take certain positions when reviewing ANDAs for generic equivalents of Solodyn. On March 18, 2008, Medicis asked the FDA not to approve any generic versions of Solodyn without requiring *in vivo* bioequivalence testing for each strength of Solodyn (the "Proportionality Petition"). D. 91, DPP CAC ¶ 88; D. 115-17, D. 115-18 (Proportionality Petition). In gaining approval for Solodyn, Medicis had previously represented to the FDA that *in vivo* bioequivalence testing was needed only for 135 mg Solodyn, since the 45 mg and 90 mg strengths were proportional in dose to the 135 mg strength. D. 91, DPP CAC ¶ 89. The FDA denied the Proportionality Petition in February 2009. Id. ¶ 91. On February 13, 2009, Medicis requested that the FDA interpret the QI**[\*18]** Act's transitional provisions as permitting a 30-month stay of approval for then-pending ANDAs for generic Solodyn that were amended to include Paragraph IV certifications (the "30-Month Stay Petition"). Id. ¶ 126; D. 115-20 (30-Month Stay Petition). On March 17, 2009, the FDA denied this petition, concluding that no 30-month stay applied because the '838 Patent was not Orange Book-listed until after the generic manufacturers filed the ANDAs in question. D. 91, DPP CAC ¶ 127.

**D. Settlements with Generic Manufacturers**

*1. Settlement with Impax*

On January 15, 2008, Medicis was sued by Impax, a manufacturer that had filed an ANDA seeking approval of generic versions of Solodyn in the Legacy Strengths. D. 91, DPP CAC ¶¶ 81, 84; see [*Impax Labs., Inc. v. Medicis Pharm. Corp., No. 08-cv-0253-MMC, 2008 U.S. Dist. LEXIS 111789, 2008 WL 1767044, at \*1 (N.D. Cal. April 16, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X5M-CHK0-YB0M-N0F7-00000-00&context=). Impax sought a declaratory judgment that the '838 Patent was invalid and not infringed by Impax's ANDA. D. 91, DPP CAC ¶ 84. The suit was dismissed on the grounds that there had been no actual sales of Impax's generic product so there was no justiciable Article III controversy. Id. ¶ 94; [*Impax Labs., 2008 U.S. Dist. LEXIS 111789, 2008 WL 1767044, at \*2-3*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X5M-CHK0-YB0M-N0F7-00000-00&context=).

In November 2008, while Impax's appeal of the dismissal was pending, Medicis and Impax negotiated a settlement of the litigation. Id. ¶ 97.**[\*19]** The parties entered into two agreements, both executed on November 26, 2008: a License and Settlement Agreement ("Impax LSA") and a Joint Development Agreement ("Impax JDA"). Id. Pursuant to the Impax LSA,[[2]](#footnote-1)2 Impax agreed to drop its challenge to the '838 Patent and Medicis granted Impax a license that would allow Impax to enter the market with its generic version of Solodyn beginning on November 26, 2011 [TEXT REDACTED BY THE COURT] Id. ¶¶ 97-98; D. 115-2 (Impax LSA) § 2.1. Impax admitted that the '838 Patent was valid and infringed by Impax's product and agreed to pay Medicis royalties on future sales of its generic Solodyn products. D. 115-2 §§ 2.4, 3.1. Medicis and Impax also agreed that Impax would eventually serve as Medicis' exclusive distributor of generic Solodyn [TEXT REDACTED BY THE COURT] Id. § 2.2.

Pursuant to the**[\*20]** Impax JDA, Impax agreed to perform development work on a "next-generation" minocycline product and fourt [TEXT REDACTED BY THE COURT] drugs. D. 115-3 (Impax JDA) §§ 2.1, 5.1. Impax would receive a $40 million upfront payment and up to $23 million in milestone payments keyed to ***regulatory*** progress, [TEXT REDACTED BY THE COURT] [TEXT REDACTED BY THE COURT] Id. §§ 6.1. 6.2. Impax agreed to pay Medicis 50% of the profits generated by sales of the ANDA products for a ten-year period and Medicis agreed to pay Impax a [TEXT REDACTED BY THE COURT] royalty on sales of the next-generation product [TEXT REDACTED BY THE COURT] Id. §§ 6.3, 6.4. Thus far, Medicis has paid Impax milestone payments totaling at least $15 million. D. 91, DPP CAC ¶ 101.

As contemplated by the Impax LSA, Impax and Medicis entered into a Distribution and Supply Agreement ("Impax DSA") on November 13, 2009. D. 91, DPP CAC ¶ 105. Pursuant to this agreement, Medicis agreed to supply Impax with generic Legacy Strength Solodyn at little more than cost, with Impax to receive [TEXT REDACTED BY THE COURT] of the 65 mg and 115 mg generic more than cost, with Impax to receive) Solodyn sold in the United States. Id.

*2. Settlement with Sandoz*

On December 3,**[\*21]** 2008, Medicis submitted the '838 Patent to the FDA for Orange Book listing. D. 91, DPP CAC ¶ 111. With the passage of the QI Act and Medicis' listing of the '838 Patent in the Orange Book, the Paragraph IV and 30-month stay provisions of Hatch-Waxman became applicable to Solodyn. See id. ¶ 111-12. In December 2008, Sandoz filed a Paragraph IV certification for generic versions of the Legacy Strengths of Solodyn. Id. ¶ 115. Other manufacturers seeking to produce generic versions of Solodyn — Impax[[3]](#footnote-2)3, Mylan Inc. ("Mylan") and Teva Pharmaceuticals USA Inc. ("Teva") — also submitted Paragraph IV certifications, all stating that the '838 Patent was invalid or would not be infringed by their respective generic products. Id. ¶¶ 113-14, 116-17.

On January 13, 2009, Medicis filed a patent infringement suit against Sandoz (and also against Mylan and Teva, manufacturers who are not defendants in the instant case)**[\*22]** in the United States District Court for the District of Delaware. Id. ¶ 119. The FDA granted Sandoz approval for its generic versions of Solodyn in the Legacy Strengths on August 13, 2009. Id. ¶ 147. Sandoz immediately launched its generic Legacy Strength Solodyn products despite Medicis' pending patent infringement suit. Id.

In August 2009, within days of Sandoz' product launch, Medicis and Sandoz settled their pending patent litigation. Id. ¶¶ 148, 151. In their Settlement Agreement (the "Sandoz SA"), Medicis agreed to dismiss the litigation with prejudice and Sandoz agreed not to manufacture or market its generic Legacy Strength Solodyn until licensed to do so by Medicis. D. 115-8 (Sandox SA) *§ 2*. The Sandoz SA included a commitment by both Medicis and Sandoz "to negotiate in good faith" to reach a definitive patent license and business partnership agreement. Id. § 1.

As agreed in the Sandoz SA, on November 27, 2009 the parties executed an "Asset Purchase Agreement" (the "Sandoz APA") and a "License Agreement" (the "Sandoz License"). D. 91, DPP CAC ¶¶ 152-53. In the Sandoz APA, Medicis agreed to purchase from Sandoz [TEXT REDACTED BY THE COURT] an upfront cash payment of $14 million. Id.**[\*23]** ¶ 152; D. 115-10 (Sandoz APA) §§ 2.1, 2.4. [TEXT REDACTED BY THE COURT] brand manufacture had pulled [TEXT REDACTED BY THE COURT] from the market and switched to [TEXT REDACTED BY THE COURT] four years earlier, leaving no market for [TEXT REDACTED BY THE COURT] as the switch essentially eliminated [TEXT REDACTED BY THE COURT] D. 91, DPP CAC ¶ 152. Medicis also committed to buy at least [TEXT REDACTED BY THE COURT] and agreed to pay [TEXT REDACTED BY THE COURT] in which Medicis did not market the product. Id.; 115-10 §§ 2.6, 3.2. At the time the instant complaints were filed, Medicis had not sold [TEXT REDACTED BY THE COURT] D. 91, DPP CAC ¶ 155.

In the Sandoz License, Medicis granted Sandoz a license to market generic versions of the Legacy Strengths of Solodyn beginning on November [TEXT REDACTED BY THE COURT] 2011 or earlier if another Solodyn Legacy Strength generic entered the market. D. 115-9 (Sandoz License) § 3.1. Sandoz agreed that the '838 Patent was valid, enforceable and infringed by generic versions of Solodyn. Id. § 2.3. [TEXT REDACTED BY THE COURT] Id. § 4.1 [TEXT REDACTED BY THE COURT] Id. § 9.10.

*3. Settlement with Lupin*

On October 8, 2009, Lupin submitted a Paragraph IV certification challenging the '838 Patent and seeking FDA**[\*24]** approval for its generic versions of the Legacy Strengths of Solodyn. D. 91, DPP CAC ¶ 171. On November 17, 2009, Medicis sued Lupin for patent infringement in the United States District Court for the District of Maryland. Id. ¶ 172. Lupin also filed Paragraph IV ANDAs seeking approval for generic versions of the Subsequent Strengths of Solodyn, and Medicis amended its complaint to encompass these ANDAs and to allege infringement of both the '838 Patent and U.S. Patent No. 7,790,705 (the "'705 Patent"), issued by the PTO on September 7, 2010. Id. ¶¶ 173, 176, 178-79. The '705 Patent covers the method of dosing extended release minocycline hydrochloride according to weight to prevent certain adverse effects. Id. ¶ 176.

On July 21, 2011, Medicis and Lupin settled their patent litigation. D. 91, DPP CAC ¶ 209. In a License and Settlement Agreement ("Lupin LSA"), the parties agreed to dismiss the litigation and Medicis granted Lupin a license to market its generic versions of the Legacy Strengths of Solodyn beginning November 26, 2011 [TEXT REDACTED BY THE COURT] D. 115-12 (Lupin LSA) §§ 2.1, 3.1.1. Lupin did not receive final approval from the FDA for its generic versions of Legacy Strength Solodyn until November 30, 201 I. D. 115-11. In the Lupin LSA, Medicis granted**[\*25]** Lupin a license for generic versions of the Subsequent Strengths of Solodyn beginning February [TEXT REDACTED BY THE COURT] 2018 (the 65 mg and 115 mg strengths) and February [TEXT REDACTED BY THE COURT] 2019 (the 55 mg, 80 mg, and 105 mg strengths). D. 115-12 §§ 3.1.2, 3.1.3.

On the same day that the Lupin LSA was executed, Medicis and Lupin also entered into a Joint Development Agreement ("Lupin JDA"). D. 91, DPP CAC ¶ 209. Pursuant to the Lupin JDA, Lupin agreed to perform development work on two projects: [TEXT REDACTED BY THE COURT] D. 115-13 (Lupin JDA) § 2.1. Lupin would receive royalties from eventual sales of the drugs to be developed. D. 115-13 § 4.3. Medicis agreed to provide Lupin with a $20 million upfront payment that [TEXT REDACTED BY THE COURT][[4]](#footnote-3)4 Id. § 4.1. At the time, the relevant IP portfolio did not contain any issued patents. D. 91, DPP CAC ¶ 213. The Lupin JDA also provided for up to $35.5 million in milestone payments. Id. ¶ 215.

**IV. Procedural History**

In July 2013, direct purchasers of Solodyn brought the first ***antitrust*** suit against Defendants in the United States District Court for the Eastern District of Pennsylvania. See Rochester Drug Co-Operative. Inc. v. Medicis Pharm. Corp., No. 2:13-cv-04270-JCJ (E.D. Pa. July 23, 2013). Shortly thereafter, various "end payors" — consumers and third-party payors who indirectly purchased, paid for or provided reimbursement for Solodyn other than for resale — filed suit. On February 25, 2014, the Judicial Panel on Multidistrict Litigation ordered all Solodyn ***antitrust*** actions centralized, and transferred the direct purchaser and end payor actions to this Court.[[5]](#footnote-4)5 D. 2. The direct purchasers and end payors filed their respective consolidated amended complaints on September 15, 2014. D. 91, DPP CAC; D. 92, EPP CAC. Defendants have now moved to dismiss. D. 110. The Court heard the parties on the pending motions and took this matter under advisement. D. 142.

**V. Discussion**

**A. Claims under Section 1 of the Sherman Act**

*1. Legal****[\*27]*** *Framework*

The direct purchasers allege that the settlement agreements between Medicis and each of Impax, Sandoz and Lupin violated *Section 1* of the Sherman Act, *15 U.S.C. § 1* ("*Section 1*"). The Supreme Court in FTC v. Actavis considered the ***antitrust*** implications of reverse-payment settlements between a brand-name drug manufacturer who holds a patent and an alleged generic infringer. [*FTC v. Actavis. Inc.,     U.S.    , 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). Under these agreements, the patent holder pays the alleged infringer in exchange for the alleged infringer's agreement to drop its patent challenge and stay out of the market for a period of time. Prior to the Supreme Court's decision in Actavis, several circuit courts had held that reverse-payment settlements allowing for entry of a generic prior to the expiration of the brand-name patent were immune from ***antitrust*** liability, absent sham litigation or fraud in obtaining the patent, since such settlements were consistent with a patent-holder's right to exclude competitors. See. e.g., [*FTC v. Watson Pharms., Inc., 677 F.3d 1298 (11th Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55GR-M6W1-F04K-X0RR-00000-00&context=).

In Actavis, the Supreme Court held that the scope of the patent did not end the inquiry and that reverse-payment settlements that allow for generic entry prior to the expiration of a patent may still be subject to ***antitrust*** scrutiny under the burden-shifting**[\*28]** rule of reason. [*Actavis, 133 S. Ct. at 2230-31, 2237*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). [***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc2)[] Rule-of-reason analysis demands a determination as to "whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." [*Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5GN0-003B-S4S3-00000-00&context=). Under the rule-of-reason burden shifting regime:



a plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. If the plaintiff meets this initial burden, the defendant can come back with evidence that the agreement was formed for legitimate business purposes which outweigh any anti-competitive effects. Finally, the plaintiff can prevail by showing that the legitimate ends of the agreement could have been accomplished through less restrictive alternatives.

[*Addamax Corp. v. Open Software Found., Inc., 888 F. Supp. 274, 279 (D. Mass. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RV4-96W0-001T-50CM-00000-00&context=) (internal quotation omitted) (emphasis in original). [***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc3)[] Actavis set forth five considerations to support the application of the rule of reason to a reverse-payment settlement: (I) whether the payment has the "potential for genuine adverse effects on competition"; (2) whether the payment is unjustified in light of "a rough approximation of the litigation expenses saved through the settlement" and "compensation for other services that the generic**[\*29]** has promised to perform"; (3) whether the payment indicates that the patentee held sufficient market power to "work unjustified anticompetitive harm"; (4) the patent holder's belief in the strength or weakness of its patent; and (5) the reasons given for the settlement agreement. [*133 S. Ct. at 2234-37*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=) (citation omitted). The Actavis Court noted that the risk of anticompetitive consequences is particularly acute where the reverse payment is "large and unjustified." [*Id. at 2237*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). "[T]he likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." Id.



The parties in the instant case dispute whether a plaintiff challenging a reverse-payment settlement after Actavis must allege, as a threshold matter, that the reverse payment was "large and unjustified" before the rule of reason applies. The direct purchasers argue that their threshold burden under Actavis is simply to allege anticompetitive harm resulting from the reverse payment settlements and then Defendants must justify the challenged payments.**[\*30]** D. 126, Pl. Opp. at 37-38. The Supreme Court in Actavis "[left] to the lower courts the structuring of the present rule-of-reason ***antitrust*** litigation." [*133 S. Ct. at 2238*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). Lower courts have not been entirely consistent as to whether plaintiffs must fulfill a threshold burden of showing that the settlement payment was "large and unjustified" before the rule of reason applies. See. e.g., [*King Drug Co. of Florence, Inc. v. Cephalon, Inc., No. 2:06-cv-1797-MSG, 88 F. Supp. 3d 402, 2015 U.S. Dist. LEXIS 9545, 2015 WL 356913, at \*10-11 (E.D. Pa. Jan. 28, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F5R-5YK1-F04F-400R-00000-00&context=) (noting that "evidence of a large payment is required for a plaintiff to satisfy its initial burden" under Actavis, but requiring defendant to bear the burden of addressing potential "precompetitive" justifications for the reverse payment); [*In re Loestrin 24 FE* ***Antitrust*** *Litig., 45 F. Supp. 3d 180, 191, 195 (D.R.I. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D2P-5SX1-F04F-601K-00000-00&context=) (dismissing reverse-payment claims where plaintiffs failed to allege a cash payment because of difficulty of determining whether a non-cash payment was "large" and "unjustified"). The Third Circuit recently considered the related question of whether a plaintiff must allege a cash reverse payment to survive a motion to dismiss after Actavis. [*King Drug Co. of Florence v. Smithkline Beecham Corp., 791 F.3d 388, 394 (3d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G9F-WC71-F04K-K028-00000-00&context=). The Third Circuit reversed the district court's dismissal of the case and held that a non-cash transfer**[\*31]** — in that case, an agreement by a brand-name drug manufacturer not to produce an "authorized generic" version of its product — could qualify as a "reverse payment" ***antitrust*** violation under Actavis "because it may represent an unusual, unexplained reverse transfer of considerable value from the patentee to the alleged infringer and may therefore give rise to the inference that it is a payment to eliminate the risk of competition." Id.

After reviewing Actavis and subsequent decisions, the Court concludes that allegations of a large and unjustified payment are required for plaintiffs to satisfy their initial burden of alleging anticompetitive effects under Section I, but once plaintiffs do so, the burden shifts to defendants to show that the challenged conduct promotes a sufficiently procompetitive objective. See. e.g., [*In re Aggrenox* ***Antitrust*** *Litig., No. 3:14-MD-2516 SRU, 94 F. Supp. 3d 224, 2015 U.S. Dist. LEXIS 35634, 2015 WL 13I 1352, at \*9 (D. Conn. Mar. 23, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FK7-J4F1-F04C-W0D6-00000-00&context=) (holding that, for claims to survive after Actavis, plaintiffs must "plead facts sufficient to infer (and they must ultimately prove, within the rule-of-reason framework) that a large and otherwise unjustified reverse-payment was made as part of the settlement in order**[\*32]** to shore up some perceived risk of the . . . patent's invalidity"). Actavis provided that "a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects." [*133 S. Ct. at 2237*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=) (emphasis added). The Court focused on whether a reverse payment could have an anticompetitive effect or whether it was reasonable compensation for litigation costs or the value of services. After discussing potential legitimate reasons that may justify a large reverse-payment settlement, the Supreme Court noted that "[a]n ***antitrust*** defendant may show in the ***antitrust*** proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason." [*Id. at 2236*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=) (emphasis added). In light of the language and reasoning in Actavis and the persuasive weight of cases imposing an initial burden on plaintiffs to allege plausibly a large and unjustified payment, the Court concludes that the direct purchasers must bear this initial burden, but such allegations then shift the burden of persuasion to Defendants to justify the challenged payments. See [*In re Niaspan* ***Antitrust*** *Litig. ("Niaspan"), 42 F. Supp. 3d 735, 753 (E.D. Pa. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D3F-3Y11-F04F-42BD-00000-00&context=); [*King Drug Co. of Florence, 2015 U.S. Dist. LEXIS 9545, 2015 WL 356913, at \*8-12*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F5R-5YK1-F04F-400R-00000-00&context=). The Court**[\*33]** now turns to applying this burden-shifting framework here.

2. *Impax Settlement Allegations*

a) Large and Unjustified Payment

The direct purchasers adequately allege a Iarge and unjustified reverse-payment settlement to Impax to state a claim under *Section 1*. The direct purchasers allege that Medicis' reverse-payment agreement with Impax had the anticompetitive effects of lowering output and reducing consumer choice by delaying the launch of generic Solodyn and, consequently, maintaining inflated prices. D. 91, DPP CAC ¶ 233. In terms of the size of the payments, the direct purchasers have satisfied their burden to allege a large payment by pleading that the settlement payments to Impax (the $40 million upfront payment pursuant to the Impax LSA and the $15 million milestone payments to date pursuant to the Impax JDA) substantially exceed even a conservative estimate of Medicis' saved litigation costs (which are alleged to be no more than $6 million). Id. ¶¶ 100-01. The direct purchasers plausibly allege that the large upfront payments to Impax served no purpose other than to delay generic competition. Under the governing rule of reason, the burden then shifts to Defendants to produce evidence to**[\*34]** justify the payment by showing it was no more than the brand-name manufacturer's own saved litigation costs or was fair value for services the generic manufacturer promised to perform and was not a payment for delay. See [*Addamax, 888 F. Supp. at 279*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RV4-96W0-001T-50CM-00000-00&context=). Such justifications, as with any affirmative defense, cannot be resolved on a motion to dismiss unless the facts establishing the defense are clear on the face of the plaintiffs' complaint, which they are not in this case. [*Blackstone Realty LLC v. FDIC, 244 F.3d 193, 197 (1st Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42R7-H1T0-0038-X2KF-00000-00&context=).

b) Statute of Limitations

Defendants also argue that the direct purchasers' claims with regard to the Impax settlement are barred by the statute of limitations. D. 141, Def. Mem. at 37-40. The direct purchasers allege that if not for Impax's November 2008 contracts with Medicis, Impax would have launched generic Solodyn no later than March 17, 2009, when Teva briefly launched a generic Solodyn product. D. 91, DPP CAC ¶ 225. Defendants argue that any cause of action accrued on March 17, 2009, so the direct purchasers had four years from that date to file suit under the Clayton ***Antitrust*** Act. D. 141, Def. Mem. at 37-38; see [*15 U.S.C. § 15b*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43V6-00000-00&context=). Because the direct purchasers did not file suit until July 23, 2013 (four months after Defendants claim the statute of limitations**[\*35]** elapsed), Defendants argue that this suit is barred. D. 141, Def. Mem. at 3 8-40.

The Court finds that the continuing violation theory allows the direct purchasers to recover for all overcharges incurred within four years of the date the complaint was filed. The Supreme Court has noted that:

[***HN4***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc4)[] [a]ntitrust 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, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-HY60-003B-R1DG-00000-00&context=) (internal citation and quotation marks omitted). "Every court to have considered this issue in the pay-for-delay context has held that a new cause of action accrues to purchasers upon each overpriced sale of the drug." [*Niaspan, 42 F. Supp. 3d at 746-47*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D3F-3Y11-F04F-42BD-00000-00&context=); see [*In re Nexium (Esomeprazole)* ***Antitrust*** *Litie. "Nexium"), 777 F.3d 9, 27 (1st Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F4D-4MY1-F04K-H002-00000-00&context=) (holding that "***antitrust*** injury occurs the moment the purchaser incurs an overcharge"); [*In re Skelaxin (Metaxalone)* ***Antitrust*** *Litig., No. 1:12-md-2343-CLC, 2013 U.S. Dist. LEXIS 70968, 2013 WL 2181185, at \*29 (ED. Tenn. May 20, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58FY-BGV1-F04F-B011-00000-00&context=) (holding that the plaintiffs' claims were timely because**[\*36]** they were "overcharged for metaxalone well into the limitations period"); [*In re K-Dur* ***Antitrust*** *Litig., 338 F. Supp. 2d 517, 551 (D.N.J. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DGB-TC80-0038-Y415-00000-00&context=) (holding that "[p]laintiffs' claims are not barred by the statute of limitations to the extent that they bought and overpaid for K—Dur within the applicable time limitations"); [*In re Relafen* ***Antitrust*** *Litig., 286 F. Supp. 2d 56, 62 (D. Mass. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49SY-C0X0-0038-Y3GX-00000-00&context=) (using "the continuing act of charging higher prices" as an example of the continuing violation theory and noting that a purchaser plaintiff "is not limited by the initial acts of predatory pricing by the defendant"); [*In re Buspirone Patent Litig., 185 F. Supp. 2d 363, 378 (S.D.N.Y. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:456G-Y290-0038-Y0W0-00000-00&context=) (explaining that "if a party commits an initial unlawful act that allows it to maintain market control and overcharge purchasers for a period longer than four years, purchasers maintain a right of action for any overcharges paid within the four years prior to their filings").

Despite Defendants' contention otherwise, [*United States v. Doherty, 867 F.2d 47 (1st Cir. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D8T0-003B-50NX-00000-00&context=), does not command a different result. In Doherty, the defendants were charged with conspiring to steal copies of civil service examinations and sell them to policemen so they could cheat and obtain promotions. [*Id. at 50*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D8T0-003B-50NX-00000-00&context=). The indictment charged that the conspiracy continued up until the indictment date. [*Id. at 60-61*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D8T0-003B-50NX-00000-00&context=). While the charged overt acts all took place outside the statute of limitations, defendants continued to receive**[\*37]** salary payments due to the improper promotions until the filing of the indictment. [*Id. at 61*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D8T0-003B-50NX-00000-00&context=). The court rejected the government's view that the conspiracy continued with every receipt of salary payments functioning as a new overt act. [*Id. at 62*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D8T0-003B-50NX-00000-00&context=). While "[i]t may seem reasonable to say that the act of receiving a conspiratorial objective is part of the conspiracy, where the receiving consists of one action, or a handful of actions, taking place over a limited period of time, or where some evidence exists that the special dangers attendant to conspiracies, the dangers of 'concerted' activity and 'group association' for criminal purposes, remain present until the payoff is received," [*id. at 61*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D8T0-003B-50NX-00000-00&context=), the First Circuit drew the line at the salary payments in question:

where receiving the payoff merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions, such as receiving salary payments, and there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place, we do not see how one can reasonably say that the conspiracy continues.

Id. (emphasis in original). Here, unlike the continued salary benefits in [*Doherty*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D8T0-003B-50NX-00000-00&context=) which were**[\*38]** different from the "concerted activity posing the special societal dangers of conspiracy," the continuing pay-for-delay payments are the continued, concerted anticompetitive action that ***antitrust*** law seeks to prohibit.

*3. Sandoz Settlement Allegations*

The direct purchasers also adequately allege a large and unjustified reverse-payment settlement to Sandoz to state a claim under *Section 1*. They allege that in connection with the settlement Medicis paid Sandoz $14 million to purchase the [TEXT REDACTED BY THE COURT] which the direct purchasers allege was worthless because there was no viable market for such [TEXT REDACTED BY THE COURT] D. 91, DPP CAC ¶ 152. The direct purchasers allege that a reasonable estimate of litigation costs is at least $6 million, id. ¶ 100, so subtracting litigation costs from the alleged payment to Sandoz leaves a total of $8 million. Id. ¶ 100. Defendants argue that $8 million is not "large" as a matter of law under Actavis, as it constitutes only approximately .04% of Medicis' 2009-to-2011 annual Solodyn sales in the United States. D. 141, Def. Mem. at 43-44. However, Actavis established as the relevant measure whether the "the payment (if otherwise unexplained) likely**[\*39]** seeks to prevent the risk of competition." [*133 S. Ct. at 2236*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). Furthermore, Actavis specifically provided that an appropriate benchmark for the size of a reverse payment is "its scale in relation to the payer's anticipated future litigation costs[.]" [*Id. at 2237*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). Defendants argue that Medicis was not legally committed to make any payment to Sandoz when the parties agreed to dismiss the pending patent litigation with prejudice since the terms of the settlement required only that the parties "negotiate in good faith" to reach a definitive licensing and partnership agreement. D. 141, Def. Mem. at 41-42. An allegation of an actionable reverse-payment settlement, however, does not require an enforceable contract. See [*Am. Tobacco Co. v. United States, 328 U.S. 781, 809, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JX10-003B-S29W-00000-00&context=) (noting that "[n]o formal agreement is necessary to constitute an unlawful conspiracy"). The direct purchasers allege a payment to Sandoz significantly larger than Medicis' estimated saved litigation costs, so the burden shifts to Defendants to come forward with evidence that the reverse payment is justified by procompetitive considerations.

*4. Lupin Settlement Allegations*

The direct purchasers allege that Medicis' agreements with Lupin provided Lupin with "large, continuing, unjustifiable payments in exchange**[\*40]** for agreeing to forestall coming to market with its generic Solodyn products." D. 91, DPP CAC ¶ 209. Pursuant to these agreements, Lupin agreed to delay launching its Legacy Strength Solodyn generics until November 26, 2011 and delay launching certain Subsequent Strength Solodyn generics until February 2018 and others until February 2019. Id. ¶ 210. Pursuant to the Lupin JDA, Lupin agreed to work on two development projects in exchange for upfront payments totaling $22.5 million, as well as milestone payments and royalty payments if the products went to market. Id. ¶¶ 213-15.

To the extent that part of the direct purchasers' ***antitrust*** claims are based upon Lupin's alleged delayed market entry of its Legacy Strength Solodyn generic products, this portion of the claims fail because the direct purchasers have not plausibly alleged any delay. Lupin agreed with Medicis to a licensed entry date of November 26, 2011 for its Legacy Strength Solodyn generic products. D. 115-12 § 1.21. Lupin, however, did not receive the FDA approval necessary for the launch of these products until November 30, 2011. D. 115-11 at 1. Without a plausible allegation of delay caused by Defendants, the direct purchasers**[\*41]** have not alleged a cognizable ***antitrust*** injury. [***HN5***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc5)[] A plaintiff has suffered an ***antitrust*** injury sufficient to confer standing only if "the defendant's conduct was the substantial cause of the injury . . . ." [*Bristol-Myers Squibb Co. v. Copley Pharm., Inc., 144 F. Supp. 2d 21, 22 (D. Mass. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CM-0TB0-0038-Y406-00000-00&context=) (citing [*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=). The FDA's approval, not an agreement with Medicis, was the limiting factor in Lupin's ability to bring generic Solodyn in Legacy Strengths to market.



The direct purchasers, however, have adequately alleged delay in Lupin's market entry for its Subsequent Strength Solodyn generic products. The direct purchasers allege that "[b]ut for Medicis' unlawful continuing payments to Lupin, . . . Lupin would have launched its [Subsequent Strength] Solodyn products substantially earlier than 2018 or 2019" as agreed to in the Lupin-Medicis agreements. D. 91, DPP CAC ¶ 218. The parties dispute exactly what impact the agreements had on the market for generic Subsequent Strength Solodyn. The direct purchasers allege that the agreements preserved a "bottleneck" at the 65 mg and 115 mg generic doses until 2018 and created a bottleneck at the 55 mg strength until 2019 because Lupin was the first to file a Paragraph IV certification for a 55 mg strength generic and had the power to invoke a 180-day**[\*42]** period of exclusivity. Id. ¶¶ 208-11, 218. However, Congress in 2003 amended the FDCA, see Pub. L. No. 108-173, 117 Stat. 2066 (December 8, 2003), to provide that the first-filing generic manufacturer forfeits its 180-day exclusivity if it fails to market its generic product. See [*21 U.S.C. § 355(j)(5)(D)(i)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNC1-NRF4-4393-00000-00&context=). Setting aside allegations that the Lupin agreements preserved or created bottlenecks that blocked generic Solodyn at the Subsequent Strengths from reaching the market, the Lupin LSA on its face provided for a delayed entry of Lupin's Subsequent Strength generics of Solodyn beginning February [TEXT REDACTED BY THE COURT] 2018 (the 65 mg and 115 mg strengths) and February [TEXT REDACTED BY THE COURT] 2019 (the 55 mg, 80 mg, and 105 mg strengths). D. 115-12 §§ 3.1.2, 3.1.3. The direct purchasers allege that the cash payments agreed upon in the Lupin JDA — $20 million upfront and up to $35.5 million in milestone payments — far exceeded the value of the development services to be performed by Lupin pursuant to the Lupin JDA and served no purpose other than to compensate Lupin for keeping its generic Subsequent Strength Solodyn off the market. The direct purchasers have, therefore, sufficiently alleged a large and unjustified payment from Medicis to Lupin for no purpose other**[\*43]** than to delay Lupin's release of a generic version of Solodyn at the Subsequent Strengths and this portion of their claims regarding Lupin survives the motion to dismiss.

*5. Other Section I Sherman Act Allegations*

Defendants argue that the direct purchasers' ***antitrust*** theory is implausible because they allege that Medicis made large and unjustified payments to Impax, Sandoz and Lupin with the purpose of delaying their entry to the generic Solodyn market but raise no such claims as to the agreements reached with other generic manufacturers who agreed to delay bringing their generics to market until the same date. D. 141, Def. Mem. at 32. In Defendants' view, the only plausible inference from the fact that Medicis settled with other generic manufacturers for the same entry date (without any alleged payments) is that the agreed entry date reflected a legitimate compromise of the patent dispute and the payments Medicis made to Impax, Sandoz, and Lupin were not for delay but rather for other lawful business reasons. *Id.* at 32-33. The Court disagrees that the direct purchasers have failed to state ***antitrust*** claims in this regard. As explained in Actavis, a variety of considerations inform the extent**[\*44]** to which different generic challengers may pose different threats to the brand manufacturer and have differing Financial incentives and resolve to challenge the brand's patent. See [*133 S. Ct. at 2235*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). The alternative inference to the direct purchasers' allegations of improper reverse-payment settlements suggested by Defendants — that the delayed entry date was in fact a fair settlement of the patent infringement claims in question — is for a jury to decide and does not warrant dismissal of the claims at this stage.

**B. Claims under *Section 2* of the Sherman Act**

*1. Legal Framework*

[***HN6***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc6)[] *Section 2* of the Sherman Act makes it unlawful for a firm to "monopolize . . . any part of the trade or commerce among the several States . . . ." *15 U.S.C. § 2*. The elements of monopolization are "'(1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" [*Díaz Aviation Corp. v. Airport Aviation Servs., Inc., 716 F.3d 256, 265 (1st Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58N8-64X1-F04K-H00Y-00000-00&context=) (quoting [*United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G490-003B-S2W3-00000-00&context=). Attempted monopolization requires proof that "'(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'"**[\*45]** [*Díaz Aviation Corp., 716 F.3d at 265*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58N8-64X1-F04K-H00Y-00000-00&context=) (quoting [*Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S5B-0D20-003B-R505-00000-00&context=). Courts refer to unlawful methods of acquiring or maintaining monopoly power as "exclusionary conduct." [*Town of Concord. Mass. v. Boston Edison Co., 915 F.2d 17, 21 (1st Cir. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2B70-003B-5538-00000-00&context=). The direct purchasers allege that Medicis engaged in exclusionary conduct by: (i) pursuing sham litigation to enforce its patent rights; (ii) endeavoring to have its Solodyn patents listed in the Orange Book; (iii) petitioning the FDA; (iv) introducing new products; and (v) engaging in an overarching scheme of exclusionary conduct.



*2. Allegations of Sham Litigation*

The direct purchasers allege that Medicis engaged in exclusionary conduct by filing sham lawsuits against Impax, Sandoz and Lupin for infringement of the '838 Patent. D. 91, DPP CAC ¶¶ 119, 172, 197. [***HN7***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc7)[] Under the Noerr-Pennington doctrine, filing a lawsuit is protected under the *First Amendment* unless the lawsuit is a "sham." [*Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJ6-FCR0-003B-R0M3-00000-00&context=). To plead the sham litigation exception, a plaintiff must allege that the lawsuit was (1) "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; and (2) subjectively motivated by a desire to "interfere directly with the business relationships of a competitor, through the use of the governmental process — as opposed to the outcome of that process — as an anticompetitive**[\*46]** weapon.'" [*Id. at 60-61*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJ6-FCR0-003B-R0M3-00000-00&context=) (internal citations and quotation marks omitted) (emphases in original). The Court concludes that the direct purchasers fail to state a claim for sham litigation under Noerr-Pennington because they have not plausibly alleged that Medicis' patent litigation was objectively baseless. The '838 Patent has never been invalidated by any court and was upheld by the PTO after re-examination so it was objectively reasonable for Medicis to believe that it had a chance of prevailing in its infringement suits.



The direct purchasers' two theories as to why the litigation was objectively unreasonable fail to alter this conclusion. [***HN8***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc8)[] First, an "on-sale bar" renders an invention unpatentable if, more than one year before the patent application, (1) the product was the subject of a commercial offer for sale; and (2) the invention was reduced to practice, or the inventor must have disclosed prepared drawings or descriptions sufficiently specific to enable a person skilled in the art to practice the invention. [*Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 67-68, 119 S. Ct. 304, 142 L. Ed. 2d 261 (1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3V2M-69F0-004B-Y00C-00000-00&context=). The direct purchasers argue that the '838 Patent's invention, in the form of Dynacin, had been on sale for over a year before Medicis applied for the patent. D. 91, DPP CAC ¶ 62. The direct purchasers contend**[\*47]** that the '838 Patent covers a method of using a range of slow-dissolving minocycline products, which would include both Solodyn and Dynacin. Id. ¶ 68. However, according to the allegations, the prior public sale and use of Dynacin did not clearly render the '838 Patent invalid. Indeed, the direct purchasers point to differences in the release rates of these two products that could have provided a reasonable basis for Medicis to conclude the '838 Patent was enforceable. The complaint alleges that Solodyn is an extended release minocycline hydrochloride, id. ¶ 53, whereas Dynacin is rated as equivalent to Minocin, an "immediate release minocycline hydrochloride," id. ¶ 62.



Second, the direct purchasers argue that Medicis committed inequitable conduct in procuring the Solodyn patent and, therefore, had no reasonable basis for believing the Solodyn patent was enforceable. See D. 91, DPP CAC ¶¶ 68-76. [***HN9***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc9)[] To prevail on a claim of inequitable conduct, the accused infringer "must prove by clear and convincing evidence that the patentee 'acted with the specific intent to deceive the PTO,' something more than mere negligence or even gross negligence." [*Smith & Nephew, Inc. v. Interlace Med., Inc., 955 F. Supp. 2d 69, 73 (D. Mass. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58S2-91B1-F04D-D01Y-00000-00&context=) (quoting [*Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1290 (Fed. Cir. 2011))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52YB-5241-652G-21HV-00000-00&context=). The direct purchasers allege that Medicis engaged in inequitable**[\*48]** conduct by intentionally withholding references to Dynacin and the Dynacin Study from its application for the '838 Patent. D. 91, DPP CAC ¶¶ 68-72, 74. However, in light of the additional allegation that Medicis ultimately provided the Dynacin Study to the PTO during the patent re-examination process, id. ¶ 144, the direct purchasers have not stated a plausible claim that Medicis' patent litigation was a sham on this basis even assuming the truth of all of its allegations, as the Court must, in consideration of the motion to dismiss.



Because the Court finds that the direct purchasers have not stated a plausible claim that Medicis' patent litigation was objectively baseless, it need not reach the other prong of the sham litigation claim, the question of whether the complaint adequately alleges that the patent litigation was subjectively motivated by a desire to use the lawsuit as an anticompetitive weapon for interfering with competitors. [*Prof'l Real Estate Investors, Inc., 508 U.S. at 60*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJ6-FCR0-003B-R0M3-00000-00&context=) (noting that "[o]nly if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation").

*3. Allegations of Other Monopolistic Acts*

The direct purchasers allege various other acts of exclusionary conduct, but these allegations**[\*49]** are insufficient to support a *Section 2* claim. First, they allege that Medicis unlawfully had the '838 Patent listed in the FDA's Orange Book for the purpose of delaying generic competition. D. 91, DPP CAC ¶ 111. However, as discussed above, the '838 Patent was never held to be invalid or unenforceable and Medicis was required by statute to submit its patents for listing in the Orange Book. See [*21 U.S.C. § 355(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNC1-NRF4-4393-00000-00&context=). Medicis' listing of the '838 Patent in the Orange Book, therefore, cannot form the basis for a *Section 2* claim. See [*In re Lipitor* ***Antitrust*** *Litig. ("Lipitor"), No. 3:12-CV-2389-PGS, 2013 U.S. Dist. LEXIS 126468, 2013 WL 4780496, at \*21 (D.N.J. Sept. 5, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:598Y-7VX1-F04D-W0CF-00000-00&context=) (holding that "listing presumptively valid patents in the Orange Book and enforcing them against infringers are not bases for an ***antitrust*** claim; Orange Book listing is a statutory obligation and enforcement is a statutory right").

See In re Lipitor ***Antitrust*** Litig. ("Lipitor") Second, the direct purchasers allege that the two petitions filed by Medicis with the FDA (the Proportionality Petition and the 30-Month Stay Petition) constitute exclusionary conduct under *Section 2*. D. 91, DPP CAC ¶¶ 88-91, 126-27. [***HN10***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc10)[] The Noerr-Pennington doctrine, discussed above, protects against ***antitrust*** liability on the basis of filing a citizen petition with the FDA. See [*Lipitor, 2013 U.S. Dist. LEXIS 126468, 2013 WL 4780496, at \*22*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:598Y-7VX1-F04D-W0CF-00000-00&context=). Like litigation, a citizen**[\*50]** petition is protected unless it is objectively baseless and subjectively motivated by a desire to interfere directly with the business relationships of a competitor through the use of governmental process. [*Prof'l Real Estate Investors, 508 U.S. at 60-61*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJ6-FCR0-003B-R0M3-00000-00&context=). A citizen petition is "objectively baseless" only when "no reasonable [drug] manufacturer could have 'realistically expected the FDA to grant the relief sought.'" [*Lipitor, 2013 U.S. Dist. LEXIS 126468, 2013 WL 4780496, at \*22*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:598Y-7VX1-F04D-W0CF-00000-00&context=) (quoting [*La. Wholesale Drue Co. v. Sanofi—Aventis, No. 07-cv-7343-HB, 2009 U.S. Dist. LEXIS 77206, 2009 WL 2708110, at \*4 (S.D.N.Y. Aug. 28, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X4B-5GY0-TXFR-J2C2-00000-00&context=)).



In the Proportionality Petition, Medicis petitioned the FDA to require *in vivo* bioequivalence testing of generic versions against all Legacy Strengths of Solodyn. D. 91, DPP CAC ¶ 88. This position contradicted the argument Medicis made when initially seeking NDA approval that bioequivalence testing was required only for the 135 mg strength because the 45 mg and 90 mg strength versions were proportional in dose to the 135 mg strength version. Id. ¶ 89. In the Proportionality Petition, Medicis relied upon bioequivalence testing requirements and proportionality definitions set forth in prior FDA guidance documents to support its argument for increased bioequivalence testing. D. 115-17 at 5-7. Medicis also cited new data suggesting a lack of proportionality**[\*51]** between the 90 and 135 mg strengths which conflicted with the initial studies that had demonstrated proportional bioequivalence. Id. at 8-9. Medicis hypothesized that the results of the new study were caused by different dissolution characteristics of the 135 mg tablets which more accurately reflected the characteristics of the commercially available tablets. Id. Despite Medicis' change in position in the Proportionality Petition, the direct purchasers have not adequately alleged that no reasonable manufacturer could have realistically expected to prevail on this petition in light of this new data.

The 30-Month Stay Petition, in which Medicis requested that the statutory 30-month stay apply to ANDAs for generic Solodyn in light of the passage of the QI Act, was also not objectively baseless. Indeed, three other pharmaceutical companies submitted similar petitions in the wake of the QI Act, suggesting that the applicability of the 30-month stay was widely considered an unsettled question. See D. 115-21 (Mayne Pharma Int'l Pty Ltd., and Warner Chilcott (US), LLC, Warner Chilcott Labs. Ireland Ltd., and Warner Chilcott Co., Inc. Citizen Petition); D. 115-22 (Hoffman-La Roche Inc., and Roche Palo**[\*52]** Alto LLC Citizen Petition); D. 115-23 (Stiefel Labs, Inc. Citizen Petition).

Next, the direct purchasers allege that Medicis' introduction of the Subsequent Strengths of Solodyn violated *Section 2*. See D. 91, DPP CAC ¶ 276. After initially introducing the Legacy Strengths of Solodyn in 2006, Medicis obtained FDA approval for and began marketing new strengths of Solodyn in 2009 and 2010. Id. ¶¶ 77, 87, 182. The direct purchasers allege that Medicis began marketing Solodyn in the Subsequent Strengths to shift the market away from doses that stood to face generic competition once Legacy Strength Solodyn faced generic competition. Id. ¶ 87. However, Medicis continued selling the Legacy Strengths until July 2011, id. ¶ 187, and the direct purchasers acknowledge that generic versions of Legacy Strength Solodyn were available in the marketplace beginning in 2009, id. ¶¶ 128, 147, 165. The direct purchasers thus fail to allege plausibly that Medicis limited consumer choice by offering Solodyn at new strengths in 2009 and 2010. See [*Walgreen Co. v. AstraZeneca Pharm. L.P., 534 F. Supp. 2d 146, 151 (D.D.C. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RXH-KGK0-TXFP-H30P-00000-00&context=) (granting motion to dismiss for lack of allegations that branded manufacturer "eliminated any consumer choices" where allegations showed expanded choice through introduction**[\*53]** of a new drug to compete with already-established drugs).

Finally, the direct purchasers argue that these allegations together demonstrate Medicis' complex strategy to unlawfully impair generic competition. D. 126, Pl. Opp. at 67. The direct purchasers argue that an overarching scheme can be an ***antitrust*** violation even if parts of the scheme individually are not themselves unlawful. Id. at 68. [***HN11***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc11)[] However when "alleged instances of misconduct are not independently anti-competitive . . . they are not cumulatively anti-competitive either." [*Eatoni Ergonomics, Inc. v. Research in Motion Corp., 486 F. App'x 186, 191 (2d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55XW-M521-F04K-J0PD-00000-00&context=); see [*Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1366-67 (Fed. Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XTD-S890-003B-9075-00000-00&context=) (noting that "[e]ach legal theory must be examined for its sufficiency and applicability, on the entirety of the relevant facts," [*id. at 1367*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XTD-S890-003B-9075-00000-00&context=)).



**C. End-Pavor Plaintiffs' Claims**

The EPP Complaint contains substantially the same factual allegations as the DPP Complaint, but the end payors' claims arise under state law (with the exception of the Seventh Claim for Relief, which seeks declaratory and injunctive relief under the Clayton Act for violations of the Sherman Act). See generally D. 92, EPP CAC. The end payors' state law claims include: monopolization and attempted monopolization, conspiracy and combination in restraint of trade, unfair competition and deceptive trade**[\*54]** practices, and unjust enrichment. The end payors also add Valeant, the company that acquired Medicis in 2012, as a defendant. Id. ¶ 24.

*1. Article III Standing*

Defendants argue that the end payors lack Article III standing to bring claims in states where they are not residents or have not suffered harm. D. 141, Def. Mem. at 65-66 (citing [*In re Wellbutrin XL* ***Antitrust*** *Litig., 260 F.R.D. 143, 157 (E.D. Pa. 2009))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4WXB-W220-TXFR-P1S8-00000-00&context=). On this basis, they seek dismissal of all state law claims arising under the laws of 29 states and Puerto Rico. The end payors respond that all named plaintiffs have constitutional standing as a result of their alleged overpayment for Solodyn caused by Defendants' unlawful conduct, and "[o]nce a named plaintiff establishes Article III standing to assert her own claim, whether she may also advance claims of absent class members is determined by *Rule 23*." D. 126, Pl. Opp. at 72.

[***HN12***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc12)[] Article III contains a requirement of justiciability which limits the jurisdiction of Article III courts to active "Cases" and "Controversies." *U.S. Const, art. III, § 2, cl. 1*. Article III standing presents a "threshold question in every federal case . . . ." [*Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BGK0-003B-S1WN-00000-00&context=). To establish standing, a plaintiff must allege an injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested**[\*55]** relief. [*Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XF70-003B-R3RX-00000-00&context=).



The interplay between Article III standing and class standing presents a surprisingly difficult question. See [*Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762, 768 (1st Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:520N-PD41-652P-Y00J-00000-00&context=) (noting that "[t]he issue looks straightforward and one would expect it to be well settled; neither assumption is entirely true"). In [*Gratz v. Bollinger, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48X4-Y610-004B-Y02D-00000-00&context=), the Supreme Court acknowledged that when there is "variation" between the claims of named plaintiffs and absent class members, "there is a question whether the relevance of this variation . . . is a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to *Federal Rule of Civil Procedure 23(a)*," [*id. at 263*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48X4-Y610-004B-Y02D-00000-00&context=), and that "there is tension in our prior cases in this regard," [*id. at 263 n.15*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48X4-Y610-004B-Y02D-00000-00&context=).

Courts have taken different views about how to evaluate Article III and class standing at the motion to dismiss stage where putative class representatives assert claims arising under the laws of states where they neither reside nor allege to have suffered injury. See [*In re Aggrenox* ***Antitrust*** *Litig., No. 3:14-md-2516-SRU, 2015 U.S. Dist. LEXIS 35634, 2015 WL 1311352, at \*20 (D. Conn. Mar. 23, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FK7-J4F1-F04C-W0D6-00000-00&context=) (granting without prejudice motion to dismiss end-payors' complaints with respect to all claims under the laws of states where the named plaintiffs did not allege to have suffered injury); [*In re Nexium, 968 F. Supp. 2d 367, 407-08 (D. Mass. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59BB-KNF1-F04D-D05Y-00000-00&context=) (determining that named plaintiffs had Article III standing**[\*56]** due to alleged overpayment for drugs and postponing its determination as to whether the named plaintiffs may pursue claims arising under the laws of states where they had not purchased drugs until class certification); [*In re Relafen* ***Antitrust*** *Litig., 221 F.R.D. 260, 270 (D. Mass. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CCX-0F20-0038-Y48V-00000-00&context=) (holding that a single named plaintiff bringing a claim under Illinois law could adequately represent the claims of class members arising under the laws of a plurality of states and deferring consideration of standing until after class certification); [*Niaspan, 42 F. Supp. 3d at 758*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D3F-3Y11-F04F-42BD-00000-00&context=) (agreeing that "named plaintiffs lack standing to assert claims under the laws of the states in which they do not reside or in which they suffered no injury" and dismissing claims based on laws of states where no end-payor plaintiff resided or made purchases and/or reimbursements) (citation and internal quotation marks omitted).

The Court concludes that the named end payors have Article III standing. It is undisputed that the end payors allege that they paid for Solodyn at prices that were inflated due to Defendants' alleged anticompetitive actions and such allegations constitute a cognizable monetary injury. It is further undisputed that the remedy sought — compensatory and injunctive relief for these overpayments — is**[\*57]** likely to redress this injury. The district court in Nexium declined to dismiss claims arising under the laws of states where end-payor plaintiffs had not made purchases because "[a]ll members of the putative class have a common interest in litigating claims arising from the Defendants' allegedly anticompetitive collusion designed to cause the End-Payors to pay supracompetitive prices across the several states." [*968 F. Supp. 2d at 407*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59BB-KNF1-F04D-D05Y-00000-00&context=); see [*Plumbers' Union Local No. 12 Pension Fund, 632 F.3d at 770*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:520N-PD41-652P-Y00J-00000-00&context=)) (preserving rule from [*Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WSK-9JC0-004B-Y01T-00000-00&context=) that class certification may be determined before Article III standing in cases where there is an "identity of issues" and "alignment of incentives" between named plaintiffs and the rest of the putative class members). The Nexium court accordingly postponed its "determination as to whether the named representatives may pursue claims on behalf of its absent class members under *Rule 23* until the time it entertains the certification of the putative class."[[6]](#footnote-5)6 [*968 F. Supp. 2d at 408*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59BB-KNF1-F04D-D05Y-00000-00&context=). The same analysis applies with equal force to the present case and the Court will consider the issue of the end payors' standing to bring claims arising under the laws of states where they are not residents and have not alleged to have suffered harm at the class certification stage.

*2. Slate Law Claims Derivative of Federal Claims*

Defendants argue that end payors' state law ***antitrust*** allegations fail for the same reason as the direct purchasers' allegations: "because the [end payors] do**[\*59]** not adequately or plausibly allege any 'large and unjustified' payments, exclusionary conduct, and/or anticompetitive injury, all of the [end payors'] state and federal ***antitrust*** claims must be dismissed as a matter of law." D. 141, Def. Mem. at 63. Defendants also argue that dismissal of the end payors' consumer protection and unjust enrichment claims is warranted because they "make no specific factual allegations to support their claims that Defendants engaged in deceptive trade practices, or 'unfair,' 'unconscionable,' 'unlawful,' or 'inequitable' conduct, or that Defendants have been unjustly enriched." Id. at 64. In particular, Defendants fault the end payors for failing to allege specific facts to satisfy the unique elements of each state's laws or to plead causation as required by state consumer protection and unjust enrichment laws. Id. at 64-65. The end payors' claims, however, incorporate by reference the entire complaint, which contains many allegations of unfair competition and anticompetitive injury caused by Defendants' allegedly exclusionary and collusive conduct. As discussed above, the DPP Complaint, which parallels the substance of the EPP Complaint, contains specific allegations**[\*60]** of large and unjustified payments that state ***antitrust*** claims under federal law. To the extent that Defendants have identified elements or requirements of specific state laws that warrant dismissal of individual claims, these arguments are addressed below.

*3. State-Specific Arguments*

a) ***Antitrust*** Claims

Defendants raise three arguments for dismissal of the end payors' state law ***antitrust*** claims. First, Defendants argue that the ***antitrust*** claims asserted under the laws of Florida, Massachusetts, Oregon, Puerto Rico and Rhode Island must be dismissed because these states apply the federal bar on indirect purchaser claims established by [*Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9DJ0-003B-S1WY-00000-00&context=). D. 141, Def. Mem. at 66 (citing [*Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 102 (Fla. Dist. Ct. App. 1996))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-4H40-003F-31KN-00000-00&context=); [*O'Connell v. Microsoft Corp., No. 00-cv-01743, 2001 Mass. Super. LEXIS 321, 2001 WL 893525, at \*5 (Mass. Super. Ct. June 14, 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43TS-9W20-0039-40KC-00000-00&context=); Daraee v. Microsoft Corp., No. 0004-cv-033I I, 2000 WL 33187306, at \*1 (Or. Cir. Ct. June 27, 2000); [*Nexium, 968 F. Supp. 2d at 409-10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59BB-KNF1-F04D-D05Y-00000-00&context=); [*Siena v. Microsoft Corp., 796 A.2d 461,464-65 (R.I. 2002))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45TT-TC20-0039-4397-00000-00&context=).

In Illinois Brick, the Supreme Court held that only direct purchasers of goods produced by firms engaged in anticompetitive conduct could be regarded as injured within the meaning of the Clayton Act. [*431 U.S. at 746-47*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9DJ0-003B-S1WY-00000-00&context=) (acknowledging that its holding "denies recovery to those indirect purchasers who may have been actually injured by ***antitrust*** violations," [*id. at 746*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9DJ0-003B-S1WY-00000-00&context=)). While some states have passed laws known**[\*61]** as "Illinois Brick-repealers" which expressly grant end-payors the right to sue for ***antitrust*** violations, "end-payors cannot assert ***antitrust*** claims under the law of states which have not passed such laws." [*Nexium, 968 F. Supp. 2d at 409*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59BB-KNF1-F04D-D05Y-00000-00&context=). Oregon and Rhode Island passed Illinois Brick-repealer laws in 2010 and 2013, respectively. See [*Or. Rev. Stat. §§ 646.770-780*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5812-D6T1-648C-847N-00000-00&context=); [*R.I. Gen. Laws § 6-36-7(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SW5-BR00-004G-43WB-00000-00&context=). The "repealer statutes of both states are presumed to apply only prospectively, absent evidence of legislative intent to the contrary." [*Niaspan, 42 F. Supp. 3d at 759*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D3F-3Y11-F04F-42BD-00000-00&context=) (citing [*Hydro-Mfg., Inc, v. Kayser-Roth Corp., 640 A.2d 950, 954 (R.I. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-XTP0-003D-F17F-00000-00&context=); [*Strizver v. Wilsey, 210 210 Ore. App. 33, 150 P.3d 10, 12 (Or. Ct. App. 2006))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MMG-K6Y0-0039-405J-00000-00&context=). Accordingly, the end payors may not recover for any alleged overcharges incurred before the Oregon and Rhode Island Illinois Brick-repealer statutes took effect, but may proceed with their claims for alleged overcharges incurred after the statutes were in effect.

Puerto Rico's law is less clear, with some courts holding that indirect purchasers lack standing to bring ***antitrust*** claims under Puerto Rico law and others disagreeing. Compare [*In re TFT-LCD (Flat Panel)* ***Antitrust*** *Litig., 599 F. Supp. 2d 1179, 1188 (N.D. Cal. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VXD-XCF0-TXFP-C20F-00000-00&context=) (holding that "the indirect purchaser plaintiffs lack standing under the Puerto Rico [***Antitrust*** Act]") with *Rivera-Muniz v. Horizon Lines Inc., 737 F. Supp. 2d 57, 61 (D.P.R. 2010)* (noting that "[a]lthough federal jurisprudence has implied special standing requirements into private ***antitrust*** actions . . ., Puerto Rico explicitly rejects any such limitations" because "Puerto Rico liberally**[\*62]** construes its standing requirements in private ***antitrust*** cases") (citations omitted). Because Puerto Rico's ***antitrust*** laws have been interpreted in accordance with federal law, the bar against claims by indirect purchasers set forth in Illinois Brick applies and mandates dismissal of the Puerto Rico claims. See [*Nexium, 968 F. Supp. 2d at 409-10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59BB-KNF1-F04D-D05Y-00000-00&context=).

The end payors, however, state a claim for relief under the laws of Florida and Massachusetts, which have been interpreted to permit claims by indirect purchaser plaintiffs. The Florida Deceptive and Unfair Trade Practices Act ("DTPA") "clearly expresses the legislative policy to authorize consumers (that is, indirect purchasers) to bring actions under the Florida DTPA for price-fixing conduct." [*Mack, 673 So. 2d at 110*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-4H40-003F-31KN-00000-00&context=) (reversing dismissal of indirect purchaser claim under Florida DTPA). Similarly, indirect purchasers "can assert claims for price fixing or other anticompetitive conduct" under Massachusetts law. [*Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 55, 762 N.E.2d 303 (2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:453J-FCP0-0039-41D6-00000-00&context=).

Second, Defendants argue that the ***antitrust*** claims arising under the laws of the District of Columbia, Hawaii, Massachusetts, Mississippi, Nevada, New Hampshire, New York, Oregon and West Virginia should be dismissed because these state laws target only anticompetitive conduct that occurs**[\*63]** solely or predominantly within the borders of the state. D. 141, Def. Mem. at 66 (citing [*Sun Dun. Inc. of Wash. v. Coca-Cola Co., 770 F. Supp. 285, 289 (D. Md. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-BKY0-001T-74DR-00000-00&context=) (District of Columbia); [*Haw. Rev. Stat. § 480-4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GCM-SSV1-DXC8-03XJ-00000-00&context=) (1993); [*Ciardi v. Hoffmann-Laroche. Ltd., No. 993244, 2000 Mass. Super. LEXIS 615, 2000 WL 33162197, at \*3 (Mass. Sup. Ct. Sept. 29, 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CD-3600-0039-4448-00000-00&context=), aff'd, [*436 Mass. 53, 762 N.E.2d 303 (2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:453J-FCP0-0039-41D6-00000-00&context=); [*In re Microsoft Corp.* ***Antitrust*** *Litig., No. MDL 1332, 2003 U.S. Dist. LEXIS 15612, 2003 WL 22070561, at \*2 (D. Md, Aug. 22, 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49H0-6Y20-0038-Y4WN-00000-00&context=) (Mississippi); [*Nev. Rev. Stat. Ann. § 598A.060*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5B62-NJJ1-6X0H-048J-00000-00&context=) (West 2014); N.H. Const, art. 83 (2003); [*H-Quotient, Inc, v. Knight Trading Group, Inc., No. 03-cv5889-DAB, 2005 U.S. Dist. LEXIS 1924, 2005 WL 323750, at \*4-5 (S.D.N.Y. Feb. 9, 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FFX-3VP0-TVW3-P1WY-00000-00&context=); [*FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 50-51 (D.D.C.)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WYG-YD40-0038-Y3P6-00000-00&context=) (Oregon), amended on other grounds, [*99 F. Supp. 2d 1 (D.D.C. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YJG-V2N0-0038-Y4FF-00000-00&context=); [*Anziulewicz v. Bluefield Cmty. Hosp., Inc., 531 F. Supp. 49, 53 (S.D. W. Va. 1981))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-HY40-0039-S1T9-00000-00&context=). Defendants reason that the end payors allege an ***antitrust*** conspiracy that caused injury in 23 states, so the alleged activities are interstate, not intrastate. The end payors respond that they sufficiently plead intrastate activity through their allegations of a nationwide ***antitrust*** violation that increased prices paid by the end payors in each state. D. 126, Pl. at 74-75. They allege that Defendants' anticompetitive conduct "had substantial intrastate effects in that, among other things, retailers within each state were foreclosed from offering less expensive generic, bioequivalent versions of Solodyn to end-payors within each state." D. 92, EPP CAC ¶ 267. Construing the pleadings in a light favorable to the end payors, the Court finds these allegations sufficient to allege intrastate conduct. See [*In re Digital Music* ***Antitrust*** *Litig., 812 F. Supp. 2d 390, 407-08 (S.D.N.Y. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:53BS-MJB1-JCNC-81P3-00000-00&context=) (finding plaintiffs' allegations of a nationwide conspiracy affecting commerce within**[\*64]** the states to satisfy intrastate conduct requirements).

Finally, Defendants argue that the ***antitrust*** claims under Mississippi and Illinois law must be dismissed because these states do not permit ***antitrust*** class actions. D. 141, Def. Mem. at 67 (citing [*Am. Bankers Ins. Co. v. Booth, 830 So. 2d 1205, 1214 (Miss. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4790-16B0-0039-453X-00000-00&context=); [*Nexium, 968 F. Supp. 2d at 408*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59BB-KNF1-F04D-D05Y-00000-00&context=)). The Illinois ***Antitrust*** Act states that "no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General, who may maintain an action parens patriae as provided in this subsection." [*740 III. Comp. Stat. § 10/7 (2010)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C66-0WY1-6YS3-D065-00000-00&context=). Mississippi's ***antitrust*** law grants the state Attorney General or authorized district attorneys the power to bring ***antitrust*** claims on behalf of a group of similarly situated plaintiffs. [*Miss. Code Ann. § 75-21-37*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8P6B-8782-8T6X-74SR-00000-00&context=) (2014). The end payors reply that [*Shady Grove Orthopedic Associates. P.A. v. Allstate Insurance Co., 559 U.S. 393, 406, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y4J-8F10-YB0V-9153-00000-00&context=), holds that *Rule 23* preempts state rules restricting class actions in diversity cases, so ***antitrust*** class actions can proceed despite contrary state law. D. 126, PI. Opp. at 75 (citing [*Shady Grove, 559 U.S. at 406*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y4J-8F10-YB0V-9153-00000-00&context=) ("*Rule 23* unambiguously authorizes any plaintiff, in any federal civil proceeding, to maintain a class action if the Rule's prerequisites are met") (emphasis in original)). In Shady Grove, the Court considered a New York law that excluded**[\*65]** suits seeking penalties or statutory minimum damages from class action eligibility. [*559 U.S. at 396*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y4J-8F10-YB0V-9153-00000-00&context=). The law in question was contained within a section of New York procedural law governing the prerequisites for class certification. [*Id. at 396*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y4J-8F10-YB0V-9153-00000-00&context=) n.l (citing [*N.Y. Civ. Prac. Law § 901*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-08C1-6RDJ-848G-00000-00&context=) (2006)). The Shady Grove plurality observed that federal procedural rules apply in federal courts, so where state laws conflict with *Rule 23*, *Rule 23* governs, [*Id. at 409*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y4J-8F10-YB0V-9153-00000-00&context=).

The district court in Nexium considered the question of how the Shady Grove analysis maps on to Illinois ***antitrust*** law. [*968 F. Supp. 2d at 408-09*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59BB-KNF1-F04D-D05Y-00000-00&context=). The Nexium court noted that the Illinois ***Antitrust*** Act does not appear in a generally applicable procedural law, but rather in the state's substantive ***antitrust*** statute. Id. The court concluded that Justice Stevens' concurring opinion in Shady Grove to be controlling on this point. [*Id. at 409*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59BB-KNF1-F04D-D05Y-00000-00&context=). In Justice Stevens' view, "[a] federal rule . . . cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." [*Shady Grove, 559 U.S. at 423*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y4J-8F10-YB0V-9153-00000-00&context=) (Stevens, J., concurring in part and concurring in the judgment). The Nexium court concluded that *Rule 23*'s preemption**[\*66]** of Illinois ***antitrust*** law would be "an application of a federal rule that effectively abridges, enlarges, or modifies a state-created right or remedy." [*968 F. Supp. 2d at 409*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59BB-KNF1-F04D-D05Y-00000-00&context=) (quoting [*Shady Grove, 559 U.S. at 422*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y4J-8F10-YB0V-9153-00000-00&context=)) (Stevens, J., concurring in part and concurring in the judgment). This Court agrees that it would be inconsistent with Shady Grove to conclude that *Rule 23* preempts the ban on class actions contained within Illinois ***antitrust*** law.

The class action bar under Mississippi law, however, does not fit the same Shady Grove analysis as the Illinois bar. Mississippi's state rules of civil procedure do not recognize class actions. See [*Am. Bankers Ins. Co., 830 So. 2d at 1214*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4790-16B0-0039-453X-00000-00&context=). Its ***antitrust*** law states that "[i]t shall be the duty of the district attorneys . . . to enforce the civil features of the ***antitrust*** laws of this state" but does not make that power exclusive or expressly state that ***antitrust*** class actions are prohibited. [*Miss. Code Ann. § 75-21-37*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8P6B-8782-8T6X-74SR-00000-00&context=) (2014). Mississippi's general ban on class actions is not so intertwined with the state's substantive ***antitrust*** rights that it functions to define their scope, so *Rule 23* governs. See [*In re New Motor Vehicles Canadian Exp.* ***Antitrust*** *Litig., 241 F.R.D. 77, 83 (D. Me. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4N9X-4PY0-TVVK-B200-00000-00&context=) vacated on other grounds, [*522 F.3d 6 (1st Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S5B-G8J0-TXFX-32S2-00000-00&context=) (concluding that "a class is properly certifiable under Federal *Rule 23* to enforce Mississippi ***antitrust*** law").

Accordingly, the Court dismisses the end payors' ***antitrust* [\*67]** claims arising under the laws of Illinois and Puerto Rico.

b) Consumer Protection and Deceptive Trade Practices Claims

Defendants raise a series of challenges to the end payors' state consumer protection and deceptive trade practices claims. First, Defendants argue that the end payors lack standing under Iowa and Kansas law because these states bar indirect purchasers from bringing consumer protection or deceptive trade practices claims. D. 141, Def. Mem. at 67 (citing [*Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 228 (Iowa 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3STK-0720-0039-40NX-00000-00&context=); [*Kan. Stat. Ann. §§ 50- 624(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BY4-SXF1-DYB8-31D2-00000-00&context=), [*50-632*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BY4-SXF1-DYB8-31DB-00000-00&context=), [*50-634 (2013)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BY4-SXF1-DYB8-31DD-00000-00&context=)). Turning first to the claim arising under Kansas law, [***HN13***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc13)[] the Kansas Consumer Protection Act is intended, in part, "to protect consumers from suppliers who commit deceptive and unconscionable practices." [*Kan. Stat. Ann. § 50-623(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BY4-SXF1-DYB8-31D1-00000-00&context=). A "consumer" is defined as an "individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property or services for personal, family, household, business or agricultural purposes." Id. [*§ 50-624(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BY4-SXF1-DYB8-31D2-00000-00&context=). As institutional purchasers, the end payors do not fall within the statutory definition of consumers and cannot state a claim for relief under the Kansas Consumer Protection Act. See [*CIT Group/Sales Fin., Inc. v. E-Z Pay Used Cars, Inc., 29 Kan. App. 2d 676, 32 P.3d 1197, 1204 (Kan. App. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43TX-FKX0-0039-40WS-00000-00&context=) (dismissing claim under the KCPA where plaintiff did not fall under the statutory definition**[\*68]** of consumer). Next, the Iowa Consumer Fraud statute, *Iowa Code § 714.16(2)(a)*, does not create a private cause of action. See [*Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 227 (Iowa 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3STK-0720-0039-40NX-00000-00&context=). The end payors' claims under Kansas and Iowa law must, therefore, be dismissed.



Second, Defendants argue that the end payors fail to state a claim under Michigan or Tennessee consumer protection laws, as these laws prohibit only specifically enumerated conduct. D. 141, Def. Mem. at 67 (citing *Mich. Comp. Laws Ann. § 445.903(1)* (2014); [*Tenn. Code Ann. § 47-18-104(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4WV6-KPC0-R03N-Y4F9-00000-00&context=) (2002)). [***HN14***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc14)[] Michigan's consumer protection law prohibits "unfair, unconscionable, or deceptive methods, acts or practices," including "charging the consumer a price that is grossly in excess of the price at which similar property or services are sold." *Mich. Comp. Laws Ann. § 445.903(1)*. Because the end payors allege that there was a "gross disparity between the price that Plaintiffs and the End-Payor Class members paid for the brand product and the value received, given that a less expensive substitute generic product should have been available," D. 92, EPP CAC ¶ 346, the alleged conduct fits within the enumerated categories of Michigan law. [***HN15***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc15)[] Tennessee consumer protection laws contain a list of unfair and deceptive acts and also a catch-all section that prohibits "[e]ngaging in any other act or practice which is deceptive to the**[\*69]** consumer or to any other person." [*Tenn. Code Ann. § 47-18-104(b)(27)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4WV6-KPC0-R03N-Y4F9-00000-00&context=). This provision is broad enough to encompass the end payors' allegations. However, there is no private right of action for claims arising from the catch-all section, as enforcement of this section is "vested exclusively in the office of the attorney general and reporter and the director of the division," id., so the claim under Tennessee law must be dismissed.



Third, Defendants argue that Nebraska and Vermont case law holds that indirect purchaser consumer protection claims present an injury "too remote" to state a claim. D. 141, Def. Mem. at 68 (citing [*Kanne v. Visa U.S.A. Inc., 272 Neb. 489, 723 N.W.2d 293, 302 (Neb. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4M8F-51P0-0039-40GF-00000-00&context=); [*Fucile v. Visa U.S.A. Inc., No. S1560-03-CNC, 2004 Vt. Super. LEXIS 42, 2004 WL 3030037, at \*2-3 (Vt. Super. Ct. Dec. 27, 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YNR-3JT0-Y9NK-S1VV-00000-00&context=)). The parties dispute whether the Nebraska Supreme Court's decision in Kanne permits actions by indirect purchasers under Nebraska's consumer protection laws. The Kanne court, citing [*Arthur v. Microsoft Corp. 267 Neb. 586, 676 N.W.2d 29 (Neb. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BYS-Y6C0-0039-43JV-00000-00&context=), affirmed that the state consumer protection act "contemplates an action by indirect purchasers," [*723 N.W.2d at 300*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4M8F-51P0-0039-40GF-00000-00&context=), but distinguished the indirect purchasers in Arthur (consumer purchasers of Microsoft Windows 98 operating systems who were licensed end-users of Microsoft's products but purchased the operating system through an intermediary distributer) from the plaintiffs in Kanne seeking relief**[\*70]** under the consumer protection act (consumers claiming they paid higher prices for goods resulting from merchants' purchase of Visa and MasterCard debit card services). [*Id. at 300-01*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4M8F-51P0-0039-40GF-00000-00&context=). The Kanne court found that indirect purchasers with a direct relationship with the defendant could maintain an action under Nebraska's consumer protection act, but plaintiffs without a direct relationship with the defendant (such as the plaintiffs in Kanne who had not themselves purchased debit card services) lacked standing to pursue state consumer protection claims. [*Id. at 301*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4M8F-51P0-0039-40GF-00000-00&context=). Like the plaintiffs in [*Arthur*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BYS-Y6C0-0039-43JV-00000-00&context=), the end payors in the present case have a direct relationship with Defendants as end-payors for Solodyn and, therefore, state a claim under Nebraska consumer protection law. [***HN16***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=&link=clscc16)[] Under Vermont law consumer protection law, however, a seller is defined as "a person regularly and principally engaged in a business of selling goods or services to consumers." [*Vt. Stat. Ann. tit. 9 § 2451a*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SDC-H3B0-004G-G3MW-00000-00&context=) (2011). The end payors fail to plausibly allege that Defendants sell directly to consumers as required to fit Vermont's statutory definition of a seller.



Finally, Defendants argue that Illinois prohibits class action consumer protection claims.[[7]](#footnote-6)7 D. 141, Def. Mem. at 68.**[\*71]** The end payors repeat their argument that Shady Grove preempts such state laws that are inconsistent with *Rule 23*. As discussed above, the Illinois state statutory bar against consumer protection class actions is not merely procedural but intertwined with a substantive right, so [*Shady Grove*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y4J-8F10-YB0V-9153-00000-00&context=) does not apply and the claim must be dismissed. See [*Nexium, 968 F. Supp. 2d at 408-09*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59BB-KNF1-F04D-D05Y-00000-00&context=).

Accordingly, the Court dismisses the consumer protection and deceptive trade practices claims arising under the laws of Iowa, Illinois, Kansas, Tennessee and Vermont.

c) Unjust Enrichment Claims

Defendants also make several arguments through which they seek dismissal of various state law unjust enrichment claims. First, Defendants argue that states that follow Illinois Brick do not permit unjust enrichment claims by indirect purchaser plaintiffs for ***antitrust*** injury, since such claims would "'result in circumvention of the policies expressed by state legislatures through limitations inherent in those laws.'" D. 141, Def. Mem. at 68 (quoting [*Niaspan, 42 F. Supp. 3d at 762*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D3F-3Y11-F04F-42BD-00000-00&context=) (quoting [*Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 425 (E.D. Pa. 2010)))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5102-1SV1-652J-J00D-00000-00&context=). As the district court recognized in**[\*72]** Niaspan, the "vast majority of courts have held that indirect purchasers may not bring state claims for unjust enrichment if they otherwise would be barred from bringing a claim under that state's ***antitrust*** and consumer protection statutes, absent a showing that the common law of the state in question expressly allows for such recovery." [*42 F. Supp. 3d at 763*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D3F-3Y11-F04F-42BD-00000-00&context=). The end payors' unjust enrichment claims arising under Colorado, Connecticut, Delaware, Georgia, Kentucky, Maryland, Pennsylvania, South Carolina, Texas and Virginia must, therefore, be dismissed. [*Id. at 762-65*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D3F-3Y11-F04F-42BD-00000-00&context=). Oregon and Rhode Island have recently enacted Illinois Brick-repealer statutes, so assertion of unjust enrichment claims is no longer contrary to the public policies of those two states. [*Id. at 765*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D3F-3Y11-F04F-42BD-00000-00&context=).

Second, Defendants argue that certain states' unjust enrichment laws — Florida, Idaho, Kansas, Maine, Michigan, North Carolina, North Dakota and Utah — require allegations that plaintiffs directly conferred a benefit on Defendants. D. 141, Def. Mem. at 69 (citing [*In re Aftermarket Filters* ***Antitrust*** *Litig., No. 08-cv-4883-RWG, 2010 U.S. Dist. LEXIS 32652, 2010 WL 1416259, at \*3 (N.D. Ill. Apr. 1, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y5K-R8Y0-YB0N-30JW-00000-00&context=) (Kansas, Maine, Michigan, North Carolina, Utah); [*Extraordinary Title Servs., LLC v. Fla. Power & Light Co., 1 So. 3d 400, 404 (Fla. Dist. Ct. App. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VKG-0M90-TXK7-H21S-00000-00&context=); [*Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 433 n.26 (E.D. Pa. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5102-1SV1-652J-J00D-00000-00&context=) (Idaho); see also [*Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 388, 111 P.3d 73, 91-92 (Idaho 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FKS-V4D0-0039-44GX-00000-00&context=), overruled on other grounds by [*Farber v. Idaho State Ins. Fund, 152 Idaho 495, 272 P.3d 467 (Idaho 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54TS-V3C1-F04G-1013-00000-00&context=); [*Apache Corp. v. MDU Res. Group. Inc., 1999 ND 247, 603 N.W.2d 891, 895 (N.D. 1999))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y72-B1J0-0039-44FM-00000-00&context=). District**[\*73]** courts interpreting the laws of Florida, Kansas, Michigan, North Carolina and Utah have refused to dismiss unjust enrichment claims on this basis, finding that these states' unjust enrichment laws do not necessarily require a plaintiff to plead a conferral of a direct benefit. See [*In re Processed Egg Prods.* ***Antitrust*** *Litig., 851 F. Supp. 2d 867, 927-35 (E.D. Pa. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5576-YSS1-F04F-4077-00000-00&context=) (declining to dismiss unjust enrichment claims under Florida, Kansas, North Carolina, and Utah law); [*Niaspan, 42 F. Supp. 3d at 766*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D3F-3Y11-F04F-42BD-00000-00&context=) (declining to dismiss Florida unjust enrichment claim); [*In re Cardizem CD* ***Antitrust*** *Litig., 105 F. Supp. 2d 618, 671 (E.D. Mich. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:416S-GY40-0038-Y3RD-00000-00&context=) (declining to dismiss Michigan and North Carolina unjust enrichment claims). However, Idaho, Maine and North Dakota require a direct benefit to state a claim for unjust enrichment so the unjust enrichment claims arising under these states' laws must be dismissed. See [*Hayden Lake, 111 P.3d at 91-92 (Idaho)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FKS-V4D0-0039-44GX-00000-00&context=); [*Aftermarket Filters, 2010 U.S. Dist. LEXIS 32652, 2010 WL 1416259, at \*3 (Maine)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y5K-R8Y0-YB0N-30JW-00000-00&context=); [*Apache Corp., 603 N.W.2d at 895 (North Dakota)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y72-B1J0-0039-44FM-00000-00&context=).

Third, Defendants argue that Alaska and New Jersey[[8]](#footnote-7)8 abide by the equitable principle "that a court must not apply equity to do indirectly 'what the law or its clearly defined policy forbids to be done directly'" and unjust enrichment claims, therefore, cannot stand in these states because they cannot be addressed through the law. D. 141, Def. Mem. at 69 (quoting [*Riddell v. Edwards, 76 P.3d 847, 855 (Alaska 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49GJ-SPD0-0039-41YS-00000-00&context=); accord [*Dolinger v. Driver, 269 Ga. 141, 498 S.E.2d 252, 254 (Ga. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SJ4-0VH0-0039-439W-00000-00&context=); [*In re K-Dur* ***Antitrust*** *Litig, No. 01-cv-1652-JAG, 2008 U.S. Dist. LEXIS 71768, 2008 WL 2660780, at \*4-5 (D.N.J. Feb. 28, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4THD-F2P0-TXFR-F3BC-00000-00&context=); [*Stutzle v. Rhone-Poulenc S.A., No. 002768, 2003 Phila. Ct. Com. Pl. LEXIS 74, 2003 WL 22250424, at \*2 (Pa. Ct. Com. PI. Sept. 26, 2003))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4G24-4XJ0-0039-452R-00000-00&context=). The end payors correctly respond that they have the right to plead**[\*74]** in the alternative equitable claims along with legal claims. D. 126, Pl. Opp. at 76 (citing [*United States v. Kensington Hosp., 760 F. Supp. 1120, 1135 (E.D. Pa. 1991))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-F8D0-001T-7051-00000-00&context=).

Fourth, Defendants argue that unjust enrichment claims under Arkansas and Iowa law are considered too remote to provide recovery when based on alleged ***antitrust*** violations. D. 141, Def. Mem. at 69 (citing [*Arkansas Carpenters' Health & Welfare Fund v. Philip Morris Inc., 75 F. Supp. 2d 936, 942, 946 (E.D. Ark. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y1J-V3S0-0038-Y4NB-00000-00&context=); [*Southard v. VISA U.S.A. Inc., 734 N.W.2d 192, 199-200 (Iowa 2007))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P1P-2PT0-TXFS-X264-00000-00&context=). These cases, however, are distinguishable and do not provide a basis for dismissal of these claims. In Arkansas Carpenters' Health & Welfare Fund, plaintiff union health and welfare trust fund sought recovery against cigarette companies under Arkansas law for medical expenses it had reimbursed due to illnesses related to smoking. [*75 F. Supp. 2d at 938*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y1J-V3S0-0038-Y4NB-00000-00&context=). The court found that "no benefit ha[d] been conveyed" when the fund paid the smoking-related health claims that it was legally obligated to pay. [*Id. at 946*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y1J-V3S0-0038-Y4NB-00000-00&context=). In the instant case, there was an alleged benefit received by Defendants in the form of alleged monopoly profits. The same result holds under Iowa law. In Southard, the Iowa Supreme Court considered whether indirect**[\*75]** plaintiffs' claims were too remote under state unjust enrichment law. [*734 N.W.2d at 199-200*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P1P-2PT0-TXFS-X264-00000-00&context=). The Southard plaintiffs alleged that Visa and MasterCard required merchants who accepted credit cards to also accept debit cards, and this arrangement led to merchants paying inflated fees which they passed on to consumers. [*Id. at 194*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P1P-2PT0-TXFS-X264-00000-00&context=). The Southard court concluded that a "nonpurchaser suffering a derivative injury" could not recover. [*Id. at 197-98*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P1P-2PT0-TXFS-X264-00000-00&context=). The end payors here are in a different position because their injury stems directly from the purchase of "the product that is the subject of [the alleged] anticompetitive activity" by Defendants. Id.; see [*Sheet Metal Workers Local 441 Health & Welfare Plan, 737 F. Supp. 2d at 434*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5102-1SV1-652J-J00D-00000-00&context=) (distinguishing Southard and sustaining Iowa unjust enrichment claim by indirect purchasers against a brand drug company alleged to have filed sham patent litigation to maintain its monopoly).

Fifth, Defendants argue that the end payors fail to show unconscionable or inequitable conduct as required to state unjust enrichment claims under the laws of Idaho and New Hampshire. D. 141, Def. Mem. at 69 (citing [*Gibson v. Ada Cnty., 142 Idaho 746, 133 P.3d 1211, 1224 (Idaho 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4J7Y-P030-0039-4134-00000-00&context=); [*R. Zoppo Co., Inc. v. City of Manchester, 122 N.H. 1109, 453 A.2d 1311, 1313 (N.H. 1982))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXP-55B0-003G-B369-00000-00&context=). These citations are inapposite here, as the end payors have alleged unconscionable or inequitable conduct**[\*76]** in the form of suppression of competition that led to higher prices for consumers. See [*In re Lorazepam & Clorasepate* ***Antitrust*** *Litig., 295 F. Supp. 2d 30, 51 (D.D.C. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BG2-HBD0-0038-Y0VN-00000-00&context=) (holding that indirect purchasers conferred a "benefit of money on defendants 'under circumstances in which it would be unjust or inequitable for [defendants] to retain the benefit'") (citation omitted). However, for reasons previously stated, the end payors' claim under Idaho law is dismissed.

Sixth, Defendants argue that California does not recognize unjust enrichment as a cause of action. D. 141, Def. Mem. at 69 (citing [*Melchior v. New Line Prods., Inc., 106 Cal. App. 4th 779, 131 Cal. Rptr. 2d 347, 357 (Cal. Ct. App. 2003))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:481P-5PX0-0039-435T-00000-00&context=). California law is unclear as to whether unjust enrichment is permitted as a separate cause of action, but the Ninth Circuit recently treated unjust enrichment as a separate claim. [*Berger v. Home Depot USA, Inc., 741 F.3d 1061, 1070 (9th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BF4-YPY1-F04K-V4T7-00000-00&context=) (recognizing California common law claim of unjust enrichment, defined as the "receipt of a benefit and unjust retention of the benefit at the expense of another") (citation omitted). California law, therefore, does not provide a settled basis on which to dismiss the end payors' unjust enrichment claim. See [*In re Processed Egg Prods., 851 F. Supp. 2d at 913*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5576-YSS1-F04F-4077-00000-00&context=) (refusing to dismiss California unjust enrichment claim because "California courts have not uniformly or definitively barred an independent cause of action for unjust enrichment").

Finally, Defendants**[\*77]** argue that under Tennessee law, an unjust enrichment claim based upon ***antitrust*** conduct must show that measures were first taken to "seek relief from intervening links in the chain of distribution ... and/or the futility of such measures." D. 141, Def. Mem. at 70 (quoting [*D.R. Ward Constr. Co. v. Rohm & Haas Co., 470 F. Supp. 2d 485, 509 (E.D. Pa. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KSK-MN60-TVWB-J2Y1-00000-00&context=) (applying Tennessee law)). The end payors allege that it would be futile to seek relief from intermediaries in the chain of distribution. D. 92, EPP CAC ¶ 357 (alleging that "[i]t would be futile for Plaintiffs and the End-Payor Class members to seek to exhaust any remedy against the immediate intermediary in the chain of distribution from which they indirectly purchased Solodyn, as those intermediaries are not liable and would not compensate Plaintiffs and the End-Payor Class for Defendants' unlawful conduct"). Such allegations are sufficient to state a claim under Tennessee law. See [*In re Chocolate Confectionary* ***Antitrust*** *Litig., 749 F. Supp. 2d 224, 242 (M.D. Pa. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:512T-HBJ1-652J-J002-00000-00&context=) (refusing to dismiss unjust enrichment claims brought by end-purchasers under Tennessee law because the plaintiffs "simply lack a cognizable remedy against the direct purchasers").

Accordingly, the Court dismisses the unjust enrichment claims arising under the laws of Colorado, Connecticut, Delaware, Georgia, Idaho, Kentucky, Maine, Maryland,**[\*78]** North Dakota, Pennsylvania, South Carolina, Texas and Virginia.

*4. Claims Against Valeant*

The EPP Complaint adds Valeant as a defendant. D. 92, EPP CAC ¶ 24. Valeant is a Canadian corporation that acquired Medicis in December 2012. Id. The end payors allege that Valeant "joined the unlawful course of conduct . . . with respect to the suppression of generic competition for Solodyn" when it acquired Medicis, and participated in the conduct "by continuing to adhere to the unlawful agreements" after the acquisition, including by making payments pursuant to the challenged agreements. Id. ¶ 25. The end payors allege that Impax shared gross profits with Valeant for one of the four generic products contemplated by the Impax JDA and received payments from Valeant pursuant to the Impax JDA. Id. ¶¶ 113, 120. The end payors, however, allege no specific facts that set forth a plausible theory as to why Valeant is liable for the conduct of its independent subsidiary or why Valeant's own actions were unlawful, so Valeant must be dismissed. The end payors offer no allegations as to why the corporate veil should be pierced or what specific unlawful actions could plausibly be attributed to Valeant. See**[\*79]** [*In re Suboxone (Buprenorphine Hydrochloride & Naloxone)* ***Antitrust*** *Litig., 64 F. Supp. 3d 665, 713-14 (E.D. Pa. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DRS-T1V1-F04F-43D7-00000-00&context=) (allegations regarding parent company board of director's approval and direction of anticompetitive scheme insufficient to survive a motion to dismiss where the allegations do not tie the parent company to anticompetitive acts). Therefore, the claims against Valeant are dismissed.

**VI. Conclusion**

For the foregoing reasons, the Court **ALLOWS** in part and **DENIES** in part Defendants' motion to dismiss, D. 110, as follows:

1. The Motion to Dismiss is **ALLOWED** with respect to the Direct-Purchaser Plaintiffs' claims against Defendants for monopolization and attempted monopolization under Sherman Act *Section 2*.

2. The Motion to Dismiss is **ALLOWED** with respect to the End-Payor Plaintiffs' state law claims against Defendants for monopolization, attempted monopolization and conspiracy and combination in restraint of trade arising under the laws of Illinois and Puerto Rico.

3. The Motion to Dismiss is **ALLOWED** with respect to the End-Payor Plaintiffs' state law consumer protection and deceptive trade practices claims against Defendants arising under the laws of Iowa, Illinois, Kansas, Tennessee and Vermont.

4. The Motion to Dismiss is **ALLOWED** with respect to the End-Payor Plaintiffs' state law claims for unjust**[\*80]** enrichment against Defendants arising under the laws of Colorado, Connecticut, Delaware, Georgia, Idaho, Kentucky, Maine, Maryland, North Dakota, Pennsylvania, South Carolina, Texas and Virginia.

5. The Motion to Dismiss is **ALLOWED** with respect to all remaining claims asserted against Defendant Valeant.

6. The Motion to Dismiss is **DENIED** in all other respects.

**So Ordered**.

/s/ Denise J. Casper

United States District Judge

**End of Document**

1. 1The substantive allegations of the DPP CAC parallel the allegations of D. 92, the End-Payor Plaintiffs' Consolidated Amended Complaint ("EPP CAC"). [↑](#footnote-ref-0)
2. 2In evaluating a motion to dismiss, a court may consider documents attached to the complaint or expressly incorporated therein. [*Watterson v. Page. 987 F.2d 1, 3 (1st Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HT90-003B-P3GN-00000-00&context=). A court may also consider certain documents not attached to the complaint, including documents the authenticity of which are not disputed by the parties, official public records, documents central to plaintiffs' claim and documents sufficiently referred to in the complaint. Id. [↑](#footnote-ref-1)
3. 3Medicis and Impax had already executed the Impax LSA by this time. Impax served the Paragraph IV notice to preserve its first-to-file status, which would allow it to launch if another generic manufacturer successfully invalidated the '838 Patent and brought a generic Legacy Strength Solodyn product to market. D. 91, DPP CAC ¶ 116. [↑](#footnote-ref-2)
4. 4In March 2012, nine months after the original Lupin JDA was executed, Medicis and Lupin entered into an Amended Joint Development Agreement whereby [TEXT REDACTED BY THE COURT] was swapped for a different development project, and Medicis agreed to make a $2.5 million**[\*26]** upfront payment to Lupin.Id. ¶ 213. [↑](#footnote-ref-3)
5. 5On April 8, 2015 and May 1. 2015, two additional cases were transferred for consolidation with the present case. D. 153; D. 156. [↑](#footnote-ref-4)
6. 6The First**[\*58]** Circuit recently affirmed the district court's subsequent order certifying a class of end-payor plaintiffs. [*777 F.3d 9 (1st Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F4D-4MY1-F04K-H002-00000-00&context=). Defendants argued that the certified class included members who were not injured by the alleged foreclosure of generic competition because some brand-loyal consumers would have continued to purchase brand-name Nexium even if there had been a generic version on the market. [*Id. at 17*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F4D-4MY1-F04K-H002-00000-00&context=). The First Circuit held that class certification is permissible even if a class includes a de minimis number of uninjured parties as long as a mechanism exists for establishing injury at the liability stage of the case. [*Id. at 19-20, 25*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2B70-003B-5538-00000-00&context=). The First Circuit also held that the named plaintiffs had standing because they had established that they "were overcharged for at least one Nexium transaction during the class period" and [t]o the extent that it is necessary that each and every member of the class who secures a recovery also has standing, the requirement will be satisfied—only injured class members will recover." [*Id. at 32*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2B70-003B-5538-00000-00&context=). [↑](#footnote-ref-5)
7. 7Defendants make the same argument as to the Kansas and Tennessee consumer protection claims, but these claims fail for the reasons noted above. [↑](#footnote-ref-6)
8. 8Defendants make the same argument as to the laws of Georgia and Pennsylvania, but, as discussed above, these unjust enrichment claims fail independently because these states follow the Illinois Brick rule. [↑](#footnote-ref-7)