No. 18-3735

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

MARION HEALTHCARE, LLC, ET AL.,

Plaintiffs-Appellants,

v.

BECTON DICKINSON & COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois
(Hon. Nancy J. Rosenstengel, No. 3:18-cv-01059)

BRIEF AND SHORT APPENDIX OF PLAINTIFFS-APPELLANTS

R. STEPHEN BERRY
BERRY LAW PLLC
1100 Connecticut Avenue, N.W.
Suite 645
Washington, D.C. 20036
(202) 296-3020 (telephone)
(202) 296-3038 (facsimile)

STEVEN F. MOLO
Counsel of Record
ERIC A. POSNER
ALLISON M. GORSUCH
MOLOLAMKEN LLP
300 N. LaSalle Street
Suite 5350
Chicago, IL 60654
(312) 450-6700 (telephone)
(312) 450-6701 (facsimile)
smolo@mololamken.com

JUSTIN M. ELLIS
JENNIFER E. FISCHELL
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8159 (telephone)
(212) 607-8161 (facsimile)

Counsel for Plaintiffs-Appellants

ORAL ARGUMENT REQUESTED

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3735

Short Caption: Marion Diagnostic Center, LLC, et al. v. Becton, Dickinson, and Co., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Marion Diagnostic Center, LLC

Marion Healthcare, LLC

Andron Medical Associates

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

MoloLamken LLP

Berry Law PLLC

Goldsmith & Goldsmith, LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a (no parent corporation for any Plaintiff-Appellant)

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a (no publicly held company that owns 10% or more of any Plaintiff-Appellant's stock)

Attorney's Signature: s/ R. Stephen Berry Date: 4/18/2019

Attorney's Printed Name: R. Stephen Berry

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 1100 Connecticut Avenue, NW, Suite 645
Washington, DC 20036

Phone Number: (202) 296-3020 Fax Number: (202) 296-3038

E-Mail Address: sberry@berrylawpllc.com

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n/a (no publicly held company that owns 10% of any Plaintiff's stock)

Attorney's Signature: /s/ Justin M. Ellis Date: 04/18/2019

Attorney's Printed Name: Justin M. Ellis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: MoloLamken LLP, 430 Park Avenue, New York, NY 10022

Phone Number: (212) 607 8159 Fax Number: (212) 607 8161

E-Mail Address: jellis@mololamken.com

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None (no parent corporation for any Plaintiff)

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None (no publicly held company that owns 10% or more of any Plaintiff's stock)

Attorney's Signature: s/ Jennifer E. Fischell Date: 04/18/2019

Attorney's Printed Name: Jennifer E. Fischell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: MoloLamken LLP, 430 Park Avenue, New York, NY 10022

Phone Number: (212) 607-8174 Fax Number: (212) 607-8161

E-Mail Address: jfischell@mololamken.com

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Goldsmith & Goldsmith, LLP (Inadvertently Omitted on Previous Disclosure)

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Marion Diagnostic Center, LLC: None; Marion Healthcare, LLC: None; Andron Medical Associates: None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Marion Diagnostic Center, LLC: None; Marion Healthcare, LLC: None; Andron Medical Associates: None

---

Attorney's Signature: s/ Allison Mileo Gorsuch Date: 04/18/2019

Attorney's Printed Name: Allison Mileo Gorsuch

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 300 N LaSalle Street, Suite 5350
Chicago, IL 60654

Phone Number: 312-450-6713 Fax Number: 312-450-6701

E-Mail Address: agorsuch@mololamken.com

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Attorney's Signature: s/ Steven F. Molo Date: 04/18/2019

Attorney's Printed Name: Steven F. Molo

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: MoloLamken LLP, 300 N. LaSalle Street, Suite 5350, Chicago, IL 60654

Phone Number: (312) 450 6700 Fax Number: (312) 450 6701

E-Mail Address: smolo@mololamken.com

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Attorney's Signature: s/ Eric Posner Date: 4/18/2019

Attorney's Printed Name: Eric Posner

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 300 North LaSalle Street, Suite 5350
Chicago, IL 60654

Phone Number: (312) 450-6715 Fax Number: (312) 450-6701

E-Mail Address: eposner@mololamken.com

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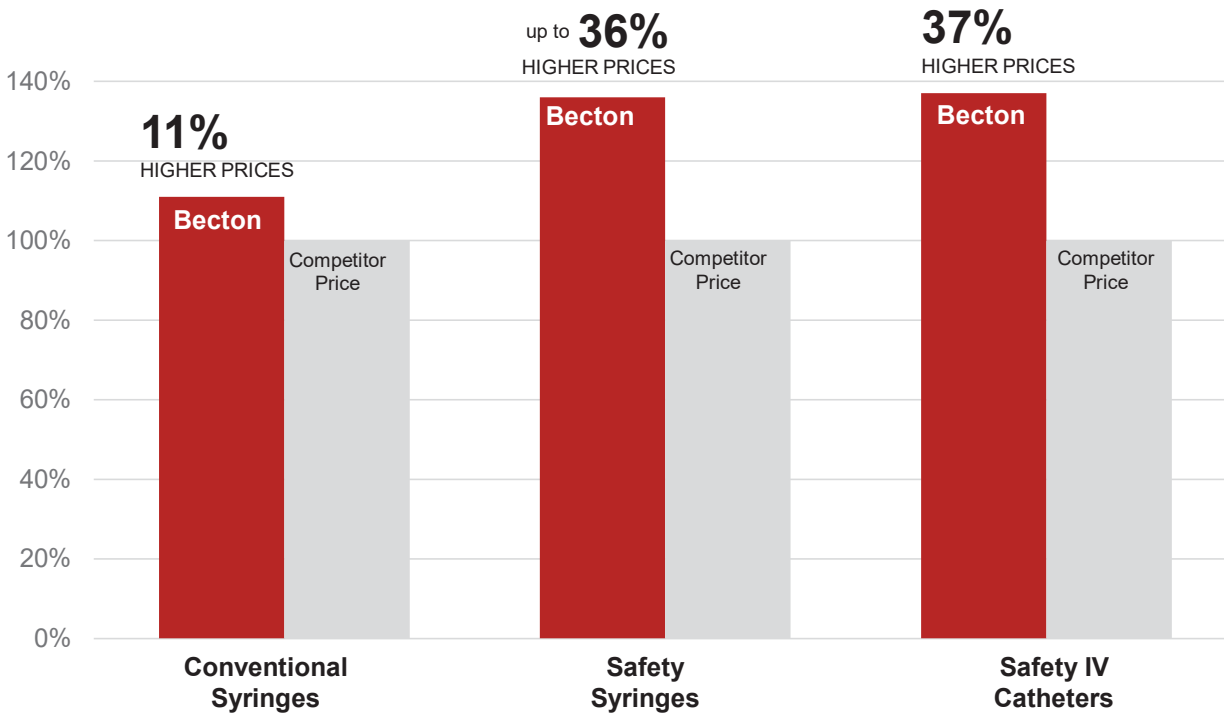
INTRODUCTION

Defendant-Appellee Becton, Dickinson & Company ("Becton") is a monopolist. It possesses substantial market power in the nationwide markets for syringes and catheters, and it charges supracompetitive prices for these commodity products. Becton's prices vis-à-vis its competitors in the three markets at issue – conventional syringes, safety syringes, and safety IV catheters – are jaw-dropping:



Dist. Ct. Dkt. 121 at 6; *see* A.10-A.11, Compl. ¶39.[1]

[1] District court docket entries are cited by internal page (except for Dist. Ct. Dkt. 121, which is cited by docket-stamped page). The amended complaint ("Compl.") is cited by short-appendix page and internal paragraph numbers.

Becton maintains its monopoly through a web of oppressive contracts and by facilitating payments among itself, distributors, and Group Purchasing Organizations ("GPOs") that purportedly act on behalf of medical purchasers but which, in fact, are tools of Becton. The conspirators benefit from supracompetitive prices paid by healthcare providers.

Plaintiffs-Appellants – Marion HealthCare LLC, Marion Diagnostic Center LLC, and Andron Medical Associates – are small healthcare providers that are outside the conspiracy and the first innocent purchasers of Becton's products. They brought this class action to restore competition in the markets for these commodity products.

The district court acknowledged that Plaintiffs pled a conspiracy among the defendants, but it misapplied the antitrust standing rule articulated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and dismissed the action below. We ask that the district court's decision be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§1331 and 1337 because Plaintiffs alleged claims under Section One of the Sherman Act, 15 U.S.C. §1, *et seq.*

This Court has jurisdiction under 28 U.S.C. §1291 because this appeal is from a final judgment that disposes of all parties' claims. The district court granted the defendants' motions to dismiss and judgment was entered on November 30, 2018. A.30-A.38 (opinion); A.39 (judgment). Plaintiffs timely filed their notice of appeal on December 27, 2018. A.40-A.41.

ISSUES PRESENTED

The Clayton Act allows private antitrust damages suits by "any person who shall be injured in his business or property." 15 U.S.C. §15(a). But the Supreme Court has allowed only "direct purchasers" from antitrust violators to sue under that statute. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 747 (1977). This Court has recognized that *Illinois Brick* does not bar suit if the plaintiff directly purchases goods from a distributor that – as alleged here – participated in an anticompetitive conspiracy. *See, e.g.*, *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 631-32 (7th Cir. 2002).

The issues presented are:

1. Whether the district court erred in applying *Illinois Brick* to dismiss a suit by healthcare product purchasers alleging a conspiracy, where the distributors from which they purchased agreed to enforce non-price exclusionary terms and engage in other anticompetitive acts, and were per-

mitted to add their own markup.

2. Whether *Illinois Brick* should be overruled if it is deemed to bar suit here.

STATEMENT OF THE CASE

I. RELEVANT STATUTES AND THEIR APPLICATION

Section One of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. §1.

Section Four of the Clayton Act provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §15(a).

The Supreme Court has limited which parties may sue under these provisions. In *Illinois Brick*, the Court held that only "the overcharged direct purchaser" from the antitrust violator, "and not others in the chain of manufacture or distribution," should be considered "the party 'injured in his business or property'" under the Clayton Act. 431 U.S. at 729. The Supreme Court based its ruling on the purported difficulties caused by apportioning

damages between different levels of the distribution chain. *See id.* at 737; *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605 (7th Cir. 1997).

Illinois Brick, however, does not "stand for the proposition . . . that a defendant cannot be sued under the antitrust laws by any plaintiff to whom it does not [directly] sell." *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 481-82 (7th Cir. 2002). Rather, this Court has held repeatedly that a plaintiff that has purchased directly from an anticompetitive conspiracy may sue *all* conspirators, regardless of their place in the distribution chain. *See Paper Sys.*, 281 F.3d at 631; *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980); *see also Brand Name Prescription Drugs*, 123 F.3d at 604.

Allowing a plaintiff that purchased two or three steps down the distribution chain from a monopolistic manufacturer – from a seller that participated in the manufacturer's conspiracy – follows the basic doctrine of "joint and several liability, under which each member of a conspiracy is liable for all damages caused by the conspiracy's entire output." *Paper Sys.*, 281 F.3d at 632 (citing *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981)). Although some courts describe "[t]he right to sue middlemen that joined the

conspiracy . . . as a co-conspirator 'exception' to *Illinois Brick*," "it would be better to recognize that . . . *Illinois Brick* allocate[s] to the first non-conspirator in the distribution chain" – *i.e.*, "the first purchaser[ ] from outside the conspiracy" – "the right to collect 100% of the damages." *Paper Sys.*, 281 F.3d at 631-32 (emphasis omitted).

II. FACTUAL BACKGROUND

A. The Parties

Plaintiffs – Marion HealthCare LLC, Marion Diagnostic Center LLC, and Andron Medical Associates – are small healthcare providers that purchased Becton products through distributors. A.3-A.4, Compl. ¶¶7-10.[2] Healthcare providers do not typically purchase syringes and catheters directly from manufacturers such as Becton. A.2, Compl. ¶¶2-3. Instead, they rely on GPOs, which, by aggregating the purchasing power of many small buyers, are supposed to help healthcare providers get fairer prices. As a result, the healthcare providers' purchases of the relevant products occur through a complicated web of contracts among GPOs, manufacturers, and distributors.

[2] These factual allegations are drawn from the amended complaint and must be accepted as true on this appeal from a dismissal under Fed. R. Civ. P. 12(b)(6). *See O'Boyle v. Real Time Resolutions, Inc.*, 910 F.3d 338, 342 (7th Cir. 2018).

A.2, Compl. ¶¶2-3; A.11-A.13, Compl. ¶¶40-47.

Each defendant plays a distinct role in the conspiracy:

Becton: Becton is a commodity medical products manufacturer that sells over $500,000,000 of conventional and safety syringes and safety IV catheters in the United States every year. A.8, Compl. ¶29. Becton controls about 60% of the market for conventional syringes, 60% of the market for safety syringes, and 55% of the market for safety IV catheters. A.9, Compl. ¶33. Its share in each of these markets is at least twice as large as the share of its nearest competitor. *Id.*; *see infra* at p. 9.

GPOs: Group purchasing organizations such as Premier, Inc. ("Premier") and Vizient, Inc. ("Vizient") stand at the center of the relevant markets for the sale of Becton syringes and catheters. GPOs purport to represent large groups of healthcare providers, such as Plaintiffs. In that capacity, they broker with Becton the contracts under which the healthcare providers buy Becton's syringes and catheters. A.8, Compl. ¶30; A.11-A.12, Compl. ¶42. At the same time, Becton pays "millions of dollars annually in anticompetitive payments" to the GPOs, *id.* – what it calls "administrative fees," Dist. Ct. Dkt. 116 at 35; *see* Dist. Ct. Dkt. 121 at 13. Together, Vizient

and Premier control over 75% of the annual spending in the United States by healthcare providers on medical devices and supplies. A.9, Compl. ¶34.

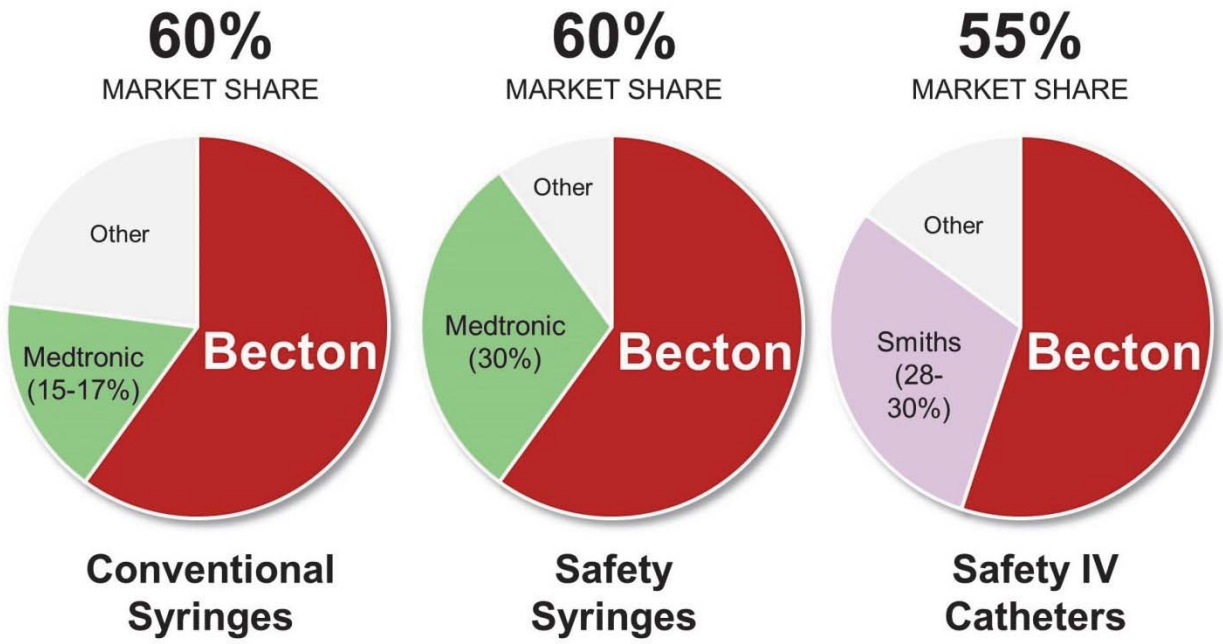
Distributors: Cardinal Health, Inc. ("Cardinal"), Owens & Minor Distribution, Inc. ("Owens & Minor"), McKesson Medical-Surgical, Inc. ("McKesson"), and Henry Schein, Inc. ("Henry Schein"), as well as unnamed coconspirators, purchase the relevant products from Becton for resale to healthcare providers such as Plaintiffs. A.5, Compl. ¶¶14-18; A.8-A.9, Compl. ¶31; A.12-A.13, Compl. ¶45. These distributors control a massive share of the market for distribution of medical devices and supplies. A.8-A.9, Compl. ¶31. In particular, Cardinal and Owens & Minor alone distribute 65% of the relevant Becton products in the market. A.12-A.13, Compl. ¶45. As market observers describe it, Cardinal and other Becton distributors enjoy "wide economic moats" allowing them to "keep new entrants at bay." A.8-A.9, Compl. ¶¶31-35.[3] The distributors agree to promote Becton's products, and Becton pays the distributors' sales personnel to sell Becton products to the exclusion of competing brands. A.12-A.13, Compl. ¶46. Also at Becton's

[3] A minority of healthcare providers are not members of GPOs. In these cases, distributors "resell the relevant Becton products under direct contracts entered into directly between Becton and the healthcare provider." A.8-A.9, Compl. ¶31; *see* A.14-A.15, Compl. ¶51. Those healthcare providers, too, are subject to restrictive contracts with Becton. A.14-A.15, Compl. ¶51.

behest, the distributors make anticompetitive cash payments to the GPOs based on Becton sales volume. A.12-A.13, Compl. ¶45; *see infra* at p. 12.

B. Becton's Market Power

Together, these conspirators have enabled Becton to exercise tremendous market power – at least a 55% share – in each of the relevant markets:



Dist. Ct. Dkt. 121 at 7; *see* A.9, Compl. ¶¶32-33.

The relevant markets have high barriers to entry, and their structure enhances Becton's ability to maintain its market power and charge supra-competitive prices. A.10-A.11, Compl. ¶¶36-39. Healthcare providers often lack their own in-house procurement capabilities, making it difficult to negotiate better terms. A.10, Compl. ¶36. Thus, they must rely heavily on GPOs to negotiate their purchasing contracts. *Id.* Further, Becton, which can

produce billions of syringes and catheters each year, enjoys huge economies of scale that other competitors cannot seriously match. A.10, Compl. ¶37. And regulatory barriers caused by patents and FDA approval requirements make it difficult for competitors to meaningfully enter the relevant markets. A.10, Compl. ¶38.

C. The Conspiracy To Restrain Trade

The defendants have conspired to restrain trade by preventing healthcare providers such as Plaintiffs from buying non-Becton products. A.11-A.15, Compl. ¶¶40-51. They have done so through a series of long-term exclusionary contracts and concerted practices that make it difficult or impossible for healthcare providers to buy the relevant products from Becton's competitors at competitive prices. A.11-A.13, Compl. ¶¶40-47.

The conspirators use three types of contracts to carry out their exclusionary scheme. A.11-A.13, Compl. ¶¶42-45. *First*, the GPOs and Becton enter into "Net Dealer Contracts." A.11-A.12, Compl. ¶42. These long-term contracts, usually lasting three to five years, dictate the terms of purchases and typically contain a penalty pricing rebate scheme that punishes healthcare providers with higher prices unless they keep buying a high percentage – often 80 to 95% – of their volume of Becton purchases in prior years. A.11-

A.12, Compl. ¶¶42-43. These contracts also include sole-source or dual-source terms that allow the healthcare providers to buy either only Becton products or the products of, at most, only one other manufacturer. A.11-A.12, Compl. ¶42. While GPOs are supposed to negotiate these contracts with their members' best interests in mind, Becton pays "millions of dollars annually in anticompetitive payments" – in the guise of administrative fees – to the GPOs to ensure that they instead serve the interests of Becton and the other conspirators. *Id.*; *see* A.16, Compl. ¶56.[4]

Second, healthcare providers and distributors enter into "Distributor Agreements" to purchase and deliver Becton products. A.12, Compl. ¶44. These contracts require distributors to enforce the Net Dealer Contracts' penalty-pricing and sole-source terms – *i.e.*, the requirement that healthcare providers meet Becton purchase quotas or else pay stiff penalties. *Id.*

Third, distributors and Becton enter into "Dealer Notification

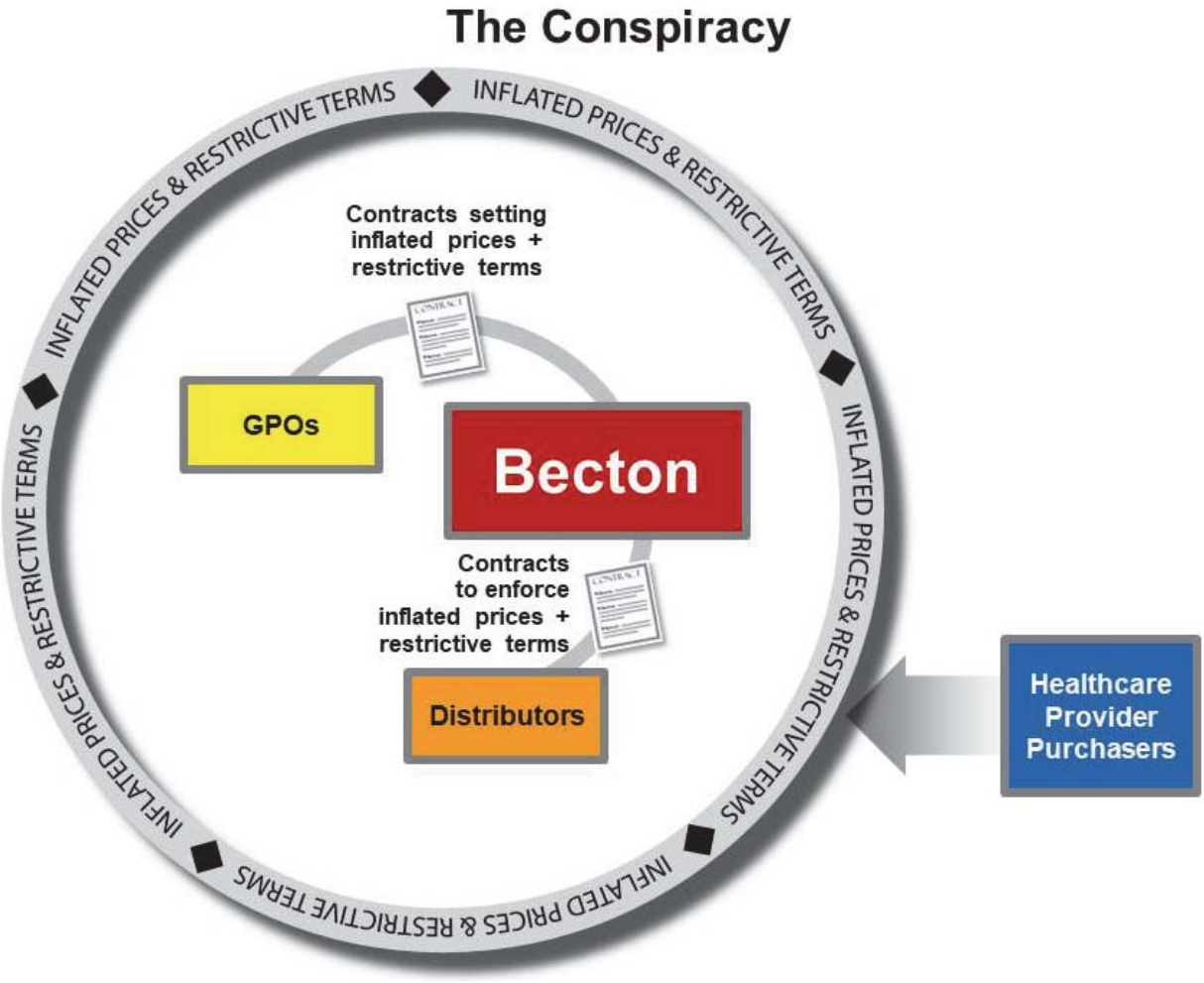
[4] According to the Government Accountability Office, GPOs often broker terms that harm their members' interests. The GAO found that "GPOs' prices were not always lower and were often higher than prices paid by hospitals negotiating with vendors directly." William J. Scanlon, U.S. Gov't Accountability Off., GAO-02-690T, *Group Purchasing Organizations: Pilot Study Suggests Large Buying Groups Do Not Always Offer Hospitals Lower Prices* (Apr. 30, 2002), https://www.gao.gov/products/GAO-02-690T (cited by Dist. Ct. Dkt. 108 at 7 n.4).

Agreements" in which the distributors agree how to distribute Becton products. In doing so, the distributors also agree with Becton to enforce the Net Dealer Contracts' anticompetitive terms, including the sole-source and penalty-pricing provisions. A.12-A.13, Compl. ¶45. The distributors further agree to make cash payments to the GPOs based on the volume of Becton products sold under the Net Dealer Contracts. A.12-A.13, Compl. ¶45; A.16, Compl. ¶56. These distributor payments are in addition to the large cash payments – euphemistically called "administrative fees," Dist. Ct. Dkt. 116 at 35; Dist. Ct. Dkt. 121 at 13 – that Becton gives the GPOs to induce them to offer the exclusionary contracts to their members. A.11-A.12, Compl. ¶42; *see infra* at p. 12. Like the other contracts, Dealer Notification Agreements are typically long-term, lasting three to five years. A.12-A.13, Compl. ¶45.

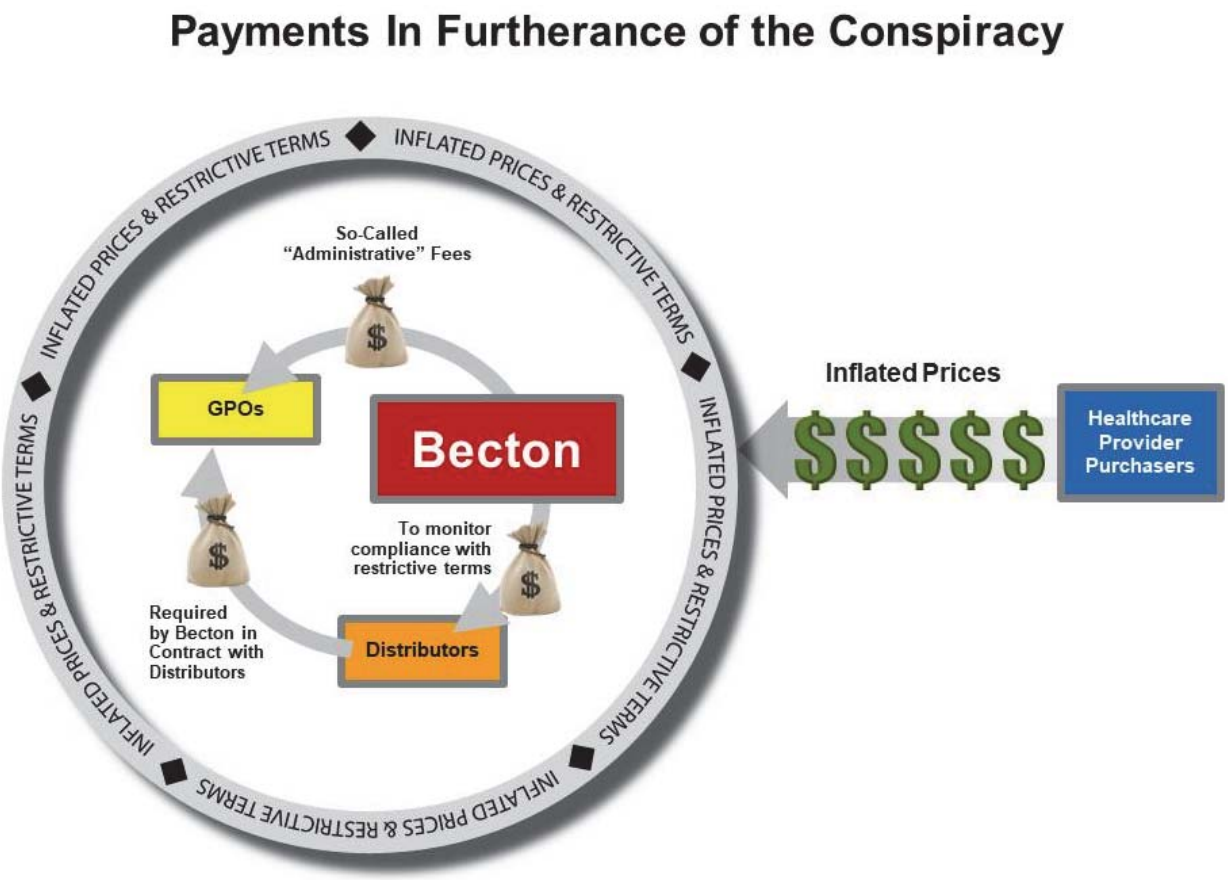
The conspirators engage in other anticompetitive conduct to limit the healthcare providers' choices. A.13-A.15, Compl. ¶¶46-51. For example, Becton, with the agreement of the distributors, pays extra commissions to the distributors' sales personnel who sell Becton products to the exclusion of competitors. A.13, Compl. ¶46. Distributors thereby permit Becton to monitor their compliance with its exclusive-dealing terms. Distributors also agree to promote Becton's products over those of competitors. *Id.* Additionally,

Becton has engaged in disparagement, false advertising, and patent infringement against competitors. A.13-A.14, Compl. ¶¶48-50.

Together, this web of anticompetitive contracts and concerted practices benefits each of the conspirators by allowing them to reap the rewards of supracompetitive prices. The operation of the conspiracy can be demonstrated as follows:



Dist. Ct. Dkt. 121 at 11; *see* A.11-A.13, Compl. ¶¶40-47. And the flow of money amongst the conspirators can be demonstrated as follows:



Dist. Ct. Dkt. 121 at 13; *see* A.11-A.13, Compl. ¶¶40-47.

D. Antitrust Injury

The purchasers have suffered severe antitrust price injury. A.17-A.18, Compl. ¶¶58-62. The prices paid for the relevant products far exceed competitive levels. *See supra* at p. 1; *see also* A.8-A.11, Compl. ¶¶29-39.

In the conventional syringe market, Becton charges prices that are 11% higher than what its nearest rival charges. A.10, Compl. ¶39(a). In the safety syringe market, Becton charges up to 36% more than competitors for safety syringes. A.11, Compl. ¶39(b). And Becton charges 37% more for safety IV catheters than what competitors can charge. A.11, Compl. ¶39(c).

III. PROCEEDINGS BELOW

A. The Operative Complaint and Motions to Dismiss

On May 3, 2018, Plaintiffs filed a class action complaint against Becton; Premier, Inc., and Vizient, Inc. (collectively, the "GPOs"); and Cardinal Health, Inc., Owens & Minor Inc., Henry Schein, Inc., and other unnamed distributor coconspirators (collectively, the "distributors") in the U.S. District Court for the Southern District of Illinois. *See* Dist. Ct. Dkt. 1. On June 15, 2018, they filed an amended class action complaint, adding one more distributor-defendant, McKesson Medical-Surgical Inc., and substituting Owens & Minor Inc. for a corporate affiliate, Owens & Minor Distribution Inc. A.1-A.29. On July 20, 2018, the defendants filed three motions under Rule 12(b)(6) to dismiss the healthcare providers' amended complaint for failing to state a claim. Dist. Ct. Dkts. 83, 84, 85. Plaintiffs opposed each motion. Dist. Ct. Dkts. 105-107; *see also* Dist. Ct. Dkt. 108. The district court heard argument on October 17, 2018, and granted the defendants' motions with prejudice on November 30, 2018. A.30-A.38.

B. The District Court's Decision

The district court acknowledged that Plaintiffs pled that Becton, the GPOs, and the distributors "are engaged in a conspiracy to prevent competition and restrain trade by negotiating and enforcing net dealer contracts

that employ penalty pricing rebate provisions and sole or dual source provisions." A.32; *see also* A.37 (noting that "Plaintiffs allege a conspiracy"). It also acknowledged that "[t]he Seventh Circuit recognizes an exception to the direct purchaser rule in cases involving conspiracies." A.34 (citing *Fontana*, 617 F.2d at 478, and *Paper Sys.*, 281 F.3d at 629). But it held that Plaintiffs lacked antitrust standing because they did not purchase the relevant products directly from Becton. A.38.

The district court concluded that Plaintiffs' claims "implicate[d] the same concerns expressed in *Illinois Brick*" – an asserted difficulty in calculating damages – because the conspiracy did not involve an agreement between the distributors and Becton to fix the prices that the healthcare providers ultimately paid. A.37-A.38. It expressed concern that the distributors "are passing on alleged overcharges already established in net dealer contracts they have no hand in negotiating"; that they "are not involved in determining the inflated prices"; and that they "merely enforce the terms of net dealer contracts and then subject Plaintiffs to additional costs the distributors independently assess." A.37. According to the district court, it would be "infeasible to calculate with any certainty which portion of overcharges the distributors absorb or ascertain which portion of the distributors' upcharges

are due to market force, rather than overcharges." *Id.*

The district court recognized that this Court has held that "principles of joint and several liability rendered the difficulty of tracing overcharges 'unimportant.'" A.37-A.38 (citation omitted). Even so, the district court stated that, because "the distributors act independently to increase already-inflated prices" instead of fixing a final price with the other defendants, "[a]pportioning overcharges in this case would lead to the complexities *Illinois Brick* sought to avoid." A.38.

The district court did not address the implications of its holding for joint and several liability – namely, that it was preventing the victims of a conspiracy from obtaining a remedy from *any* of the conspirators. It also ignored this Court's holding in *Paper Systems* that the presence of intermediaries in a transaction "does not justify abandonment of the joint-and-several-liability norm." 281 F.3d at 632. Instead, the district court held that "Plaintiffs' claims fall within the direct purchaser rule, and no exception applies." A.38.

SUMMARY OF ARGUMENT

The district court erred in dismissing Plaintiffs' amended complaint under *Illinois Brick*. It found that Plaintiffs have pled that Becton, the

GPOs, and the distributors "are engaged in a conspiracy to prevent competition and restrain trade by negotiating and enforcing net dealer contracts that employ penalty pricing rebate provisions and sole or dual source provisions." A.32; *see also* A.37. Under this Court's holdings in *Paper Systems*, *Fontana*, and *Brand Name Prescription Drugs*, the district court should have allowed Plaintiffs, as the first purchasers outside the conspiracy, to sue all the conspirators for damages. Because the district court failed to do so, its decision must be reversed.

The district court's ruling also ignores that, under the doctrine of joint and several liability, each member of a conspiracy is liable for all damages caused by the conspiracy's entire output. Thus, as this Court has held, the first innocent purchaser – the first purchaser outside the conspiracy – has the right to collect 100% of its damages from any conspirator. *Paper Sys.*, 281 F.3d at 630-32.

Extending *Illinois Brick* to bar suit here pushes its direct-purchaser rule – which prevents unquestionably injured parties from recovering damages caused by a violation of federal law – beyond its precarious policy justifications. Should *Illinois Brick* apply, it should be overruled.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] *de novo* the dismissal of a complaint for failure to state a claim, accepting [plaintiffs'] factual allegations as true and drawing all permissible inferences in [plaintiffs'] favor." *O'Boyle v. Real Time Resolutions, Inc.*, 910 F.3d 338, 342 (7th Cir. 2018). "To survive a motion to dismiss, the plaintiffs' complaint need contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Olson v. Champaign Cty.*, 784 F.3d 1093, 1098 (7th Cir. 2015) (quoting Fed. R. Civ. P. 8(a)(2)). "A complaint that invokes a recognized legal theory . . . and contains plausible allegations on the material issues . . . cannot be dismissed under Rule 12." *Richards v. Mitcheff*, 696 F.3d 635, 638 (7th Cir. 2012); *see also Carmody v. Bd. of Trustees*, 747 F.3d 470, 475 (7th Cir. 2014) (stating that a complaint that offers "at least plausible theories" for relief will survive a motion to dismiss). Where a district court fails to draw reasonable inferences in a plaintiff's favor, requires more than merely plausible allegations, or otherwise misapplies the law on a motion to dismiss, its decision must be reversed. *See Olson*, 784 F.3d at 1098; *Richards*, 696 F.3d at 638.

II. THE DISTRICT COURT ERRED IN DISMISSING THIS CASE UNDER *ILLINOIS BRICK*

A. The Healthcare Providers Are Direct Purchasers

The district court found that the healthcare providers "allege Defendants are engaged in a conspiracy," and that they purchased Becton's products directly from distributors who had joined the conspiracy. A.32; A.37. Under this Court's precedents set forth in *Paper Systems*, *Brand Name Prescription Drugs*, and *Fontana*, that should have been the end of the *Illinois Brick* inquiry. Because the healthcare providers are "the first purchasers from *outside* the conspiracy . . . *Illinois Brick* allocate[s] to th[ose] first non-conspirator[s] in the distribution chain the right to collect 100% of the damages." *Paper Sys.*, 281 F.3d at 631-32.[5]

[5] This Court is hardly an outlier. Numerous courts of appeals recognize that direct purchasers from antitrust conspiracies have standing to sue. *See In re Processed Egg Prods. Antitrust Litig.*, 881 F.3d 262, 274 (3d Cir. 2018) (holding that purchasers "suing the conspiring parties from whom they bought the price-fixed product" may sue); *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 797 F.3d 538, 542 (8th Cir. 2015) (holding that "indirect purchasers" may "bring an antitrust claim if they allege the direct purchasers are 'party to the antitrust violation' and join the direct purchasers as defendants" (quotation omitted)); *Del. Valley Surgical Supply, Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1123 n.1 (9th Cir. 2008) (noting that "an indirect purchaser may bring suit where he establishes a price-fixing conspiracy between the manufacturer and the middleman"); *Lowell v. Am. Cyanamid Co.*, 177 F.3d 1228, 1232 (11th Cir. 1999) (noting that "*Illinois*

When plaintiffs are "direct purchasers from the conspirators," "any indirect-purchaser defense would go by the board." *Brand Name Prescription Drugs*, 123 F.3d at 604; *see also Fontana*, 617 F.2d at 481 ("We are not satisfied that the *Illinois Brick* rule directly applies in circumstances where the manufacturer and the intermediary are both alleged to be co-conspirators in a common illegal enterprise resulting in intended injury to the buyer."). Given that the distributors and GPOs have joined Becton's conspiracy, Plaintiffs, as the first honest purchasers, are entitled to sue each of Becton, the distributors, and the GPOs for the damages Plaintiffs have suffered from the conspiracy.

Of course, as *Paper Systems* noted, "[p]erhaps if a conspirator defects and sues its former comrade, that snitch would come to own the right to damages." *Paper Sys.*, 281 F.3d at 632. For example, in *Brand Name Prescription Drugs*, some intermediaries had defected from the conspiracy and sued; this Court observed that allowing the intermediaries' customers to also sue would be "just what the Supreme Court . . . told the federal courts not to do" in *Illinois Brick*. 123 F.3d at 606. But when intermediaries such as

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Brick does not apply to a single vertical conspiracy where the plaintiff has purchased directly from a conspiring party in the chain of distribution").

Becton's distributors "d[o] *not* change sides and align themselves as plaintiffs," the next purchasers in the distribution chain, such as Plaintiffs, "are entitled to collect damages from both the manufacturers and their intermediaries if conspiracy and overcharges can be established." *Paper Sys.*, 281 F.3d at 632 (emphasis added).

The district court tried to distinguish *Fontana* and *Paper Systems* as "employ[ing] the conspiracy exception in the context of vertical price-fixing." A.36. Neither case, however, limited the standing of antitrust conspiracy victims based on the type of conspiracy alleged. *Paper Sys.*, 281 F.3d at 631-32; *Fontana*, 617 F.2d at 481. Nor did *Brand Name Prescription Drugs*. 123 F.3d at 604. And the district court misread *Fontana*. In that case, the plaintiff, a dealer in airplane avionics, alleged that the Cessna distributor from which it bought parts conspired with Cessna to drive dealers like itself out of business. *Fontana*, 617 F.2d at 481. The plaintiff alleged that Cessna's conspiracy involved a bundling scheme to sell its aircraft with avionics installed for a lower price than what the avionics and aircraft would cost separately. *Id.* at 478.[6] And there, the plaintiff was "only seeking damages . . . for

[6] The plaintiff also accused the conspirators of "[a] number of other claimed misdeeds," including false advertising, improper rebates, geographic

losses arising from Cessna's pricing policy," not from any alleged agreement between Cessna and its distributors to fix resale prices. *Fontana*, 460 F. Supp. at 1160. In fact, this Court expressly declared that the plaintiff "d[id] not seek damages for an illegal indirect overcharge passed on to it as is prohibited by *Illinois Brick*, but . . . [for] a combination of acts allegedly causing competitive injury which destroyed its avionics business." 617 F.2d at 481.

If the district court here were right, this Court would have held in *Fontana* that the plaintiff lacked standing because its damages did not flow from vertical price fixing. But this Court instead did the opposite, holding that the plaintiff could sue because Cessna and its distributors had joined a conspiracy from which the plaintiff was a direct purchaser.[7] 617 F.2d at 480, 481. *Fontana* demonstrates that direct purchasers from antitrust conspiracies have standing even if the conspiracy does not involve vertical price

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restrictions, vertical integration, and price stabilization. *Fontana*, 617 F.2d at 480; *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 460 F. Supp. 1151, 1160 (N.D. Ill. 1978), *rev'd*, 617 F.2d 478 (1980).

[7] This Court reached that conclusion even over a dissent asserting that *Illinois Brick* applied because the "dealerships could have absorbed" any overcharge "by altering their markup on avionics equipped and unequipped aircraft." *Fontana*, 617 F.2d at 484 (Castle, J., dissenting). This Court's rejection of that argument further refutes the district court's reading of *Fontana*. It simply does not matter if the distributors added a markup. *See* A.37 (nonetheless concluding that such a markup implicated *Illinois Brick*).

fixing. There is no logical reason to conclude otherwise.

B. The District Court Ignored the Conspirators' Joint and Several Liability

The district court not only misread the clear holdings of this Court's cases, it also ignored the fundamental tenet of conspiracy law on which those holdings are based – joint and several liability. Joint and several liability allows Plaintiffs to sue and recover the full measure of damages from any member of the conspiracy. It also resolves the *Illinois Brick* policy concerns on which the district court based its decision.

1. *The Conspirators Are Jointly and Severally Liable*

The district court acknowledged that Plaintiffs adequately "allege[d] a conspiracy" including all defendants. A.37; *see also* A.32.[8] But it emphasized

[8] The distributors and GPOs also argued in the district court that the conspiracy alleged was a legally defective "rimless wheel." Dist. Ct. Dkt. 84 at 5-9; Dist. Ct. Dkt. 85 at 17-22. The district court did not adopt that ground. To do so would have been error. The Complaint alleges that the distributors each knowingly joined a scheme to restrain trade that was centrally organized by Becton. A.11-A.15, Compl. ¶¶40-51. Such schemes are illegal under Section One whether they have a so-called rim or not. *E.g.*, *United States v. Masonite Corp.*, 316 U.S. 265, 274-75 (1942) (finding a Section One conspiracy where seemingly "isolated transaction[s]" were "part of a larger arrangement" in restraint of trade); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-27, 232 (1939) (finding a Section One conspiracy even absent "simultaneous" acts or agreement); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 934-96 (7th Cir. 2000) (finding a Section One conspiracy where a single "ringmaster" entity induced suppliers to collude to injure its

that the distributors "are not involved" in fixing prices and that they "independently assess" a markup. A.37. It thus concluded that there was not a unitary, "single transaction" between Plaintiffs and the conspirators. *Id.* According to the district court, the lack of such a "transaction" meant that the alleged conspiracy "implicates the same concerns expressed in *Illinois Brick*." *Id.*

That flawed reasoning wholly ignores joint and several liability. If the distributors, the GPOs, and Becton have joined a conspiracy, each conspirator is liable for the full damage caused to Plaintiffs by any conspirator's actions. *See Paper Sys.*, 281 F.3d at 633. Conspirators are liable for their partners' acts even when they do not specifically agree to and are not aware of "'every aspect of the conspiracy.'" *United States v. Orlando*, 819 F.3d 1016, 1022 (7th Cir. 2016) (citation omitted) (holding conspirator liable because he "knowingly participated in the overarching conspiracy"); *see Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946) (discussing coconspirator liability). And even passive players in conspiracies – whether they

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competitors); *see also Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 459 F.2d 138, 146 (6th Cir. 1972) (describing "rimless wheel" conspiracy). Moreover, all that is needed for a "rim" – and which the Complaint plausibly alleges here – is "an agreement to further a single design or purpose." *United States v. Orlando*, 819 F.3d 1016, 1022 (7th Cir. 2016).

play a minor role or act as "tools of [a] manufacturer[]" and "reluctant accomplices" – are liable once they agree to join a conspiracy. *Brand Name Prescription Drugs*, 123 F.3d at 615 (collecting cases); *see also United States v. Duran*, 407 F.3d 828, 836 (7th Cir. 2005) (rejecting argument that a "lesser" role might "negate or mitigate . . . conspiratorial liability").

Paper Systems is a classic example. The plaintiffs sued paper manufacturers and distributors for "conspiring to reduce output and raise price." 281 F.3d at 631. One conspiring manufacturer, Nippon Paper, had not sold any paper to the plaintiffs, and the distributors through which Nippon Paper sold its goods had not joined the conspiracy. *Id.* This Court held that Nippon Paper was still liable, because *every* defendant was jointly and severally liable for "the conspiracy's entire output." *Id.* at 632. "That the plaintiffs did not buy from Nippon Paper directly, or at all, [did] not matter." *Id.* at 634. The presence of even an innocent intermediary in a given anticompetitive conspiracy "does not justify abandonment of the joint-and-several liability norm." *Id.* at 632. Indeed, "[i]f the presence of *any* wholesaler or retailer in the chain of distribution creates complications too great to allow joint liability, then the norm that *every* conspirator is responsible for the acts of *every* other would be overthrown." *Id.* (emphasis added).

Under those principles, Becton's negotiations with the GPOs to set the wholesale prices and exclusionary terms are chargeable to the distributors. As conspirators, the distributors were aware of the exclusionary terms, agreed to enforce those terms, permitted Becton to make payments to their employees, and made their own payments to the GPOs. A.12-A.13, Compl. ¶¶43-46. Plaintiffs, who dealt directly with the distributors and GPOs, can therefore sue each and every conspirator directly for the damages attributable to their direct purchases from any member of the conspiracy. *Paper Sys.*, 281 F.3d at 632. The distributors' absence from the GPOs' negotiations with Becton over price is irrelevant.[9]

Nor does it matter in what order the distributors, GPOs, and Becton carry out their various tasks in furtherance of the conspiracy. "A defendant need not join a conspiracy at its inception or participate in all of [its] unlawful acts" to be liable for the conspiracy's conduct. *Orlando*, 819 F.3d at 1022 (citation omitted); *see also Duran*, 407 F.3d at 835-36 (drug dealer who joined a conspiracy could be held responsible for other conspirators' actions, incl-

[9] Similarly, the GPOs are accountable for anticompetitive acts of the distributors whether or not they participated in, or even knew of, those acts. That result is no different than a street-level drug dealer being accountable for the acts of a distributor and a dirty cop who combine to sell narcotics to drug users. *See generally Duran*, 407 F.3d at 835-36.

uding actions taken before he joined). The distributors' position in the distribution chain – as the conspirators that sell to Plaintiffs after Becton and the GPOs negotiate prices and terms – does not insulate any defendant from responsibility for their partners' acts. *See Paper Sys.*, 281 F.3d at 632.[10]

The district court attempted to distinguish *Paper Systems* as a "price-fixing" case. A.38. But this Court identified no reason in *Paper Systems* why joint and several liability should disappear when conspirators agree to exclusionary terms rather than prices. Rather, to bar suit here because the defendants' conspiracy did not involve price fixing would effectively allow *Illinois Brick* to swallow the principle of joint and several liability. That is just what *Paper Systems* cautioned against. 281 F.3d at 632. Joint and several liability allows victims of antitrust conspiracies such as Plaintiffs to sue any conspirator, regardless of the type of conspiracy alleged. To conclude

[10] The district court did not find that the distributors' acts were outside the scope of the conspiracy. Any such finding would flout the principle that courts are to "accept all well-pleaded facts in the complaint as true and draw all reasonable inferences in the plaintiff's favor." *NewSpin Sports, LLC v. Arrow Elecs., Inc.*, 910 F.3d 293, 299 (7th Cir. 2018). The Complaint alleges that the distributors participate in the conspiracy through enforcing anti-competitive terms of various contracts. *See, e.g.*, A.8-A.9, Compl. ¶31. It also alleges that the distributors benefit from the raised prices those contracts cause – including by charging a "percentage markup" on the supracompetitive price. *Id.* It is at least plausible that the distributors added their markup in furtherance of the conspiracy.

otherwise was error.

2. *Joint and Several Liability Resolves the District Court's Mistaken Policy Concerns*

The district court paid lip service to the conspirators' joint and several liability. It acknowledged that *Paper Systems* held that "principles of joint and several liability rendered the difficulty of tracing overcharges 'unimportant.'" A.38. But it erroneously concluded that the Complaint still raised "a classic 'pass-on' theory prohibited by *Illinois Brick*" and further would implicate the policy concerns that "*Illinois Brick* sought to avoid" – including apportioning damages, risking duplicative recoveries, and undermining the efficient enforcement of the antitrust laws. *Id.*; *see also* A.34 (describing policy concerns); *Illinois Brick*, 431 U.S. at 730, 745-46; *Paper Systems*, 281 F.3d at 632-34. Given the defendants' joint and several liability, however, none of those three concerns are implicated.

First, this case does not implicate *Illinois Brick*'s concern about whether courts can reliably apportion an overcharge between plaintiffs at different points on the distribution chain. *See* 431 U.S. at 746. Each conspirator is liable for the "*entire* overcharge" to "any direct purchaser from any conspirator." *See Paper Sys.*, 281 F.3d at 632 (emphasis in original). If the healthcare providers "can prove that there was indeed a conspiracy, they

may collect damages not just firm-by-firm according to the quantity each sold, but from all conspirators for all sales" made to them. *Id.* There is thus no need to apportion damages between the distributors and the healthcare providers. *See* 2 Phillip E. Areeda *et al.*, *Antitrust Law* ¶346h, at 369 (2d ed. 2000) ("Whether one adopts a coconspirator exception or regards this situation as outside *Illinois Brick*'s domain, there is no tracing or apportionment to be done."). Thus, the district court need not decide whether any distributor's markup passes on Becton's overcharge in whole, in part, or not at all. Instead, only the overcharge must be calculated; every conspirator is then liable for its full amount.[11]

Even if "elasticities of supply and demand" entered into the Plaintiffs' damages calculations, that would be no reason to deny Plaintiffs the right to sue. *Paper Sys.*, 281 F.3d at 633. In *Paper Systems*, this Court rejected the

[11] The overcharge calculation here would likely be based on what the market price of the healthcare providers' purchases would have been absent the conspiracy's unlawful conduct. *See generally* ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 172 (1996) ("The typical measure of damages is the difference between the actual price and the presumed competitive price multiplied by the quantity purchased."). Neither that calculation theory nor typical alternatives require apportionment. *See* Phillip E. Areeda *et al.*, *Antitrust Law* ¶346k1 (3rd & 4th eds., 2018 Cum. Supp. 2010-2017) ("[O]vercharge damages [may be] measured by . . . the 'yardstick' method or the 'before-and-after' method, and neither requires computation of the pass-on.") (footnotes omitted).

argument that *Illinois Brick* "creates an exception" to joint and several liability because otherwise "judges or juries will have to trace the original overcharge through several levels of distribution to determine what damages it caused." *Id.* at 632. That "prospect is present in every cartel case; it is not occasioned solely by the presence of intermediaries" – and it does nothing to restrict joint and several liability. *Id.*

Second, this case does not implicate *Illinois Brick*'s concern with avoiding duplicative recoveries. *See* 431 U.S. at 730. *Illinois Brick* expressed concern about pass-on damages because of the potential that multiple parties (distributors and further downstream buyers) could sue and recover the entire overcharge from the antitrust violator. *Id.* But no conspirator has defected and sued Becton. The healthcare providers alone own the claims against the alleged conspiracy, and there cannot be any duplicative recovery. *See Paper Sys.*, 281 F.3d at 633; *see also Brand Name Prescription Drugs*, 123 F.3d at 606 (explaining that apportionment concerns arise when intermediaries are plaintiffs, and thus such defecting intermediaries are the only ones "permitted to complain" about the overcharges they paid).

Third, this case does not implicate *Illinois Brick*'s concern about undermining the antitrust laws' efficient enforcement. As *Paper Systems*

observed, "[j]oint and several liability is another vital instrument for *maximizing* deterrence." 281 F.3d at 633 (emphasis added). The Supreme Court expressed concern in *Illinois Brick* that, if indirect purchasers and (innocent) distributors shared overcharge damages, neither group would have a strong incentive to sue. *See Illinois Brick*, 431 U.S. at 725-26, 745 ("[D]iffusing the benefits of bringing a treble-damages action could seriously impair th[e] important weapon of antitrust enforcement."). Joint and several liability for all conspirators – including the distributors here – prevents that result.

C. The District Court Improperly Extended *Illinois Brick* Beyond Its Precarious Policy Justifications

The district court's ruling also improperly extended *Illinois Brick* in the name of policy reasons that no longer hold force.

Illinois Brick is a judicially-crafted doctrine that deprives concededly injured parties of a remedy in the interest of simpler case management. In that case, the Supreme Court acknowledged that its rule "denies recovery to those indirect purchasers who may have been actually injured by antitrust violations." 431 U.S. at 746. The Court concluded that the complexity of apportioning overcharges between direct and indirect purchasers, and the supposed efficiency of "elevating direct purchasers to a preferred position as private attorneys general," justified that denial. *Id.*

The Supreme Court's policy concerns have not been borne out. Developments in economic theory have proven that concerns about tracing overcharges are unfounded. Economists can allocate damages among multiple victims, and they can do so without "measuring the relevant elasticities," as the Court feared would be necessary in *Illinois Brick*. 431 U.S. at 742; 2 Phillip E. Areeda *et al.*, *Antitrust Law* ¶346k1, at 380-81 (2d ed. 2000). In recent years, economists have developed increasingly sophisticated tools for allocating damages, blunting *Illinois Brick*'s justifications.[12]

Concerns about case management also have not come to pass. State and federal courts have presided successfully for decades over indirect-purchaser actions brought under state "*Illinois Brick*-repealer" statutes. *See* Antitrust Modernization Comm'n, *Report and Recommendations* 268-69 (Apr. 2007), govinfo.library.unt.edu/amc ("*AMC Report*"). In fact, federal courts routinely handle such indirect-purchaser cases under their diversity jurisdiction. *See* 28 U.S.C. §1332(d) (Class Action Fairness Act of 2005);

[12] *See, e.g.*, Jan Boone & Wieland Müller, *The Distribution of Harm in Price-Fixing Cases*, 30 Int'l J. Indus. Org. 265, 273-74 (2012); Leonardo J. Basso & Thomas W. Ross, *Measuring the True Harm from Price-Fixing to Both Direct and Indirect Purchasers*, 58 J. Indus. Econ. 895, 920 (2010); Frank Verboven & Theon van Dijk, *Cartel Damages Claims and the Passing-On Defense*, 57 J. Indus. Econ. 457, 481-83 (2009).

Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and* Illinois Brick, 100 Iowa L. Rev. 2115, 2119-120 (2015); *see also, e.g.*, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 285, 287 (3d Cir. 2011) (in part an indirect-purchaser action under State law); *Brand Name Prescription Drugs*, 123 F.3d at 607 (same).

Duplicative recovery is also not a problem. As experts in the field have observed, "there has not been a single documented instance where a defendant has been subject to suit by direct and indirect purchasers and been required to pay more than treble damages." J. Thomas Prud'homme, Jr. & Ellen S. Cooper, *One More Challenge for the AMC: Repairing the Legacy of* Illinois Brick, 40 U.S.F.L. Rev. 675, 684 (2006); *see also AMC Report* at 274 (similar). And when courts apply joint and several liability, "duplicative recovery has been blocked at the outset" because purchasers own the right to recover only on account of their own purchases. *Paper Sys.*, 281 F.3d at 633.

There is also no proof that *Illinois Brick* has helped deter antitrust violations. In fact, that doctrine can have the perverse effect of *undermining* deterrence. Because *Illinois Brick* often means that only distributors can sue manufacturers, manufacturers easily can induce distributors to conspire with

them instead of bringing direct-purchaser claims. *See, e.g.*, *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 378-79 n.12 (3d Cir. 2005) (explaining how distributors can benefit from anticompetitive conspiracies); *Brand Name Prescription Drugs*, 123 F.3d at 614 (noting how distributors can act as manufacturers' "cats-paws" in enforcing monopolistic practices); *see also* Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. Cal. L. Rev. 69, 94 (2007); Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Antitrust Standing Analysis*, 68 Geo. Wash. L. Rev. 1, 33 (1999).

To be sure, the Supreme Court has instructed lower courts not to create a "series of exceptions" to *Illinois Brick*, even if "any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case." *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 217 (1990). *Utilicorp*, however, does not permit courts to *expand* the direct-purchaser rule beyond its rationales. That is just what the district court's decision did by absolving coconspirators in non-price-fixing conspiracies of their joint and several liability. And it did so when the policy rationales that support *Illinois*

Brick have been cast into doubt by four decades of judicial experience and econometric developments.

III. *ILLINOIS BRICK* SHOULD BE OVERRULED

If this Court agrees with the district court that *Illinois Brick* bars Plaintiffs from bringing suit, then *Illinois Brick* should be overruled. For the reasons discussed *supra* at pp. 32-36, *Illinois Brick*'s rationales are no longer persuasive. Plaintiffs acknowledge that it "is the Supreme Court's prerogative," rather than this Court's, to assess whether its precedent remains good law. *United States v. Henderson*, 536 F.3d 776, 779 n.2 (7th Cir. 2008). The healthcare providers thus respectfully request, "for the sole purpose of preserving [the argument] for Supreme Court review," that *Illinois Brick* be overruled. *Bingham v. New Berlin Sch. Dist.*, 550 F.3d 601, 604 (7th Cir. 2008) (citing *United States v. Sachsenmaier*, 491 F.3d 680, 685 (7th Cir. 2007)).

CONCLUSION

The district court's judgment should be reversed.

Dated: April 18, 2019
Chicago, Illinois

Respectfully submitted,

/s/ Steven F. Molo

STEVEN F. MOLO
Counsel of Record
ERIC A. POSNER
ALLISON M. GORSUCH
MOLOLAMKEN LLP
300 N. LaSalle Street
Suite 5350
Chicago, IL 60654
(312) 450-6700 (telephone)
(312) 450-6701 (facsimile)
smolo@mololamken.com

JUSTIN M. ELLIS
JENNIFER E. FISCHELL
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8159 (telephone)
(212) 607-8161 (facsimile)

R. STEPHEN BERRY
BERRY LAW PLLC
1100 Connecticut Avenue, N.W.
Suite 645
Washington, D.C. 20036
(202) 296-3020 (telephone)
(202) 296-3038 (facsimile)

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,228 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using CenturyExpd BT 14-point font.

April 18, 2019

/s/ Steven F. Molo
Steven F. Molo

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(D)

Pursuant to Circuit Rule 30(d), counsel certifies that all materials required by Circuit Rule 30(a) and 30(b) are included in the Required Short Appendix bound with this brief.

April 18, 2019

/s/ Steven F. Molo
Steven F. Molo

No. 18-3735

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

MARION HEALTHCARE, LLC, ET AL.,

Plaintiffs-Appellants,

v.

BECTON DICKINSON & COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois
(Hon. Nancy J. Rosenstengel, No. 3:18-cv-01059)

SHORT APPENDIX OF PLAINTIFFS-APPELLANTS

R. STEPHEN BERRY
BERRY LAW PLLC
1100 Connecticut Avenue, N.W.
Suite 645
Washington, D.C. 20036
(202) 296-3020 (telephone)
(202) 296-3038 (facsimile)

STEVEN F. MOLO
Counsel of Record
ERIC A. POSNER
ALLISON M. GORSUCH
MOLOLAMKEN LLP
300 N. LaSalle Street
Suite 5350
Chicago, IL 60654
(312) 450-6700 (telephone)
(312) 450-6701 (facsimile)
smolo@mololamken.com

JUSTIN M. ELLIS
JENNIFER E. FISCHELL
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8159 (telephone)
(212) 607-8161 (facsimile)

Counsel for Plaintiffs-Appellants

SHORT APPENDIX – TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

MARION DIAGNOSTIC CENTER, LLC; MARION HEALTHCARE, LLC; and ANDRON MEDICAL ASSOCIATES, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BECTON, DICKINSON, AND COMPANY; PREMIER, INC.; VIZIENT, INC.; CARDINAL HEALTH, INC.; OWENS & MINOR DISTRIBUTION INC.; MCKESSON MEDICAL-SURGICAL INC.; HENRY SCHEIN, INC.; and UNNAMED BECTON DISTRIBUTOR CO-CONSPIRATORS,

Defendants.

AMENDED CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs Marion Diagnostic Center, LLC ("Marion Diagnostic"), Marion HealthCare, LLC ("Marion HealthCare"), and Andron Medical Associates ("Andron"), individually and on behalf of all those similarly situated, for their Complaint against Defendants Becton, Dickinson & Co. ("Becton"), Premier, Inc. ("Premier"), Vizient, Inc. ("Vizient"), Cardinal Health, Inc. ("Cardinal"), Owens & Minor Distribution, Inc. ("Owens & Minor"), McKesson Medical-Surgical Inc. ("McKesson"), Henry Schein, Inc. ("Henry Schein"), and other unknown Becton distributors, state as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action to restore competition in the relevant conventional and safety syringe and safety IV catheter markets and to hold a conspiracy responsible for its restraint of trade.

2. This case arises out of the oppressive structure imposed on healthcare providers when purchasing medical devices and supplies in the United States. Purchasing those medical devices and supplies is not like buying consumer goods, where a person can simply walk into a store or click on Amazon to compare prices. Rather, a purchase must occur via a web of manufacturers, distributors, and "group purchasing organizations" (or "GPOs") that use interrelated contracts to drive up costs for healthcare providers. At its most basic level, the purchase of medical devices by healthcare providers typically works as follows:

> Step One: The healthcare provider becomes a member of a GPO that negotiates prices for devices and supplies with manufacturers.
>
> Step Two: The GPO, representing many healthcare providers, negotiates pricing for medical devices and supplies with a manufacturer.
>
> Step Three: A healthcare provider wishing to purchase medical devices and supplies then does so through a distributor authorized to sell the manufacturer's goods.

3. Effecting these steps requires a series of contracts. In this case, Becton, a manufacturer of devices and supplies, has abused its extraordinary market power to require the use of oppressive, anti-competitive contracts that effectively force above-competitive prices on the market.

4. Defendants have exploited that network of contracts to enter into a vertical conspiracy to restrain trade in the nationwide markets for conventional and safety syringes and

safety IV catheters. Using those contracts, Becton has unlawfully conspired with GPOs and distributors to force healthcare providers into long-term exclusionary contracts that restrain trade and inflate the prices of certain Becton products to above-competitive levels.

5. Defendants' exclusionary contracts effectively compel healthcare providers to buy Becton products or else face substantial economic punishment. Defendants hold tremendous market power in the nationwide markets for conventional and safety syringes and safety IV catheters. Defendants have profited greatly from the above-competitive pricing that they have charged for the relevant Becton products.

6. Through their conspiracy, Defendants have suppressed competition by preventing Becton's rivals from obtaining sufficient market shares to bid Becton's prices down to economically efficient, competitive levels. The conspiracy has also suppressed conventional and safety syringe innovation and safety, placing patients and healthcare workers at needless risk of serious infectious diseases spread by needlesticks and blood-borne pathogens.

7. Plaintiffs are healthcare providers who have purchased conventional and safety syringes and safety IV catheters directly from the conspiracy and paid above-competitive prices caused by the conspiracy. The proposed classes include healthcare providers nationwide.

PARTIES

Class Representative Plaintiff Health Care Providers

8. Marion Diagnostic is a limited liability company formed under the laws of the State of Illinois with its principal place of business in Marion, Illinois. Marion Diagnostic operates a multidisciplinary healthcare facility including an outpatient surgery practice, a diagnostic center, and a walk-in clinic. Marion Diagnostic has purchased Becton conventional and safety syringes, as well as safety IV catheters, from co-conspirator Becton distributor McKesson during the period of the conspiracy.

9. Marion HealthCare is a limited liability company formed under the laws of the State of Illinois with its principal place of business in Marion, Illinois. Marion HealthCare, which is owned and operated by area physicians, operates a multi-specialty surgery center in Marion. Marion HealthCare has purchased Becton conventional and safety syringes, as well as safety IV catheters, from co-conspirator and Becton distributor McKesson during the period of the conspiracy.

10. Andron is a professional association formed under the laws of the State of New Jersey with its principal place of business in Englewood, New Jersey. Andron operates an outpatient clinic specializing in rheumatology. Andron has bought Becton conventional and safety syringes, as well as safety IV catheters, from co-conspirator Becton distributor Henry Schein during the period of the conspiracy under contracts brokered by GPO Med Assets, Inc., which has since been acquired, in part, by Vizient.

Defendant Manufacturer

11. Becton is a corporation formed under the laws of the State of New Jersey with its principal place of business in Franklin Lakes, New Jersey. Becton is the largest manufacturer in the United States of conventional and safety syringes and safety IV catheters.

Defendant Group Purchasing Organizations ("GPOs")

12. Vizient is a corporation formed under the laws of the State of Delaware with its principal place of business in Irving, Texas. Vizient is the nation's largest GPO, representing more than 50% of the annual spending of United States healthcare providers on medical devices and supplies, including Becton products. It brokers more than $100 billion in sales annually.

13. Premier is a corporation formed under the laws of the State of Delaware with its principal place of business in Charlotte, North Carolina. Premier is the second largest GPO, representing more than 25% of the annual spending of United States healthcare providers on

medical devices and supplies, including Becton products.

Defendant Distributors

14. Cardinal is a corporation formed under the laws of the State of Ohio with its principal place of business in Dublin, Ohio. Cardinal is one of the largest distributors of Becton conventional syringes, safety syringes, and safety IV catheters in the United States.

15. Owens & Minor is a corporation formed under the laws of the State of Virginia with its principal place of business in Mechanicsville, Virginia. Owens & Minor is one of the largest distributors of Becton conventional syringes, safety syringes, and safety IV catheters in the United States.

16. McKesson is a corporation formed under the laws of the State of Virginia with its principal place of business in Richmond, Virginia. McKesson is a distributor of Becton conventional syringes, safety syringes, and safety IV catheters in the United States.

17. Henry Schein is a corporation formed under the laws of the State of Delaware with its principal place of business in Melville, New York. Henry Schein is a distributor of Becton conventional syringes, safety syringes, and safety IV catheters in the United States.

18. Unknown Becton co-conspirators include Becton distributors facilitating the conspiracy's restraint of trade by distributing Becton products, including Becton conventional syringes, safety syringes, and safety IV catheters in the United States under the exclusionary contracts.

JURISDICTION AND VENUE

19. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1337 because this action arises under the laws of the United States regulating commerce and protecting trade and commerce against restraints and monopolies.

20. This Court has personal jurisdiction over each of the Defendants under the Clayton Act, 15 U.S.C. § 12, *et seq.*, because (a) each Defendant has been or will be validly served with process within the United States; (b) each Defendant has transacted business in the United States, including in this District; (c) each Defendant has been incorporated in a United States jurisdiction and maintains its corporate headquarters in the United States; (d) each Defendant has directly or indirectly sold substantial quantities of Becton brand conventional and safety syringes and safety IV catheters in the United States, including in this District; and (e) each Defendant has had substantial aggregate contacts with the United States, including in this District.

21. Each Defendant is also subject to personal jurisdiction under the laws of the State of Illinois because (a) it transacts business within this State and (b) it has joined in a conspiracy that was directed at, and had the direct, substantial, reasonably foreseeable, and intended effect of causing injury to the business or property of persons and entities residing in and located in the State of Illinois, including without limitation, Plaintiffs.

22. Venue lies in this District pursuant to Sections Four and Twelve of the Clayton Act, 15 U.S.C. §§ 15, 22, because Defendants have each transacted substantial business in the Southern District of Illinois.

23. Venue also lies in this District pursuant to 28 U.S.C. § 1391 because a substantial part of the events and omissions giving rise to this claim arose in this District, including the formation and performance of Defendants' exclusionary contracts and the sale by the conspiracy of conventional and safety syringes and safety IV catheters at above-competitive prices.

FACTUAL ALLEGATIONS

I. The Markets for Conventional and Safety Syringes and Safety IV Catheters

A. The Relevant Product Markets

24. The relevant markets in this case are the markets for the sale in the United States of conventional syringes, safety syringes, and safety IV catheters.

25. ***Conventional syringes***. This market includes the conventional syringes manufactured and sold by Becton's competitors.

26. ***Safety syringes***. Unlike conventional syringes, safety syringes have features that aim to prevent accidental needlesticks that can spread blood-borne pathogens. For example, Becton offers syringes with retractable needles and sliding safety guards that seek to shield patients and providers from being touched by the syringe needle. Manufacturers, including Becton, typically sell safety syringes at substantially higher prices than conventional syringes. Because safety syringes offer additional features and are priced differently than conventional syringes, they are not reasonably interchangeable and thus form a distinct market. The market for safety syringes includes those safety syringes manufactured and sold by Becton's competitors.

27. ***Safety IV catheters***. As with safety syringes, safety IV catheters differ from conventional catheters in that they have features designed to reduce the risk of accidental needlesticks. Safety catheters are typically priced at substantially higher prices than conventional catheters and are not reasonably interchangeable with conventional catheters because they have distinct safety functions. They thus form a distinct market. The market includes safety IV catheters manufactured and sold by Becton and by Becton's competitors.

28. For each of these three relevant product markets, the relevant geographical market is the United States. Becton and its competitors market their safety and conventional syringes

and safety IV catheters throughout the United States. Those markets are limited to the United States because regulatory barriers prevent healthcare providers in the United States from purchasing safety and conventional syringes or safety IV catheters from manufacturers who lack approval to sell medical devices in this country.

B. The Conspirators' Roles in the Relevant Markets

29. ***Becton.*** Each of the conspirators plays a distinct role in the relevant markets. Becton manufactures conventional and safety syringes and safety IV catheters for sale to healthcare providers such as Plaintiffs. Typically, these sales are made through distributors. On average, Becton sells substantially more than $500 million of conventional and safety syringes and safety IV catheters in the United States every year.

30. ***Group Purchasing Organizations.*** Vizient and Premier are group purchasing organizations ("GPOs") that represent their member healthcare providers. They do not purchase or sell medical devices from Becton or other manufacturers. Rather, GPOs are intermediaries who negotiate contracts with vendors, such as Becton, for the sale of medical devices to the healthcare providers that they represent, such as Plaintiffs. Nearly every healthcare provider in the United States is represented by a GPO. The purpose of GPOs is, in theory, to save their member healthcare providers money by pooling the healthcare providers' purchasing power to obtain more favorable prices from vendors such as Becton. Co-conspirators Vizient and Premier are responsible for approximately 75% of GPO-managed sales in the United States.

31. ***Becton Distributors.*** Cardinal, Owens & Minor, McKesson, and Henry Schein, as well as unnamed Becton distributor co-conspirators, purchase products from Becton and then resell the relevant Becton products directly to healthcare providers pursuant to terms negotiated by the GPOs. In many cases, once the GPOs have negotiated contractual pricing and other terms of sale, their member healthcare providers purchase Becton products by paying the contract price

plus a percentage markup to distributors such as Cardinal, Owens & Minor, McKesson, Henry Schein, or unnamed Becton co-conspirator distributors. In other instances, these Becton distributors resell the relevant Becton products under direct contracts entered into directly between Becton and the healthcare provider, typically a hospital, that are not negotiated by Vizient or Premier.

II. The Conspirators' Market Power

32. Together, the conspirators have tremendous power to control pricing or exclude competition in the markets for conventional and safety syringes and safety IV catheters.

33. Becton has dominant shares in the relevant product markets.

(a) Becton controls approximately 60% of the market for conventional syringes, while its nearest competitor has only a 15% share.

(b) Becton controls approximately 60% of the market for safety syringes, nearly double the share of its nearest competitor.

(c) Becton controls approximately 55% of the market for safety IV catheters, approximately twice that of its nearest competitor.

34. GPOs Vizient and Premier also have considerable power in the relevant markets. They are the two largest GPOs in the United States. Together, they control over 75% of the annual spending in the United States by healthcare providers on medical devices and supplies.

35. Co-conspirators Cardinal, Owens & Minor, McKesson, and Henry Schein also control a massive share of the distribution of medical devices and supplies. Distributors purchase medical supplies from a manufacturer, such as Becton, and then resell those supplies to healthcare providers, like Plaintiffs, on terms dictated by the Becton contracts. As a market observer has described it, Cardinal and other Becton distributors have erected "wide economic moats" that allow them to "keep new entrants at bay."

36. High barriers to entering the relevant markets protect the conspiracy's and Becton's dominance. First, the fact that healthcare providers rely heavily – if not exclusively – on Vizient, Premier, and other GPOs has caused the larger healthcare providers to reduce their own in-house procurement capabilities. Many smaller healthcare providers lack that sophisticated capability altogether. Thus, because most healthcare providers have little capacity to negotiate contracts for conventional and safety syringes or safety IV catheters on their own, they must accept the long-term, exclusionary GPO contracts and above-competitive pricing offered by the conspiracy.

37. In addition, the relevant markets manifest large economies of scale in which a market competitor must produce enormous amounts of conventional and safety syringes and safety IV catheters to reduce its costs to a level that would be competitive with Becton. No competitors can match the output of Becton, which has the capacity to produce billions of conventional and safety syringes and safety IV catheters per year worldwide. As a result, it is difficult for Becton's competitors to enter into, or expand in, the relevant markets and match the massive benefits that Becton enjoys from its economies of scale.

38. Regulatory barriers caused by patents and FDA approval requirements also increase the barriers to entry in the relevant markets.

39. The conspiracy's and Becton's market power is also demonstrated directly by the above-competitive pricing that Becton is able to charge, as well as the conspiracy's ability to exclude competition with long-term, exclusionary contracts and other overt acts.

(a) In the conventional syringe market, Becton has charged healthcare providers prices that are 11% higher than the pricing charged by its closest rival.

(b) In the safety syringe market, Becton has charged healthcare providers prices that are 36% higher than the pricing charged by its competitors for retractable safety syringes, and prices that are 22-30% higher than the pricing charged by its competitors for non-retractable safety syringes.

(c) In the safety IV catheter market, Becton has charged healthcare providers prices that are 37% higher than the pricing charged by its competitors.

III. Defendants' Conspiracy in Restraint of Trade

40. Defendants have achieved and maintained their market power by entering into a series of long-term exclusionary contracts over many years that have restricted trade to their substantial benefit and at the expense of healthcare providers, and by engaging in other anticompetitive acts in restraint of trade.

41. These long-term exclusionary contracts usually contain at least one of two key components: sole or dual sourcing provisions and disloyalty penalties. Sole sourcing provisions require that a healthcare provider, which is a member of a GPO, purchase only Becton products. Dual sourcing provisions allow purchasing from only one other approved non-Becton manufacturer. Disloyalty penalty provisions punish healthcare providers with higher prices if they switch from Becton products to a competitor. Because each contract is typically long term, these two contractual components together have the practical effect of preventing healthcare providers from being able to purchase non-Becton products for years.

42. As an initial matter, Becton and the GPOs, Vizient and Premier, typically enter into "Net Dealer Contracts." These contracts control the pricing and other terms under which healthcare providers, which are members of the GPOs, buy Becton products. In exchange, Becton pays the GPOs, Vizient and Premier, millions of dollars annually in anticompetitive payments. These Net Dealer Contracts often contain a penalty pricing rebate scheme that

punishes GPO-member healthcare providers that do not purchase a certain volume of their prior Becton purchases – typically 80-95%. These contracts also often contain sole or dual source provisions. These contracts are usually long term, lasting between three and five years.

43. The penalty pricing rebate scheme punishes healthcare provider purchasers who switch from Becton products to a competitor's products. Purchasers pay less per unit as the volume of purchases increases, but the cost savings is realized through an end-of-year rebate payment. Typically the purchaser must purchase 80-95% of its volume from the prior year to qualify for the rebate. If the purchaser does *not* meet the required percentage of prior purchases – perhaps by purchasing certain products from a competitor – there are no end-of-year rebates and the purchaser must pay the highest prices for products, even if it purchases a large volume.

44. Once a healthcare provider decides to purchase Becton products pursuant to the terms of a Net Dealer Contract negotiated by its GPO, it selects a distributor such as Cardinal, Owens & Minor, McKesson, or Henry Schein to deliver Becton's products. The distributors and healthcare providers enter into a related exclusionary contract, usually called a Distributor Agreement. Distributor Agreements typically require that distributors enforce the requirement that the healthcare providers buy a certain volume of Becton products or else pay the penalty pricing set forth in the Net Dealer Contract.

45. Becton then enters into another exclusionary contract with distributors, often called a "Dealer Notification Agreement," to further the conspiracy in three ways. *First*, the distributors agree to distribute Becton's products to healthcare providers pursuant to the Net Dealer Contract's anticompetitive terms. *Second*, the distributors agree to enforce Becton's penalty pricing system that punishes healthcare providers for switching from Becton products to competitors' products. *Third*, the distributors agree to make additional anticompetitive cash

payments to the GPOs, Vizient and Premier, based on the volume of Becton sales under the Net Dealer Contract. Dealer Notification Agreements are typically long term, lasting from three to five years. Approximately 65% of the relevant Becton products are distributed under Cardinal and Owens & Minor distributor contracts alone.

46. Becton undertakes additional anticompetitive action to increase the exclusivity of these distributor contracts. Becton pays extra commissions to the distributors' sales personnel who sell Becton products to the exclusion of competitors' products. Becton also requires that distributors' promotional materials emphasize Becton as the preferred brand. Becton has also asked Cardinal, its largest distributor by far, to commit to not induce a Becton customer to purchase a competitor's products.

47. Thus, this scheme of three interrelated exclusionary contracts keep Becton's market power securely in place: (1) Net Dealer Contracts, between Becton and the GPOs, that set the prices of Becton products and punish healthcare providers for switching to competitors; (2) Distributor Agreements, between the distributors and the healthcare providers, that enforce penalties for switching from Becton products; and (3) Dealer Notification Agreements, between Becton and the distributors, that require distributors to enforce Becton's anticompetitive pricing scheme and resale restrictions. Together, this web of contracts effects a conspiracy that results in higher prices, lowered competition, and less consumer choice.

IV. Becton's Other Anticompetitive Acts

48. Becton has committed other anticompetitive acts in aid of the conspiracy, including deception, disparagement, patent infringement, and false advertising aimed against its most aggressive and innovative safety syringe competitor, Retractable Technologies, Inc. ("Retractable"). Those acts improperly diminish Retractable's market share in a concentrated market. Becton has also engaged in anticompetitive actions resulting in consent decrees and

fines. And Becton likewise employs anticompetitive practices with healthcare providers that are not members of GPOs. All of these actions have materially contributed – in combination with other overt acts – to the conspiracy's and Becton's market power in the relevant conventional and safety syringe markets, and allowed Becton to charge above-competitive pricing.

49. Becton has at least twice been adjudicated to have engaged in anticompetitive conduct. First, Becton has been found liable for disparaging Retractable and engaging in false advertising. Specifically, a jury found that Becton falsely claimed both that its needles were the world's sharpest and that Retractable's syringes did not inject a full dose of medicine. *Retractable Tech., Inc. v. Becton, Dickinson and Co.*, No. 2:08-CV-16, 2014 WL 12596469 at *6 (E.D. Tex. Nov. 10, 2014), *rev'd and remanded on other grounds*, 842 F.3d 883 (5th Cir. 2016). Becton engaged in these practices to exclude Retractable and other competitors from the safety syringe market, resulting in lowered quality and higher prices for safety syringes. Becton's false advertising and disparagement of its competitors helped coerce those competitors against participating in the relevant markets, further contributing to the unreasonable restraint of trade.

50. Second, Becton unlawfully infringed patented Retractable technology and used it against Retractable by introducing a line of 1 mL "Integra" retractable syringes. Becton rushed these infringing syringes to market in 2002 to impede Retractable's market entry, raising its competitor's costs, after the passage of the Needlestick Safety and Prevention Act. A jury found that Becton infringed on Retractable's patents and that verdict was affirmed. *Retractable Techs., Inc. v. Becton, Dickinson and Co.*, 653 F.3d 1296, 1307 (Fed. Cir. 2011).

51. Becton also enters into exclusionary contracts directly with healthcare providers outside of the GPO system. In these direct contracts, Becton will "bundle" the rebates offered to

the purchasing healthcare provider for many types of Becton products and require a healthcare provider to buy certain quotas to keep all of the rebates. Because other conventional and safety syringe and safety IV catheter manufacturers do not have broad product lines like Becton, healthcare providers will not choose a non-Becton conventional and safety syringe or safety IV catheter for fear of paying higher prices on other Becton medical supplies. As a result, other conventional and safety syringe or safety IV catheter manufacturers cannot compete because they are unable to offer discounts on conventional and safety syringes or safety IV catheters that could match the rebates Becton offers on *all* its products. Matching all Becton rebates would likely compel below-cost pricing, or sales at the very least with little or no profit.

V. The Conspiracy's Exclusionary Conduct Is Evaluated in its Entirety and Not Piecemeal

52. A plaintiff need not demonstrate how each of the conspiracy's several exclusionary overt acts has individually and materially contributed to the conspiracy's maintenance of its market power and antitrust price injury in the relevant markets. As a matter of law, the combined effect of the conspiracy's exclusionary practices must be evaluated to determine whether in combination they materially contribute to market power and above-competition pricing. Each overt act or practice alone need not constitute a restraint of trade. Further, a plaintiff need not demonstrate how much each overt act alone has contributed to the above-competitive price premiums Becton has enjoyed in the relevant markets.

VI. Long-Term, Exclusionary Conduct Contributing to Antitrust Price Injury in the Damage Period Is Actionable

53. All exclusionary overt acts before and after the beginning of the four-year damage period that materially contribute in combination to the conspiracy's market power and to antitrust price injury in the damage period are actionable. Much of the conspirators' exclusionary conduct continues until the present and occurs in the statutory damage period. Nonetheless, as a

matter of law, exclusionary overt acts occurring before the beginning of the statutory damage period in 2014 are also actionable if they materially contribute with other overt acts to the conspiracy's acquisition and maintenance of market power and its exaction of above-competitive pricing in the damage period. As long as the conspiracy continues to use power it has gained unlawfully over time to overcharge hospitals and other purchasers, it has no claim on the repose that a statute of limitations is intended to provide. The taint of anticompetitive origin does not dissipate after four years if the conspiracy continues to cause antitrust price injury.

VII. Benefits to the Conspirators

54. The economic interests of the conspirators are closely aligned with the aims of the vertical conspiracy in restraint of trade. All benefit substantially from the restraint of trade.

55. As a result of the conspiracy, Becton enjoys above-competitive pricing for its products and protects and expands its market dominance. Becton can rely on exclusive contracts with distributors and GPOs to ensure that healthcare providers will buy Becton products, including conventional syringes, safety syringes, and safety IV catheters.

56. As a result of the conspiracy, the GPOs, Vizient and Premier, receive large anticompetitive payments from Becton amounting to tens of millions of dollars annually. These payments are calculated as percentages of Becton's revenues realized under the anticompetitive contracts. The higher Becton's pricing, the more the GPOs benefit. This provides the GPOs lucrative and powerful incentives to protect and increase Becton's market shares for the relevant conventional and safety syringe and safety IV catheter products.

57. As a result of the conspiracy, the distributors, Cardinal, Owens & Minor, McKesson, Henry Schein, and unnamed Becton distributor co-conspirators, are also well-rewarded. First, the fees these distributors receive on their sales are computed based on Becton's above-competitive pricing. Thus, as with the GPOs' contracts, the distributors are rewarded

when Becton prices are higher. Second, Becton pays significantly higher sales commissions when the distributors sell the relevant Becton products instead of its rivals' products. Third, the long-term nature of the anticompetitive contracts ensures the distributors stable business and discourages competition.

VIII. Antitrust Price and Quality Injury

A. The Conspiracy Has Materially Contributed to the Antitrust Price Injury Inflicted on Plaintiffs and Other Healthcare Providers

58. Plaintiffs and all those similarly situated have suffered antitrust price injury because of the conspirators' conduct.

59. As a result of Defendants' anticompetitive conduct, Plaintiffs and other purchasers of conventional and safety syringes and safety IV catheters have paid more than they would have in a truly competitive market. They have paid above-competitive pricing when they bought the relevant products directly from the conspiracy through Becton, Cardinal, Owens & Minor, McKesson, Henry Schein or unnamed Becton distributor co-conspirators. Because the conspiracy has enabled Becton to charge above-competitive pricing throughout the nationwide relevant markets, the healthcare providers have suffered antitrust injury.

60. The conspiracy has also prevented Becton's competitors from obtaining sufficient market shares and resources to bid down Becton's pricing to competitive levels in these highly-concentrated relevant markets. The conspiracy has also prevented competitors from innovatively and effectively challenging Becton's sales of lower-quality and less-safe conventional and safety syringes.

B. The Conspiracy Has Also Suppressed Syringe Innovation and Safety

61. Nurses and other healthcare professionals have experienced as many as 600,000 needlesticks a year. These needlesticks spread HIV, hepatitis B, and hepatitis C. As a

consequence, syringes are among the most dangerous devices purchased by healthcare providers. The Occupational Health and Safety Administration has estimated that up to 5.6 million healthcare workers are at risk of occupational exposure to bloodborne pathogens from needlesticks. But the conspiracy's market power has discouraged attempts to develop and market new conventional and safety syringes that could reduce needlestick risk. The conspiracy's exclusionary practices have also discouraged healthcare providers from switching to Becton competitors' conventional and safety syringes even when doing so might be safer for healthcare workers and patients.

62. Julia Nauheim Hipps, a nurse and needlestick victim from Missouri, has testified that healthcare provider-GPO contracts have "critically discouraged" the use of safer syringes by healthcare providers: "Even if the healthcare providers want to utilize safer devices, they are bound by agreements they entered into years ago, never believing that they would lose all control on purchasing equipment for their patients and healthcare workers. Newer and safer medical treatment and safety devices that have proven to be safer and more cost effective have been locked out by larger corporations that have the market share contractually, providing financial incentives to some and penalizing those who breach these contracts, making it difficult for the healthcare industry to make the necessary changes to save lives of both patients and those who provide care, including nurses, firefighters, policemen, EMTs and other frontline workers."

CLASS ACTION ALLEGATIONS

I. Class of Purchasers of Becton Conventional Syringes

A. Federal Rule of Civil Procedure 23(a) Prerequisites

63. Plaintiffs Marion Diagnostic Center, LLC, Marion HealthCare, LLC and Andron Medical Associates ("Class Representatives") are representatives of a Class of United States

healthcare providers who purchased Becton conventional syringes on or after May 3, 2014 directly from Becton, Cardinal, Owens & Minor, McKesson, Henry Schein or unnamed Becton distributor co-conspirators ("Becton Conventional Syringe Class"). The Becton Conventional Syringe Class includes acute care providers or hospitals, hospital systems, clinics, physician groups, pharmacies, wholesale drug companies, home care firms, and other purchasers that offer inpatient or outpatient medical care. For ease of reference, Class purchasers are referred to herein as "healthcare providers or other purchasers."

64. Prosecution of the claims of the Class as a class action is appropriate because the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are met:

(a) The number of persons in the Class is, at a minimum, in the hundreds, and the Class members are therefore so numerous that joinder of all members of the Class is impracticable. Joinder also is impracticable because of the geographic diversity of the Class members, the need to expedite judicial relief, and the Class Representatives' lack of knowledge of the identities and addresses of all Class members.

(b) There are common questions of law and fact arising from the conspirators' restraint of trade. These include, but are not limited to, common issues as to (1) whether there is a vertical conspiracy; (2) whether the conspirators have engaged in restraint of trade; and (3) whether the conspiracy's anticompetitive conduct and overt acts have caused antitrust price injury to be inflicted on Class members. In addition, there are common issues as to the nature and extent of the injunctive and monetary relief available to the Class members.

65. The claims of each Class Representative are typical of the claims of the Class members and fairly encompass the claims of the Class members. Each Class Representative and

the Class members are similarly or identically harmed by the same systematic and pervasive concerted action.

66. Each Class Representative and its counsel will fairly and adequately protect the interests of the Class members. There are no material conflicts between the claims of each Class Representative and the Class members that would make class certification inappropriate. Counsel for the Class will vigorously assert the claims of the Class Representative and the other Class members.

B. Federal Rule of Civil Procedure 23(b)(1) Prerequisites

67. Plaintiffs' claims also meet the requirements of Federal Rule of Civil Procedure 23(b)(1) because prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications that would establish incompatible standards for Defendants. Defendants continue to market and sell Becton conventional syringes, safety syringes, and safety IV catheters, and varying adjudications could establish incompatible standards with respect to whether Defendants' conduct is permissible under the federal antitrust laws. Prosecution of separate actions by individual Class members would also create a risk of individual adjudications that would be dispositive of the interests of other Class members not parties to the individual adjudications, or would substantially impair or impede the ability of Class members to protect their interests.

C. Federal Rule of Civil Procedure 23(b)(2) Prerequisites

68. The prosecution of the claims of the Class as a class action pursuant to Rule 23(b)(2) is appropriate because the conspirators have acted, or refused to act, on grounds generally applicable to the Class, thereby making appropriate final injunctive relief, or corresponding declaratory relief, for the Class as a whole.

D. Federal Rule of Civil Procedure 23(b)(3) Prerequisites

69. In addition, the prosecution of the claims of the Class as a class action is appropriate under Rule 23(b)(3) because:

(a) Questions of law or fact common to the Class members predominate over any questions affecting only its individual members; and

(b) A class action is superior to other methods for the fair and efficient resolution of the controversy.

II. Class of Purchasers of Becton Safety Syringes

A. Federal Rule of Civil Procedure 23(a) Prerequisites

70. Plaintiffs Marion Diagnostic Center, LLC, Marion HealthCare, LLC and Andron Medical Associates ("Class Representatives") are representatives of a Class of United States healthcare providers who purchased Becton safety syringes on or after May 3, 2014 directly from Becton, Cardinal, Owens & Minor, McKesson, Henry Schein or unnamed Becton distributor co-conspirators ("Becton Safety Syringe Class"). The Becton Safety Syringe Class includes acute care providers or hospitals, hospital systems, clinics, physician groups, pharmacies, wholesale drug companies, home care firms, and other purchasers that offer inpatient or outpatient medical care. For ease of reference Class purchasers are referred to herein as "healthcare providers or other purchasers."

71. Prosecution of the claims of the Class as a class action is appropriate because the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are met:

(a) The number of persons in the Class is, at a minimum, in the hundreds, and the Class members are therefore so numerous that joinder of all Class members is impracticable. Joinder also is impracticable because of the geographic diversity of the

Class members, the need to expedite judicial relief, and the Class Representatives' lack of knowledge of the identity and addresses of all Class members.

(b) There are common questions of law and fact arising from the pattern of conspirators' restraint of trade. These include, but are not limited to, common issues as to (1) whether there is a vertical conspiracy; (2) whether the conspirators have engaged in restraint of trade; and (3) whether the conspiracy's anticompetitive conduct and overt acts have caused antitrust price injury to be inflicted on Class members. In addition, there are common issues as to the nature and extent of the injunctive and monetary relief available to the Class members.

72. The claims of each Class Representative are typical of the claims of the Class members and fairly encompass the claims of the Class members. Each Class Representative and the Class members are similarly or identically harmed by the same systematic and pervasive concerted action.

73. Each Class Representative and its counsel will fairly and adequately protect the interests of the Class members. There are no material conflicts between the claims of each Class Representative and the Class members that would make class certification inappropriate. Counsel for the Class will vigorously assert the claims of the Class Representative and the other Class members.

B. Federal Rule of Civil Procedure 23(b)(1) Prerequisites

74. Plaintiffs' claims also meet the requirements of Federal Rule of Civil Procedure 23(b)(1) because prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications that would establish incompatible standards for Defendants. Defendants continue to market and sell Becton conventional syringes, safety syringes, and safety IV catheters, and varying adjudications could establish incompatible

standards with respect to whether Defendants' conduct is permissible under the federal antitrust laws. Prosecution of separate actions by individual Class members would also create a risk of individual adjudications that would be dispositive of the interests of other Class members not parties to the individual adjudications, or would substantially impair or impede the ability of Class members to protect their interests.

C. Federal Rule of Civil Procedure 23(b)(2) Prerequisites

75. The prosecution of the claims of the Class as a class action pursuant to Rule 23(b)(2) is appropriate because the conspirators have acted, or refused to act, on grounds generally applicable to the Class, thereby making appropriate final injunctive relief, or corresponding declaratory relief, for the Class as a whole.

D. Federal Rule of Civil Procedure 23(b)(3) Prerequisites

76. In addition, the prosecution of the claims of the Class as a class action is appropriate under Rule 23(b)(3) because:

(a) Questions of law or fact common to the Class members predominate over any questions affecting only its individual members; and

(b) A class action is superior to other methods for the fair and efficient resolution of the controversy.

III. Class of Purchasers of Becton Safety IV Catheters

A. Federal Rule of Civil Procedure 23(a) Prerequisites

77. Plaintiffs Marion Diagnostic Center, LLC, Marion HealthCare, LLC, and Andron Medical Associates ("Class Representatives") are representatives of a Class of United States healthcare providers who purchased Becton safety IV catheters on or after May 3, 2014 directly from Becton, Cardinal, Owens & Minor, McKesson, Henry Schein, or unnamed Becton

distributor co-conspirators ("Becton IV Catheter Class"). The Becton IV Catheter Class includes, without limitation, acute care providers or hospitals, hospital systems, clinics, physician groups, pharmacies, home care firms, and other purchasers that offer inpatient or outpatient medical care. For ease of reference Class purchasers are referred to herein as "healthcare providers and other purchasers."

78. Prosecution of the claims of the Class as a class action is appropriate because the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are met:

(a) The number of persons in the Class is, at a minimum, in the hundreds, and the Class members are therefore so numerous that joinder of all Class members is impracticable. Joinder also is impracticable because of the geographic diversity of the Class members, the need to expedite judicial relief, and the Class Representatives' lack of knowledge of the identities and addresses of all Class members.

(b) There are common questions of law and fact arising from the pattern of conspirators' restraint of trade. These include, but are not limited to, common issues as to (1) whether there is a vertical conspiracy; (2) whether the conspirators have engaged in restraint of trade; and (3) whether the vertical conspiracy's conduct and overt acts, taken as a whole, have caused antitrust price injury to be inflicted on Class members. In addition, there are common issues as to the nature and extent of the injunctive and monetary relief available to the Class members.

79. The claims of each Class Representative are typical of the claims of the Class members and fairly encompass the claims of the Class members. Each Class Representative and the Class members are similarly or identically harmed by the same systematic and pervasive concerted action.

80. The Class Representatives and their counsel will fairly and adequately protect the interests of the Class members. There are no material conflicts between the claims of each Class Representative and the Class members that would make class certification inappropriate. Counsel for the Class will vigorously assert the claims of the Class Representatives and the other Class members.

B. Federal Rule of Civil Procedure 23(b)(1) Prerequisites

81. Plaintiffs' claims also meet the requirements of Federal Rule of Civil Procedure 23(b)(1) because prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications that would establish incompatible standards for Defendants. Defendants continue to market and sell Becton conventional syringes, safety syringes, and safety IV catheters, and varying adjudications could establish incompatible standards with respect to whether Defendants' conduct is permissible under the federal antitrust laws. Prosecution of separate actions by individual Class members would also create a risk of individual adjudications that would be dispositive of the interests of other Class members not parties to the individual adjudications, or would substantially impair or impede the ability of Class members to protect their interests.

C. Federal Rule of Civil Procedure 23(b)(2) Prerequisites

82. The prosecution of the claims of the Class as a class action pursuant to Rule 23(b)(2) is appropriate because the conspirators have acted, or refused to act, on grounds generally applicable to the Class, thereby making appropriate final injunctive relief, or corresponding declaratory relief, for the Class as a whole.

D. Federal Rule of Civil Procedure 23(b)(3) Prerequisites

83. In addition, the prosecution of the claims of the Class as a class action pursuant to Rule 23(b)(3) is appropriate because:

(a) Questions of law or fact common to the members of the Class predominate over any questions affecting only its individual members; and

(b) A class action is superior to other methods for the fair and efficient resolution of the controversy.

STANDING TO ASSERT ANTITRUST PRICE INJURY

84. The members of the proposed Classes have purchased directly from the unlawful vertical conspiracy in restraint of trade by buying directly from Becton, Cardinal, Owens & Minor, McKesson, Henry Schein, or unnamed Becton distributor co-conspirators.

85. As a consequence, the Class members have as a matter of law constitutional and statutory standing to pursue damages inflicted by the conspiracy under Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a).

STANDING TO SEEK INJUNCTIVE RELIEF

86. The proposed Classes also have standing to seek injunctive relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, because the conspiracy has inflicted or has threatened to inflict harm on the Classes alleged, thereby making appropriate final injunctive relief, or corresponding declaratory relief, for the Classes as a whole.

COUNT I

Restraint of Trade in the Relevant Markets
(Section 1 of the Sherman Act)

87. All foregoing paragraphs are incorporated herein by reference.

88. Becton and its co-conspirators have market power in the relevant markets in the United States for the sale of safety and conventional syringes and safety IV catheters.

89. Conspirators Becton, Vizient, Premier, Cardinal, Owens & Minor, McKesson, Henry Schein and unnamed Becton distributor co-conspirators have entered into a vertical combination or conspiracy in restraint of trade and committed several overt acts in aid of this conspiracy.

90. This conspiracy restrains trade in interstate commerce.

91. The restraint of trade is unreasonable and has had substantial anticompetitive effects on price and quality competition in the relevant markets for the sale of conventional and safety syringes and safety IV catheters.

92. The anticompetitive effects of the conspiracy are not offset by procompetitive effects in these markets.

93. Members of the proposed Classes purchasing directly from Becton, Cardinal, Owens & Minor, McKesson, Henry Schein, or unnamed Becton distributor co-conspirators have paid above-competitive prices for the relevant Becton conventional and safety syringes and safety IV catheters and have been denied quality and safety competition in the relevant markets for the sale of syringes. The conspirators' conduct is unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs individually and as members of the proposed Classes pray that:

A. This Court declare that named Defendants' conduct constitutes a violation of the Sherman Act, 15 U.S.C. § 1, allowing treble damage relief to the proposed Classes under Section 4 of the Clayton Act., 15 U.S.C. § 15.

B. This Court permanently enjoin Defendants and unnamed Becton distributor co-conspirators from continuing the conspiracy and unlawful actions described herein under Section 16 of the Clayton Act, 15 U.S.C. § 26.

C. Plaintiffs recover reasonable attorneys' fees and costs as allowed by law;

D. Plaintiffs recover pre-judgment and post-judgment interest at the highest rate allowed by law; and

E. Plaintiffs be granted such other and further relief as the Court deems just and equitable.

JURY DEMAND

Plaintiffs demand a trial by jury.

Dated: June 15, 2018
New York, New York

Respectfully submitted,

Steven F. Molo
Allison M. Gorsuch
MoloLamken LLP
300 North LaSalle Street
Chicago, IL 60654
Telephone: (312) 450-6700
Facsimile: (312) 450-6701
smolo@mololamken.com
agorsuch@mololamken.com

Justin M. Ellis
MoloLamken LLP
430 Park Avenue
New York, NY 10022
Telephone: (212) 607-8160
Facsimile: (212) 607-8161
jellis@mololamken.com

/s/ R. Stephen Berry
R. Stephen Berry
Berry Law PLLC
R. Stephen Berry
(Pro Hac Vice Petition Pending)
1717 Pennsylvania Avenue, N.W.
Suite 850
Washington, D.C. 20006
Telephone: (202) 296-3020
Facsimile: (202) 296-3038
sberry@berrylawpllc.com

Lee Goldsmith, J.D.-M.D.
Goldsmith & Goldsmith, LLP
(Pro Hac Vice Petition Pending)
Park 80 West, Plaza One
250 Pehle Avenue, Suite 401
Saddle Brook, NJ 07336
Telephone: (201) 429-7892
Facsimile: (201) 291-9428
lee@goldsmithlegal.com

Attorneys for Plaintiffs and Proposed Class Co-Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MARION DIAGNOSTIC CENTER, LLC; MARION HEALTHCARE, LLC; and ANDRON MEDICAL ASSOCIATES, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	**Case No. 18-CV-01059-NJR-RJD**
BECTON, DICKINSON, AND COMPANY; PREMIER, INC.; VIZIENT, INC.; CARDINAL HEALTH, INC.; OWENS & MINOR DISTRIBUTION, INC.; MCKESSON MEDICAL-SURGICAL INC.; HENRY SCHEIN, INC.; and UNNAMED BECTON DISTRIBUTOR CO-CONSPIRATORS,	)	
Defendants.	)	

MEMORANDUM AND ORDER

ROSENSTENGEL, District Judge:

Pending before the Court are three motions to dismiss (Docs. 83, 84, & 85) filed by Defendants Becton, Dickinson, and Company ("Becton"); Premier, Inc. ("Premier"); Vizient, Inc. ("Vizient"); Cardinal Health, Inc. ("Cardinal"); Owens & Minor Distribution, Inc. ("Owens"); McKesson Medical-Surgical, Inc., ("McKesson"); and Henry Schein, Inc. ("Schein") (collectively "Defendants"). The Court heard arguments from counsel on October 17, 2018, and took the motions under advisement (*see* Docs. 112, 116). For the reasons set forth below, the Court now grants the motions to dismiss and dismisses the Amended Complaint (Doc. 52) with prejudice.

FACTUAL & PROCEDURAL BACKGROUND

Plaintiffs Marion Diagnostic Center, LLC; Marion Healthcare, LLC; and Andron Medical Associates (collectively "Plaintiffs") are healthcare providers who assert that Defendants are part of a conspiracy to charge inflated prices for medical supplies, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (*see* Doc. 52).[1]

Generally, when a healthcare provider wants to purchase medical supplies, it becomes a member of a group purchasing organization ("GPO") (Doc. 52, p. 2). GPOs aggregate the purchasing power of healthcare providers and, ideally, negotiate significant discounts with medical supply manufacturers on behalf of its members.[2] Once the GPO and the manufacturer agree on the terms of a sale, the GPO notifies the healthcare provider of the proposed contract (Doc. 52, p. 2). The contract, referred to as a "net dealer contract," is not binding on the provider (*Id.* at p. 11). But if the provider decides to move forward with the net dealer contract, it enters into a "distributor agreement" with a medical supply distributor (*Id.* at p. 12). In that agreement, the distributor agrees to purchase the medical supplies from the manufacturer and resell them to the provider according to the terms of the net dealer contract, plus an additional cost (*Id.*). The distributor also enters into a "dealer notification agreement" with the manufacturer to sell the supplies under the terms of the net dealer contract

[1] The Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1337. Those statutes grant district courts original jurisdiction over actions "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, and over "any civil action . . . arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C. § 1337.

[2] *GPOs and the Commoditization of Medical Devices*, DRG, https://decisionresourcesgroup.com/drg-blog/medtech-perspectives/gpos-and-the-commoditization-of-medical-devices/ (last visited Nov. 29, 2018).

(*Id.*).

According to the Amended Complaint, Plaintiffs have purchased hypodermic products[3] from Becton, a medical supply manufacturer, through the process described above (*Id.* at pp. 3-4). Premier and Vizient are GPOs involved in those transactions, and Cardinal, Owens, Schein, and McKesson are Becton distributors (*Id.* at p. 4). Plaintiffs allege Defendants are engaged in a conspiracy to prevent competition and restrain trade by negotiating and enforcing net dealer contracts that employ penalty pricing rebate provisions and sole or dual source provisions (*Id.* at pp. 11-13).[4] Plaintiffs also assert Becton has engaged in other anticompetitive acts in aid of the conspiracy, including deception, disparagement, patent infringement, and false advertising against one of its competitors (*Id.* at pp. 13-15).

Defendants now move the Court to dismiss Plaintiffs' Amended Complaint under Federal Rule of Civil Procedure ("Rule") 12(b)(6), arguing Plaintiffs do not have antitrust standing to bring their claims (Doc. 83).

RULE 12(B)(6) MOTION TO DISMISS

The purpose of a Rule 12(b)(6) motion is to decide the adequacy of the complaint,

[3] Specifically, the sales at issue here involve safety catheters, safety syringes, and conventional syringes (Doc. 52, pp. 2-3).

[4] Penalty pricing rebate provisions require a provider to purchase a certain volume of products based on its Becton purchases from the year before (Doc. 52, pp. 11-12). For instance, a net dealer contract may state that a provider must make purchases equal to at least 80% of its purchases from the previous year (*Id.*). In return, the provider pays a lower cost per unit (*Id.*). The provider realizes the cost-savings through an end-of-year rebate payment (*Id.* at p. 12). If the provider does not meet the required amount of purchases, it must pay Becton's highest price for the products (*Id.*). Becton's net dealer contracts also usually contain sole or dual source provisions (*Id.* at p. 11). Sole source provisions require providers to purchase products only from Becton while dual source provisions permit providers to purchase from only one other approved non-Becton manufacturer (*Id.*). If the provider violates the source provision, it must pay higher prices (*Id.*).

not to determine the merits of the case or decide whether a plaintiff will ultimately prevail. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). To survive a Rule 12(b)(6) motion to dismiss, a plaintiff only needs to allege enough facts to state a claim for relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff need not plead detailed factual allegations, but must provide "more than labels and conclusions, and a formulaic recitation of the elements." *Id.* For purposes of a motion to dismiss under Rule 12(b)(6), the Court must accept all well-pleaded facts as true and draw all possible inferences in favor of the plaintiff. *McReynolds v. Merrill Lynch & Co., Inc.*, 694 F.3d 873, 879 (7th Cir. 2012).

DISCUSSION

Section 1 of the Sherman Act prohibits any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . ." 15 U.S.C. § 1. Section 4 the Clayton Act grants private citizens standing to enforce the Sherman Act. *See* 15 U.S.C. § 15(a) ("[A]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."). Although the Clayton Act broadly defines the class of persons who can bring claims under the Sherman Act, the Supreme Court has set forth numerous doctrines that limit the circumstances under which someone may recover from an antitrust violator. *Loeb Industries, Inc. v. Sumitomo Corp.*, 306 F.3d 469, 480 (7th Cir. 2002). The "direct purchaser rule," a doctrine announced in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), forms the crux of Defendants' motion to dismiss.

In *Illinois Brick*, building owners brought antitrust claims against manufacturers of concrete blocks, based on allegations of price-fixing. *Id.* at 726-27. The defendants sold the blocks primarily to masonry contractors, who then submitted bids to general contractors for construction projects. *Id.* at 726. The general contractors, in turn, submitted bids to customers such as the plaintiffs. *Id.* The Supreme Court found the plaintiffs lacked standing to bring their antitrust claims because they were not direct purchasers of the blocks. *Id.* at 746-47. "The only way in which the antitrust violation alleged could have injured [the plaintiffs] is if all or part of the overcharge was passed on by the masonry and general contractors to [the plaintiffs], rather than being absorbed at the first two levels of distribution." *Id.* at 727. The Court explained that allowing indirect purchasers to assert "pass-on arguments" would lead to "uncertainties and difficulties" in tracing the economic adjustments made throughout the chain of distribution and leave antitrust defendants susceptible to double recovery. *Id.* at 731-32. "Permitting the use of pass-on theories under [§] 4 would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers." *Id.* at 737. Additionally, "potential plaintiffs at each level in the distribution chain are in a position to assert conflicting claims to a common fund the amount of the alleged overcharge by contending that the entire overcharge was absorbed at that particular level in the chain." *Id.*

The Seventh Circuit recognizes an exception to the direct purchaser rule in cases involving conspiracies, *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir.

1980); *Paper Systems Inc. v. Nippon Paper Industries Co., Ltd.*, 281 F.3d 629 (7th Cir. 2002), but here, the parties disagree as to what types of conspiracies qualify for the exception.

In *Fontana*, the plaintiff, Fontana, was a corporation that sold aviation aircrafts and performed custom installations of avionics equipment. *Fontana*, 617 F.2d at 479. Cessna, the defendant, manufactured aviation aircrafts and manufactured and sold its own line of avionics. *Id.* Fontana was a Cessna dealer, but it purchased its Cessna products from Aviation Activities, Inc., and not directly from Cessna. *Id.* Another relevant party, Cessna Finance Corporation, provided financing for distributors, dealers, and purchasers of Cessna products. *Id.* Fontana filed suit against Cessna, alleging it conspired with Aviation Activities, Inc. and Cessna Finance Corporation to unreasonably restrain trade via price-fixing and to monopolize the selling and installation of avionics equipment in Cessna aircrafts, in violation of the Sherman Act. *Id.* The trial court granted summary judgment in favor of Cessna, finding, in part, that *Illinois Brick* precluded Fontana from bringing antitrust claims as an indirect purchaser. *Id.* at 481. On appeal, the Seventh Circuit rejected this conclusion, stating, "[w]e are not satisfied that the Illinois Brick rule directly applies in circumstances where the manufacturer and the intermediary are both alleged to be co-conspirators in a common illegal enterprise resulting in intended injury to the buyer." *Id.* The Seventh Circuit also distinguished the facts of *Fontana* from *Illinois Brick*, pointing out that Fontana was not just an indirect purchaser of Cessna products; it was also a competitor alleging competitive injury that destroyed its avionics business. *Id.* The Seventh Circuit concluded that summary judgment was inappropriate and reversed and remanded the

case to the trial court. *Id.* at 482.

The Seventh Circuit addressed *Illinois Brick* again in *Paper Systems Inc.* There, paper distributors brought antitrust claims against several paper manufacturers, who allegedly participated in a price-fixing conspiracy. *Paper Systems*, 281 F.3d at 631. Two of the manufacturers sold directly to distributors, like the plaintiffs. *Id.* The Seventh Circuit held that, even though the plaintiffs resold the paper to their own customers, the plaintiffs were entitled to collect damages from the manufacturers because "[t]he first buyer from a conspirator is the right party to sue." *Id.* Two other manufacturers sold exclusively to trading houses, who then resold to the plaintiffs. *Id.* The plaintiffs alleged that the trading houses were part of the conspiracy. *Id.* The Seventh Circuit found the plaintiffs could also recover damages in that instance because the plaintiffs were "the first purchasers from *outside* the conspiracy." *Id.* The Court went on to explain that *Illinois Brick* did not bar the plaintiffs from recovering against the conspiracy because all members of the conspiracy were jointly and severally liable for damages. *Id.* at 633. Thus, multiple recovery was a non-issue, and "[t]he difficulty of tracing overcharges through the chain of distribution therefore [was] unimportant." *Id.*

Fontana and *Paper Systems* both employed the conspiracy exception in the context of vertical price-fixing. Vertical price restraints are agreements involving actors at different levels of a distribution chain to set either minimum or maximum prices. WILLIAM B. RUBENSTEIN, 6 NEWBERG ON CLASS ACTIONS § 20:27 (5th ed. 2018). Applying the conspiracy exception in these instances avoids the potential conundrums recognized in *Illinois Brick*, namely, duplicative recovery and difficulties tracing overcharges.

2 P. AREEDA, R. BLAIR, & H. HOVENKAMP, ANTITRUST LAW 369 (2d ed. 2004). That is because, in practicality, there is only one true sale when the direct purchaser conspires with the manufacturer to fix the price of the sale. Thus, "the consumer is the only party who has paid any overcharge." *Id.*

Here, Plaintiffs do not allege a price-fixing conspiracy. Rather, they argue Defendants use exclusive-dealing provisions, penalty provisions, and other anticompetitive behavior to inflate prices. The parties disagree as to whether the conspiracy exception applies only to vertical price-fixing conspiracies or whether it encompasses other types of conspiracies as well.

Regardless of the semantics, Plaintiffs allege a conspiracy that implicates the same concerns expressed in *Illinois Brick*. The direct purchasers, the distributors, are passing on alleged overcharges already established in net dealer contracts they have no hand in negotiating. According to the Amended Complaint, the distributor defendants are not involved in determining the inflated prices. The distributors merely enforce the terms of net dealer contracts and then subject Plaintiffs to additional costs the distributors independently assess.[5] It would be infeasible to calculate with any certainty which portion of overcharges the distributors absorb or ascertain which portion of the distributors' upcharges are due to market force, rather than overcharges. In other words, unlike *Paper Systems* and *Fontana*, there is not, as a practical matter, a single transaction between Becton, the distributors, and Plaintiffs.

Plaintiffs cite the portion of *Paper Systems* where the Seventh Circuit opined that

[5] Notably, the contracts at issue here do not qualify for the "cost-plus" exception to the direct purchaser rule because the distributor agreements do not contemplate a strict purchasing requirement or pre-date the overcharge. *Illinois Brick*, 431 U.S. at 735-36.

principles of joint and several liability rendered the difficulty of tracing overcharges "unimportant." *Paper Systems*, 281 F.3d 629 at 633. But *Paper Systems* involved a price fixing conspiracy between the manufacturer and intermediary. Here, Plaintiffs allege that the distributors act independently to increase already-inflated prices—a classic "pass-on" theory prohibited by *Illinois Brick*. Apportioning overcharges in this case would lead to the complexities *Illinois Brick* sought to avoid. As such, Plaintiffs' claims fall within the direct purchaser rule, and no exception applies.

CONCLUSION

Plaintiffs do not allege facts plausibly suggesting they have antitrust standing to proceed under the Sherman Act. Accordingly, the Court **GRANTS** Defendants' motions to dismiss (Docs. 83, 84, & 85). The Amended Complaint (Doc. 52) is **DISMISSED with prejudice**. The case is **CLOSED**, and judgment will be entered accordingly.

IT IS SO ORDERED.

DATED: November 30, 2018

NANCY J. ROSENSTENGEL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MARION DIAGNOSTIC CENTER, LLC; MARION HEALTHCARE, LLC; and ANDRON MEDICAL ASSOCIATES, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	**Case No. 18-CV-01059-NJR-RJD**
BECTON, DICKINSON, AND COMPANY; PREMIER, INC.; VIZIENT, INC.; CARDINAL HEALTH, INC.; OWENS & MINOR DISTRIBUTION, INC.; MCKESSON MEDICAL-SURGICAL INC.; HENRY SCHEIN, INC.; and UNNAMED BECTON DISTRIBUTOR CO-CONSPIRATORS,	)	
Defendants.	)	

JUDGMENT IN A CIVIL ACTION

DECISION BY THE COURT.

This matter having come before the Court, and the Court having rendered a decision,

IT IS ORDERED AND ADJUDGED that pursuant to the Order dated November 30, 2018 (Doc. 117), which granted Defendants' motions to dismiss (Docs. 83, 84, & 85), Plaintiffs' Amended Complaint (Doc. 52) is **DISMISSED with prejudice**. This entire action is **DISMISSED**, and the case is closed.

DATED: November 30, 2018

MARGARET M. ROBERTIE,
Clerk of Court

By: s/ *Deana Brinkley*
Deputy Clerk

APPROVED: Nancy J. Rosenstengel

NANCY J. ROSENSTENGEL
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

MARION DIAGNOSTIC CENTER, LLC; MARION HEALTHCARE, LLC; and ANDRON MEDICAL ASSOCIATES, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BECTON, DICKINSON, AND COMPANY; PREMIER, INC.; VIZIENT, INC.; CARDINAL HEALTH, INC.; OWENS & MINOR DISTRIBUTION INC.; MCKESSON MEDICAL-SURGICAL INC.; HENRY SCHEIN, INC.; and UNNAMED BECTON DISTRIBUTOR CO-CONSPIRATORS,

Defendants.

No. 18 Civ. 1059

Hon. Nancy J. Rosenstengel

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Plaintiffs Marion Diagnostic Center, LLC, Marion Healthcare, LLC, and Andron Medical Associates, individually and on behalf of all others similarly situated, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the Judgment entered November 30, 2018, and from all prior orders and rulings merged therein.

Dated: December 27, 2018
Chicago, Illinois

/s/ Steven F. Molo
Steven F. Molo
Counsel of Record
Allison M. Gorsuch
MoloLamken LLP
300 N. LaSalle St.
Chicago, IL 60654

R. Stephen Berry
Berry Law PLLC
(Admitted *Pro Hac Vice*)
1717 Pennsylvania Ave., N.W.
Suite 850
Washington, D.C. 20006

Justin M. Ellis
MoloLamken LLP
430 Park Ave.
New York, N.Y. 10022

Attorneys for Plaintiffs and Proposed Class Co-Counsel

CERTIFICATE OF SERVICE

I hereby certify that, on December 27, 2018, I caused the foregoing Notice of Appeal to be served on all parties of record by filing the same with the Court's CM/ECF system.

/s/ Steven F. Molo

CERTIFICATE OF SERVICE

I hereby certify that, on April 18, 2019, I caused Plaintiffs-Appellants' opening brief and required appendix to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

April 18, 2019

/s/ Steven F. Molo
Steven F. Molo