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# [***Picone v. Shire PLC***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PTK-BWC1-JFKM-6051-00000-00&context=)

United States District Court for the District of Massachusetts

October 20, 2017, Decided; October 20, 2017, Filed

Civil Action No. 16-cv-12396-ADB

**Reporter**

2017 U.S. Dist. LEXIS 178150 \*

TINA PICONE, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. SHIRE PLC, SHIRE, LLC, SHIRE U.S., INC., ACTAVIS ELIZABETH LLC, ACTAVIS HOLDCO US, INC., and ACTAVIS LLC, Defendants.

**Core Terms**

***Antitrust***, patent, generic, no-AG, settlement, allegations, anticompetitive, launch, brand, ***anti trust*** law, exclusivity, sham, purchasers, premised, royalty rate, indirect, settlement agreement, conspiracy, plausibly, motion to dismiss, federal patent law, courts, violations, infringement, consumers, documents, ***antitrust*** liability, below-market, license, unfair

**Counsel:** **[\*1]**For Sherri Cummisford, Consolidated Plaintiff: Allan Kanner, LEAD ATTORNEY, PRO HAC VICE, Allan Kanner & Associates, New Orleans, LA; Conlee S. Whiteley, Layne Hilton, Marshall L. Perkins, LEAD ATTORNEYS, PRO HAC VICE, Kanner & Whiteley, LLC, New Orleans, LA; David S. Shotlander, LEAD ATTORNEY, PRO HAC VICE, Frommer Lawrence & Haug LLLP, Washington, DC; Denise L Morris, John D Blythin, Mark A Eldridge, LEAD ATTORNEYS, Ademi & O'Reilly LLP, Cudahy, WI; Ruben Honik, LEAD ATTORNEY, PRO HAC VICE, Golomb & Honikl, P.C., Philadelphia, PA; Shpetim Ademi, LEAD ATTORNEY, Ademi & O'Reilly, Cudahy, WI.

For Carmen Richard, Consolidated Plaintiff: Allan Kanner, LEAD ATTORNEY, PRO HAC VICE, Allan Kanner & Associates, New Orleans, LA; Bradley Winston, LEAD ATTORNEY, Winston Law Firm, Davie, FL; Conlee S. Whiteley, Layne Hilton, Marshall L. Perkins, LEAD ATTORNEYS, PRO HAC VICE, Kanner & Whiteley, LLC, New Orleans, LA; David J. Stanoch, LEAD ATTORNEY, PRO HAC VICE, Golomb & Honik, P.C., Philadelphia, PA; Ruben Honik, LEAD ATTORNEY, PRO HAC VICE, Golomb & Honikl, P.C., Philadelphia, PA.

For Tina Picone, Plaintiff: Allan Kanner, LEAD ATTORNEY, PRO HAC VICE, Allan Kanner & Associates, New Orleans, LA; Conlee**[\*2]** S. Whiteley, Layne Hilton, Marshall L. Perkins, LEAD ATTORNEYS, PRO HAC VICE, Kanner & Whiteley, LLC, New Orleans, LA; David J. Stanoch, LEAD ATTORNEY, PRO HAC VICE, Golomb & Honik, P.C., Philadelphia, PA; Ruben Honik, LEAD ATTORNEY, PRO HAC VICE, Golomb & Honikl, P.C., Philadelphia, PA; Stephen Herbert Galebach, Galebach Law Office, Medford, MA.

For Shire U.S. Inc., Shire LLC, Defendants: Amanda J. Hamilton, LEAD ATTORNEY, PRO HAC VICE, Haug Partners LLLP, Washington, DC; David S. Shotlander, LEAD ATTORNEY, PRO HAC VICE, Frommer Lawrence & Haug LLLP, Washington, DC; David A Zwally, John F. Collins, LEAD ATTORNEYS, PRO HAC VICE, Haug Partners LLLP, New York, NY; Michael F. Brockmeyer, LEAD ATTORNEY, PRO HAC VICE, Frommer Lawrence & Haug LLP, Washington, DC; Fred A. Kelly, Jr., Haug Partners, One Post Office Square, Boston, MA; Joshua S. Barlow, Haug Partners LLP, One Post Office Square, Boston, MA; Tarae L. Howell, Nixon & Peabody, LLP, Boston, MA.

For Actavis Elizabeth LLC, Actavis Holdco U.S., Inc., Defendants: Christopher T. Holding, David Robert Fox, Sarah K. Frederick, Goodwin Procter LLP, Boston, MA.

**Judges:** ALLISON D. BURROUGHS, UNITED STATES DISTRICT JUDGE.

**Opinion by:** ALLISON D. BURROUGHS

**Opinion**

**AMENDED [\*3]  MEMORANDUM AND ORDER ON MOTIONS TO DISMISS**

BURROUGHS, D.J.,

Plaintiffs Tina Picone, Sherry Cummisford, Carmen Richard, and Shana Wright, individually and on behalf of all others similarly situated as consumer indirect purchasers ("IPPs") of the pharmaceutical drug Intuniv, allege violations of federal and state ***antitrust*** laws and state consumer protection statutes against Defendants Shire, LLC and Shire U.S., Inc. ("Shire"), and Actavis Elizabeth LLC and Actavis Holdco US, Inc. ("Actavis") (collectively, "Defendants"). Currently pending before the Court are Shire's and Actavis's separate motions to dismiss for failure to state a claim. [ECF Nos. 51, 54]. For the reasons stated below, the motions are GRANTED in part and DENIED in part.

**I. PROCEDURAL BACKGROUND**

On November 23, 2016, the IPPs filed their first complaint. [ECF No. 1]. Following the Court's allowance of a motion for consolidation [ECF Nos. 26, 32], they filed a Consolidated and Amended Class Action Complaint ("CAC"). [ECF No. 39]. On April 10 and April 11, 2017, Defendants moved separately to dismiss the CAC [ECF Nos. 51, 54]. On July 20, 2017, the Court held a hearing on the motions to dismiss in both the instant action and**[\*4]** the related action, FWK Holdings LLC v. Shire PLC et al., No. 16-cv-12653. [ECF No. 78].

**II. ALLEGATIONS IN THE COMPLAINT**

The CAC is 100 pages long and consists of 508 paragraphs. Accordingly, the Court provides only an abbreviated overview here, with additional facts included in the analysis as needed.

**A. Intuniv**

Shire manufacturers and sells Intuniv, which is a branded, once-daily, extended-release formulation of the prescription medication guanfacine hydrochloride, generally prescribed for young patients to treat attention deficit hyperactivity disorder. CAC ¶ 1. On September 2, 2009, the Food and Drug Administration ("FDA") approved Shire's New Drug Application ("NDA") for Intuniv, pursuant to [*21 U.S.C. § 355, et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNC1-NRF4-4393-00000-00&context=) Id. ¶ 2. An NDA discloses any patents that claim the new drug, and, if approved, the manufacturer must list these patents in the FDA publication known as the "Orange Book." See [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., 814 F.3d 538, 542 (1st Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J4W-JVF1-F04K-H07H-00000-00&context=). During the relevant time period, Shire held three patents covering Intuniv: U.S. Patent No. 5,854,290 ('290 Patent), which was a method-of-use patent, and U.S. Patent Nos. 6,287,599 ('599 Patent) and 6,811,794 ('794 Patent) (collectively, the "Intuniv Patents"), which covered the sustained release coating allowing for the extended release of the active ingredients. CAC ¶¶ 45, 50. The IPPs assert that**[\*5]** these sorts of patents, which do not cover the active pharmaceutical ingredient, "have a high rate of being found invalid or not infringed." Id. ¶ 47. According to the CAC, Wall Street analysts, generic pharmaceutical companies, and Shire itself considered the Intuniv Patents to be "weak." Id. ¶ 51.

**B. Intuniv Patent Litigation**

Under the [*Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CD7-HSN0-01XN-S4FK-00000-00&context=), commonly known as the Hatch-Waxman Act, a generic manufacturer may file an Abbreviated New Drug Application ("ANDA") to seek approval of a proposed generic version of a brand drug. See [*21 U.S.C. § 355(j)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNC1-NRF4-4393-00000-00&context=). Obtaining approval for an ANDA is simpler than obtaining approval for an NDA. See [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., 814 F.3d at 543*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J4W-JVF1-F04K-H07H-00000-00&context=). In filing an ANDA to obtain approval for a generic drug, a generic manufacturer must certify, in one of four ways specified by statute, that the generic does not infringe any of the patents that the brand company listed in the Orange Book. See [*21 U.S.C. § 355(j)(2)(A)(vii)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNC1-NRF4-4393-00000-00&context=). In a "Paragraph IV" certification, the ANDA filer certifies that the patent claiming the brand drug "is invalid or will not be infringed by the manufacture, use, or sale of the" proposed generic. Id. at [*§ 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=). This certification constitutes**[\*6]** a constructive act of infringement, granting the brand company standing to sue the ANDA filer. See [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., 814 F.3d at 543*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J4W-JVF1-F04K-H07H-00000-00&context=); *35 U.S.C. § 271(e)(2)(A)*. The brand company may initiate patent infringement litigation against the ANDA filer within 45 days after receiving notice of the certification. [*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=). See [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., 814 F.3d at 543*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J4W-JVF1-F04K-H07H-00000-00&context=). This litigation also triggers an automatic 30-month stay of FDA approval of the ANDA. Id.

On December 29, 2009, Actavis was the first to file an ANDA to manufacture and sell a generic version of Intuniv, and included a Paragraph IV certification as to all three Intuniv patents. CAC ¶¶ 53-54. The first filer of an ANDA, if successful, "will receive a 180-day period of exclusivity during which 'no other generic can compete with the brand-name drug.'" [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., 814 F.3d at 543*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J4W-JVF1-F04K-H07H-00000-00&context=) (quoting [*FTC v. Actavis, 570 U.S. 136, 133 S. Ct. 2223, 2229, 186 L. Ed. 2d 343 (2013))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). See [*21 U.S.C. § 355(j)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNC1-NRF4-4393-00000-00&context=). One relevant exception, however, is that the brand company itself can market an "authorized generic" ("AG") during this 180-day, first-filer exclusivity period.[[1]](#footnote-0)1 See [*Sanofi-Aventis v. Apotex Inc., 659 F.3d 1171, 1175 (Fed. Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83F7-NKH1-652G-21KK-00000-00&context=) ("[T]he branded company may still market an authorized generic during this 180-day exclusivity period."). See also [*Mylan Pharms., Inc. v. U.S. Food And Drug Admin., 454 F.3d 270, 271 (4th Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KBG-GSG0-0038-X02N-00000-00&context=) (holding that Hatch-Waxman Act**[\*7]** "does not grant the FDA the power to prohibit the marketing of authorized generics during the 180-day exclusivity period"); [*Teva Pharm. Indus. Ltd. v. Crawford, 410 F.3d 51, 52, 366 U.S. App. D.C. 203 (D.C. Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4G9V-3JH0-0038-X1YX-00000-00&context=) (same).

Shortly after Actavis filed its ANDA, TWi Phamaceuticals, Inc. ("TWi") and Anchen Pharmaceuticals, Inc. ("Anchen") (together, "Twi/Anchen")[[2]](#footnote-1)2 each filed ANDAs with Paragraph IV certifications on January 25, 2010 and January 28, 2010, respectively. CAC ¶¶ 56-57. Teva Pharmaceuticals, Inc. ("Teva"), Watson Pharmaceuticals, Impax Laboratories, Inc. ("Impax"), Mylan Pharmaceuticals, and Sandoz Inc. also filed ANDAs with Paragraph IV certifications in 2010 and 2011. Id. ¶¶ 57, 59.

Shire initiated patent infringement litigation against each of the ANDA filers, which the IPPs contend amounted to sham litigation. Id. ¶¶ 1, 59. The CAC emphasizes parts of the litigation that purportedly revealed Shire's anticompetitive behavior and weak patents. For instance, on March 22, 2012, Shire dedicated the '290 Patent to the public shortly before it would have been required to make expert disclosures. Id. ¶ 62. With Actavis's support, Shire then moved to dismiss the '290 Patent claims without judgment. Id. ¶ 64. Nevertheless, on July 23, 2012, the court entered a judgment finding the '290 Patent invalid.**[\*8]** Id. ¶ 66. The IPPs claim that Actavis's support of the motion for dismissal without judgment was the first step in an anticompetitive scheme, because without a judgment against the '290 patent, even if the second ANDA filer, TWi/Anchen, "achieved victory against Shire's '599 and '794 Patents (triggering Actavis's exclusivity as to those patents), it still could not have launched a generic Intuniv until 180 days after Actavis's launch because the '290 Patent's exclusivity would have still been in effect." Id. ¶ 64.

The IPPs further claim that Shire had a "weak litigation position" with respect to the '599 and '794 Patents, which were "formulation" patents that were generally at a higher risk of invalidation. Id. ¶ 68. In March 2012, in Shire's cases against TWi/Anchen and Impax, the courts issued claim construction orders that were unfavorable to Shire. Id. ¶ 69. In both instances, Shire moved for reconsideration but both motions were denied. Id. These examples are purportedly indicative of Shire's overall strategy to prolong litigation through "untimely expert disclosures, motions for discovery, and other litigation tactics" in order to maintain its monopoly. Id. ¶ 71.

On or around September 4, 2012, Shire allegedly took a key step toward**[\*9]** accomplishing its anticompetitive scheme by settling the Intuniv patent litigation with TWi/Anchen. Id. ¶¶ 72, 79. Upon information and belief, the settlement agreement made TWi/Anchen an AG distributor of Intuniv. Id. ¶ 78. On September 6, 2012, Shire issued a press release regarding the settlement, stating that Shire may authorize Twi/Anchen to sell an AG version of Intuniv, in exchange for which Shire would receive a "significant royalty." Id. ¶ 77. TWi/Anchen also could market its own generic version of Intuniv beginning on July 1, 2016, "or earlier in certain limited circumstances." Id. In the event that the first ANDA filer, Actavis, did not settle its patent litigation with Shire and released its own generic, Twi/Anchen could launch a Shire AG to compete with Actavis during its 180-day exclusivity period. Id. ¶ 78. These settlement terms allegedly gave Shire substantial leverage over Actavis. Id. ¶ 79. In short, even if Actavis prevailed over Shire in the pending litigation and began marketing its generic Intuniv, Twi/Anchen could launch the AG during Actavis's 180-day exclusivity period and cut into Actavis's profits. Id.

Although Shire had settled with Twi/Anchen, litigation**[\*10]** remained pending against Actavis and Teva. Id. ¶ 87. From September 17 through September 20, 2012, a bench trial was held as to the '599 and '794 Patents. Id. The IPPs allege that Wall Street analysts believed that the generic drug defendants were going to prevail. Id. ¶¶ 88, 91. However, Shire delayed the ruling following the bench trial by a "frivolous and non-substantive post-trial motions practice." Id. ¶ 89.

On or around April 25, 2013, Shire and Actavis accomplished another key step in implementing the anticompetitive scheme: they settled the patent litigation between them prior to the entry of a court decision. Id. ¶ 93. On April 25, 2013, Shire and Actavis entered into a Settlement Agreement, which also incorporated by reference a related License Agreement. [ECF No. 53-10]. That same day Shire and Actavis also issued press releases stating that Actavis could launch its own generic Intuniv on December 1, 2014 and would pay Shire 25% royalties on gross profits, which the IPPs assert was a commercially unreasonably low rate. Id. ¶ 96. Additionally, the IPPs claim that Shire agreed as part of the settlement not to launch an AG during Actavis's 180-day exclusivity period (a so-called "no-AG agreement").**[\*11]**[[3]](#footnote-2)3 Id. ¶ 98.

In sum, the IPPs assert that the no-AG agreement and the low royalty rates negotiated with TWi/Anchen and Actavis constitute unlawful "reverse payments" under [*FTC v. Actavis, 570 U.S. 136, 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=). See [*id. at 2227*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=) (generally describing a "'reverse payment' settlement agreement" as one that "requires the patentee to pay the alleged infringer, rather than the other way around"). Moreover, absent Shire's assertion of the Intuniv Patents in sham litigation and the subsequent settlements, Actavis could have launched its generic starting on October 5, 2012, the day the FDA approved Actavis's ANDA (shortly after the 30-month stay expired). Id. ¶ 90. As a result of the anticompetitive scheme, however, Shire was able to prolong its Intuniv monopoly until December 1, 2014 and then shared in the monopoly profits with Actavis during Actavis's statutorily granted 180-day exclusivity period. Therefore, purchasers of Intuniv paid artificially inflated prices until at least December 1, 2014, and likely until July 2015, when other generics entered the market. Id. ¶ 10.

**C. Causes of Action**

The CAC asserts 25 causes of action under state law. In Counts 1-4, the IPPs allege, under Massachusetts law, (1) unreasonable restraint of trade against**[\*12]** Shire and Actavis (premised on *Section 1 of the Sherman Act*); (2) unlawful monopoly against Shire (premised on *Section 2 of the Sherman Act*); (3) unlawful attempted monopolization against Shire (premised on *Section 2 of the Sherman Act*); and (4) unlawful conspiracy to monopolize against Shire and Actavis (premised on *Section 2 of the Sherman Act*). In Count 5, they allege a violation of the Massachusetts Consumer Protection Statute against Shire and Actavis (not premised on the *Sherman Act*).

The remaining claims mirror those above, except they are brought under consumer protection and/or ***antitrust*** laws of Florida (Counts 6-10), Missouri (Counts 11-15), New York (Counts 16-20), and Wisconsin (Counts 21-25).

**III. LEGAL STANDARD**

On a motion to dismiss for failure to state a claim pursuant to [*Federal Rule of Civil Procedure 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), the Court must accept as true all well-pleaded facts, analyze those facts in the light most hospitable to the plaintiff's theory, and draw all reasonable inferences from those facts in favor of the plaintiff. [*U.S. ex rel. Hutcheson v. Blackstone Med. Inc., 647 F.3d 377, 383 (1st Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:530K-MKS1-F04K-H01S-00000-00&context=). In ruling on a motion under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), the Court "must consider the complaint, documents annexed to it, and other materials fairly incorporated within it," which "sometimes includes documents referred to in the complaint but not annexed**[\*13]** to it" and "matters that are susceptible to judicial notice." [*Rodi v. S. New Eng. Sch. of Law., 389 F.3d 5, 12 (1st Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DS4-2BR0-0038-X55F-00000-00&context=).

Although detailed factual allegations are not required, a complaint must set forth "more than labels and conclusions." [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 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=). A "formulaic recitation of the elements of a cause of action" is not enough. Id. To avoid dismissal, a complaint must set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." [*Gagliardi v. Sullivan, 513 F.3d 301, 305 (1st Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RMD-H8V0-TXFX-32W0-00000-00&context=) (internal quotations and citation omitted).

Further, the facts alleged, when taken together, must be sufficient to "state a claim to relief that is plausible on its face." [*A.G. ex rel. Maddox v. Elsevier, Inc., 732 F.3d 77, 80 (1st Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59KP-FGK1-F04K-H079-00000-00&context=) (quoting [*Twombly 550 U.S. at 570*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)). "The plausibility standard invites a two-step pavane." Id. (quoting [*Grajales v. P.R. Ports Auth., 682 F.3d 40, 45 (1st Cir. 2012))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55W6-N831-F04K-H04T-00000-00&context=). "At the first step, the court 'must separate the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited).'" Id. (quoting [*Morales-Cruz v. Univ. of P.R., 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=). "At the second step, the court must determine whether the remaining factual content allows a 'reasonable inference that the defendant is liable for the misconduct alleged.'" Id. (quoting [*Morales-Cruz, 676 F.3d at 224*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55CH-YG01-F04K-H003-00000-00&context=)). "Although not equivalent to a probability requirement, the plausibility standard asks for more**[\*14]** than a sheer possibility that a defendant has acted unlawfully." [*Boroian v. Mueller, 616 F.3d 60, 65 (1st Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:50S3-N7M1-652P-Y001-00000-00&context=) (internal quotations and citation omitted). See also [*Sepulveda-Villarini v. Dep't of Educ. of P.R., 628 F.3d 25, 29 (1st Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51NP-KGX1-652P-Y000-00000-00&context=) (citing [*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=) ("The make-or-break standard . . . is that the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief.").

**IV. DISCUSSION**

All but five of the IPPs' claims rely on two theories of ***antitrust*** liability premised on Sherman Act violations: first, that Shire engaged in sham litigation, and second, that Shire entered into illegal reverse payment settlement agreements with Actavis and non-party TWi/Anchen.[[4]](#footnote-3)4 Under federal law, indirect purchasers cannot bring ***antitrust*** claims for damages under the Sherman Act. See [*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=). See also [*California v. ARC Am. Corp., 490 U.S. 93, 100, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BF10-003B-42H3-00000-00&context=) ("Under federal law, no indirect purchaser is entitled to sue for damages for a Sherman Act violation. . . ."). Following Illinois Brick, various states passed legislation granting indirect purchasers standing to sue under state ***antitrust*** laws. See Newberg on Class Actions § 20:12 (5th ed.). The Supreme Court has upheld the validity of such legislation. See [*ARC Am. Corp., 490 U.S. at 101*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BF10-003B-42H3-00000-00&context=). The remaining five claims (Counts 5, 10, 15, 20, and 25) are not premised on Sherman Act violations and instead allege violations of each applicable**[\*15]** state's consumer protection or ***antitrust*** laws (Massachusetts, Florida, Missouri, New York, and Wisconsin, respectively).

Shire argues that the IPPs failed to plausibly allege unlawful conduct or injury based on Shire's assertion of the '290 Patent during litigation. With respect to the reverse payment claims, the Defendants argue that, in light of the settlement documents, the IPPs' allegations fail to plead the existence of a no-AG agreement and that a royalty payment, whatever the size, is a lawful forward payment. Shire also asserts that the IPPs fail to adequately plead the value of the reverse payments in the Shire-TWi/Anchen settlement agreement.

**A. Elements of Violations of *Sections 1* and *2 of the Sherman Act***

*Section 1 of the Sherman Act* prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." See *15 U.S.C. § 1*. See also [*In re Nexium (Esomeprazole)* ***Antitrust*** *Litig., 309 F.R.D. 107, 140 (D. Mass. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GJV-KPS1-F04D-D0KV-00000-00&context=), as amended (Aug. 7, 2015), aff'd, [*842 F.3d 34 (1st Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M73-M0F1-F04K-H003-00000-00&context=). The First Circuit has explained:

There are two prerequisites for a successful *section 1* claim. First, there must be concerted action. Second, the actors' agreement must involve either restrictions that are per se illegal or restraints of trade that fail scrutiny under the rule of reason.**[\*16]**

[*Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11, 16 (1st Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CDC-71D0-0038-X0F9-00000-00&context=) (internal citations omitted).

Under *Section 2* of the Sherman Act, it is illegal to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States." *15 U.S.C. § 2*. To prove monopolization, a plaintiff must show "(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." [*Diaz 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=). To prove attempted monopolization, a plaintiff must show "(1) that 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." Id. (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=). To prove conspiracy to monopolize, "a plaintiff must show: '(1) the existence of a conspiracy, (2) an overt act in furtherance of the conspiracy, and (3) specific intent to monopolize.'" [*Sterling Merch., Inc. v. Nestle, S.A., 724 F. Supp. 2d 245, 273 (D.P.R. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YSM-DMW1-652J-K00S-00000-00&context=), aff'd, [*656 F.3d 112 (1st Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:8337-V571-652P-Y05B-00000-00&context=) (quoting [*Dyno Nobel, Inc. v. Amotech Corp., 63 F. Supp. 2d 140, 150 (D.P.R. 1999))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WYF-4WB0-0038-Y3MW-00000-00&context=).

**B. Sham Litigation**

i. Background Legal Principles

The Noerr-Pennington doctrine, which arose in ***antitrust*** cases under the Sherman Act, holds that "[t]hose who petition government for redress are generally immune from ***antitrust*** liability." [*Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56, 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=) (hereinafter, "PRE"). **[\*17]**Noerr-Pennington immunity extends to "petitioning" activities before the courts (*i.e.*, litigation). See [*Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DB70-003B-S53W-00000-00&context=). There are exceptions to Noerr-Pennington immunity, however, including when a defendant engages in sham litigation. See [*Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1071 (Fed. Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S95-X9P0-003B-91BC-00000-00&context=).[[5]](#footnote-4)5

In order to bring a sham litigation claim, a plaintiff must plausibly plead that the litigation 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.

[*In re Solodyn (Minocycline Hydrochloride)* ***Antitrust*** *Litig., No. 14-md-02503, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at \*11 (D. Mass. Sept. 16, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=) (quoting [*PRE, 508 U.S. at 60-61*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJ6-FCR0-003B-R0M3-00000-00&context=)). "The existence of probable cause to institute legal proceedings precludes a finding that an ***antitrust*** defendant has engaged in sham litigation." [*PRE, 508 U.S. at 62*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJ6-FCR0-003B-R0M3-00000-00&context=). Further, "[o]nly if challenged litigation is objectively meritless may a court examine**[\*18]** the litigant's subjective motivation." [*Id. at 60*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJ6-FCR0-003B-R0M3-00000-00&context=).

ii. Analysis

No reasonable reading of the CAC would give Shire sufficient notice that the sham litigation claims are based not only on the '290 Patent, but also on the '599 and '794 Patents. For example, the four paragraphs of the CAC cited by the IPPs in their opposition and in support of their argument that the sham litigation is based on all of the Intuniv Patents, only fairly contemplate a sham litigation claim premised on the '290 Patent. See CAC ¶ 62 (discussing only '290 Patent); id. ¶ 64 (discussing '290 Patent and only mentioning other patents to state that "even if TWi/Anchen achieved victory against Shire's '599 and '794 Patents (triggering Actavis's exclusivity as to those patents), it still could not have launched a generic Intuniv until 180 days after Actavis's launch because the '290 Patent's exclusivity would have still been in effect"); id. ¶ 67 (discussing only '290 Patent); id. ¶ 71 ("Shire's conduct underscores the baselessness of its patent litigation, which was designed to delay generic entry rather than to vindicate valid patent rights."). Because the CAC did not allege that the sham litigation claims included the '599 and '794 Patents, the IPPs cannot now restyle their claims. See [*Cabi v. Boston Children's Hosp., 161 F. Supp. 3d 136, 159 (D. Mass. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J2V-VS31-F04D-D12D-00000-00&context=) ("Plaintiffs are limited to the claims that are raised**[\*19]** in the complaint."); [*Portfolioscope, Inc. v. I-Flex Sols. Ltd., 473 F.Supp.2d 252, 256 (D. Mass. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4N2F-S9N0-TVVD-N3DN-00000-00&context=) (noting that "it is axiomatic that a [p]laintiff may not amend its pleadings in the opposition memorandum").

Furthermore, the CAC does not plausibly allege that, at the time that the patent litigation was instituted, the assertion of any of the Intuniv Patents was objectively baseless and subjectively motivated by a desire to interfere with the business relationships of a competitor, both of which are elements required to plead a sham litigation claim. See [*Solodyn, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at \*11*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=). A statutory presumption under [*35 U.S.C. § 282*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMM1-NRF4-40YJ-00000-00&context=) provides that a patent, including a method-of-use or formulation patent, is valid. See [*Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 100, 131 S. Ct. 2238, 180 L. Ed. 2d 131 (2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5328-SNS1-F04K-F44H-00000-00&context=) (applying presumption of validity to method-of-use patents); [*Cadence Pharms., Inc. v Exela PharmSci Inc., 780 F.3d 1364, 1375 (Fed. Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FK6-FGM1-F04B-M052-00000-00&context=) (applying presumption of validity to formulation patents). In determining whether the IPPs have stated plausible claims, the Court does not credit the purely conclusory legal allegations that the '290 Patent was "objectively baseless" or that Shire engaged in "sham patent litigation." Moreover, merely losing a patent infringement suit does not alone subject a company to ***antitrust*** liability. See [*FilmTec Corp. v. Hydranautics, 67 F.3d 931, 936 (Fed. Cir. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-M2T0-003N-41HM-00000-00&context=) ("[J]ust because the patentee loses, he does not lose his immunity from ***antitrust*** liability. Liability turns on whether the**[\*20]** suit is a sham, that is, on the nature of and the underlying merits of the patentee's case."). See also [*Organon Inc. v. Mylan Pharms., Inc., 293 F. Supp. 2d 453, 461 (D.N.J. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4B65-K960-0038-Y31C-00000-00&context=) ("In applying the first objective prong of the 'sham' litigation test, the Supreme Court in PRE cautioned that, where the lawsuit was ultimately unsuccessful, courts should resist the temptation to engage in post hoc reasoning by concluding that the unsuccessful lawsuit must not have been unreasonable or without foundation.").

Further, the IPPs' claims that the Intuniv Patents were "weak" or that after the litigation began, they appeared likely to be invalidated, do not plausibly suggest that Shire's initiation of the litigation was objectively baseless, nor do the IPPs' claims suggest that Shire was motivated by a desire to interfere with the generic companies' business relationships. See [*Braintree Labs., Inc. v. Schwarz Pharma, Inc., 568 F. Supp. 2d 487, 497 (D. Del. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4T44-8W30-TXFP-J2F9-00000-00&context=) ("Even a potentially 'weak' patent enjoys a presumption of validity."); [*Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 13-cv-00740, 2013 U.S. Dist. LEXIS 177836, 2013 WL 6682981, at \*7 (E.D. Va. Dec. 18, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B37-DFD1-F04F-F2RH-00000-00&context=) (dismissing sham litigation claim where, even though plaintiff alleged that the patents were "unenforceable or so weak that . . . they have limited commercial value," it failed to "allege any specific litigation history to support that claim or identify**[\*21]** any particular patents [the defendant] has attempted or threatened to enforce that have expired, been cancelled or adjudicated to be invalid"). At base, the CAC does not contain sufficient factual allegations to allow the Court to reasonably infer that there was no "probable cause to institute legal proceedings" based on the Intuniv Patents. See [*PRE, 508 U.S. at 62*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJ6-FCR0-003B-R0M3-00000-00&context=). The dismissal, however, is without prejudice and the IPPs may seek leave to amend their complaint with respect to the sham litigation claims.

**C. Reverse Payment Settlements**

i. The Standard For Unlawful Reverse Payments

In [*FTC v. Actavis, 133 S. Ct. at 2227*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=), the Supreme Court held that settlements in which a patent holder, who originally brought suit for patent infringement, pays a patent challenger to delay entry of its generic into the market, can be actionable under federal ***antitrust*** laws. Such pay-to-delay provisions in settlement agreements are commonly referred to as "reverse payments." The First Circuit subsequently decided that non-cash payments can also constitute actionable reverse payments within the meaning of FTC v. Actavis. See [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., 814 F.3d at 549*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J4W-JVF1-F04K-H07H-00000-00&context=).

In order to determine whether a reverse payment is unlawful, the Supreme Court instructs**[\*22]** courts to apply a rule of reason analysis. See [*FTC v. Actavis, 133 S. Ct. at 2237*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=); [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., 814 F.3d at 544-545*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J4W-JVF1-F04K-H07H-00000-00&context=) (quoting [*Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343-344, 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=) ("The 'rule of reason' is a means of evaluating a restraint on trade and determining 'whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.'").[[6]](#footnote-5)6 "[I]t is the prevention of that risk of competition—eliminating 'the risk of patent invalidation or a finding of noninfringement' by 'paying the challenger to stay out' of the market (for longer than the patent's strength would otherwise allow)—that 'constitutes the relevant anticompetitive harm,' which must then be analyzed under the rule of reason." [*King Drug Co. of Florence v. Smithkline Beecham Corp., 791 F.3d 388, 404 (3d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G9F-WC71-F04K-K028-00000-00&context=), cert. denied, *137 S. Ct. 446, 196 L. Ed. 2d 328 (2016)* (quoting [*FTC v. Actavis, 133 S. Ct. at 2236-2237*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=)). The rule of reason analysis helps determine whether the complained of conduct results in "significant unjustified anticompetitive consequences." [*FTC v. Actavis, 133 S. Ct. at 2238*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). Thus, in applying the rule of reason to reverse payments, courts should consider "[the reverse payment's] 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." [*FTC v. Actavis, 133 S. Ct. at 2237*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). Moreover, the rule of reason**[\*23]** eventually requires a plaintiff to prove "that the alleged agreement involved the exercise of power in a relevant economic market, that this exercise had anti-competitive consequences, and that those detriments outweighed efficiencies or other economic benefits." [*Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CPF-49N0-0038-X3XG-00000-00&context=).

In In re Nexium (Esomeprazole) ***Antitrust*** Litig., the First Circuit stated that, under a functional application of FTC v. Actavis, "'no-AG' provisions . . . may constitute a reverse payment subject to ***antitrust*** scrutiny."[[7]](#footnote-6)7 [*In re Nexium (Esomeprazole)* ***Antitrust*** *Litig., 842 F.3d 34, 42 (1st Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M73-M0F1-F04K-H003-00000-00&context=). Even if arguably dictum, as Actavis suggests, this conclusion merits some weight. See [*Haag v. United States, 736 F.3d 66, 70 (1st Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59X7-GM61-F04K-H0DD-00000-00&context=) (quoting [*Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 459 (1st Cir. 1992))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1P20-008H-V0DT-00000-00&context=) ("-[C]ourts often, quite properly, give considerable weight to dictum—particularly to dictum that seems considered as opposed to casual.'").[[8]](#footnote-7)8

Moreover, other courts have explicitly held that no-AG agreements can constitute illegal reverse payments. See [*King Drug Co. of Florence, 791 F.3d at 403*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G9F-WC71-F04K-K028-00000-00&context=) ("[W]e think that a no-AG agreement, when it represents an unexplained large transfer of value from the patent holder to the alleged infringer, may be subject to ***antitrust*** scrutiny under the rule of reason."). See also**[\*24]** [*In re Opana ER Antritrust Litig., 162 F. Supp. 3d 704, 717 (N.D. Ill. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J2G-0M61-F04D-732D-00000-00&context=) (holding that the no-AG agreement could be a reverse payment because "the [no-AG agreement] transferred the profits [brand company] would have made from its AG to [generic company]—plus potentially more, in the form of higher prices, because it enabled [generic company] to have a generic monopoly instead of a generic duopoly"); [*In re Actos End Payor* ***Antitrust*** *Litig., No. 13-cv-9244, 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at \*18 (S.D.N.Y. Sept. 22, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H0F-6HM1-F04F-017W-00000-00&context=), aff'd in part and vacated on other grounds, [*848 F.3d 89 (2d Cir. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MTX-KYT1-F04K-J006-00000-00&context=) ("The Court agrees with Plaintiffs that such arrangements [no-AG agreements] trigger ***antitrust*** scrutiny due to their potential anticompetitive effect."); [*In re Aggrenox* ***Antitrust*** *Litig., 94 F. Supp. 3d at 242-243*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FK7-J4F1-F04C-W0D6-00000-00&context=) (holding that no-AG agreement may constitute large and unjustified reverse payment); [*United Food & Commercial Workers Local 1776 v. Teikoku Pharma USA, Inc., 74 F. Supp. 3d 1052, 1070 (N.D. Cal. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DMF-SK01-F04C-T341-00000-00&context=) ("I agree with the courts who have held that a no-authorized-generic term can constitute a payment."); [*In re Niaspan* ***Antitrust*** *Litig., 42 F. Supp. 3d 735, 751 (E.D. Pa. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D3F-3Y11-F04F-42BD-00000-00&context=) (holding that no-AG provision may constitute unlawful reverse payment); [*In re Nexium (Esomeprazole)* ***Antitrust*** *Litig., 968 F. Supp. 2d 367, 392 (D. Mass. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59BB-KNF1-F04D-D05Y-00000-00&context=) ("This Court does not see fit to read into the [FTC v. Actavis] opinion a strict limitation of its principles to monetary-based arrangements alone.").

In short, it is well recognized that a generic monopoly during the 180-day exclusivity period is highly lucrative. See [*FTC v. Actavis, 133 S. Ct. at 2229*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=) (quoting Hemphill, Paying for Delay: Pharmaceutical Patent Settlement as a ***Regulatory* [\*25]** Design Problem, [*81 N.Y.U. L. Rev. 1553, 1579 (2006)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4M7M-08X0-02BN-1029-00000-00&context=)) (noting that first-to-file exclusivity period is "possibly 'worth several hundred million dollars'"). If a brand company markets an AG during this period, it captures part of the generic market, and thereby cuts into the generic company's revenue. When a brand company promises not to market an AG during that time period, it gives up its potential share of the generic market, ceding it to the generic company, which effectively transfers value to the generic company. Further, the First Circuit has already held that reverse payments may take the form of non-cash payments, thereby rejecting a literal reading of FTC v. Actavis. See [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., 814 F.3d at 549*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J4W-JVF1-F04K-H07H-00000-00&context=). Accordingly, an agreement not to market an AG in exchange for a patent challenger abandoning its lawsuit can constitute a meaningful transfer of value from the brand company to the generic company that has unjustified anticompetitive consequences.

Actavis attempts to distinguish [*King Drug Co. of Florence, 791 F.3d at 393, 397*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G9F-WC71-F04K-K028-00000-00&context=)—in which the Third Circuit held that a no-AG agreement may constitute an illegal reverse payment—because the no-AG agreement in King Drug Co. of Florence, unlike here, involved a provision that precluded the marketing**[\*26]** of the AG after the expiration of the patents at issue, and was thus not part of the exclusive patent license. In reaching its decision in FTC v. Actavis, however, the Supreme Court explicitly assumed "that the [settlement] agreement's anticompetitive effects fall within the scope of the exclusionary potential of the patent," and nonetheless held that such an agreement could violate the ***antitrust*** laws. [*FTC v. Actavis, 133 S. Ct. at 2230*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=) (emphasis added). [*Seealso King Drug Co. of Florence, 791 F.3d at 393*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G9F-WC71-F04K-K028-00000-00&context=) ("The [Supreme] Court rejected the near-irrebuttable presumption, known as the 'scope of the patent' test, that a patentee can make such reverse payments so long as it is paying potential competitors not to challenge its patent within the patent's lifetime."). When there is litigation that challenges both "the patent's validity" and "its actual preclusive scope," "it would be incongruous to determine ***antitrust*** legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive ***antitrust*** policies as well." [*FTC v. Actavis, 133 S. Ct. at 2231*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). Actavis does not attempt to distinguish any of the other cases that hold that a no-AG agreement can be an illegal reverse payment, including those that explicitly reject the very**[\*27]** argument that Actavis raises here. See e.g., [*Teikoku, 74 F. Supp. 3d at 1070-71*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DMF-SK01-F04C-T341-00000-00&context=) (rejecting argument that a no-AG agreement is not subject to ***antitrust*** scrutiny because it is a partially exclusive license); [*Niaspan, 42 F. Supp. 3d at 751*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D3F-3Y11-F04F-42BD-00000-00&context=) ("[T]he Court rejects defendants' argument that a no-AG provision has the same economic effect as the grant of an exclusive license to enter the market prior to the expiration of a patent."). Thus, the argument that a no-AG agreement is simply an exclusive license not subject to ***antitrust*** scrutiny is unavailing.

Accordingly, the Court holds that a no-AG agreement, even one involving a time period during the pendency of a patent, can constitute an illegal reverse payment within the scope of [*FTC v. Actavis*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). Even if no-AG agreements may constitute actionable reverse payments, however, they are still subject to a rule-of-reason analysis to determine their legality. See [*In re Aggrenox* ***Antitrust*** *Litig., 94 F. Supp. 3d 224, 243 (D. Conn. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FK7-J4F1-F04C-W0D6-00000-00&context=) ("Such a settlement, under [FTC v. Actavis], is not ipso facto unlawful: the parties to the settlement might be able to explain the apparent 'missing' value for the patent-holder in a procompetitive way—and they will have an opportunity to do so under the rule-of-reason framework—in which case the reverse payment may turn out to be justified, or to be**[\*28]** entirely illusory.").

ii. Documents External to the Complaint

The parties disagree about whether, at this stage of the case, Defendants may rely upon documents not accompanying the CAC, including documents memorializing the settlements with both Actavis and TWi/Anchen. The IPPs do not appear to challenge the settlement documents' authenticity. Instead, they argue that the settlement documents are incomplete and ambiguous because they were not produced with all of the attachments, are out of context, could not be evaluated by their experts, and do not necessarily eliminate the existence of side deals. The Court "must consider the complaint, documents annexed to it, and other materials fairly incorporated within it," which "sometimes includes documents referred to in the complaint but not annexed to it" and "matters that are susceptible to judicial notice." [*Rodi, 389 F.3d at 12*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DS4-2BR0-0038-X55F-00000-00&context=). Even considering the documents at issue, however, dismissal of the reverse payment claims is not warranted at this stage.

iii. Shire-Actavis Settlement

With respect to the Shire-Actavis settlement, the IPPs allege that there were two illegal reverse payments: a no-AG agreement and a below-market royalty rate.

*1. No-AG Agreement*

The IPPs**[\*29]** allege that as part of the settlement with Actavis, Shire agreed not to launch its AG during Actavis's 180-day exclusivity period. The Defendants argue that the documents that memorialize the settlement agreement unambiguously contradict this allegation because [TEXT REDACTED BY THE COURT] The IPPs claim that there was nonetheless a tacit no-AG agreement. Even assuming this to be true, Actavis responds that a no-AG agreement is not a reverse payment within the meaning of FTC v. Actavis.

Anticompetitive conduct violates the Sherman Act when it stems from "an agreement, tacit or express" and is thus not a product of an "independent decision." [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553, 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=) (citation omitted). To allege a plausible ***antitrust*** conspiracy, "a complaint must at least allege the general contours of when an agreement was made, supporting those allegations with a context that tends to make said agreement plausible." [*Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 46 (1st Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58PB-22M1-F04K-H004-00000-00&context=). Although mere allegations of parallel conduct that is possibly anticompetitive, without any suggestion of an agreement to engage in such conduct, are insufficient under [*Twombly, 550 U.S. at 556*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=) ("[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice."), the First Circuit has specifically cautioned**[\*30]** against heightening the pleading requirements for ***antitrust*** cases. See [*Evergreen Partnering Grp., 720 F.3d 33 at 45-47*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58PB-22M1-F04K-H004-00000-00&context=). The Twombly Court explained that "when allegations of parallel conduct are set out in order to make a *[Sherman Act] § 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." [*Twombly, 550 U.S. at 557*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). However, "allegations contextualizing agreement need not make any unlawful agreement more likely than independent action nor need they rule out the possibility of independent action at the motion to dismiss stage." [*Evergreen Partnering Grp., 720 F.3d at 47*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58PB-22M1-F04K-H004-00000-00&context=).

The License Agreement between Shire and Actavis states that [TEXT REDACTED BY THE COURT] [ECF No. 53-10 at ¶ 2.3]. This explicit reservation, however, does not on its own preclude the existence of an implicit no-AG agreement, and the IPPs have pleaded sufficient allegations to infer that it plausibly existed. Defendants' emphasis on case law holding that a document incorporated into the complaint trumps contradictory allegations is misplaced, because the License Agreement does not, at this stage, directly contradict the existence of a no-AG agreement, given the possibility of either an implicit or oral agreement.

In support**[\*31]** of their claims that a no-AG agreement existed, the IPPs allege that Shire publicly announced a plan to launch an AG through TWi/Anchen in the event that an unlicensed generic was launched, but nonetheless did not launch an AG at all, despite the fact that Shire was incentivized to launch its own AG to compete with Actavis's generic. CAC ¶¶ 77, 78, 101. Additionally, a FTC study indicates that the vast majority of brand companies choose to launch an AG during a generic company's 180-day exclusivity period. Id. ¶ 99. Absent an AG launch, Shire lost 91% of the Intuniv market within six months of the entry of the Intuniv generic. Id. ¶ 99. Moreover, by settling with the first ANDA filer, Shire disincentivized other generics from pursuing their own patent litigation since they would not have been able to launch a generic during the 180-day exclusivity period anyway. Id. ¶ 105. Overall, the CAC allows the Court to infer who formed the conspiracy (Shire and Actavis), when it was formed (around the same time as the documented settlement agreement), and what the terms of the conspiracy were (that Shire would not launch an AG during Actavis's 180-day exclusivity period in exchange for Actavis**[\*32]** dropping its patent suit). Finally, the CAC sufficiently estimates the value of the no-AG agreement, and alleges that it was a large and unjustified reverse payment. See Id. ¶ 101 (explaining why the no-AG agreement was worth approximately $50 million); Id. ¶ 102 (alleging that the value of the no-AG agreement "vastly exceeded Shire's future anticipated litigation costs").

At this stage, the IPPs need not eliminate the possibility of lawful reasons for Shire's decision not to launch an AG or allege facts "that are more consistent with conspiracy than independent action." [ECF No. 67-1 at 16]. The Defendants fail to explain why this Court should ignore the First Circuit's statement that "allegations contextualizing agreement need not make any unlawful agreement more likely than independent action nor need they rule out the possibility of independent action at the motion to dismiss stage." [*Evergreen Partnering Grp., 720 F.3d at 47*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58PB-22M1-F04K-H004-00000-00&context=). Accordingly, the Court can reasonably infer that it is plausible that but for a no-AG agreement, Shire would have launched an AG during Actavis's 180-day exclusivity period.

*2. Below-Market Royalty Rate*

The CAC also alleges that the royalty rate (25%) Actavis paid Shire under the settlement agreement**[\*33]** was, upon information and belief, an "unreasonably, commercially low rate," and "represent[ed] a disguised, large transfer of value from Shire to Actavis." CAC ¶ 96. Defendants argue that the royalty rate, even assuming it was below-market, is a lawful forward payment expressly permitted by the Supreme Court in FTC v. Actavis.

As discussed supra, the First Circuit has interpreted FTC v. Actavis as establishing a "functional" approach to reverse payments and held that a non-cash payment may qualify as a reverse payment. See [*In re Nexium (Esomeprazole)* ***Antitrust*** *Litig., 842 F.3d at 42*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M73-M0F1-F04K-H003-00000-00&context=); [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., 814 F.3d at 549*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J4W-JVF1-F04K-H07H-00000-00&context=). The First Circuit was concerned that reading FTC v. Actavis too narrowly would insulate settlement agreements between drug manufacturers from ***antitrust*** scrutiny as long as they provided non-monetary advantages. [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., 814 F.3d at 551*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J4W-JVF1-F04K-H07H-00000-00&context=). The core holding in FTC v. Actavis is that a large and unjustified reverse payment is "strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market," and can therefore cause anticompetitive harm and trigger ***antitrust*** liability.**[\*34]** [*133 S. Ct. at 2235*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). The sorts of payments subject to ***antitrust*** scrutiny "are said to flow in 'reverse' because 'a party with no claim for damages (something that is usually true of a paragraph IV litigation defendant) walks away with money simply so it will stay away from the patentee's market.'" [*King Drug Co. of Florence, 791 F.3d at 402*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G9F-WC71-F04K-K028-00000-00&context=) (quoting [*FTC v. Actavis, 133 S. Ct. at 2233*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=)).

Here, the royalty provisions at issue mandated that the generic company pay the brand company a certain percentage of its profits (net in the case of TWi/Anchen and gross in the case of Actavis) earned from selling the generic drug. Although the IPPs fail to specify what a typical royalty rate for a license like the one Shire gave Actavis would be, they plead that the royalty rate was unreasonably commercially low, claiming, as a point of comparison, that AG license royalty rates are typically 90%. CAC ¶ 83. In their opposition, the IPPs argue that Actavis's below-market royalty rate resulted in Actavis being able to keep "millions of dollars" that it otherwise would have paid Shire. [ECF No. 59 at 25]. Further, the CAC alleges that Actavis earned approximately $110 million in profit from selling generic Intuniv during its 180-day exclusivity period, CAC ¶ 101,[[9]](#footnote-8)9 and a larger royalty payment on this**[\*35]** amount would have obviously been substantial. Shire's litigation costs were allegedly "minimal" and "negligible" at the time of the settlements. CAC ¶¶ 75, 93.

A sharply discounted royalty rate could permit the generic company to keep a portion of the profits that it otherwise would have turned over to the brand company, had the royalty reflected the competitive market rate. In other words, by agreeing to a below-market royalty rate and thereby giving up a claim to the generic profits, the brand company could transfer value to the generic company. This sort of transfer of value is perhaps analogous to the transfer of value by means of a no-AG agreement: the brand company agrees to give up something of value and thereby permits the generic to capture profits the brand otherwise could have obtained. In this way, a below-market royalty rate could potentially incentivize a generic company to drop a patent challenge, which is the sort of anticompetitive harm that concerned the Supreme Court.

At this stage, however, the Court need not reach the question of whether a below-market royalty rate alone might constitute an unlawful reverse payment. As explained supra, the IPPs have plausibly alleged**[\*36]** a Sherman Act violation based on the existence of a no-AG agreement. The fact that a royalty payment may be lawful on its own does not prohibit the Court from considering it as part of the context of an alleged conspiracy.[[10]](#footnote-9)10 As noted by the Defendants, the FTC v. Actavis Court stated that permissible settlements may, for example, include "allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point." [*FTC v. Actavis, 133 S. Ct. at 2237*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). The Court does not understand FTC v. Actavis, by this statement, to hold that a below-market royalty rate is completely insulated from the Court's consideration, where, as here, the IPPs have plausibly alleged that a no-AG agreement is also a component of the settlement agreement. The Court must "evaluate the cumulative effect of the factual allegations," [*Ocasio-Hernandez v. Fortuño-Burset, 640 F.3d 1, 14 (1st Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52HK-HV61-652P-Y04Y-00000-00&context=), and read "the complaint . . . as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." Id. (quoting [*Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X5P-98C0-YB0V-M00N-00000-00&context=).[[11]](#footnote-10)11

iv. Shire-TWi/Anchen Settlement

The CAC alleges that the royalty rate TWi/Anchen paid Shire under the settlement agreement was, upon information and belief,**[\*37]** "commercially unreasonably low," and constituted a reverse payment in that "Shire traded a significant number of royalty percentage points to TWi/Anchen in exchange for TWi/Anchen settling its strong patent challenge." CAC ¶ 84. Defendants argue that the IPPs fail to adequately allege that the TWi/Anchen settlement contained a reverse payment or that there was a cognizable ***antitrust*** injury as a result of the purportedly unlawful settlement. For substantially the same reasons explained above in the context of the Shire-Actavis settlement, the Court may consider the alleged below-market royalty rate in the Shire-TWi/Anchen settlement as a component of the anticompetitive scheme and does not need to parse each of the IPPs' individual theories of reverse payments at this stage.

With respect to ***antitrust*** injury, "[a] private plaintiff seeking monetary relief must show actual, quantifiable damages 'by reason of' the ***antitrust*** violation." [*In re Nexium (Esomeprazole)* ***Antitrust*** *Litig., 842 F.3d 34, 60 (1st Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M73-M0F1-F04K-H003-00000-00&context=) (quoting [*Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 543, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5500-003B-S0SB-00000-00&context=). The Court notes that because TWi/Anchen launched its generic immediately after FDA approval of its ANDA despite the settlement, the IPPs have failed to plead that they suffered ***antitrust*** injury based on delayed entry of TWi/Anchen's generic as**[\*38]** a result of the TWi/Anchen settlement agreement. See [*Solodyn, 2015 U.S. Dist. LEXIS 125999, 2015 WL 5458570, at \*9*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GYV-HD01-F04D-D05V-00000-00&context=) (holding that "[w]ithout a plausible allegation of delay caused by [d]efendants, the direct purchasers have not alleged a cognizable ***antitrust*** injury" because "[t]he FDA's approval, not an agreement with [the co-defendant], was the limiting factor in [the defendant's] ability to bring generic Solodyn in Legacy Strengths to market."); [*In re Asacol* ***Antitrust*** *Litig., No. 15-cv-12730, 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \*7 (D. Mass. July 20, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K8S-BDB1-F04D-D0KS-00000-00&context=) ("Without FDA approval, 'Plaintiffs cannot claim ***antitrust*** injury on the premise that they should have paid less for a generic product that [the defendant] cannot have sold'" (citations omitted)).

The IPPs argue in their sur-reply, however, that the TWi/Anchen agreement resulted in an ***antitrust*** injury because it "was the springboard by which Shire could corral other generic manufacturers with the threat of the launch of an Intuniv AG." [ECF No. 72-3 at 11]. "[A]ntitrust injury" is an "injury of the type the ***antitrust*** laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." [*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=).[[12]](#footnote-11)12 The Defendants have not responded to this theory of ***antitrust*** injury in their briefs, and may argue against it at summary judgment if they**[\*39]** so choose. At this time, the Court does not dismiss the claims premised on the TWi/Anchen agreement on ***antitrust*** injury grounds.[[13]](#footnote-12)13

v. "Overarching Anticompetitive Scheme"

The IPPs argue that specific claims of anticompetitive conduct in the CAC are components of an "overarching anticompetitive scheme." See e.g., CAC ¶¶ 79, 95. It thus appears that the IPPs are seeking to hold Defendants liable for both the individual instances of purported anticompetitive conduct, such as the no-AG agreement, and also the synergistic effect of that conduct. Defendants argue that the claims should be dismissed if the individual components of the so-called scheme are not independently viable.

"[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." [*Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H8B0-003B-S01X-00000-00&context=) (quoting United [*States v. Patten, 226 U.S. 525, 544, 33 S. Ct. 141, 57 L. Ed. 333 (1913))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8FV0-003B-H4PK-00000-00&context=). Thus, it is not necessarily the case that if individual acts are lawful, they cannot, when viewed as a whole, trigger ***antitrust*** liability. See [*In re Gabapentin Patent Litig., 649 F. Supp. 2d 340, 359 (D.N.J. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X48-CW90-TXFR-F222-00000-00&context=) ("If a plaintiff can allege that a series of actions, when viewed together, were taken in furtherance and as an integral part of a plan to violate the ***antitrust*** laws, that series of actions, as an overall**[\*40]** scheme, may trigger ***antitrust*** liability."). See also [*Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342, 1356 (5th Cir. 1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9R70-0039-W29P-00000-00&context=) ("[N]o one of the instances of improper conduct, standing alone, would lead to *[Sherman Act] section 2* liability. Taken together, however, they show a pattern of exclusionary behavior sufficient to support the jury's verdict."). The Supreme Court instructs that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." [*Cont'l Ore Co., 370 U.S. at 699*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H8B0-003B-S01X-00000-00&context=). As described supra, the Court may consider the individual claims, but must do so in their overall context. As the Ninth Circuit has explained, "[w]e are not dealing with a mathematical equation," but "with what has been called the 'synergistic effect' of the mixture of the elements." [*City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1376 (9th Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5VJ0-008H-V2GK-00000-00&context=) (citation omitted) (explaining that "while our discussion will speak to the specific claims, we emphasize that we have also ruminated upon the effect of combining those claims, but the result of that rumination makes no difference in our ultimate conclusion").

Defendants agree that the Court can consider the individual components in assessing plausibility, see [ECF No. 67-1 at 28], and further do not argue that the particular**[\*41]** "mixture of elements" here does not give rise to a scheme that, when considered on the whole, triggers ***antitrust*** liability. The IPPs have adequately alleged an unlawful reverse payment settlement agreement that may trigger ***antitrust*** liability, and thus do not rely solely on an overarching scheme. Accordingly, the Court does not dismiss any claims on this basis.

**D. State Law-Related Issues**

i. Preemption

Actavis argues that the standalone state law claims are preempted by federal patent law under [*Hunter Douglas, Inc. v. Harmonic Design, Inc., 153 F.3d 1318, 1335 (Fed. Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=), overruled on other grounds, [*Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356 (Fed. Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WDC-17C0-003B-90WV-00000-00&context=). The IPPs argue that the standalone state law claims do not raise exclusively federal patent law elements, and are therefore not preempted.

In [*Hunter Douglas, 153 F.3d at 1321*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=), the Federal Circuit considered whether federal patent law preempted state law claims for, inter alia, state unfair competition laws that prohibited tortious activities in the marketplace. It held that there was no field preemption of state unfair competition laws by federal patent law. [*Id. at 1334*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=) (quoting [*ARC Am. Corp., 490 U.S. at 101*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BF10-003B-42H3-00000-00&context=) ("Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally ***regulated*** by the States."). With respect to conflict preemption,**[\*42]** Hunter Douglas held that state law claims were preempted by federal patent law only "[i]f a plaintiff bases its tort action on conduct that is protected or governed by federal patent law." [*Id. at 1335*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=). Further, "there is conflict preemption when it is impossible for a private party to comply with both state and federal requirements, or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" [*Id. at 1332*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=) (citation omitted) (quoting [*Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GW0-003B-71BR-00000-00&context=). The Hunter Douglas Court explained that whether state law torts conflict with federal patent law is determined on an "as-applied" basis:

If a plaintiff bases its tort action on conduct that is protected or governed by federal patent law, then the plaintiff may not invoke the state law remedy, which must be preempted for conflict with federal patent law. Conversely, if the conduct is not so protected or governed, then the remedy is not preempted.

[*Id. at 1335*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=).

"A state claim is not protected or governed by patent law when it 'address[es] entirely different wrongs[,]' 'provide[s] different forms of relief,' and 'is not an impermissible attempt to offer patent-like protection to subject matter addressed by federal law.'" [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., No. 13-md-2472, 261 F. Supp. 3d 307, 2017 U.S. Dist. LEXIS 150422, 2017 WL 3600938, at \*37 (D.R.I. Aug. 8, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P98-VM01-F2F4-G2JS-00000-00&context=) **[\*43]**(quoting [*Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470, 1478 (Fed. Cir. 1998))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SB0-VT70-003B-91DF-00000-00&context=). See also [*In re Netflix* ***Antitrust*** *Litig., 506 F. Supp. 2d 308, 319 (N.D. Cal. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P1J-0W60-TXFP-C20W-00000-00&context=) (citing [*Dow Chemical Co., 139 F.3d at 1473*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SB0-VT70-003B-91DF-00000-00&context=)) ("Tort claims under state law are not preempted by federal patent law where they include additional elements not found in federal patent law claims."). Here, the remaining claims are based on tortious conduct in the marketplace—*i.e.*, the purportedly illegal settlement agreements—that require different elements than any arguably corresponding federal patent law claim (such as patent invalidity), and are therefore not protected or governed by federal patent law. See [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., at 2017 U.S. Dist. LEXIS 150422, 2017 WL 3600938, at \*38*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P98-VM01-F2F4-G2JS-00000-00&context=) (quoting [*FTC v. Actavis, 133 S. Ct. at 2236-2237*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=)) (holding that "state law claims challenging the alleged unlawful reverse payment" are not preempted by federal patent law because "the Supreme Court has acknowledged that '[i]t is normally not necessary to litigate patent validity to answer the ***antitrust*** question' as '[a] large, unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the patent's validity'").

ii. Other Grounds for Dismissal

*1. Massachusetts*

The Defendants argue that under Massachusetts choice-of-law rules, Massachusetts law does not**[\*44]** apply, and therefore the Counts 1-5 under Mass. Gen. Laws ch. 93A ("Chapter 93A") should be dismissed. Given the complex nature of the facts alleged, including the nature of the purported unlawful conduct and resulting harm, it is premature to conduct the choice-of-law analysis at the motion to dismiss stage prior to discovery. See [*Primarque Prods. Co. v. Williams West & Witt's Prods. Co., No. 15-30067, 2015 U.S. Dist. LEXIS 176288, 2015 WL 10097150, at \*6 n.6 (D. Mass. Nov. 18, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J47-4BP1-F04D-D140-00000-00&context=) (declining to undertake choice-of-law analysis prior to discovery and collecting cases); [*Chinn v. Gen. Motors Corp., No. 07-11249, 2007 U.S. Dist. LEXIS 89977, 2007 WL 4287594, at \*2 (D. Mass. Dec. 7, 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R9C-BRC0-TXFR-031G-00000-00&context=) ("Without a stipulation of the parties, the court is unable to make a choice-of-law determination at this early stage of procedural skirmishing."). Cf. [*In re Fresenius Granuflo/NaturaLyte Dialysate Prods. Liab. Litig., 76 F. Supp. 3d 294, 308 (D. Mass. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F08-J0M1-F04D-D1BC-00000-00&context=) (providing only tentative choice-of-law holding that was subject to change as discovery unfolded). Defendants may raise this argument at summary judgment if appropriate.

Defendants also argue that the standalone Chapter 93A claim (Count 5) should be dismissed because it is coextensive with Counts 1-4, which are premised on Sherman Act violations. Chapter 93A's prohibition of "[u]nfair methods of competition and unfair or deceptive acts or practices" is construed consistently with the "interpretations given by the Federal Trade Commission and the Federal Courts to [*section 5(a)(1) of the Federal Trade Commission Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=)" ("FTCA"). [*Mass. Gen. Laws ch. 93A § 2*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5FF4-8J81-6HMW-V4HM-00000-00&context=). The**[\*45]** Supreme Judicial Court has explained that "[t]he Federal Trade Commission may, under [*§ 5(a)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) of the [FTCA], enforce the ***antitrust*** laws, including the Sherman Act and the Clayton Act, but it is not confined to their specific prohibitions." [*Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 762 N.E.2d 303, 309 (Mass. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:453J-FCP0-0039-41D6-00000-00&context=). Moreover, the Federal Trade Commission "may bar incipient violations of those statutes," as well as "conduct which, although not a violation of the letter or spirit of the ***antitrust*** laws, is nevertheless either an unfair method of competition, or an unfair or deceptive act or practice." Id. See [*Parikh v. Franklin Med. Ctr., 940 F. Supp. 395, 406 (D. Mass. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-BWC0-006F-P2SV-00000-00&context=) ("According to the Supreme Court, [*§ 5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) of the [FTCA] may be used to ban conduct that infringes the spirit, or that constitutes an incipient violation, of the Sherman Act."). As explained supra, the IPPs have plausibly alleged claims for violations of the Sherman Act. Further, at this stage, the alleged anticompetitive conduct plausibly could violate Chapter 93A even if it does not constitute a Sherman Act violation. See [*Ciardi, 762 N.E.2d at 309*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:453J-FCP0-0039-41D6-00000-00&context=). See also [*Growers 1-7 v. Ocean Spray Cranberries, Inc., 2014 U.S. Dist. LEXIS 61654, 2014 WL 1764533, at \*4 (D. Mass. May 2, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5C4J-DF21-F04D-D002-00000-00&context=) (citation omitted) ("A plaintiff may bring a 93A claim even if it is unable to bring a statutory ***antitrust*** claim."); Michael C. Gilleran, Law of Chapter 93A, 52 Mass. Prac. at § 4.12 ("93A claims that satisfy neither the letter**[\*46]** nor the spirit of the ***antitrust*** laws, as long as they establish an unfair method of competition or an unfair or deceptive act or practice, will establish a 93A claim."). Accordingly, the Court will permit Counts 1-5 to proceed but notes specifically as to the standalone claim (Count 5) that at summary judgment, if applicable, the IPPs should clarify the scope of the state law and the Sherman Act in relation to the conduct that may be actionable under either law.[[14]](#footnote-13)14

*2. Florida*

Counts 6-10 allege claims under the [*Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201, et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-MHT1-6SKW-D02M-00000-00&context=), and [*Florida* ***Antitrust*** *Act, Fla. Stat. § 542.15, et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-MHT1-6SKW-D100-00000-00&context=) Defendants argue that Florida law, consistent with Illinois Brick, prohibits indirect purchasers from recovering for damages under the Florida ***Antitrust*** Act. See [*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=) (explaining that "the standing requirements for a private cause of action under the Florida ***Antitrust*** Act parallel the standing requirements of [*Section 4 of the Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44B7-00000-00&context=)"). The IPPs appear to implicitly concede their lack of standing under the Florida ***Antitrust*** Act, and the Court agrees. [ECF No. 59 at 44-45].

The Mack Court, however, held that indirect purchasers may bring claims under the FDUTPA where they were otherwise barred**[\*47]** on standing grounds from bringing such claims under the Florida ***Antitrust*** Act, because "[p]ermitting indirect purchasers to sue under the [FDUTPA] effectuates the consumer protection policies of the [FDUTPA], but is not adverse to the purposes of the ***Antitrust*** Act." [*Mack, 673 So. 2d at 110*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-4H40-003F-31KN-00000-00&context=). The Mack Court recognized that the remedies provided under the Florida ***Antitrust*** Act are "cumulative" of those already existing under the FDUTPA. Id. ("If the legislature intended the ***Antitrust*** Act to take away the right of a consumer to sue for unfair competition under the [FDUTPA] where the defendants' conduct also violated the ***Antitrust*** Act, the legislature would have expressly said so."). Accordingly, on these grounds, the Court dismisses the IPPs' claims under the Florida ***Antitrust*** Act but not the claims under the FDUTPA. See [*In re Wellbutrin XL* ***Antitrust*** *Litig., 260 F.R.D. 143, 161 (E.D. Pa. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4WXB-W220-TXFR-P1S8-00000-00&context=) ("Despite the Florida courts' interpretation of the state's ***antitrust*** law as prohibiting indirect purchaser actions, indirect purchaser plaintiffs may still pursue claims under the FDUTPA.").

Courts also are not in agreement on whether an FDUTPA claim must be pleaded with particularity under [*Federal Rule of Civil Procedure 9(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YN-00000-00&context=). See [*In re Asacol* ***Antitrust*** *Litig., 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \*15 n.15*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K8S-BDB1-F04D-D0KS-00000-00&context=) (noting disagreement and declining to apply [*Rule 9(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YN-00000-00&context=) to dismiss FDUTPA claims based on purported ***antitrust* [\*48]** violations). The Court finds the cases holding that [*Rule 9(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YN-00000-00&context=) does not apply to an FDUTPA case based on ***antitrust*** violations persuasive where a successful FDUTPA claim does not require a showing of fraud. See [*In re Auto. Parts* ***Antitrust*** *Litig., No. 12-md-02311, 2014 U.S. Dist. LEXIS 90724, 2014 WL 2999269, at \*20 (E.D. Mich. July 3, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CK5-3X91-F04D-H1CN-00000-00&context=) (holding that [*Rule 9(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YN-00000-00&context=) does not apply to FDUTPA claim because "[t]he claim here is based on price-fixing conspiratorial conduct, and reliance by IPPs is not an element"); [*Guerrero v. Target Corp., 889 F. Supp. 2d 1348, 1355 (S.D. Fla. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56H1-1WP1-F04D-134Y-00000-00&context=) ("Accordingly, the heightened pleading requirements of [*Rule 9(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YN-00000-00&context=) cannot serve as a basis to dismiss FDUTPA claims."); [*State, Office of Atty. Gen., Dep't of Legal Affairs v. Wyndham Int'l, Inc., 869 So.2d 592, 598 (Fla. Dist. Ct. App. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BT3-KJ10-0039-441K-00000-00&context=) ("A deceptive or unfair trade practice constitutes a somewhat unique tortious act because, although it is similar to a claim of fraud, it is different in that, unlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.").

Where, as here, the CAC adequately pleads a claim based on the Sherman Act, it sufficiently pleads an FDUTPA claim. See [*In re Processed Egg Prods.* ***Antitrust*** *Litig., 851 F. Supp. 2d 867, 900 (E.D. Pa. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5576-YSS1-F04F-4077-00000-00&context=) ("It follows that Florida law recognizes that a FDUTPA claim may arise from a violation of ***antitrust*** laws such as the Sherman Act and other state ***antitrust*** laws because such a violation in and of itself is an unfair method of competition."); [*Precision Rx Compounding, LLC v. Express Scripts Holding Co., No. 16-0069, 2016 U.S. Dist. LEXIS 112851, 2016 WL 4446801, at \*5 (E.D. Mo. Aug. 24, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KJ4-DBR1-F04D-K2YG-00000-00&context=) ("Because**[\*49]** the complaint alleges sufficient facts to support plaintiffs' ***antitrust*** conspiracy claims, the violations of federal and state ***antitrust*** laws in turn constitute an unfair practice in support of plaintiffs' FDUTPA claim."). The Court will thus allow Counts 6-10 to proceed under the FDUTPA.

*3. Missouri*

Counts 11-15 allege claims under the [*Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. § 407.010, et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DT0-CDR1-6M8F-50GR-00000-00&context=), and the [*Missouri* ***Antitrust*** *Act, Mo. Rev. Stat. § 416.011, et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DT0-CDS1-6M8F-508V-00000-00&context=) Defendants argue that the IPPs lack standing as indirect purchasers to sue under either statute, and they also fail to state a MMPA claim because the Defendants' conduct was not undertaken "in connection with the sale or advertisement of any merchandise in trade or commerce," as required under the statute. [*Mo. Rev. Stat. § 407.020*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DT0-CDR1-6M8F-50GS-00000-00&context=).

Consistent with the principles set forth in Illinois Brick, indirect purchasers do not have standing to sue under the [*Missouri* ***Antitrust*** *Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DT0-CDS1-6M8F-508V-00000-00&context=), which the IPPs implicitly concede. [ECF No. 59 at 51]. See [*Mo. Rev. Stat. § 416.141*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DT0-CDS1-6M8F-5098-00000-00&context=) (The statute "shall be construed in harmony with ruling judicial interpretations of comparable federal ***antitrust*** statutes."); *Duvall v. Silvers, Asher, Sher & McLaren, M.D.'s, 998 S.W.2d 821, 825-827 (Mo. Ct. App. 1999)* (holding that indirect purchaser did not have ***antitrust*** standing to sue under Missouri ***antitrust*** laws). Thus, the claims based on the Missouri**[\*50]** ***Antitrust*** Act are dismissed.

It is less clear whether the IPPs have standing to pursue claims under the MMPA. The Defendants ask this Court to follow [*Ireland v. Microsoft Corp., No. 00-201515, 2001 Mo. App. LEXIS 2371, 2001 WL 1868946, at \*1 (Mo. Cir. Ct. Jan. 24, 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y2M-3780-Y9NK-S4H7-00000-00&context=), an unpublished opinion that concluded, without any discussion, that Illinois Brick applied to both the Missouri ***Antitrust*** Act and the MMPA. Several federal district courts have since held to the contrary. In [*Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 415 (E.D. Pa. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5102-1SV1-652J-J00D-00000-00&context=), the court concluded that Ireland was abrogated by a subsequent Missouri Supreme Court case, [*Gibbons v. Nuckolls, Inc., 216 S.W.3d 667, 669-670 (Mo. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4N9N-5MJ0-0039-4473-00000-00&context=). See [*Gibbons, 216 S.W.3d at 669*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4N9N-5MJ0-0039-4473-00000-00&context=) (quoting [*State v. Polley, 2 S.W.3d 887, 892 (Mo. Ct. App. 1999))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XJT-NDK0-0039-40N1-00000-00&context=) (indirect purchaser could recover under the MMPA, because "[t]he statute's broad language of 'any person who has suffered any ascertainable loss' contemplates that other parties, besides the direct purchaser or contracting party, who suffer damages resulting from the violator's prohibited conduct under the Act are included among those eligible to receive restitution."). Therefore, the Sheet Metal Workers Court held that indirect purchasers could bring ***antitrust*** claims under the MMPA. [*737 F. Supp. 2d at 415*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5102-1SV1-652J-J00D-00000-00&context=). Similarly, in [*In re Pool Prods. Distrib. Mkt.* ***Antitrust*** *Litig., 946 F. Supp. 2d 554, 571 (E.D. La. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58HF-3Y31-F04D-C043-00000-00&context=), the court, without addressing Ireland but relying on Gibbons, held that "the Missouri Supreme Court would allow indirect suits under the MMPA when a plaintiff has otherwise made out an MMPA claim." See [*In re Lithium Ion Batteries* ***Antitrust*** *Litig., No. 13-md-2420, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at \*19 (N.D. Cal. Oct. 2, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D8M-YWH1-F04C-T4XY-00000-00&context=) **[\*51]**("The post-Gibbons cases cited to the Court have been uniform in reaching the same conclusion that indirect-purchaser status alone does not bar Missouri consumers from bringing claims under the MMPA."); [*In re Asacol* ***Antitrust*** *Litig., 2016 U.S. Dist. LEXIS 94605, 2016 WL 4083333, at \*12*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K8S-BDB1-F04D-D0KS-00000-00&context=) (allowing MMPA claims premised on ***antitrust*** violations and brought by indirect purchasers to proceed). But see [*In re Suboxone (Buprenorphine Hydrochloride & Naloxone)* ***Antitrust*** *Litig., 64 F. Supp. 3d 665, 701-02 (E.D. Pa. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DRS-T1V1-F04F-43D7-00000-00&context=), amended on other grounds, [*2015 U.S. Dist. LEXIS 184458, 2015 WL 12910728 (E.D. Pa. Apr. 14, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MN5-5CP1-F04F-446J-00000-00&context=) (distinguishing Gibbons because it "did not consider facts in the ***antitrust*** context"). The Court agrees with the district courts that have held that, in light of Gibbons, the Missouri Supreme Court would likely permit MMPA claims by indirect purchasers and therefore will not dismiss the MMPA claims on these grounds.

Defendants also argue that the IPPs fail to state a claim under the MMPA because the alleged anticompetitive conduct was not undertaken "in connection with the sale or advertisement of any merchandise in trade or commerce." [*Mo. Rev. Stat. § 407.020*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DT0-CDR1-6M8F-50GS-00000-00&context=). The Court finds, consistent with prior holdings, that ***antitrust*** violations may state a claim for unfair practices under the MMPA. See [*Pool Prods. Distrib., 946 F. Supp. 2d at 571-572*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58HF-3Y31-F04D-C043-00000-00&context=) (MMPA claim for unfair practices was adequately pleaded where plaintiffs "plausibly alleged ***antitrust*** violations based**[\*52]** on defendants' engaging in anticompetitive agreements to exclude Pool's rivals and Pool's attempted monopolization, which led to increased costs and reduced output of Pool Products in the relevant national market"); [*Sheet Metal Workers Local 441 Health & Welfare Plan, 737 F. Supp. 2d at 415*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5102-1SV1-652J-J00D-00000-00&context=) (sham litigation allegations sufficiently stated a MMPA claim for unfair practices). See also [*Conway v. CitiMortgage, Inc., 438 S.W.3d 410, 416 (Mo. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CY9-MDB1-F04H-C002-00000-00&context=) (quoting [*Ports Petroleum Co., Inc. of Ohio v. Nixon, 37 S.W.3d 237, 240 (Mo. 2001))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:428G-72W0-0039-40J2-00000-00&context=) (Missouri Supreme Court has recognized that language of the MMPA is "unrestricted, all-encompassing and exceedingly broad"); id. (citing [*Gibbons, 216 S.W.3d at 669-670*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4N9N-5MJ0-0039-4473-00000-00&context=)) (courts have interpreted the MMPA "to provide protection to consumers in a gradually increasing variety of circumstances"). Because the IPPs have adequately pleaded Sherman Act violations, the Court will not dismiss the MMPA claims at this stage.

*4. New York*

Counts 16-20 allege claims under the [*Donnelly Act, N.Y. Gen. Bus. Law § 340 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HF-00000-00&context=), and the [*New York Deceptive Acts & Practices Act, N.Y. Gen. Bus. Law § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=). Courts generally interprets the Donnelly Act consistent with the Sherman Act. See [*In re Digital Music* ***Antitrust*** *Litig., 592 F. Supp. 2d 435, 447 n.18 (S.D.N.Y. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TN1-NPX0-TXFR-J20P-00000-00&context=), vacated on other grounds, [*Starr v. Sony BMG Music Entm't., 592 F.3d 314 (2d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XJ5-11G0-YB0V-D03K-00000-00&context=) (observing that "the substantive provisions of the Donnelly Act mirror federal ***antitrust*** law"); [*X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 634 N.E.2d 158, 611 N.Y.S.2d 786 (N.Y. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S2R-70P0-003V-B2X3-00000-00&context=) (quoting [*People v. Rattenni, 81 N.Y.2d 166, 613 N.E.2d 155, 158, 597 N.Y.S.2d 280 (N.Y. 1993))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S2R-7HT0-003V-B411-00000-00&context=) ("This Court has held that the Donnelly Act, having been modelled on the Federal Sherman**[\*53]** Act of 1890, 'should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result'"). As explained supra, because the IPPs have pleaded a plausible Sherman Act claim at this stage, the Court will allow the Donnelly Act claims to proceed. Defendants may raise their preemption argument with respect to the Donnelly Act at summary judgment, if appropriate. See [*WorldHomeCenter.com, Inc. v. PLC Lighting, Inc., 851 F. Supp. 2d 494, 500-501 (S.D.N.Y. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54C9-JRR1-F04F-00K0-00000-00&context=) (quoting [*H-Quotient, Inc. v. Knight Trading Grp., Inc., No. 03-5889, 2005 U.S. Dist. LEXIS 1924, 2005 WL 323750, at \*4 (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=) (premature at motion to dismiss stage to determine whether "the conduct complained of principally affects interstate commerce, with little or no impact on local or intrastate commerce.").

To plead a plausible [*§ 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim, a plaintiff must allege that "(1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result." [*In re DDAVP Indirect Purchaser* ***Antitrust*** *Litigation, 903 F. Supp. 2d 198, 228 (S.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56V3-DKJ1-F04F-0001-00000-00&context=) (quoting [*Maurizio v. Goldsmith, 230 F.3d 518, 521 (2d Cir. 2000))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:41JT-4GC0-0038-X0TH-00000-00&context=). Defendants do not dispute "***antitrust*** conduct 'imbued with a degree of subterfuge,' . . . is sufficient to state a claim under [*Section 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) where consumers have felt the ultimate effect of such deception." Id. (quoting [*Leider v. Ralfe, 387 F. Supp. 2d 283, 295 (S.D.N.Y.2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FB9-84B0-TVW3-P28S-00000-00&context=). See also [*New York v. Feldman, 210 F. Supp. 2d 294, 301-302 (S.D.N.Y. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4568-R8B0-0038-Y0R7-00000-00&context=) (sufficient allegations where complaint asserted that**[\*54]** defendants' activity "undermined New York's interest in an honest marketplace in which economic activity is conducted in a competitive manner, and caused injury to numerous 'marketplace participants' who 'rely on the competitive bidding process to obtain the best prices for the stamps offered" (citations and quotations omitted)).

Defendants argue, however, that the IPPs fail to plausibly plead any deceptive acts, because "'anticompetitive conduct that is not premised on consumer deception is not within the ambit of the statute.'" [*In re Digital Music* ***Antitrust*** *Litig., 812 F. Supp. 2d at 410*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:53BS-MJB1-JCNC-81P3-00000-00&context=) (quoting [*Leider, 387 F. Supp. 2d at 295*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FB9-84B0-TVW3-P28S-00000-00&context=)). "Although the New York statute is based upon [*section 5 of the Federal Trade Commission Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSM1-NRF4-44DS-00000-00&context=) . . . , 'New York has chosen not to include 'unfair competition' or 'unfair' practices in its consumer protection statute, language that bespeaks a significantly broader reach.'" Id. (quoting [*Leider, 387 F. Supp. 2d at 296*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FB9-84B0-TVW3-P28S-00000-00&context=)). "[T]he New York Court of Appeals has instructed that a deceptive act or practice has an 'objective definition,' whereby deceptive acts or practices—which may be acts or omissions—are 'limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances.'" [*New World Solutions, Inc. v. NameMedia Inc., 150 F. Supp. 3d 287, 329-330 (S.D.N.Y. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HM5-S9Y1-F04F-0170-00000-00&context=) (quoting [*Leider, 387 F. Supp. at 292*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FB9-84B0-TVW3-P28S-00000-00&context=)). Defendants assert that while the IPPs may allege conduct that is unfair, their**[\*55]** allegations fail to plead deceptive or misleading actions toward consumers.

Efforts to conceal or mislead consumers about anticompetitive agreements may amount to deceptive conduct. See [*In re Auto. Parts* ***Antitrust*** *Litig., 29 F. Supp. 3d 982, 1010 (E.D. Mich. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CK5-3X91-F04D-H1CR-00000-00&context=) ([*§ 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim allowed to proceed where plaintiffs alleged "Defendants took efforts to conceal their agreement from New York plaintiffs" and "engaged in deceptive acts to keep their agreement to fix-prices secret"). See also [*In re Static Random Access Memory (SRAM)* ***Antitrust*** *Litig., No. 07-01819, 2008 U.S. Dist. LEXIS 120279, 2008 WL 2610549, at \*2 (N.D. Cal. June 27, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52JD-9JC1-652H-7024-00000-00&context=) (finding sufficient at motion to dismiss stage "allegations to suggest that Defendants provided information that they knew would be seen by [plaintiffs] and failed to provide other material information necessary to prevent the provided information from being misleading"). Here, the IPPs allege conduct that was plausibly deceptive and not merely anticompetitive. The CAC contains allegations of misrepresentations in a Shire press release concerning the royalty rate paid to Twi/Anchen and Twi/Anchen's ability to actually release an AG, CAC ¶¶ 77, 84-85, 136, and misleading statements made by Actavis's CEO that the Actavis-Shire settlement provided consumers with an earlier launch of an Intuniv generic, when in reality the settlement delayed release of a generic. Id. ¶¶ 97, 135. In addition,**[\*56]** the IPPs assert that the patent litigations, related settlement agreements, and consent judgments concealed the anticompetitive nature of the agreements and the weaknesses in Shire's patents from the public. Id. ¶¶ 103, 133-140. Finally, the no-AG agreement itself was an allegedly undisclosed implicit or oral agreement. The Court will therefore allow Counts 16-20 to proceed under the Donnelly Act and [*§ 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=).[[15]](#footnote-14)15

*5. Wisconsin*

Counts 21-25 allege claims under the [*Wisconsin* ***Antitrust*** *Act, Wis. Stat. § 133.03, et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5G4X-PM41-DYB7-M174-00000-00&context=) The Wisconsin Supreme Court has held that:

Wisconsin's ***antitrust*** statutes may reach interstate commerce if (1) actionable conduct, such as the formation of a combination or conspiracy, occurred within this state, even if its effects are felt primarily outside Wisconsin; or (2) the conduct complained of 'substantially affects' the people of Wisconsin and has impacts in this state, even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside this state.

[*Olstad v. Microsoft Corp., 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139, 141 (Wis. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GMR-WH60-0039-439F-00000-00&context=). Actavis argues that the CAC fails to plead that the alleged unlawful conduct took place in Wisconsin or had a substantial effect on the people of Wisconsin. No heightened pleading standard applies to the IPPs'**[\*57]** claims under the Wisconsin ***Antitrust*** Act. See [*California v. Infineon Tech. AG, 531 F. Supp. 2d 1124, 1161 (N.D. Cal. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PN7-C180-TXFP-C2BX-00000-00&context=) (citing [*Meyers v. Bayer AG, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448 (Wis. 2007))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P66-JRV0-TXFY-11TH-00000-00&context=) (controlling Wisconsin case law "clearly dictates that, as long as plaintiffs allege in their complaint that defendants unlawfully conspired to fix the price of [dynamic random access memory ("DRAM")], in a manner that substantially affected the people of Wisconsin and had impacts in this state, a claim is stated under Wisconsin's ***antitrust*** statute. It matters not that the allegation is bare, so long as it is made."). Here, the CAC alleges that the putative Wisconsin subclass members paid supracompetitive prices as a result of Defendants' anticompetitive conduct, id. ¶¶ 125-128, 447, 453, 464, 469, 479, 492, 506, and enables the Court to reasonably infer that Defendants' anticompetitive conduct substantially affected the people of Wisconsin and had impacts on the state. See [*Infineon Tech. AG, 531 F. Supp. 2d at 1160*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PN7-C180-TXFP-C2BX-00000-00&context=) (Wisconsin ***Antitrust*** Act claims sufficiently pled where "[p]laintiffs have alleged that defendants engaged in unlawful price fixing in the market for DRAM, that consumers and businesses who purchased DRAM during the conspiracy period paid artificially high prices for DRAM, and that these violations 'substantially affected the people of Wisconsin and had impacts**[\*58]** within the State of Wisconsin'" (citation omitted)); *In re Terazosin Hydrochloride* ***Antitrust*** *Litig., 160 F. Supp. 2d 1365, 1375-1376 (S.D. Fla. 2001)* (Wisconsin ***Antitrust*** Act may apply "regardless of whether the conspiracies are formed or implemented in Wisconsin," as long as they "had a significant and adverse effect on commerce in Wisconsin"). Accordingly, the Court will not dismiss the Wisconsin state law claims on these grounds, and given that the IPPs have stated a Sherman Act violation and sufficiently alleged that the anticompetitive conduct injured the class of Wisconsin IPPs, the Court will allow Counts 21-25 to proceed.[[16]](#footnote-15)16

**V. CONCLUSION**

For the reasons explained above, Defendants' motions to dismiss are GRANTED in part and DENIED in part as follows:

1) The Motions to Dismiss are DENIED on Counts 1-5.

2) The Motions to Dismiss are GRANTED on Counts 6-10 to the extent premised on the Florida ***Antitrust*** Act but DENIED on Counts 6-10 to the extent premised on the FDUTPA.

3) The Motions to Dismiss are GRANTED on Counts 11-15 to the extent premised on the Missouri ***Antitrust*** Act but DENIED on Counts 11-15 to the extent premised on the MMPA.

4) The Motions to Dismiss are DENIED on Counts 16-20.

5) The Motions to Dismiss are DENIED on Counts 21-25.

6) To the extent any Sherman**[\*59]** Act violation is premised on allegations of sham litigation, the related Counts are DISMISSED without prejudice.

**SO ORDERED**.

Dated: October 20, 2017

/s/ Allison D. Burroughs

ALLISON D. BURROUGHS

U.S. DISTRICT JUDGE

**End of Document**

1. 1"An authorized generic is a generic drug sold by the company who markets the brand name drug (or a third party licensee). Authorized generics, like other generics, are sold at a reduced price compared to the brand name drug." [*Sanofi-Aventis v. Apotex Inc., 659 F.3d 1171, 1174-1175 (Fed. Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83F7-NKH1-652G-21KK-00000-00&context=) (citation omitted). [↑](#footnote-ref-0)
2. 2Upon information and belief, the CAC alleges that Anchen agreed that it would distribute any generic Intuniv in the United States in collaboration with TWi. CAC ¶ 56. [↑](#footnote-ref-1)
3. 3In the CAC, the IPPs allege that "[i]n exchange for such a substantial generic delay, upon information and belief, Shire agreed, among other things, not to launch an AG to compete with Actavis during its highly valuable 180-day exclusivity period." CAC ¶ 98. In their opposition, they clarify that this agreement was either express or implied. [ECF No. 59 at 21]. [↑](#footnote-ref-2)
4. 4The Court notes that the IPPs do not allege a sham litigation claim against Actavis. [↑](#footnote-ref-3)
5. 5The parties do not dispute that Noerr-Pennington immunity bars state law ***antitrust*** claims premised on patent litigation unless the IPPs adequately plead sham litigation. The First Circuit has not decided whether the Noerr-Pennington doctrine is applicable to state law claims as a matter of federal law. See [*Davric Me. Corp. v. Rancourt, 216 F.3d 143, 148 n.7 (1st Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:40K8-VYX0-0038-X0J7-00000-00&context=). The majority of circuits, however, have recognized that Noerr-Pennington emanated, at least in part, from ***First Amendment*** concerns and therefore can apply to certain state law claims as well as federal claims. See, e.g., [*Coll v. First Am. Title Ins. Co., 642 F.3d 876, 895 (10th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52PX-6HF1-F04K-W06K-00000-00&context=) ("[T]he Noerr-Pennington doctrine is based upon the ***First Amendment***, which applies to [the states] through the ***Fourteenth Amendment*** . . . ."). See also [*VIBO Corp. v. Conway, 669 F.3d 675, 683-84 (6th Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5519-4J61-F04K-P0HY-00000-00&context=) ("Where private actors petition the government for action that would violate ***antitrust*** law, the ***Petition Clause*** [of the ***First Amendment***] immunizes the actors from litigation in connection with their petitioning."); [*Kottle v. Northwest Kidney Ctrs., 146 F.3d 1056, 1059 (9th Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SYX-CV20-0038-X385-00000-00&context=) (noting that the Noerr-Pennington doctrine "sweeps broadly and is implicated by both state and federal ***antitrust*** claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government"); John J. Miles, Health Care and ***Antitrust*** Law, § 7:8 n.7 (2017) (collecting cases). Further, many states have actually adopted the Noerr-Pennington doctrine and applied it to certain state-law claims. See [*Coll, 642 F.3d at 895*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52PX-6HF1-F04K-W06K-00000-00&context=) (noting that "many other states have adopted and apply the Noerr-Pennington doctrine to state ***antitrust*** claims, as well as other state-law claims," collecting cases, and anticipating that the Noerr-Pennington doctrine would be applied to the [*New Mexico* ***Antitrust*** *Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BXH-GGD1-64V8-14BB-00000-00&context=)); [*Apple, Inc. v. Motorola Mobility, Inc., 886 F. Supp. 2d 1061, 1077 (W.D. Wis. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56CN-30B1-F04F-K258-00000-00&context=) (applying Noerr-Pennington immunity to bar state-law unfair competition claim); [*Bayou Fleet, Inc. v. Alexander, 26 F. Supp. 2d 894, 897 (E.D. La. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TNY-PK90-0038-Y1YT-00000-00&context=) (dismissing claim under [*Louisiana Unfair Trade Practices Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5FH1-43V1-DYB7-W0TM-00000-00&context=) as barred by Noerr-Pennington). Accordingly, as both parties have already done, albeit without explicitly addressing the issue, the Court applies the Noerr-Pennington doctrine to the IPPs' state law claims in this case. [↑](#footnote-ref-4)
6. 6The Supreme Court articulated "the classic formulation of the Rule of Reason" as follows: "[t]he true test of legality is whether the restraint imposed is such as merely ***regulates*** and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable ***regulation*** or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." [*Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 n.10, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=) (quoting [*Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5YH0-003B-H0VW-00000-00&context=). [↑](#footnote-ref-5)
7. 7In the instant case, Actavis references the argument set forth in the briefs filed in the related case, FWK Holdings LLC v. Shire PLC et al., No. 16-cv-12653, as to why a no-AG agreement is not a reverse payment. Accordingly, the Court includes substantially the same discussion and holding here as in the Memorandum and Order in FWK Holdings LLC v. Shire PLC et al. [↑](#footnote-ref-6)
8. 8The First Circuit states in full that "[u]nder this functional approach, 'no-AG' provisions—in which the brand-name manufacturer agrees not to market an 'authorized generic' version of the drug for a certain period of time—and other settlement provisions in which some advantage is transferred from the patent holder to the alleged infringer may constitute a reverse payment subject to ***antitrust*** scrutiny." [*In re Nexium (Esomeprazole)* ***Antitrust*** *Litig., 842 F.3d 34, 42 (1st Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M73-M0F1-F04K-H003-00000-00&context=). Actavis argues that the statement is not even dictum, and that the issue of whether a no-AG provision can be a reverse payment remains open after Loestrin. In Loestrin, the First Circuit explicitly declined to address whether the plaintiffs had adequately pled that the no-AG provision was an unlawful reverse payment and only addressed whether non-cash payments can be actionable under FTC v. Actavis. See [*In re Loestrin 24 Fe* ***Antitrust*** *Litig., 814 F.3d at 552-553*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J4W-JVF1-F04K-H07H-00000-00&context=). The Court agrees that the use of the word "may" in the context of whether a no-AG agreement is ever actionable might appear ambiguous. Nonetheless, the statement in Nexium strongly suggests that the Court should apply a functional analysis to the no-AG agreement at issue to determine whether or not it can be an unlawful reverse payment. Further, as explained infra, the Court does not rely only on this language in Nexium to hold that a no-AG provision may constitute an unlawful reverse payment. [↑](#footnote-ref-7)
9. 9Although it is not clear whether this paragraph (CAC ¶ 101) refers to net or gross profits, the Court makes reasonable inferences in the IPPs' favor at this stage. [↑](#footnote-ref-8)
10. 10Neither case cited by Defendants in support of the proposition that a royalty payment cannot constitute a reverse payment holds that below-market royalty payments never, under any circumstances, contribute to the type of unjustified anticompetitive harm that concerned the Supreme Court in FTC v. Actavis. See [*FTC v. AbbVie Inc., 107 F. Supp. 3d 428, 436 (E.D. Pa. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FXM-4501-F04F-43D5-00000-00&context=) (holding that an AG license in exchange for a below customary price did not constitute a reverse payment where the settlements did not pay generic company to delay entry or include a no-AG agreement); [*In re Actos End Payor* ***Antitrust*** *Litig., 2015 U.S. Dist. LEXIS 127748, 2015 WL 5610752, at \*18*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H0F-6HM1-F04F-017W-00000-00&context=) (holding that 75% royalty payments for an AG license from the brand to the generic were not reverse payments where settlement agreement "merely fixed early-entry dates for [generic] to enter the [brand company's] market"). [↑](#footnote-ref-9)
11. 11The Court recognizes that settlements taking "commonplace forms" in which "a party with a claim (or counterclaim) for damages receives a sum equal to or less than the value of its claim" are not "for that reason alone subject to ***antitrust*** liability." [*FTC v. Actavis, 133 S. Ct. at 2233*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=). See [*id. at 2237*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58NW-3VK1-F04K-F006-00000-00&context=) ("The fact that a large, unjustified reverse payment risks ***antitrust*** liability does not prevent litigating parties from settling their lawsuit."). If necessary, the Court may consider at summary judgment whether a below-market royalty rate alone may constitute a reverse payment. [↑](#footnote-ref-10)
12. 12To the extent that the state laws at issue are not in line with federal law on ***antitrust*** injury, the parties may more adequately brief the issue at the summary judgment stage. [↑](#footnote-ref-11)
13. 13The IPPs also note that "many terms of the Shire-TWi/Anchen settlement agreement itself are anticompetitive." [ECF No. 72-3 at 11]. The CAC, however, does not contain factual allegations based on these terms, and the Court does not consider them in assessing the plausibility of the IPPs' claims. [↑](#footnote-ref-12)
14. 14The Court's expectation applies to all of the surviving standalone claims (Counts 5, 10, 15, 20, and 25), and Defendants may raise at summary judgment, inter alia, their argument that these claims are duplicative of the claims premised on the Sherman Act. [↑](#footnote-ref-13)
15. 15Again, as with all of the IPPs' standalone claims, the IPPs should clarify at summary judgment their allegations in support of the standalone claim (Count 20) and the applicability of the Donnelly Act and [*§ 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) in relation to the Sherman Act. See [*X.L.O. Concrete Corp., 83 N.Y.2d 513, 634 N.E.2d 158, 161, 611 N.Y.S.2d 786 (N.Y. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S2R-70P0-003V-B2X3-00000-00&context=) (Donnelly Act given a different interpretation from Sherman Act "only where State policy, differences in the statutory language or the legislative history justify such a result" (quotation omitted)). See also [*Assocs. Capital Serv. of New Jersey v. Fairway Private Cars, Inc., 590 F. Supp. 10, 13 (E.D.N.Y. 1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-F090-0039-S2KH-00000-00&context=) (citing [*State v. Mobil Oil Corp., 38 N.Y.2d 460, 344 N.E.2d 357, 359, 381 N.Y.S.2d 426 (N.Y. 1976))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-B970-003C-F0XF-00000-00&context=) (recognizing that "the Donnelly Act may well forbid conduct that would not violate the Sherman Act"). [↑](#footnote-ref-14)
16. 16Although the standalone claim (Count 25) may also proceed, the Court again will consider at summary judgment the applicable allegations and the scope of the applicable laws. See [*Westowne Shoes, Inc. v. Brown Grp., Inc., 104 F.3d 994, 998 (7th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JMB0-00B1-D18J-00000-00&context=) ("[T]he Supreme Court of Wisconsin has ruled that the decisions of the federal courts interpreting federal ***antitrust*** law shall control the interpretation of Wisconsin's ***antitrust*** law."). The Court further notes that the IPPs' reliance on [*Olstad v. Microsoft, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139, 157 (Wis. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GMR-WH60-0039-439F-00000-00&context=) for its position that the Wisconsin ***Antitrust*** Act has a broader scope than the Sherman Act is misplaced. The Olstad Court's statement that "a monopolist's conduct is actionable under either federal law, Wisconsin law, or both" concerns the intrastate and interstate scope of each statute, not the type of conduct that may violate state law but not federal law. Id. [↑](#footnote-ref-15)