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# [***United Food & Commer. Workers Unions & Emplrs. Midwest Health Benefits Fund v. Pfizer, Inc.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RSF-M3T1-F8KH-X458-00000-00&context=)

United States District Court for the Eastern District of Virginia, Norfolk Division

August 26, 2016, Decided; August 26, 2016, Filed

Civil Action No. 2:14cv395

**Reporter**

2016 U.S. Dist. LEXIS 193248 \*

UNITED FOOD AND COMMERCIAL WORKERS UNIONS AND EMPLOYERS MIDWEST HEALTH BENEFITS FUND, on behalf of itself and all others similarly situated, Plaintiff, v. PFIZER, INC., et al., Defendants.

**Subsequent History:** Related proceeding at [*Am. Sales Co., LLC v. Pfizer, Inc., 2017 U.S. Dist. LEXIS 137222 (E.D. Va., July 28, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PB8-3SF1-F04F-F0H0-00000-00&context=)

**Core Terms**

patent, federal patent law, ***antitrust***, preempted, state law, allegations, misconduct, unjust enrichment, state law claim, marketplace, consumer protection, preemption, purchasers, sham, motion to dismiss, indirect, plaintiffs', statutes, cases, common law, bad faith, jurisdictions, asserts, federal preemption, patent holder, procured, invoked, unfair competition, fraudulent, customers

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**Judges:** Arenda L. Wright Allen, United States District judge.

**Opinion by:** Arenda L. Wright Allen

**Opinion**

**ORDER**

Before the Court is a Motion to Dismiss (ECF No. 52) filed by Defendants Pfizer, Inc., and its subsidiaries (hereinafter referred in the singular tense as "Pfizer"). For the following reasons, Pfizer's Motion to Dismiss is **GRANTED IN PART AND DENIED IN PART**.

**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiffs are indirect purchasers of the drug Celebrex, referred to as End-Payor Plaintiffs ("EPPs") in this litigation.**[\*5]** The named EPPs consist of employee welfare benefit plans that claim to have indirectly purchased, paid for, or reimbursed portions of the purchase price of Celebrex. Plaintiffs bring this action on behalf of themselves and as representatives of the "End-Payor Class"[[1]](#footnote-0)1 under *Federal Rule of Civil Procedure 23(a)*, *(b)(2)*, and *(b)(3)*. The EPPs claim that they paid "supra-competitive" prices for Celebrex and incurred financial injuries as a result.

The EPPs bring two sets of claims: (1) the same federal claims that were brought by the Direct-Purchaser Plaintiffs (DPPs) in a related case (2:14cv361), and (2) additional state claims brought under various ***antitrust***, consumer protection, and unjust enrichment state laws. At the heart of the EPPs' Complaint is an allegation that Pfizer extended its monopoly illegally on its patent for celecoxib, the active ingredient in the anti-inflammatory drug known as Celebrex. This patent is referred to as the '048 patent. The '048 patent was also at issue in the companion Pfizer litigation in Civil Case No. 2:14cv361.

A. Federal Claims

The EPPs' federal claims allege that Pfizer fraudulently procured the '048 patent by engaging in deceptive conduct before the Patent and Trademark Office ("PTO"), and engaged in sham litigation**[\*6]** against generic manufacturers to delay generic entry of celecoxib into the market. These claims are identical to the claims raised in the companion case brought by the DPPs against Pfizer referenced above. The EPPs are seeking a declaratory judgment that Pfizer's alleged conduct violates *§ 2* of the Sherman Act. They also seek equitable and injunctive relief under [*§ 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the [*Clayton Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GNX1-NRF4-43GX-00000-00&context=), [*15 U.S.C. § 26*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=), to discourage similar anticompetitive conduct by Pfizer in the future.

B. State Claims

The EPPs also bring seventy-eight state law claims invoking the statutory and common law of forty-eight states, the District of Columbia, and Puerto Rico. The EPPs assert claims for damages under the ***antitrust*** and consumer protection statutes of twenty-five states and the District of Columbia.[[2]](#footnote-1)2 The EPPs also assert claims for damages under the common law of unjust enrichment of forty-eight states (excluding Indiana and Ohio), the District of Columbia, and Puerto Rico.[[3]](#footnote-2)3

C. Motion to Dismiss

Pfizer moves to dismiss the EPPs' Consolidated and Amended Complaint ("CAC") under [*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=) for failure to state a claim upon which relief can be granted. The following analysis addresses this Motion.

Pfizer challenges the EPPs' federal claims by**[\*7]** incorporating by reference its arguments in the companion Pfizer litigation in 2:14cv361.[[4]](#footnote-3)4 Pfizer asserts that the EPPs' federal ***antitrust*** claim, which seeks injunctive relief under *§ 2* of the *Sherman Act*, fails because the EPPs identify no cognizable future injury.

Pfizer also challenges the EPPs' state law claims. Pfizer asserts four general grounds for dismissal of the state claims. These are: (1) lack of standing, (2) federal preemption, (3) failure to plead the statutory elements of the ***antitrust*** and consumer protection statutes invoked in the various states, and (4) various grounds of dismissal for the unjust enrichment claims pertaining to all jurisdictions and some jurisdictions in particular.

The Court has addressed the Motion to Dismiss the EPPs' federal claims of *Walker Process* fraud[[5]](#footnote-4)5 and sham litigation. *See* ECF No. 80. The Court dismissed the EPPs' request for injunctive relief under [*§ 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GN71-NRF4-41ND-00000-00&context=) of the Clayton Act. *Id.* The Court now addresses the EPPs' remaining seventy-eight state law claims. These are advanced by the EPPs under the ***antitrust*** and consumer protection statutes of twenty-five states and the District of Columbia, and under the common**[\*8]** law of unjust enrichment of forty-eight states (excluding Indiana and Ohio), Puerto Rico, and the District of Columbia.

**STANDARD OF REVIEW**

In ruling on a motion to dismiss pursuant to [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), a court should dismiss a complaint if the plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face." [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547, 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=); *see also* [*Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S4P-S0C0-TXFX-6382-00000-00&context=). The facts alleged must be sufficient "to raise a right to relief above the speculative level." [*Twombly, 550 U.S. at 555*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). In evaluating the complaint, the Court will "construe the factual allegations in the light most favorable to the plaintiff." [*Smith v. Smith, 589 F.3d 736, 738 (4th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XDR-WM70-YB0V-G001-00000-00&context=) (internal citations omitted).

"We must assume all [well-pled facts] to be true." [*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 253 (4th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XF0-2CC0-YB0V-G00X-00000-00&context=) (alteration in original) (internal quotation mark omitted). "[B]ut we need not accept the legal conclusions drawn from the facts, and we need not accept as true unwarranted inferences, unreasonable conclusions or arguments." *Id.* (alteration in original). Additionally, a threadbare recitation of the "elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well-pled facts for [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) purposes." *See* [*id. at 255*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XF0-2CC0-YB0V-G00X-00000-00&context=); [*Ashcroft v. Iqbal, 556 U.S. 662, 663, 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=) (noting that "the tenet that a court must accept a complaint's allegations as true**[\*9]** is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements.").

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [*Ashcroft, 556 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* [*Federal Rule of Civil Procedure 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=) requires only that a claimant make "a short and plain statement of the claim showing that the pleader is entitled to relief." [*Masco Contractor Servs. E., Inc. v. Beals, 279 F. Supp. 2d 699, 703 (E.D. Va. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49FG-DR10-0038-Y42J-00000-00&context=).

[*Federal Rule of Civil Procedure Rule 9(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YN-00000-00&context=) requires that claimants plead fraud with particularity. However, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." [*Fed. R. Civ. P. 9(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YN-00000-00&context=); [*Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WGY-G2P0-0038-X251-00000-00&context=). Particularity requires that the claimant state "the time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." [*Harrison, 176 F.3d at 784*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WGY-G2P0-0038-X251-00000-00&context=) (quoting 5 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil § 1297* 590 (2d ed. 1990)). District courts may infer deceptive intent from indirect and circumstantial evidence. *See* [*Therasense, Inc. v. Becton, Dickinson and Co., 649 F.3d 1276 (Fed. Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:52YB-5241-652G-21HV-00000-00&context=).

**STANDING**

A. Article III Standing**[\*10]**

Pfizer argues that the EPPs lack standing under Article III of the United States Constitution in thirty-one jurisdictions in which the EPPs fail to allege injury because the named EPPs do not reside in those jurisdictions or have not made purchases or reimbursements in those jurisdictions. Pfizer lists the thirty-one jurisdictions where the EPPs lack Article III standing: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, New Hampshire, New Mexico, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. Pfizer contends that any claims asserted in these jurisdictions in which the EPPs fail to allege injury must be dismissed for lack of Article III standing. If the EPPs lack Article III standing in these jurisdictions, then their unjust enrichment claims in those states must be dismissed, along with accompanying state statutory claims.[[6]](#footnote-5)6

The United States Supreme Court has held that class certification issues are "logically antecedent" to Article III concerns, meaning that class certification issues (that pertain to statutory standing) should**[\*11]** be addressed before the Article III standing inquiry. [*Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WSK-9JC0-004B-Y01T-00000-00&context=). Circuits are split on this issue, and neither the Fourth Circuit nor the Eastern District of Virginia has weighed in.

Pfizer asserts that the "weight of authority supports resolv[ing] the standing challenge before class certification." ECF No. 53 at 11. This Court disagrees, and concludes that the EPPs have standing to bring claims against Pfizer under the state ***antitrust*** and consumer protection laws of the states in which they reside and/or have purchased Celebrex. *See* [*In re DDAVP Indirect Purchaser* ***Antitrust*** *Litigation, 903 F. Supp. 2d 198, 213 (S.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56V3-DKJ1-F04F-0001-00000-00&context=) (holding that class certification was logically antecedent to the issue of standing in a case closely aligned to the facts of this case).

Thus, this is not a case where the Named Plaintiffs are attempting to piggy-back on the injuries of the unnamed class members. Rather, each of the Named Plaintiffs asserts a[n] . . . injury resulting from Defendants' allegedly wrongful conduct, and a favorable court decision will redress the named plaintiffs' injuries. Therefore, the issue is not whether the Named Plaintiffs have standing to sue Defendants—they most certainly do—but whether their injuries are sufficiently similar to those of the purported Class to justify the**[\*12]** prosecution of a nationwide class action, which is properly determined at the class certification stage, when this Court may consider commonality and typicality issues with respect to the named plaintiffs and other putative class members.

[*Id. at 213-214*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56V3-DKJ1-F04F-0001-00000-00&context=).

The EPPs' alleged injury is directly traceable to Pfizer's alleged misconduct. The question of whether the EPPs may bring claims on behalf of the putative class is addressed at the class certification stage. Therefore, Pfizer's Motion to Dismiss EPPs' state law claims for lack of Article III standing is denied.

B. *Illinois Brick* Standing Issues

Pfizer next argues that the EPPs lack standing to bring claims under the laws of those states that bar recovery for indirect purchasers under the rule established by [*Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9DJ0-003B-S1WY-00000-00&context=).[[7]](#footnote-6)7 This ruling holds that only an overcharged direct purchaser, and not others in the chain of manufacture or distribution, is a party "injured in his business or property" within the meaning of the Clayton Act. [*Id. at 728*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9DJ0-003B-S1WY-00000-00&context=). Thus, in *Illinois Brick*, the Supreme Court recognized that only direct purchasers have standing to sue for unjust benefits gained by a defendant manufacturer through anticompetitive conduct that violates federal ***antitrust*** laws. [*Id. at 728-29*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9DJ0-003B-S1WY-00000-00&context=).

Some states have adopted *Illinois Brick* to preclude indirect purchasers from seeking recovery under state ***antitrust*** and consumer protection laws. [*In re K-Dur* ***Antitrust*** *Litigation, No. 01-1652, 2008 U.S. Dist. LEXIS 71768, 2008 WL 2660780, at \*5 (D.N.J. Feb. 28, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4THD-F2P0-TXFR-F3BC-00000-00&context=) (finding that "where the applicable state law bars ***antitrust*** actions for damages by indirect purchasers . . . a plaintiff cannot circumvent the statutory framework by recasting an ***antitrust*** claim as one for unjust enrichment."). The EPPs argue that *Illinois Brick* is inapplicable to equitable claims of unjust enrichment.

This Court concludes that states that have declined to expressly pass *Illinois Brick* repealer legislation and have not interpreted their laws as overriding *Illinois Brick* are presumed to follow the *Illinois Brick* limitation on indirect purchaser claims. *See* [*DDAVP, 903 F. Supp. 2d at 232*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56V3-DKJ1-F04F-0001-00000-00&context=). The EPPs invoked the common law of unjust enrichment in a number of states that follow *Illinois Brick*: Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, New Jersey, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Texas, Utah, Virginia, and Washington. The EPPs do not dispute that these states follow *Illinois Brick*. Pfizer's Motion to Dismiss the unjust enrichment**[\*14]** claims invoking the common law of' these states is granted.

**FEDERAL PREEMPTION**

A. Legal Principles

Under the doctrine of federal preemption, "state law that conflicts with federal law is without effect." [*Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KDT0-003B-R20J-00000-00&context=) (internal quotations omitted). Federal law may preempt state law in one of three ways: explicit preemption, field preemption, and conflict preemption. *See generally* [*English v. General Elec. Co., 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6FT0-003B-44B9-00000-00&context=). Explicit preemption is inapplicable to federal patent law. [*35 U.S.C. §§ 1-376*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTP1-NRF4-44NC-00000-00&context=). To determine whether a state law is preempted under the doctrines of field or conflict preemption, the Court should look to congressional intent.

Field preemption applies when a state law ***regulates*** conduct in a field that Congress intends for the federal government to ***regulate*** exclusively. [*Hunter Douglas, Inc. v. Harmonic Design, Inc., 153 F.3d 1318, 1332 (1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=). The Court may infer such congressional intent from a "scheme of federal ***regulation*** . . . so pervasive as to make reasonable inference that Congress left no room for the States to supplement it," or when a federal ***regulation*** "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." [*Fidelity Fed. Say. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5FF0-003B-S4DV-00000-00&context=); [*Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JVD0-003B-S0M9-00000-00&context=). Conflict preemption applies when state law actually conflicts with federal law, such that**[\*15]** it is impossible 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." [*Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H420-003B-S2NP-00000-00&context=); [*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=).

In the context of federal patent law, courts examine the nature of the alleged tortious conduct of the defendant patent holder to determine whether state tort laws are preempted by federal patent law. *See generally* [*Hunter Douglas, 153 F.3d at 1335-37*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=). A state law tort claim that is not preempted by federal patent law must allege that a defendant's misconduct occurred in the marketplace and not only before the PTO. *Id.*

Federal patent law preempts state tort law in cases in which a plaintiff alleges that a defendant engaged in two types of conduct. First, federal patent law preempts state law where a plaintiff alleges that a defendant committed misconduct before the PTO, unless the plaintiff "proves that the asserted patent was obtained through knowing and willful fraud" or that the defendant's conduct rendered the entire patent application process a "sham." [*Id. at 1336*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=) (quoting [*Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S95-X9P0-003B-91BC-00000-00&context=). Second, federal patent law preempts state law where a plaintiff alleges that a defendant publicized a patent in the marketplace, unless the defendant acted**[\*16]** in bad faith. *Id.* (internal citations omitted).

Two presumptions guide preemption analysis. *See* [*Hunter Douglas, 153 F.3d at 1332*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=). The first presumption is that Congress does not "cavalierly" preempt state law causes of action, particularly in fields traditionally occupied by the states, unless that is the "clear and manifest purpose of Congress." [*Medtronic., Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S04-RPK0-003B-R242-00000-00&context=); [*Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JVD0-003B-S0M9-00000-00&context=). The second presumption is that "the purpose of Congress is the ultimate touchstone." [*Medtronic, 518 U.S. at 485*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S04-RPK0-003B-R242-00000-00&context=) (internal citations omitted). In the context of federal patent law, the Federal Circuit has applied the presumption against preemption and has held that there is no field preemption of state unfair competition claims that rely on a substantial question of federal patent law. [*Hunter Douglas, 153 F.3d at 1333*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=); *see also* [*Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 191 L. Ed. 2d 511(2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FTC-D411-F04K-F0WK-00000-00&context=); [*In re Cipro Cases I & II, 61 Cal. 4th 116, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (Cal. May 7,2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FXT-F8K1-F04B-P0B8-00000-00&context=).

However, the presumption against preemption is not applied uniformly in cases involving federal patent law and state law claims. *See* [*Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CBY0-003B-43TN-00000-00&context=); [*Semiconductor Energy Laboratory Co., Ltd. v. Samsung Electronics Co., Ltd., 204 F.3d 1368 (Fed. Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YPS-8J90-003B-912P-00000-00&context=); [*Abbott Laboratories v. Brennan, 952 F.2d 1346 (Fed. Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-NBP0-003N-417T-00000-00&context=); [*In re K-Dur* ***Antitrust*** *Litigation, No. 01-1652, 2007 U.S. Dist. LEXIS 100238, 2007 WL 5297755 (D.N.J. March 1, 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51XG-TDT1-JCNC-500B-00000-00&context=); [*In re Ciprofloxacin Hydrochloride* ***Antitrust*** *Litigation, 363 F. Supp. 2d 514 (E.D.N.Y. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FW5-T420-TVW3-P2B4-00000-00&context=). Additional analysis must be undertaken to determine whether federal law preempts the EPPs' state law claims. **B. Statutory Claims Invoking State *Antitrust* and/or Consumer Protection Laws**

i. Case Law Supporting Finding of Preemption

The instant litigation is analogous to the cases in which federal patent law preempted the state law claims. *See* [*Abbott Laboratories v. Brennan, 952 F.2d 1346 (Fed. Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-NBP0-003N-417T-00000-00&context=); [*In re Ciprofloxacin Hydrochloride* ***Antitrust*** *Litig., 363 F. Supp. 2d 514 (E.D.N.Y. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FW5-T420-TVW3-P2B4-00000-00&context=); [*In re K-Dur* ***Antitrust*** *Litigation, No. 01-1652, 2007 U.S. Dist. LEXIS 100238, 2007 WL 5297755 (D.N.J. March 1, 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51XG-TDT1-JCNC-500B-00000-00&context=).

In *Abbott Laboratories****[\*17]*** *v. Brennan*, the plaintiffs brought a state tort action for abuse of process based on an allegation that the defendant engaged in inequitable conduct before the PTO. The Federal Circuit held that the state tort action for abuse of process was preempted by federal patent law, explaining that state law cannot be invoked as a remedy for inequitable conduct before the PTO because "the patent grant is within the exclusive purview of federal law" as it "related directly to administrative proceedings before the PTO." [*Abbott Laboratories, 952 F.2d at 1355*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-NBP0-003N-417T-00000-00&context=). Similarly, in this litigation, the remaining issue concerns the "patent grant" (or the extension of the '048 patent) and whether Pfizer engaged in fraud before the PTO resulting in the extension of the '048 patent.

In the case of [*In re Ciprofloxacin Hydrochloride* ***Antitrust*** *Litig., 363 F. Supp. 2d 514 (E.D.N.Y. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FW5-T420-TVW3-P2B4-00000-00&context=), a class of indirect purchaser plaintiffs brought claims under state ***antitrust*** and consumer protection laws based on allegations of the defendant's misconduct before the PTO in its procurement of the patent and sham litigation in enforcing the patent. Like the EPPs here, the *Cipro* plaintiffs alleged that the defendant patent holder made a series of misrepresentations to the PTO to secure the issuance of the patent. The *Cipro* plaintiffs also claimed that the defendant brought**[\*18]** a sham infringement action against a generic manufacturer with the knowledge that the underlying patent was invalid and had been fraudulently procured. [*Cipro, 363 F. Supp. 2d at 542-43*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FW5-T420-TVW3-P2B4-00000-00&context=).

The *Cipro* plaintiffs' claims of *Walker Process* fraud and sham litigation, which were brought under state ***antitrust*** and consumer protection laws, were preempted by federal law because they rested entirely on patent law. The court explained that if state law claims based on allegations of *Walker Process* fraud or sham litigation are ultimately dependent upon proof of a violation of federal patent law (such as a showing of misconduct before the PTO), then those claims are preempted. [*Id. at 543-44*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FW5-T420-TVW3-P2B4-00000-00&context=).

The *Cipro* plaintiffs' allegations centered upon activity that occurred before the PTO or in the context of litigation, and failed to include any allegations of marketplace misconduct. [*Id. at 545-47*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FW5-T420-TVW3-P2B4-00000-00&context=). Similarly, in this case, the EPPs' claim of *Walker Process* fraud can survive only if the EPPs can prove that Pfizer intentionally withheld or misrepresented material information to the PTO during the prosecution of the '048 patent.

The EPPs claim that Pfizer's listing of the '048 patent in the Orange Book[[8]](#footnote-7)8 serves as an example of marketplace misconduct. However, in the absence of other allegations**[\*19]** of tortious conduct in the marketplace, such as threats to customers, the EPPs' claims depend solely on allegations of Pfizer's misconduct before the PTO. These claims are dependent on—and therefore preempted by—federal patent law.

The decision in [*In re K-Dur* ***Antitrust*** *Litigation*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51XG-TDT1-JCNC-500B-00000-00&context=) is instructive. In *K-Dur*, the plaintiffs (a class of indirect purchasers) brought claims under the ***antitrust*** and consumer protection statutes of twenty-four states, based on the allegation that the defendants engaged in fraudulent activity before the PTO. [*K-Dur, No. 01-1652, 2007 U.S. Dist. LEXIS 100238, 2007 WL 5297755, at \*24 (D.N.J. March 1, 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51XG-TDT1-JCNC-500B-00000-00&context=). The court dismissed the indirect purchasers' claims for lack of standing, and did not reach the issue of whether the defendants engaged in actual fraud. However, in his Report and Recommendations, the Special Master recognized that although the various state statutes contained different elements of proof, they all relied upon evidence of fraud or inequitable conduct before the PTO to satisfy their respective elements of proof. [*Id. 2007 U.S. Dist. LEXIS 100238, [WL] at \*24*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51XG-TDT1-JCNC-500B-00000-00&context=). The Special Master concluded that "applying these state statutes constitutes an impermissible attempt to offer patent-like protection." [*2007 U.S. Dist. LEXIS 100238, [WL] at \*21, \*24*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51XG-TDT1-JCNC-500B-00000-00&context=).

The Special Master reasoned that evidence of marketplace misconduct could revive state claims**[\*20]** that were otherwise subject to preemption by federal patent law, defining marketplace misconduct as "intentional conduct having a direct impact on non-competitors (i.e., customers)." [*2007 U.S. Dist. LEXIS 100238, [WL] at \*24*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51XG-TDT1-JCNC-500B-00000-00&context=). The Special Master concluded that "[e]ven if reasonable people disagree about the extent to which state law ***antitrust*** claims rely upon conduct before the PTO, evidence of marketplace misconduct [in this case] is sorely lacking." *Id.*

Evidence of marketplace misconduct is lacking in this litigation, as well. The EPPs do not allege that Pfizer's misconduct had a direct impact on non-competitors (customers). Furthermore, like the indirect-purchaser plaintiffs in *Cipro* and *K-Dur*, the EPPs' state law claims are premised solely on allegations of Pfizer's misconduct before the PTO. These claims are preempted by federal patent law.

ii. Case Law Against Finding of Preemption

The cases cited by the EPPs in which state law was not preempted involve allegations of marketplace misconduct. *See* [*In re DDAVP Indirect Purchaser* ***Antitrust*** *Litigation, 903 F. Supp. 2d 198, 214 (S.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56V3-DKJ1-F04F-0001-00000-00&context=); [*Dow Chemical Co. v. Exxon Corp., 139 F.3d 1470 (Fed. Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SB0-VT70-003B-91DF-00000-00&context=); [*Hunter Douglas, Inc. v. Harmonic Design, Inc., 153 F.3d 1318 (Fed. Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=); [*Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CBY0-003B-43TN-00000-00&context=); [*Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 191 L. Ed. 2d 511 (2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FTC-D411-F04K-F0WK-00000-00&context=); [*In re Cipro Cases I & II, 61 Cal. 4th 116, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (Cal. May 7, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FXT-F8K1-F04B-P0B8-00000-00&context=). Allegations of marketplace misconduct are absent from the EPPs' Consolidated Amended Complaint.

In *DDAVP*, the plaintiffs brought state law ***antitrust*** and consumer protection claims against the defendant patent holder based**[\*21]** on allegations of fraud on the PTO and bad faith enforcement of the patent at issue. The plaintiffs alleged that the defendant misled the PTO and engaged in bad faith enforcement of their patent through an invalid Orange Book listing, sham patent infringement litigation, and the use of a sham citizen petition. [*In re DDAVP Indirect Purchaser* ***Antitrust*** *Litigation, 903 F. Supp. 2d 198, 214 (S.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56V3-DKJ1-F04F-0001-00000-00&context=). The court held that there was no preemption of the state law claims because the plaintiffs plausibly alleged both fraud on the PTO and bad faith enforcement of the patent. [*Id. at 218*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56V3-DKJ1-F04F-0001-00000-00&context=). The court also found that the alleged tort occurred later in the marketplace, although the defendant's conduct before the PTO was admissible to prove it. *Id.*

The EPPs refer to allegations of Pfizer's fraud on the PTO, Pfizer's improper listing of the '048 patent in the Orange Book, Pfizer's sham litigation against would-be generic manufacturers, and Pfizer's conduct in prolonging the impact of their sham litigation through settlement agreements as allegations of marketplace misconduct. ECF No. 56 at 7. These allegations are insufficient to rise to the level of marketplace misconduct recognized by the court in *DDAVP*.

The EPPs' claim of sham litigation has been dismissed. The related allegations regarding sham litigation**[\*22]** and the resulting settlement agreements, therefore, can no longer be considered as a basis for the EPPs' state law claims.[[9]](#footnote-8)9 An allegation of an invalid Orange Book listing provides an insufficient basis for state law action in the absence of other allegations or indications of marketplace misconduct. [*In re Ciprofloxacin Hydrochloride* ***Antitrust*** *Litigation, 363 F. Supp. 2d 514, 545-46 (E.D.N.Y. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FW5-T420-TVW3-P2B4-00000-00&context=). Because the EPPs fail to plausibly allege that Pfizer engaged bad faith enforcement of its patent, the EPPs' claims are distinguishable from those made by the plaintiffs in *DDAVP*.

The EPPs allege *Walker Process* fraud, but have yet to prove that Pfizer obtained an extension of the exclusivity period for its '048 patent through fraud. "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust*** law, as long as competition is restrained only within the scope of the patent." [*Id. at 535*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FW5-T420-TVW3-P2B4-00000-00&context=). Thus, the EPPs' allegation of fraud at this stage is also insufficient to sustain an allegation of marketplace misconduct.

The EPPs also cite [*Dow Chemical Co. v. Exxon Corp., 139 F.3d 1470 (Fed. Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SB0-VT70-003B-91DF-00000-00&context=) and [*Hunter Douglas, Inc. v. Harmonic Design, Inc., 153 F.3d 1318 (Fed. Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=) to support their argument against a finding of federal preemption. Both cases are distinguishable from the instant litigation as well.**[\*23]**

In *Dow Chemical, Co. v. Exxon Corp.*, the plaintiffs brought a state law tort claim for interference with contractual relations, based on allegations that the defendant patent holder engaged in inequitable conduct before the PTO and threatened to sue the plaintiffs' customers in order to enforce its allegedly invalid patent. [*Dow Chemical Co. v. Exxon Corp., 139 F.3d 1470 (Fed. Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SB0-VT70-003B-91DF-00000-00&context=). First, the Federal Circuit held that the plaintiffs' state law tort claim was not preempted by federal patent law because the state law cause of action (interference with contractual relations) includes additional elements not found in the federal patent law cause of action. Thus, the state law claim did not constitute an impermissible attempt to offer patent-like protection to subject matter that was addressed entirely by federal patent law. Ultimately, the state law claim for interference with contractual relations was not preempted because it addresses an entirely different wrong than a simple claim for inequitable conduct before the PTO, and it also provides for different forms of relief. [*Id. at 1478*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SB0-VT70-003B-91DF-00000-00&context=). Second, the Federal Circuit held that the state law remedy provided by a claim of interference with contractual relations was directed toward the plaintiffs' allegations**[\*24]** of tortious conduct in the marketplace, and was therefore not preempted. The *Dow* plaintiffs alleged that the defendant engaged in bad faith enforcement of an allegedly unenforceable patent by threatening to sue the plaintiffs' customers. *See* [*Cipro, 363 F. Supp. 2d at 544-45*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FW5-T420-TVW3-P2B4-00000-00&context=) ("The marketplace conduct that occurred in *Dow* was [the defendant's] threats to [the plaintiffs'] *customers*, not activity that occurred before the PTO or in the context of litigation.") (emphasis added).

The instant litigation is distinguishable from [*Dow*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SB0-VT70-003B-91DF-00000-00&context=) for two reasons. First, *Dow* involved a state tort claim of interference with contractual relations, which clearly addresses a different wrong than a claim brought under federal patent law. The purpose of a claim of interference with contractual relations is to uphold the integrity of commercial contracts, which is "traditionally the domain of state law." [*Dow, 139 F.3d at 1475*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SB0-VT70-003B-91DF-00000-00&context=). Second, the plaintiffs in *Dow* alleged that the defendant knowingly made baseless infringement assertions against the plaintiffs' customers, which clearly constitutes marketplace misconduct in the form of bad faith enforcement of the underlying patent. A plausible allegation of marketplace misconduct is absent in this case, where the EPPs' state**[\*25]** law claims "turn solely on inequitable conduct before the PTO." [*Id. at 1476*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SB0-VT70-003B-91DF-00000-00&context=).

In *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, the plaintiff brought a state law claim for unfair competition, based on allegations that the defendant's patent was unenforceable and that the defendant "informed one or more purchasers . . . that [they] had an exclusive license to sell [the products covered by the defendant's patents]." The Federal Circuit held that federal patent law does not preempt state tort law claims when: (1) a plaintiff can show that the defendant patent holder's conduct amounted to fraud or rendered the entire patent application process a sham, or (2) a plaintiff can show that the defendant patent holder acted in bad faith while publicizing a patent in the marketplace. [*Hunter Douglas, 153 F.3d at 1335-36*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=).

The first part of the rule articulated in *Hunter Douglas*—that federal patent law does not preempt state law where the plaintiff can show that the defendant patent holder's conduct amounted to fraud—is derived from [*Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059 (Fed. Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S95-X9P0-003B-91BC-00000-00&context=) (holding that a patentee may be subject to ***antitrust*** liability if the alleged infringer proves that the patentee's asserted patent was obtained through knowing and willful fraud). The reliance on *Nobelpharma* by the**[\*26]** *Hunter Douglas* court and by the EPPs is misplaced in the context of federal preemption. In *Nobelpharma*, the plaintiffs were asserting a claim under federal ***antitrust*** law—federal preemption of state law was not an issue in that case. *Nobelpharma* holds that a patent holder may be subject to *federal* ***antitrust*** liability if the alleged infringer can prove that the patent holder obtained that patent-in-suit through knowing and willful fraud. It does not hold that a plaintiff may bring a state law tort claim based on an allegation that a defendant patent holder obtained the patent through fraud.

In *Hunter Douglas*, the plaintiffs plausibly alleged that the defendant engaged in misconduct before the PTO *and* in the marketplace. The Federal Circuit in [*Hunter Douglas*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TF2-T8N0-003B-906B-00000-00&context=) did not address whether an allegation of *Walker Process* fraud by itself is sufficient to overcome federal preemption.

The EPPs cite *Bonito Boats* in support of their claim that the law of unfair competition is a "state concern" and should not be preempted by federal patent law. [*Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 154, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CBY0-003B-43TN-00000-00&context=). The Supreme Court recognized in *Bonito Boats* that traditional state law concerns, such as deceptive simulation of trade dress, trade secret protection, misappropriation**[\*27]** of proprietary information, and the law of unfair competition, may be properly raised under state law even when patent rights are also at issue. *Id.*

However, the Supreme Court in [*Bonito Boats*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CBY0-003B-43TN-00000-00&context=) nevertheless held that the plaintiff's state law claims were preempted by federal patent law because the state law invoked by the plaintiffs offered patent-like protection for ideas that were unprotected under the federal scheme. [*Id. at 168*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CBY0-003B-43TN-00000-00&context=). The Court found that the state law attempted to replace or substitute the federal patent scheme by creating patent-like rights for a particular product that did not exist under the federal scheme. Therefore, the state statute conflicted with the "strong federal policy favoring free competition in ideas which do not merit patent protection." *Id.* The Supreme Court explained further that the law of unfair competition is concerned with protecting *consumers* from confusion rather than protecting producers or incentivizing product innovation. [*Id. at 157*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CBY0-003B-43TN-00000-00&context=).

The EPPs bring claims under the ***antitrust*** and consumer protection laws of twenty-five states and the District of Columbia. Their claims are based on the allegation that Pfizer engaged in *Walker Process* fraud before the PTO. A successful**[\*28]** *Walker Process* fraud claim is intended to protect competitors who may be blocked from the market due to a patent holder's misconduct. It does not "protect consumer confusion as to source or tortious appropriation of trade secrets," which is the fundamental concern of the law of unfair competition. *Id.*

Furthermore, the EPPs' claim of *Walker Process* fraud rests solely on the allegation that Pfizer engaged in fraud before the PTO. This allegation is related to administrative proceedings before the PTO; it fails to support a claim for unfair competition or consumer protection because it is not concerned with protecting consumers, nor is it related to other traditional state law concerns. [*Id*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CBY0-003B-43TN-00000-00&context=)*.* Because the EPPs' allegation of fraud relates to Pfizer's conduct before the PTO and does not implicate traditional areas of state ***regulation***, it does not support claims brought under state ***antitrust*** and consumer protection laws.[[10]](#footnote-9)10

In conclusion, the twenty-eight state law claims brought under the ***antitrust*** and/or consumer protection statutes of Arizona, California, the District of Columbia, Florida, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada,**[\*29]** New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin are preempted by federal patent law. Therefore, Pfizer's Motion to Dismiss must be granted in part.

C. Unjust Enrichment Claims Invoking State Common Law

Conflict preemption exists when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [*Tavory v. NTP, Inc., 297 Fed. App'x 976, 983 (Fed. Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4V2S-W060-TXFN-62H6-00000-00&context=). The congressional objectives of federal patent law are to foster and reward innovation, to promote the disclosure of inventions, to uphold the stringent requirements for patent protection, to provide clear demarcation between public and private property, and to ensure nationwide uniformity in patent law. [*Ultra-Precision Mfg., Ltd. v. Ford Motor Co., 411 F.3d 1369, 1378 (Fed. Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GDH-X2W0-003B-92RF-00000-00&context=). Only conflict preemption can bar a state unjust enrichment claim. [*Trustees of Columbia Univ. in City of New York v. Symantec Corp., No. 13cv808, 2014 U.S. Dist. LEXIS 46172, 2014 WL 1329417, at \*11 (E.D. Va. Apr. 2, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BWH-9VM1-F04F-F01G-00000-00&context=) ("Because federal patent law does not provide explicit preemption . . . and because Congress does not intend to occupy exclusively the field of fraudulent concealment and unjust enrichment law . . . only conflict preemption might bar [a plaintiff's] claims for fraudulent concealment**[\*30]** and unjust enrichment.").

The EPPs allege that Pfizer procured an extension of the period of exclusivity of the '048 patent through fraudulent conduct before the PTO. The EPPs assert that it would be "inequitable for Pfizer to be permitted to retain any of the overcharges." ECF No. 56 at 29. As a remedy for Pfizer's alleged unjust enrichment, the EPPs seek to disgorge "all unlawful or inequitable proceeds received by Pfizer" and, to the extent the "Court finds that Plaintiffs and the Class members have no adequate remedy at law, a constructive trust should be imposed." *Id.*

The EPPs cite *Symantec* to assert that "unjust enrichment causes of action cover a broad range of conduct that does not bear on federal patent policies, and those causes of action are therefore not preempted by federal patent law." [*Symantec Corp., 2014 U.S. Dist. LEXIS 46172, 2014 WL 1329417, at \*12*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BWH-9VM1-F04F-F01G-00000-00&context=). However, when a state law claim for unjust enrichment is based on nothing more than an allegation of inequitable or fraudulent conduct before the PTO, such claims are preempted by federal patent law. [*Daiichi Sankyo, Inc. v. Apotex, Inc., No. 030937, 2009 U.S. Dist. LEXIS 42154, 2009 WL 1437815, at \*9 (D.N.J. May 19, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4WBC-2NH0-TXFR-F36W-00000-00&context=); *see also* [*Tavory v. NTP, Inc., 297 Fed. Appx. 976, 984 (Fed. Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4V2S-W060-TXFN-62H6-00000-00&context=) (holding that an unjust enrichment claim is preempted by federal patent law where the dispositive issue in the case is governed exclusively by federal patent law).

Because the EPPs' unjust**[\*31]** enrichment claims are based on their allegation that Pfizer engaged in misconduct before the PTO and procured an extension of the '048 patent through fraud, federal patent law preempts these claims. The EPPs concede that "[t]here is no distinction drawn in preemption precedent between statutory and equitable state law claims," but contend that "federal preemption does not extend to claims of unjust enrichment in this case, for the same reasons federal preemption does not extend to the EPPs' statutory claims." ECF No. 86 at 13. However, this Court concludes that the EPPs' statutory claims are preempted. The common law claims of unjust enrichment are preempted, as well.

**CONCLUSION**

The EPPs' seventy-eight state law claims based on the ***antitrust*** and consumer protection statutes of twenty-five states and the District of Columbia and the common law of unjust enrichment of forty-eight states and the District of Columbia and Puerto Rico are preempted by federal patent law. These state law claims are based on the allegation that Pfizer engaged in *Walker Process* fraud before the PTO, resulting in the extension of the period of exclusivity of the \*048 patent. Because *Walker Process* fraud and the parties'**[\*32]** conduct before the PTO are governed by federal patent law, federal patent law preempts state law claims based solely on these allegations.

The EPPs' unjust enrichment claims in Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, New Jersey, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Texas, Utah, Virginia, and Washington also fail because the EPPs lack standing in those jurisdictions. Those states follow the rule articulated in [*Illinois Brick. Illinois Brick, 431 U.S. at 728-29*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9DJ0-003B-S1WY-00000-00&context=).

For the foregoing reasons, Pfizer's Motion to Dismiss (ECF No. 52) is **GRANTED IN PART AND DENIED IN PART** as follows:

Pfizer's Motion to Dismiss the EPPs' fraud claim is **DENIED**. Pfizer's Motion to Dismiss the EPPs' "sham litigation" claim is **GRANTED AND DISMISSED WITHOUT PREJUDICE**. *See also* ECF No. 80.

The EPPs' seventy-eight state law claims, based on the ***antitrust*** and consumer protection statutes of twenty-five states and the District of Columbia and the common law of unjust enrichment of forty-eight states and the District of Columbia and Puerto Rico, are **DISMISSED WITHOUT PREJUDICE**.

By separate Order, the Court will issue a litigation schedule largely**[\*33]** in accordance with the parties' recent proposals.

**IT IS SO ORDERED**.

/s/ Arenda L. Wright Allen

Arenda L. Wright Allen

United States District Judge

**End of Document**

1. 1This Class is defined as follows: "all persons or entities who purchased and/or paid for some or all of the purchase price for Celebrex in the [the 48 class states, the District of Columbia, and Puerto Rico] starting on May 31, 2014." Compl., ECF No. 26, ¶ 266; *see also Id.* at Section IX ("Class Allegations"). [↑](#footnote-ref-0)
2. 2In Count One ("Monopolization under State Law"), the EPPs claim that Pfizer violated the following state laws: [*Ariz. Rev. Stat. §§ 44-1403*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DP0-J2P1-6MP7-F4P7-00000-00&context=), [*Cal. Bus. & Prof. Code §§ 16700*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-2YX1-DYB7-W1MN-00000-00&context=), [*17200*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-2YX1-DYB7-W1SB-00000-00&context=), [*D.C. Code §§ 28-4503*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CDK-B2N1-6NSS-B08N-00000-00&context=), [*Fla. Stat. §§ 501.201*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-MHT1-6SKW-D02M-00000-00&context=) & [*542.19*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-MHT1-6SKW-D104-00000-00&context=), [*740 Ill. Comp. Stat. 10/3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C66-0WY1-6YS3-D061-00000-00&context=), [*Iowa Code §§ 553*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GCJ-G901-DYB7-W008-00000-00&context=), [*Me. Rev. Stat. Ann. 10 §§ 1102*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5D41-7341-DYB8-115C-00000-00&context=), [*Mass. Ann. Laws ch. 93A*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5FF4-8J81-6HMW-V4HJ-00000-00&context=), [*Mich. Comp. Laws Ann. §§ 445.773*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:56VF-8HD1-6RDJ-84FG-00000-00&context=), [*Minn. Stat. §§ 325D.52*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DCP-CCJ1-DYB7-W3S9-00000-00&context=), [*Miss. Code Ann. §§ 75-21-3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8P6B-8782-8T6X-74S4-00000-00&context=), [*Neb. Code Ann. §§ 59-802*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DHH-V9H1-K9K2-X0NB-00000-00&context=), [*Nev. Rev. Stat. Ann. §§ 598A.060*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5B62-NJJ1-6X0H-048J-00000-00&context=), [*N.H. Rev. Stat. Ann. §§ 356.1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5B8M-42N1-669P-00X0-00000-00&context=), [*N.M. Stat. Ann. §§ 57-1-2*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BXH-GGD1-64V8-14BF-00000-00&context=), [*New York General Business Law § 340*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HF-00000-00&context=), [*N.C. Gen. Stat. §§ 75-2.1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5S90-2X80-004F-P41G-00000-00&context=), [*N.D. Cent. Code §§ 51-08.1-03*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CP7-X5Y1-66WP-P455-00000-00&context=), [*Or. Rev. Stat. §§ 646.730*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5812-D6T1-648C-8479-00000-00&context=), [*R.I. Gen. Laws §§ 6-36-5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SW5-BR00-004G-43W8-00000-00&context=), [*S.D. Codified Laws §§ 37-1-3.2*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DKM-GYJ1-66PT-F0V3-00000-00&context=), [*Tenn. Code Ann. §§ 47-25-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8K-XB40-R03J-K1ND-00000-00&context=), [*Utah Code Ann. §§ 76-10-3104*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BKJ-YPT1-6VSV-0050-00000-00&context=), [*Vt. Stat. Ann. 9 §§ 2453*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SDC-H250-004G-G4GG-00000-00&context=), [*W.Va. Code §§ 47-18-4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:56W2-96N1-64R1-B0G8-00000-00&context=), [*Wis. Stat. §§ 133.03*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5G4X-PM41-DYB7-M174-00000-00&context=). Compl., ECF No. 26 11280. [↑](#footnote-ref-1)
3. 3In Count Two ("Unjust Enrichment"), the EPPs make a general claim of unjust enrichment, asserting that "[i]t would be inequitable under the laws of the District of Columbia, Puerto Rico, and all states within the United States, except Indiana and Ohio, for Defendants to retain any of the overcharges for Celebrex derived from Defendant's unfair and unconscionable methods, acts, and trade practices alleged herein." Compl., ECF No. 26 ¶ 284. The EPPs further contend that "Pfizer should be compelled to disgorge in a common fund for the benefit of Plaintiffs and the Class all unlawful or inequitable proceeds derived by Pfizer." Compl., ECF No.26 ¶ 291. [↑](#footnote-ref-2)
4. 4See Pfizer's Memorandum in Support of Motion to Dismiss Plaintiffs' Corrected Consolidated Amended Class Action Complaint ("DPP Motion"); *In re Celebrex (Celecoxib,)* ***Antitrust*** *Litig.*, Civil Action No. 2:14cv361 (Oct. 20, 2014), ECF No. 46. [↑](#footnote-ref-3)
5. 5The "*Walker Process* standard" applies to ***antitrust*** claims based on fraud in the procurement of a patent. To state a claim for *Walker Process* fraud, a plaintiff must prove the following elements: (1) that the patentee committed fraud before the PTO; (2) that the fraud caused the patent to issue; (3) that the patentee enforced the patent knowing that it had been procured by fraud; (4) that the enforcement of the patent substantially reduced competition in the relevant ***antitrust*** market; (5) that the claimant suffered ***antitrust*** injury; and (6) that all other elements of a monopolization offense are met. [*Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GCY0-003B-S512-00000-00&context=); [*Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4J3N-6GF0-004B-Y02W-00000-00&context=). [↑](#footnote-ref-4)
6. 6[*Cal. Bus. & Prof. Code §§ 16700*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-2YX1-DYB7-W1MN-00000-00&context=), [*17200*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-2YX1-DYB7-W1SB-00000-00&context=); [*D.C. Code § 28-4503*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CDK-B2N1-6NSS-B08N-00000-00&context=); [*Iowa Code § 553*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GCJ-G901-DYB7-W008-00000-00&context=); [*Me. Rev. Stat. Ann. 10, § 1102*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5D41-7341-DYB8-115C-00000-00&context=); [*Mass. Ann. Laws ch. 93A*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5FF4-8J81-6HMW-V4HJ-00000-00&context=); [*Neb. Code Ann. § 59-802*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DHH-V9H1-K9K2-X0NB-00000-00&context=); [*N.H. Rev. Stat. Ann. § 356.1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5B8M-42N1-669P-00X0-00000-00&context=); [*N.M. Stat. Ann. § 57-1-2*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BXH-GGD1-64V8-14BF-00000-00&context=); [*Or. Rev. Stat. § 646.730*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5812-D6T1-648C-8479-00000-00&context=); [*Tenn. Code Ann. § 47-25-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8K-XB40-R03J-K1ND-00000-00&context=); [*Utah Code Ann. § 76-10-3104*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5BKJ-YPT1-6VSV-0050-00000-00&context=); [*Vt. Stat. Ann. tit. 9, § 2453*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SDC-H250-004G-G4GG-00000-00&context=); and [*W. Va. Code § 47-18-4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:56W2-96N1-64R1-B0G8-00000-00&context=). [↑](#footnote-ref-5)
7. 7Pfizer asserts that the following states have adopted the *Illinois****[\*13]*** *Brick* bar on indirect purchaser claims: Alabama, Alaska, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, New Jersey, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Texas, Utah, Virginia, Washington, and Wyoming. Pfizer contends that the EPPs lack standing to bring claims under the ***antitrust*** and consumer protection statutes and/or common law of unjust enrichment in those states. [↑](#footnote-ref-6)
8. 8The publication, "Approved Drug Products with Therapeutic Equivalence Evaluations" (commonly known as the Orange Book) identifies drug products approved on the basis of safety and effectiveness by the Food and Drug Administration under the federal [*Food, Drug, and Cosmetic Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVH1-NRF4-425X-00000-00&context=) and related patent and exclusivity information. U.S. Food and Drug Administration, http://www.fda.gov/Drugs/InformationOnDrugs/ucm129662.htm. [↑](#footnote-ref-7)
9. 9In contrast, the plaintiffs in *DDAVP* made plausible allegations of both fraud on the PTO and bad faith enforcement of the patent. [*DDAVP, 903 F. Supp. 2d at 218*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56V3-DKJ1-F04F-0001-00000-00&context=). [↑](#footnote-ref-8)
10. 10The EPPs have also cited two recent cases, [*Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 191 L. Ed. 2d 511 (2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FTC-D411-F04K-F0WK-00000-00&context=) and [*In re Cipro Cases I & II, 61 Cal. 4th 116, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (Cal. May 7, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FXT-F8K1-F04B-P0B8-00000-00&context=), to support the assertion that their state law ***antitrust*** and consumer protection claims are not preempted by federal patent law. In *Oneok*, the Supreme Court held that the plaintiffs state law ***antitrust*** claims were not preempted by the [*Federal Natural Gas Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GT11-NRF4-434M-00000-00&context=). [*Oneok, 135 S. Ct. at 1591*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FTC-D411-F04K-F0WK-00000-00&context=). This case is inapposite because it does not address the issue of preemption in the context of federal patent law.

    In *Cipro I and II*, the plaintiff challenged the terms of their patent settlement with the defendant, claiming that the settlement terms restrained competition in violation of federal and state ***antitrust*** laws. The court held that state ***antitrust*** law was not preempted by federal ***antitrust*** law where the underlying controversy involves a question of infringement. [*In re Cipro Cases I & II, 61 Cal. 4th 116, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (Cal. May 7, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FXT-F8K1-F04B-P0B8-00000-00&context=). This case is also inapposite because it does not involve allegations of fraud or misconduct before the PTO, which are at issue in this case. [↑](#footnote-ref-9)