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.

On Appeal from the
United States District Court for the Southern District of Illinois
Honorable Nancy J. Rosenstengel
No. 3:18-cv-01059-NJR-RJD

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND VACATUR

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INTEREST OF THE UNITED STATES

The United States, through the Department of Justice, has responsibility for enforcing federal competition laws and a strong interest in their correct application in both public and private antitrust enforcement actions. We file this brief, pursuant to Fed. R. App. P. 29(a), to advance this important interest.

STATEMENT OF THE ISSUE

Whether *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), bars an antitrust damages action brought by healthcare providers against a manufacturer and distributors of medical supplies—as well as two group purchasing organizations—all of whom, the providers allege, conspired to obtain supracompetitive prices for medical supplies.

STATEMENT OF THE CASE

On November 30, 2018, the U.S. District Court for the Southern District of Illinois dismissed with prejudice the amended class action complaint of three healthcare providers—Marion Diagnostic Center, LLC; Marion Healthcare, LLC; and Andron Medical Associates (collectively, "Marion" or "plaintiffs")—against a medical supply manufacturer, Becton Dickinson & Company ("Becton"); two group

purchasing organizations ("GPOs"); and four named (plus other unnamed) medical supply distributors (collectively, "defendants"). The complaint alleges a conspiracy among defendants in restraint of trade, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Marion appeals the dismissal.

A. Factual Background

Healthcare providers generally do not shop for medical devices and supplies like individual consumers perusing store shelves and comparing prices. A2 ¶ 2.[1] Instead, they rely on "a web of manufacturers, distributors, and [GPOs] that use interrelated contracts" to provision the supplies, *id.*—in this case, conventional syringes, safety syringes, and safety IV catheters, A7 ¶¶ 25-27.

In the typical course, a healthcare provider seeking to purchase medical devices or supplies will join a GPO, which negotiates prices with medical supply manufacturers on behalf of its members. A2 ¶ 2.

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[1] This brief draws this factual discussion from Marion's amended complaint, Dkt. No. 52. When weighing dismissal under Fed. R. Civ. P. 12(b)(6), courts construe the complaint in the light most favorable to the plaintiff, accept well-pleaded facts as true, and draw all inferences in the plaintiff's favor. *Bell v. City of Chi.*, 835 F.3d 736, 738 (7th Cir. 2016).

When a GPO and a manufacturer come to an agreement, the terms of sale are written into a "net dealer contract." A11 ¶ 42.

A net dealer contract does not obligate a healthcare provider to make a purchase, *see* A12 ¶ 44; A31, but if the provider chooses to proceed with a purchase, it selects an authorized medical supply distributor to deliver the manufacturer's product, A2 ¶ 2; A12 ¶ 44. The named plaintiffs claim to have purchased from two of the named defendant distributors. A3-4 ¶¶ 8-10.

A distributor enters into two agreements implementing the net dealer contract: (1) a "dealer notification agreement" with the manufacturer, A12 ¶ 45; and (2) a "distributor agreement" with the healthcare provider, A12 ¶ 44. Under those agreements, the distributor agrees to acquire the medical supplies from the manufacturer and sell them to the provider under the terms of the net dealer contract, plus a percentage markup it charges the provider. A8-9 ¶ 31.

Marion alleges that this "web of contracts" is the framework for a vertical conspiracy among the defendants that "effectively compel[s] healthcare providers to buy Becton products" and "inflate[s] the prices of certain Becton products to above-competitive levels." A2-3 ¶¶ 4-5;

A13 ¶ 47. The mechanisms Marion cites are "disloyalty" provisions, which impose higher prices on providers if they reduce their purchases from Becton, and sole- or dual-sourcing provisions, which require a provider to purchase from either Becton alone or from Becton and one other approved non-Becton manufacturer. A11-12 ¶¶ 41-43. Marion claims that, due to the "long-term" nature of the contracts, these mechanisms "have the practical effect of preventing healthcare providers from being able to purchase non-Becton products for years." A11 ¶ 41.

Marion's complaint implies that a series of cash payments among the defendants holds the conspiracy together. It states that "Becton pays the GPOs . . . millions of dollars annually in anticompetitive payments" "[i]n exchange" for negotiating net dealer contracts that contain the exclusionary terms. A11-12 ¶ 42; *cf.* A16 ¶ 56 (claiming Becton pays the GPOs "tens of millions of dollars annually"). It also states that distributors "make additional anticompetitive cash payments to the GPOs," A12-13 ¶ 45, and that "Becton pays extra commissions to the distributors' sales personnel who sell Becton products to the exclusion of competitors' products," A13 ¶ 46. This

system of payments is an additional layer of the alleged conspiracy, undergirding the contractual framework that Marion claims is exclusionary.

B. Procedural Background

Marion filed its amended class action complaint on June 15, 2018, seeking treble damages and injunctive relief. A26 ¶¶ 85-86; A28. The defendants moved to dismiss Marion's complaint under Federal Rule of Civil Procedure 12(b)(6) in three separate motions: one by Becton, Dkt. No. 83; one by the GPOs, Dkt. No. 84; and one by the named distributors, Dkt. No. 85. Broadly speaking, the GPOs and the distributors focused on the sufficiency of the conspiracy allegations, while Becton focused on "antitrust standing,"[2] casting the healthcare providers as "indirect purchasers" incapable of bringing a damages action, *see, e.g.*, Dkt. No. 83, at 9.

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[2] Antitrust standing is distinct from Article III standing. As the Supreme Court has explained, "the focus of the doctrine of 'antitrust standing' is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983).

The district court dismissed the complaint, with prejudice, along the lines Becton advanced. The court's opinion explained the "doctrine announced in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)," A33, including "an exception . . . in cases involving conspiracies," A34. It then noted that "[t]he 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." A37. The court did not squarely resolve that disagreement.

Instead, the court reasoned that, because "the distributors[] are passing on alleged overcharges," the alleged conspiracy "implicates the same concerns expressed in *Illinois Brick*," A37—namely, the "complexities" of "[a]pportioning overcharges," A38. The court observed that "[i]t 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." A37. As a result, the court concluded that the complaint presents "a classic 'pass-on' theory prohibited by *Illinois Brick*" and dismissed it in its entirety. A38.

This appeal followed.

SUMMARY OF ARGUMENT

The district court's ruling misconstrues the *Illinois Brick* rule it found decisive. *Illinois Brick* does not preclude a damages suit by plaintiffs who purchased products directly from an antitrust conspirator. Such plaintiffs paid an inflated price that the conspirator's actions helped set. Even if the conspirator could have absorbed some or all of the overcharge before selling the products to the plaintiffs, that prospect does not justify applying *Illinois Brick* to dismiss a damages suit against the conspirator and other members of its conspiracy.

Under the district court's ruling, the antitrust violation Marion alleges is effectively irremediable through private damages actions—an outcome at odds with *Illinois Brick*'s reasoning. The district court mistakenly considered the distributors to be the proper parties to sue Becton for exclusionary conduct. That understanding ignores the fact that, as pleaded in the complaint, the distributors are part of an alleged conspiracy with Becton and are unlikely to sue their co-conspirator for the alleged antitrust injury. The distributors, after all, partake in and profit from the scheme themselves.

If the distributors will not sue, and if, as the district court held, the plaintiffs cannot sue, then Becton and its co-conspirators are effectively immune from private antitrust damages actions concerning the alleged conduct. That cannot be. The *Illinois Brick* rule is meant, in part, to prevent duplicative recovery by plaintiffs in different parts of the distribution chain, not to block *all* recovery. Such an outcome would contravene the purpose of Section 4 of the Clayton Act and of *Illinois Brick* itself.

Nor would that outcome encourage effective antitrust enforcement, another animating rationale of *Illinois Brick*. To the contrary, the district court's decision undermines effective antitrust enforcement by pointlessly and perversely concentrating recovery in the hands of antitrust violators rather than victims.

ARGUMENT

Illinois Brick Does Not Bar Treble-Damages Actions by the First Purchasers Outside a Conspiracy

Section 4 of the Clayton Act states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a). Despite the apparent

breadth of the phrase "any person," the Supreme Court has not interpreted the words "any person" literally. In particular, the Supreme Court has construed Section 4 to allow treble-damages actions only by "the overcharged direct purchaser, and not others in the chain of manufacture or distribution." *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977).[3]

This *Illinois Brick* rule derived from *Hanover Shoe, Inc. v. United Shoe Machinery Corp*., a 1968 case that barred the so-called "pass-on"

[3] Outside the damages context, Section 16 of the Clayton Act provides a private right of action for injunctive relief against threatened loss or damage by an antitrust violation. 15 U.S.C. § 26. Courts have consistently held that indirect purchasers are not categorically barred from suing for injunctive relief, notwithstanding *Illinois Brick*. *See Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 n.24 (4th Cir. 2002); *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 399-401 (3d Cir. 2000); *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1235 (9th Cir. 1998); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1167 (5th Cir. 1979); *Mid-West Paper Prods. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 592-94 (3d Cir. 1979). *See generally Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 n.6 (1986); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 479 (7th Cir. 1980). Marion seeks injunctive and declaratory relief in addition to damages, A28, but the district court dismissed the entire complaint under *Illinois Brick*. Marion has not raised this issue below or on appeal, so this brief will not address it. For the same reason, this brief will not address whether the district court improperly dismissed the complaint as to all defendants, as opposed to just Becton.

defense in antitrust cases. 392 U.S. 481 (1968). *Hanover Shoe* held that a plaintiff who purchased goods or services at an inflated price as a result of a supplier's illegal monopolization may recover damages in the full amount of the overcharge, even if the plaintiff passed on some or all of the overcharge to its customers. 392 U.S. at 494. Under *Hanover Shoe*, it is no defense to a treble damages action that the plaintiff passed on to its customers, in the form of higher prices, the defendant's monopoly overcharge. *Id.* at 489.

The *Hanover Shoe* Court offered two practical reasons for its holding. First, at the time, the Court believed that establishing the extent to which a plaintiff had passed on the defendant's overcharge would normally entail "insurmountable" problems of proof, as well as "complicated proceedings involving massive evidence and complicated theories." 392 U.S. at 493. To show that the direct purchaser suffered no injury, for instance, the defendant would have to show that the plaintiff raised its prices as a result of the overcharge, that it did so by the amount of the overcharge, that the higher prices did not suppress the plaintiff's volume of sales, and that the plaintiff would not have raised prices otherwise. *Id.*

Second, the Court expressed concern that permitting a pass-on defense could mean that no buyer, either direct or indirect, would have a sufficient incentive to sue, reducing the deterrent effect of treble-damages suits. The Court believed that indirect purchasers would have "only a tiny stake in a lawsuit and little interest in attempting a class action." 392 U.S. at 494. The Court was concerned that antitrust violators would "retain the fruits of their illegality" because their actions would go unchallenged, at least in private litigation. *Id.*

Nine years later, the Court was asked whether such indirect-purchaser suits should be allowed at all. In *Illinois Brick*, the State of Illinois sought treble damages under Section 4 against concrete-block manufacturers, who had allegedly charged unlawfully inflated prices to masonry contractors, who, in turn, had submitted inflated bids to general contractors for the masonry in state construction projects.

The Court refused to allow Illinois's suit. The Court was unwilling to "construe § 4 to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers." *Illinois Brick*, 431 U.S. at 735. Such an outcome "would create a serious risk of multiple liability

for defendants" because defendants could be held liable to both direct and indirect purchasers for the exact same overcharge, subject to trebled damages. *Id.* at 730. The Court was "unwilling to 'open the door to duplicative recoveries' under § 4." *Id.* at 731 (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972)).

That being so, the Court confronted the question whether to overrule *Hanover Shoe* so that pass-on theories could be asserted by both plaintiffs and defendants. The Court again offered two reasons, aside from *stare decisis*, for declining to restrict or abandon *Hanover Shoe*. First, the Court reiterated its belief that pass-on analysis would introduce undesirable complexity into antitrust litigation, particularly in view of the difficulty of allocating an overcharge among all those who might have absorbed part of it. *Illinois Brick*, 431 U.S. at 737-43. Second, the Court observed that pass-on claims would "increas[e] the costs and diffus[e] the benefits of bringing a treble-damages action," which could "reduce the incentive to sue" and thereby "seriously impair" such private antitrust enforcement. *Id*. at 745.

The Court acknowledged that "direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting

relations with their suppliers." *Illinois Brick*, 431 U.S. at 746. The Court concluded, however, that, "on balance, and until there are clear directions from Congress to the contrary," the rule allowing recovery only by direct purchasers more effectively serves "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under § 4." *Id.*[4]

Until this Term, with *Apple Inc. v. Pepper*, No. 17-204 (U.S. argued Nov. 26, 2018), the Supreme Court had only revisited the *Illinois Brick* rule once, in *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990). There the plaintiffs sought an exception to *Illinois Brick* for customers of regulated public utilities, on the theory that a regulated

[4] Some commentators have suggested that developments in economics and class action litigation since 1968 and 1977 have mitigated many of the concerns of the Court in *Hanover Shoe* and *Illinois Brick*, weighing in favor of reconsidering the doctrine. *See* Antitrust Modernization Comm'n, *Report and Recommendations* 268-72 (Apr. 2007); 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 346k, at 219-27 (4th ed. 2014). Commentators point out that indirect purchasers have successfully sued in state courts and in federal courts applying state laws, relying on a variety of methods to estimate the overcharge they paid, which are less daunting than the complex calculations imagined by the Supreme Court. *See, e.g.*, Gary A. Winters, *Trial Issues in Consolidated Direct and Indirect Purchaser Cases: Lessons from the* SRAM *Litigation*, ABA Antitrust Trial Practice Newsletter (Spring 2011), available at https://www.mayerbrown.com/public_docs/trialissues.pdf.

public utility, in the role of the direct purchaser, would predictably "pass on 100 percent of their costs to their customers." 497 U.S. at 208. The Court was reluctant to "carve out exceptions" for "particular types of markets" and ruled against the plaintiffs in that case, *id.* at 216 (quoting *Illinois Brick*, 431 U.S. at 744), but the Court left open the possibility that exceptions might be appropriate in certain narrow circumstances, *id.* at 217-18. Those include cases in which "the direct purchaser is owned or controlled by its customer" and cases where a preexisting cost-plus contract ensures that "the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge." *Illinois Brick*, 431 U.S. at 736 & n.16.

Although this case does not involve those potential exceptions, it resembles other cases in which this and other circuits have held that *Illinois Brick* is inapplicable. In those cases, the plaintiffs alleged a vertical "conspiracy"—that is, a conspiracy agreement between parties at distinct tiers of a distribution chain—and courts allowed the suits to go forward even though the plaintiffs had purchased from a (conspiring) distributor or reseller, rather than directly from the uppermost tier.

This Court, for example, in *Fontana Aviation, Inc. v. Cessna Aircraft Co.* held that *Illinois Brick* does not apply when "the manufacturer and the intermediary are both alleged to be co-conspirators." 617 F.2d at 481. Fontana, an avionics dealer, sued a manufacturer (Cessna) for conspiring with Fontana's supplier to drive independent dealers out of business. *Id.* at 479. The alleged conspiracy involved a litany of "misdeeds," many unrelated to pricing—including bundling schemes and exclusionary conduct, such as Cessna informing its distributors "that they could not sell Cessna aircraft and also be in the business of installing non-Cessna avionics." *Id.* at 480. Despite Cessna's contention that "*Illinois Brick* applies because in between Cessna and Fontana was . . . a totally independent Cessna [distributor]," *id.*, this Court was "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.* at 481.

Paper Systems Inc. v. Nippon Paper Industries Co. cemented this reasoning. 281 F.3d 629 (7th Cir. 2002). There the plaintiffs sued paper manufacturers and distributors for conspiring to reduce output

and raise prices. *Id.* at 631. Even though the plaintiffs had not purchased directly from the defendant, Nippon Paper, this Court allowed the plaintiffs to sue Nippon Paper for damages because "[t]he first buyer from a conspirator is the right party to sue" and the plaintiffs were "the first purchasers from *outside* the conspiracy." *Id.* The Court explained that "[n]othing in *Illinois Brick* displaces the rule of joint and several liability, under which each member of a conspiracy is liable for all damages caused by the conspiracy's entire output." *Id.* at 632. The Court said this rule "is sometimes referred to as a co-conspirator 'exception' to *Illinois Brick*, but it would be better to recognize that *Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages." *Id.* at 631-32; *accord* 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 346h, at 200-01 (4th ed. 2014) ("Whether one adopts a co-conspirator exception or regards this situation as outside *Illinois Brick*'s domain" is immaterial). Under either framing, the Court stated the rule simply: "If Nippon Paper participated in a cartel," then the fact

"[t]hat the plaintiffs did not buy from Nippon Paper directly, or at all, does not matter." 281 F.3d at 634.[5]

The conspiracy Marion alleges does not follow a traditional linear chain of distribution found in these and other cases establishing this rule. The complaint names not only a manufacturer and its distributors, but also GPOs. Their inclusion does not call for a new rule or more complicated analysis, however, because the typical "manufacturer—distributor—consumer" distribution chain is still present and sufficient for deciding the *Illinois Brick* issue.[6]

The rule of *Fontana* and *Paper Systems* applies to that chain straightforwardly. Marion alleges a vertical conspiracy between Becton (the manufacturer) and its distributors, from whom the plaintiffs purchase medical supplies. The plaintiffs are "the first purchasers from

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[5] Cases from other circuits invoking this rule include *Insulate SB, Inc. v. Advanced Finishing Systems, Inc.*, 797 F.3d 538, 542 (8th Cir. 2015); *Lowell v. American Cyanamid Co.*, 177 F.3d 1228, 1231 (11th Cir. 1999); and *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1211 (9th Cir. 1984).

[6] This brief takes no position on whether the relationship, if any, between the plaintiffs and the GPOs would merit separate consideration under *Illinois Brick*.

outside the conspiracy," *Paper Systems*, 281 F.3d at 631, and the fact "[t]hat the plaintiffs did not buy from [Becton] directly, or at all, does not matter," *id.* at 634. *Illinois Brick* does not block their suit.[7]

Illinois Brick's concern about duplicative recovery does not arise when, as alleged here, the nominal direct purchasers are part of the conspiracy and thus would not take the conspiracy to court themselves. *Cf. Paper Systems*, 281 F.3d at 633 ("Nor does this suit pose any risk of double recovery."). Blocking recovery by the first purchaser outside the conspiracy goes too far by preventing *any* recovery for the alleged antitrust injury. The district court's ruling undermines Section 4's goal of ensuring that victims can recover damages for antitrust injury.

[7] One might object that *Paper Systems* and cases like it allow indirect purchaser plaintiffs to maneuver around *Illinois Brick* by alleging that everyone above them in the supply chain is part of a conspiracy. The remedy for implausible conspiracy claims, however, is the ordinary pleading rule under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The district court did not address the sufficiency of the complaint's allegations beyond the *Illinois Brick* analysis, and this brief likewise takes no position on their adequacy for *Twombly* purposes. This brief also takes no view on the merits of Marion's claims.

In addition, this case does not raise the concern in *Illinois Brick* that permitting pass-on claims would make litigation unduly complex.[8] For one thing, it is not clear from Marion's complaint the extent to which distributors can absorb any overcharge. That is partly because the price that distributors charge in the distribution agreement is largely "established in net dealer contracts they have no hand in negotiating." A37.

Regardless, in this Circuit, the possibility that a conspirator could absorb some of the overcharge, such that pass-on calculations could be necessary, is insufficient for dismissal under these circumstances. This Court recognized in both *Fontana* and *Paper Systems* that *Illinois Brick* might not apply in conspiracy cases even if there is the potential for complicated pass-on calculations. *Paper Systems*, 281 F.3d at 632 ("The difficulty of figuring out how much was passed on . . . . does not justify abandonment of the joint-and-several liability norm," *Illinois Brick*

[8] Pass-on analyses arise not only in the damages phase of a trial, but also at the class certification and liability stages, in which a plaintiff must establish classwide impact (i.e., greater than zero damages). The fact that parties engage in such analyses further demonstrates that pass-on damages calculations may not be as difficult as the Court feared in *Hanover Shoe* and *Illinois Brick*.

notwithstanding.); *see Fontana*, 617 F.2d at 484 (Castle, J., dissenting) ("These dealerships could have absorbed this entire difference, if they so desired, by altering their markup . . . . The impossibility of determining the effect of Cessna's prices upon Fontana is evident.").

Moreover, apportioning damages between different tiers of plaintiffs, as *Illinois Brick* contemplated, 431 U.S. at 737-46, is unnecessary in cases like this one, in which the tier of ostensibly "direct" purchasers are alleged to be part of the conspiracy and are therefore not plaintiffs.

The significance of pass-on also has been questioned in recent commentary concluding that the evidentiary complexities are not as great as the *Illinois Brick* Court believed them to be. *See supra* notes 4 & 8. Developments in economics and litigation resolve many of the concerns about complexity and apportionment. In any event, as this Court explained in *Paper Systems*, the *Illinois Brick* Court certainly did not intend to immunize antitrust co-conspirators based solely on evidentiary complexity. *See* 281 F.3d at 633.

Lastly, the district court's opinion alluded to Becton's argument that purchasers from vertical conspiracies can sue under Section 4 only

if those conspiracies involve price fixing, as opposed to other harms to competition. A37-38; Dkt. No. 83 (Becton's motion to dismiss), at 11-12, 14 n.5. That distinction appears nowhere in this Court's case law and is contradicted by this Court's own precedent, *Fontana*. In that case, this Court assessed a lengthy roster of "misdeeds" allegedly committed as part of a "multi-faceted conspiracy," but those misdeeds did not include price fixing. 617 F.2d at 479-80. This Court nevertheless ruled that *Illinois Brick* did not apply in *Fontana*, refuting Becton's argument. *Accord Insulate SB*, 797 F.3d at 542 (holding that *Illinois Brick* does not bar a suit alleging a vertical exclusive-dealing conspiracy).

* * *

Illinois Brick presents no bar to plaintiffs who are the first purchasers outside the conspiracy they allege. To hold otherwise would be completely to deprive injured persons from recovering damages from the conspirators. This Court should vacate the judgment below and allow the district court to place the private enforcement power where Congress established it: in the hands of the alleged scheme's victims.

CONCLUSION

This Court should vacate the district court's judgment and remand for further proceedings.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), this brief contains 4260 words.

I further certify that 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 the brief has been prepared in Microsoft Office Word 2013 using 14-point New Century Schoolbook font, a proportionally spaced typeface.

April 25, 2019

/s/ Adam D. Chandler
Counsel for the United States

CERTIFICATE OF SERVICE

I certify that on April 25, 2019, I caused the foregoing to be filed through this Court's CM/ECF filer system, which will serve a notice of electronic filing on all registered users, including counsel of record for all parties.

April 25, 2019

/s/ Adam D. Chandler
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