IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN RE: PRE-FILLED PROPANE TANK ANTIRUST LITIGATION	)	**MDL No. 2567**
	)	**Master Case No. 14-02567-MD-W-GAF**
INDIRECT PURCHASER ACTIONS	)	

ORDER

Now before the Court is the Indirect Purchaser Plaintiffs' Motion for Order Determining Jurisdiction on Remand. (Doc. # 306). Defendants UGI Corporation; AmeriGas Partners, LP; AmeriGas Propane, Inc.; and AmeriGas Propane, LP[1]; Ferrellgas Partners, LP; and Ferrellgas, LP[2] (collectively, "Defendants") have submitted their briefing on the jurisdictional issue. (Docs. ## 315, 317). Also before the Court is Defendant AmeriGas's Motion for Judgment on the Pleadings. (Doc. # 309). Defendant Ferrellgas has filed a Motion to Join Defendant AmeriGas's Motion. (Doc. # 311).[3] Indirect Purchaser Plaintiffs oppose Defendants' Motion for Judgement on the Pleadings. (Doc. # 316). For the reasons provided below, the Court finds that it has jurisdiction over Indirect Purchaser Plaintiffs' state-law claims. Further, for the reasons provided below, Defendants' Motion for Judgment on the Pleadings is DENIED.

DISCUSSION

I. BACKGROUND

[1] UGI Corporation; AmeriGas Partners, LP; AmeriGas Propane, Inc.; and AmeriGas Propane, LP will be collectively referred to as "AmeriGas."

[2] Ferrellgas Partners, L.P. and Ferrellgas, L.P. will be collectively referred to as "Ferrellgas." Ferrellgas does business under the name Blue Rhino.

[3] For the reasons stated in its Motion, Defendant Ferrellgas's Motion to Join is GRANTED.

Defendants are the leading distributors of pre-filled propane exchange tanks. (Doc. # 198, ¶ 1). Beginning in 2006, Defendants entered into co-packing agreements wherein each company agreed to refurbish and refill propane tanks for the other company. (*Id*. at ¶ 40). Before 2008, the tanks were filled with seventeen pounds of propane. (*Id*. at ¶ 4). However, propane costs spiked in 2008. (*Id*.). In the summer of 2008, Defendants reduced the fill level of the tanks from seventeen to fifteen pounds of propane per tank while maintaining the same price per tank. (*Id*. at ¶¶ 4-6).

In 2009, a group of plaintiffs filed suit against Ferrellgas and AmeriGas alleging that they had acted in concert to reduce the amount of propane contained within the tanks and thus, artificially increase the price of the tanks.[4] (Case No. 09-02086-MD-W-GAF, Doc. # 79, ¶¶ 1-4). The *In re Propane I* plaintiffs alleged that the actions of Ferrellgas and AmeriGas were in violation of Section 1 of the Sherman Act and state antitrust and consumer protection laws. (*Id.*). On December 8, 2009, the plaintiffs moved for preliminary approval of settlement agreements. (*Id.*, Doc. # 37). The settlement agreements were granted final approval on October 6, 2010. (*Id.*, Doc. # 166).

On March 27, 2014, the Federal Trade Commission (the "FTC") issued a complaint against Defendants (the "FTC Action") alleging that Defendants had restrained price competition because of their 2008 decision to decrease the fill level of the propane tanks. (Doc. # 198, ¶¶ 167-68). The FTC Action resulted in Consent Orders wherein Defendants agreed to cease and desist from any conspiracy between them to raise, fix, stabilize, or maintain prices of the tanks through any means. (*See* Docs. ## 211-1, 211-2 (collectively "FTC Consent Orders"), p. 4). Defendants also agreed to refrain from communicating competitively sensitive information to any competitor with some limited exceptions for propane refilling agreements. (*Id.*).

[4] This 2009 case will be referred to as *In re Propane I*.

Shortly thereafter, the present lawsuit was filed. (*See* Docket Sheet). Lawsuits were filed on behalf of Direct Purchaser Plaintiffs of the propane (Doc. # 102) and Indirect Purchaser Plaintiffs. (Doc # 105). Both Plaintiff groups alleged that the 2008 reduction in fill level was due to improper collusion between Defendants who conspired to force sellers of propane to accept the fill reduction and agreed not to compete with one another. (Docs. ## 102, ¶¶ 4-9; 198, ¶¶ 4-9). Plaintiffs alleged that these actions were a violation of Section 1 of the Sherman Act and state antitrust laws. (*See id.*).

The first complaint in the present action (the "*Ortiz* Complaint") was filed on May 30, 2014, which included allegations that Defendants' 2008 conduct violated Section 1 of the Sherman Act and state-antitrust laws, including the laws of Maine, Vermont, and Wisconsin. (Case No. 14–00917–CV–W–GAF, Doc. # 1). The *Ortiz* Complaint was consolidated with a number of other similar actions into a multidistrict litigation and transferred to this Court on October 16, 2014. (Doc. # 1). Indirect Purchaser Plaintiffs filed a Consolidated Class Action Complaint on January 29, 2015. (Doc. # 105). Defendants jointly moved to dismiss both the Direct Purchaser Plaintiffs' and Indirect Purchaser Plaintiffs' complaints. (Docs. ## 135, 137).

On July 2, 2015, this Court granted in part Defendants' Motion to Dismiss. *In re: Pre-Filled Propane Tank Antitrust Litig.*, 14-02567-MD-W-GAF, 2015 WL 12791756, at *1 (W.D. Mo. July 2, 2015), *reversed by* 860 F.3d 1059 (8th Cir. 2017). This Court determined that all Plaintiffs' antitrust claims were barred by the four-year federal antitrust statute of limitations. *Id*. at *9-10. However, this Court determined that the Indirect Purchaser Plaintiffs' injunctive relief claim, as a claim in equity, was not governed by the statute of limitations and was instead governed by the doctrine of laches. *Id.* at *11. This Court concluded that Defendants failed to meet their burden under the doctrine of laches because they failed to establish the existence of prejudice. *Id*. As such, the Court granted Defendants' Motion to Dismiss the Direct Purchaser Plaintiffs' complaint in its entirety. *Id*. The Court granted Defendants' Motion to Dismiss on the Indirect Purchase Plaintiffs' federal and antitrust claims, Counts

II and III respectively. *Id*. The Court denied the Motion as to Count I, injunctive relief for a violation of Section I of the Sherman Act, of the Indirect Purchaser Plaintiffs' Amended Complaint. *Id*. at *11.

The Eighth Circuit, sitting en banc, reversed the Court's dismissal of the Direct Purchaser Plaintiffs' complaint. *In re Pre-Filled Propane Tank Antitrust Litig*, 860 F.3d 1059, 1062 (8th Cir. 2017) (en banc), *cert denied* 138 S.Ct. 647 (Jan. 8, 2018) [hereinafter *Propane En Banc*]. The Eighth Circuit reversed due to its conclusion that the statute of limitations did not bar the claims. *Id*. at 1071. The Eighth Circuit stated: "Under *Klehr*, 'each sale to the plaintiff[s]' in a price-fixing conspiracy 'starts the statutory period running again.'" *Id*. at 1068 (quoting *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997)). After that determination, the Eighth Circuit, evaluating the sufficiency of the Amended Complaint, stated: "The allegations that the conspiracy continued into the class period are sufficient." *Id*. at 1069. In analyzing the sufficiency of the allegations, the court provided the following discussion[5]:

> The allegations that the conspiracy continued into the class period are sufficient. Plaintiffs plead that "Defendants' anticompetitive conduct lasted at least from July 21, 2008 through January 9, 2015" and "as a result of the [ir] anticompetitive conduct . . . Defendants have charged Plaintiffs and members of the proposed Class supracompetitive prices for Filled Propane Exchange Tanks throughout the Class Period." Amended Complaint, at ¶¶ 120-21. See *id*. at ¶¶ 122-23. Despite the settlement agreement with indirect purchasers in 2010, they plead that "Defendants maintained their illegally agreed-upon fill levels rather than resuming competition, preserving the unlawfully inflated prices that their conspiracy had produced." *Id*. at ¶ 108. See *id*. at ¶ 124. Plaintiffs also plead that "[t]hrough at least the end of 2010, Defendants regularly communicated to assure compliance with the conspiracy," "monitor[ing] the market to ensure that neither cheated on their anticompetitive agreement by offering a price reduction or competing for one another's customers or geographic markets." *Id*. at ¶ 92. See id. at ¶ 125. More specifically, they plead that in 2008, AmeriGas's Director of National Accounts Ken Janish told Blue Rhino's President Tod Brown that "it would follow closely behind Blue Rhino if it successfully implemented its fill reduction, and that it would not sell both 15-pound and 17-pound tanks" and "Janish had similar conversations with employees of Blue Rhino on numerous occasions from at least as early as 2007 until at least late 2010."

[5] Due to the varying interpretations and selected quotes provided by the parties in their briefing, the Court deems it appropriate to quote the at-issue language from *Propane En Banc* in its entirety to avoid ambiguity.

> *Id*. at ¶ 60. Additionally, "during calls and meetings with AmeriGas executives occurring at least as late as 2010, Janish repeatedly dismissed concerns that Blue Rhino might undercut AmeriGas on price or fill levels with words to the effect of, 'I talked to Blue Rhino, and that's not going to happen.'" *Id*. at ¶ 13. See *id*. at ¶ 62.
>
> Some of these allegations are "naked assertion[s] devoid of further factual enhancement," *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (internal quotation marks omitted), that do not "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. *See, e.g.*, Amended Complaint, at ¶¶ 120, 125. Others, however, list relevant individuals, acts, and conversations, providing "factual content" to support "the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. *See, e.g.*, Amended Complaint, at ¶¶ 13, 60, 92. Defendants argue these allegations are "impermissibly vague and conclusory." But Plaintiffs "need not provide specific facts in support of their allegations." *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008) (emphasis added), *citing Erickson v. Pardus*, 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam). Rather, they need only provide "sufficient factual information to provide the 'grounds' on which the claim rests, and to raise a right to relief above a speculative level." *Id*., *quoting Twombly*, 550 U.S. at 555, 555 n.3, 127 S.Ct. 1955. "[C]onstru[ing] the complaint liberally in the light most favorable to" Plaintiffs, *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 806 (8th Cir. 2008), these allegations "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937.

Id. at 1069-70. Based on the discussion of the Direct Purchaser Plaintiffs' Amended Complaint, the Eighth Circuit emphasized that "the issue is whether the amended complaint alleges that the conspiracy continued when the sales took place." *Id*. at 1070. The court concluded: "The amended complaint alleges sufficient factual matter, accepted as true to show a continuing violation to restart the statute of limitations, and, therefore, to state a claim to relief that is plausible on its face." *Id*. at 1071 (quotation omitted). Thus, the Direct Purchaser Plaintiffs' claims were remanded to this Court and are currently pending.

Before the issuance of *Propane En Banc*, Indirect Purchaser Plaintiffs moved for leave to amend their complaint to add three new subclasses asserting damages: 1) a six-year statue-of-limitations subclass, for violations of Maine, Vermont, and Wisconsin law; and 2) a new-purchaser subclass, for violations of Kansas antitrust law; and 3) a new-purchaser subclass for laws of

"*Illinois Brick* repealer states." (*See* Doc. # 173-1, Count III, Count IV, Count V). The Indirect Purchaser Plaintiffs also proposed another federal-disgorgement claim. (*Id*. at Count II). This Court ruled that the amendments to add the federal-disgorgement claim and the new-purchaser subclasses would be futile because the claims were time-barred. (Doc. # 197, p. 12). Conversely, the Court did allow the Indirect Purchaser Plaintiffs to add the six-year statute of limitations subclass. (*Id*.). As such, the *Ortiz* Amended Complaint, filed on October 16, 2015, retained the federal-injunctive claim and added the six-year statute of limitations subclass's state-law claim. (Doc. # 198, Count I, Count II). Thus, only Plaintiffs' state-law claims under the laws of Maine, Vermont, and Wisconsin remained in addition to the federal injunctive-relief claim. (Doc. # 198, Count II).

Defendants then moved for Judgment on the Pleadings on Indirect Purchaser Plaintiffs' Amended Complaint. (Doc. # 210). The Court granted Defendants' Motion as to Count I of the complaint. *In re Pre-Filled Propane Antitrust Litig.*, No. 14-02567-MD-W-GAF, 2016 WL 6963059, at *11 (W.D. Mo. Jan. 13, 2016) [hereinafter *Ortiz I*]. The Court found that Indirect Purchaser Plaintiffs lacked standing to assert Count I because the alleged injury was not redressable by court order as the relief sought was cumulative of the FTC Action. *Id*. at *5-6. However, the Court denied Defendants' Motion as to Count II, which alleged violations of state antitrust laws. *Id*. at *11. The Court found that this Count was not barred by the statute of limitations and that Indirect Purchaser Plaintiffs had standing to assert their claims. *Id*. Regarding standing, the Court determined that Indirect Purchaser Plaintiffs had sufficiently alleged they suffered an actual injury because they alleged they had purchased propane at a supra-competitive price. *Id*. at *8. The Court also found that Plaintiffs demonstrated a causal connection between the actual injury and the alleged wrongdoing of the Defendants. *Id*. at *8. The Court rejected

Defendants' argument that because the alleged conduct occurred in 2008, Indirect Purchaser Plaintiffs failed to demonstrate a causal connection to their injury. *Id*. In determining that the Indirect Purchaser Plaintiffs plausibly established a causal connection to their injury, the Court stated: "Taking the pleadings as true, there are no facts that would indicate the injury is the result of some other party or factor as opposed to the actions of Defendants." *Id*. After this decision, only Count II of the Amended Complaint remained.

Meanwhile, on July 21, 2016, an additional complaint by another group of indirect purchasers,[6] was filed. (16-00809-CV-MD-GAF, Doc. # 1). The *Orr* Complaint, which was consolidated into the same multidistrict litigation proceeding as *Ortiz*, included a federal injunctive-relief claim, a federal-disgorgement claim, the new-purchaser subclasses the *Ortiz* Plaintiffs tried to add to their Complaint, and a six-year statute of limitations subclass damages claim. (*Id*.).

Defendants then moved for Summary Judgment for the remaining *Ortiz* claims. (Doc. # 232). The Court granted that motion by finding that the state-law claims were barred by statute of limitations and, in the alternative, the named Plaintiffs lacked standing to assert claims under the laws of Maine, Vermont, and Wisconsin. *In re Pre-Filled Tank Antitrust Litig.*, No. 14-0256-MD-W-GAF, 2016 WL 6963058, at *5 (W.D. Mo. Sept. 2, 2016) [hereinafter *Ortiz II*]. The Court likewise dismissed the remaining state-law claims of the *Orr* Plaintiffs. (Doc. # 245). Both the *Ortiz* and *Orr* Plaintiffs appealed to the Eighth Circuit. (Doc. # 249; Case No. 16-00809-MD-W-GAF, Doc. # 11). The Eighth Circuit consolidated the *Ortiz* and *Orr* appeals. (Case No. 16-00809-MD-W-GAF, Doc. # 13).

[6] This case will be referred to as *Orr*.

On appeal, the Eighth Circuit affirmed the Court's dismissal of Indirect Purchaser Plaintiffs' federal injunctive claims. *In re Pre-Filled Propane Tank Antitrust Litig.*, 893 F.3d 1047, 1051 (8th Cir. 2018) [hereinafter *Ortiz III*]. In analyzing whether Indirect Purchaser Plaintiffs had standing to seek injunctive relief, the Eighth Circuit focused on whether Indirect Purchaser Plaintiffs sufficiently pled the need for injunctive relief as non-cumulative of the FTC Action. *See id*. at 1056. The court stated: "The indirect purchasers . . . must adequately plead that Defendants are, post-January 2015, conspiring to charge supra-competitive prices, resulting in some cognizable danger of recurrent violation of the FTC orders." *Id*. The Eighth Circuit then summarized its discussion of the facts pled in *Propane En Banc*, reiterating that some of the Indirect Purchaser Plaintiffs' claims echoed those found insufficient to plausibly support the factual assertion of a conspiracy in the previous case. *Id*. at 1056-57. In comparing the facts pled in both cases, the court stated the Indirect Purchaser Plaintiffs' "complaints contain allegations detailing events *in 2008 and through 2010* like those found sufficient in *Propane En Banc* to plead that the conspiracy continued into the class period." *Id*. at 1057 (emphasis in original) (internal quotations omitted). The Eighth Circuit explained that those assertions were insufficient to support "the reasonable inference that the defendant is liable for the misconduct alleged, that Defendants are conspiring to charge supra-competitive prices and are engaging in recurrent violations of the *January 7, 2015* consent orders. The indirect purchasers have not even adequately pleaded that Defendants are currently charging supra-competitive prices, let alone a conspiracy." *Id*. (emphasis in original) (internal quotation marks and citations omitted).

The court emphasized that the FTC Action was not at issue in *Propane En Banc* because the direct purchasers sought monetary damages rather than injunctive relief. *Id*. The Eighth Circuit concluded that because Indirect Purchaser Plaintiffs failed to plead actual injury, they

lacked standing to pursue their injunctive relief claims. *Id*. After affirming the Court's dismissal of the federal-injunctive-relief claims, the Eighth Circuit remanded the case to this Court to consider the threshold issue of "whether the state-law-damages claims should remain in federal court." *Id*. at 1059-60. The Eighth Circuit further instructed: "This court remands to the district court to analyze under [28 U.S.C.] § 1367(c) whether it should exercise supplemental jurisdiction over state-law claims." *Id*. at 1060.

II. LEGAL STANDARD

After the pleadings have closed, any party may move to have the Court enter judgment on the pleadings. Fed. R. Civ. P. 12(c). "A motion for judgment on the pleadings should be granted when, accepting all facts pled by the nonmoving party as true and drawing all reasonable inferences from the facts in favor of the nonmoving party, the movant has clearly established that no material issue of fact remains and that the movant is entitled to judgment as a matter of law." *Schnuck Mkts., Inc. v. First Data Merch. Servs. Corp.*, 852 F.3d 732, 737 (8th Cir. 2017). Generally, a Rule 12(c) motion for judgment on the pleadings is reviewed under the same standard as a Rule 12(b)(6) motion to dismiss. *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1233 n.3 (8th Cir. 2010). Therefore, conclusory statements lacking any factual support should be ignored. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, the Court may only consider properly pled facts and determine whether the complaint states "a claim for relief that is plausible on its face." *Id.*

III. ANALYSIS

A. Jurisdiction

"Federal Courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Federal courts "possess only that power authorized by Constitution and statute." *Id.* "The Constitution extends the judicial power of the federal courts to controversies

'between Citizens of different States.'" *Eckerberg v. Inter-State Studio & Pub. Co.*, 860 F.3d 1079, 1084 (8th Cir. 2017) (quoting U.S. Const. art. III § 2). "Congress enacted legislation to give federal courts original jurisdiction of all civil actions between citizens of different states." *Id.* (internal quotations omitted). The burden of establishing jurisdiction is on the party asserting jurisdiction. *Kokkonen*, 511 U.S. at 377. Further, "parties may not expand the limited jurisdiction of the federal courts by waiver or consent[.]" *4:20 Commc'ns, Inc. v. Paradigm Co.*, 336 F.3d 775, 778 (8th Cir. 2003).

Indirect Purchaser Plaintiffs assert that the Court need not determine if it will retain supplemental jurisdiction over the remaining state-law claims because it has original jurisdiction pursuant to the Class Action Fairness Act ("CAFA"). "CAFA grants broad federal jurisdiction over class actions and establishes narrow exceptions to such jurisdiction." *Westerfied v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010). CAFA is codified, in part, at 28 U.S.C. § 1332, the statutory provision that grants federal courts original jurisdiction on the basis of diversity of citizenship. Under CAFA, "federal courts have jurisdiction over class actions in which the amount in controversy exceeds $5,000,000 in the aggregate; there is minimal (as opposed to complete) diversity among the parties, i.e., any class member and any defendant are citizens of different states; and there are at least 100 members in the class." *Westerfield v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) (citing 28 U.S.C. § 1332(d)).

Both Defendants assert that the Court can exercise supplemental jurisdiction over the remaining state-law claims. (Docs. ## 315, p. 1; 317, p. 2). Defendant Ferrellgas contends that Indirect Purchaser Plaintiffs cannot assert jurisdiction based on CAFA because it was not pleaded in their operative complaints. (Doc. # 317, pp. 10-12). However, "[t]he general rule is that where a basis for federal court jurisdiction appears clearly from an examination of the face of the

complaint, the court may sustain the suit even if the plaintiff has not relied upon that basis." *Raus v. Bhd. Ry. Carmen of U.S. & Can.*, 663 F.2d 791, 796 (8th Cir. 1981). As such, despite Indirect Purchaser Plaintiffs not pleading jurisdiction based on CAFA (Doc. # 198, ¶ 11), the Court will examine the Complaint in its entirety to determine if jurisdiction clearly exists.

First, the face of the complaint shows that there are more than 100 class members. (*See id*. at ¶¶ 2-3, 99-101, 108 (alleging claims on behalf of thousands of class members)). Next, minimal diversity is apparent because this case was pleaded on behalf of a nationwide class and multi-state subclasses (*Id*. at ¶¶ 99-101) and brought against defendants from particular states. (*See id*. at ¶¶ 21 (Defendant AmeriGas is a citizen of Pennsylvania and Delaware); 18-19 (Defendant Ferrellgas is citizen of Kansas and Delaware)). Finally, the face of the complaint shows that the amount in controversy exceeds $5,000,000. (*See id*. at ¶¶ 10 ("[C]onsumers were and continue to be cheated out of hundreds, if not thousands if not millions of pounds of propane[.]"); 91-92 (explaining that "Plaintiffs and other class members were deprived of approximately two pounds of propane in each tank they purchased" and "Plaintiffs and class members paid more and continue to pay more for propane than they would have paid in a competitive market"). From the face of the complaint, Plaintiffs have pled that there are more than 100 class members, minimal diversity exists, and the amount in controversy exceeds $5,000,000. Because the statutory requirements of CAFA are satisfied, jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) is apparent from the face of the Complaint. Therefore, the Court has original jurisdiction over Indirect Purchaser Plaintiffs' state-law claims.

B. Defendants' Motion for Judgment on the Pleadings

Defendants' challenge to the sufficiency of Indirect Purchaser Plaintiffs' pleading primarily rests on the argument that Indirect Purchaser Plaintiffs have failed to plead that an

ongoing conspiracy occurred after 2010. (Docs. ## 309, pp. 1-2; 311, pp. 1-2). Defendants assert that *Ortiz III* shows the Eighth Circuit found that Indirect Purchaser Plaintiffs had only pled the existence of a conspiracy through late 2010. (Docs. ## 309, pp. 4-5; 311, pp. 5-6). Defendants then identify that Indirect Purchaser Plaintiffs in this case are seeking damages for purchases that occurred after the *Propane I* settlements in 2011. (Docs. ## 309, pp. 5-6; 311, pp. 4-5). As such, Defendants argue that because the purchases occurred after the conspiracy had ended, Indirect Purchaser Plaintiffs have not suffered an injury. (Docs. ## 309, pp. 8-10; 311, pp. 7-8). Because of the alleged lack of injury, Defendants contend that Indirect Purchaser Plaintiffs lack standing to bring their state-law claims. (Docs. ## 309, p. 10; 311, p. 8).

In *Ortiz I*, the Court found that sales at supra-competitive prices are injuries in fact, and the Indirect Purchaser Plaintiffs had also sufficiently plead a causal connection between the injury and the complained-of action of Defendants. *Ortiz I*, 2016 WL 6963059, at *8. Lastly, the Court determined that the Indirect Purchaser Plaintiffs had satisfied the redressability requirement. Because all three requirements were satisfied, the Court found that the Indirect Purchaser Plaintiffs had standing to pursue their state-law claims.

Defendants urge the Court to reach the opposite conclusion because the Eighth Circuit's holdings in *Propane En Banc* and *Ortiz III* establish that Indirect Purchaser Plaintiffs have only alleged an ongoing conspiracy through late 2010. (Docs. ## 309, pp. 4-5; 311, pp. 5-6). First, it is important to note that the lack of standing that warranted the dismissal of Count I was due to the injunctive relief sought by Indirect Purchaser Plaintiffs. *See Ortiz III*, 893 F.3d at 1057; *Ortiz I*, 2016 WL 6963059, at *5-6. For their state-law claims, Indirect Purchaser Plaintiffs seek monetary damages as well as injunctive relief. The Eighth Circuit's ruling in *Ortiz III* governs the conclusion

that Indirect Purchaser Plaintiffs lack standing to pursue injunctive relief in their state-law claims for the same reasons they lacked standing to pursue their now-dismissed federal claim.

The remaining issue before the Court is whether the Eighth Circuit's rulings in *Propane En Banc* and *Ortiz III* compel the conclusion that Indirect Purchaser Plaintiffs lack standing to pursue monetary damages for their state-law claims. The Court rejects Defendants' assertion that the Eighth Circuit conclusively found that Indirect Purchaser Plaintiffs only pled a conspiracy as of 2010. In *Propane En Banc*, the Court identified provisions of the Amended Complaint that show acts "through at least the end of 2010," were sufficient to "plausibly give rise to an entitlement to relief." 860 F.3d at 1069-70 (internal quotations and alterations omitted). Nowhere in the opinion did the Eighth Circuit state that the Plaintiffs had only plausibly pled a conspiracy through the end of 2010. While it is true that the class period of the Direct Purchaser Plaintiffs, which began July 21, 2008, is different from the indirect purchasers, which began December 1, 2009 as to AmeriGas and October 14, 2011 as to Ferrellgas, there is no indication from *Ortiz III* that the Eighth Circuit limited the timeframe of the alleged conspiracy to end before those class periods.

This conclusion is reinforced by the Eighth Circuit's direction "to consider the impact of *Propane En Banc* on the timeliness of the state-law claims." *Ortiz III*, 893 F.3d at 1060. Defendants do not assert timeliness arguments related to the statute of limitations in their current Motion, but the Eighth Circuit's discussion of timeliness in *Propane En Banc* is nonetheless instructive to the current analysis. The Eighth Circuit determined that "each sale to the plaintiffs in a price-fixing conspiracy starts the statutory period running again." *Propane En Banc*, 860 F.3d at 1068 (internal quotations and alteration omitted). The court analyzed whether the Direct Purchaser Plaintiffs alleged: "(1) a price-fixing conspiracy; (2) that brings about a series of

unlawfully high priced sales during the class period; and (3) sales to the plaintiffs during the class period." *Id*. (internal quotations and alterations omitted). The Eighth Circuit concluded that the plaintiffs sufficiently pled all three requirements, thus resolving the issue of "whether the amended complaint alleges that the conspiracy continued when the sales took place" in favor of the plaintiffs. *Id*. at 1070. As such, the Eighth Circuit's analysis in *Propane En Banc* does not compel a conclusion that Indirect Purchaser Plaintiffs only alleged a conspiracy through late 2010. Rather, its conclusion shows that the Direct Purchaser Plaintiffs did allege a conspiracy into the class period and they suffered an actual injury by purchasing propane tanks at supra-competitive prices.

Additionally, Defendants misconstrue *Ortiz III* to support their argument that the Eighth Circuit found that Indirect Purchaser Plaintiffs only alleged a conspiracy until late 2010. As previously stated, the analysis in *Ortiz III* was to determine whether the Indirect Purchaser Plaintiffs sufficiently pled a threat of recurring harm, such that Count I was not cumulative of the FTC Action. *Ortiz III*, 893 F.3d at 1056. Defendants identify the quote, "[o]ther allegations, however, sufficiently list[ed] relevant individuals, acts, and conversations in 2008 and 2010 to plead that the conspiracy continued into the class period," *id*. at 1058 (quotations omitted), as proof that the Eighth Circuit only found a conspiracy sufficiently alleged as of late 2010. (Docs. ## 309, p. 10; 311, p. 6). However, the emphasis of this sentence is not that the relevant allegations occurred in 2008 and 2010, but rather that these allegations sufficiently pled "that the conspiracy continued into the class period." *Ortiz III*, 893 F.3d at 1057 (quotation omitted). While these allegations were found insufficient to support the claim that Indirect Purchaser Plaintiffs were in danger of recurrent violations of the FTC Action, this does not necessarily lead to the conclusion that Indirect Purchaser Plaintiffs have failed to plausibly allege injury for Count II. Therefore, the

Court concludes that the Eighth Circuit's holding in *Ortiz III* does not compel a conclusion that the Indirect Purchaser Plaintiffs only alleged a conspiracy into late 2010.

In *Ortiz I*, this Court already analyzed the issue of whether Indirect Purchaser Plaintiffs have standing to assert their state-law claims. 2016 WL 6963059, at *7. The rulings of the Eighth Circuit in *Propane En Banc* and *Ortiz III* do not show cause for the previous analysis to be altered. As such, the Court finds, based off its previous ruling in *Ortiz I*, that Indirect Purchaser Plaintiffs have established all three of the requirements of standing: injury in fact; causal connection between the injury and the conduct complained of; and redressability. *See id*. at *8. As standing is a constitutionally mandated requirement, Indirect Purchaser Plaintiffs must have standing to sue at every stage in the case. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."). However, at this stage in the proceedings, Indirect Purchaser Plaintiffs have demonstrated standing to bring their state-law claims.

As to the *Orr* Plaintiffs, The Eighth Circuit's ruling in *Ortiz III* affirms the Court's dismissal of Count I and Count II, as both are federal-injunctive-relief claims. For the reasons provided above regarding the *Ortiz* Plaintiffs, the Court retains jurisdiction over the remaining state-law claims in the *Orr* case. Further, given the procedural posture of *Orr* and *Ortiz*, the Court believes that the Eighth Circuit's discussion of standing and timeliness of state-law claims in both *Propane En Banc* and *Ortiz III* apply with equal force to both cases. As such, the Court finds that the *Orr* Plaintiffs have demonstrated standing to bring Count III and Count IV, their state antitrust claims.

CONCLUSION

CAFA grants the Court jurisdiction over Indirect Purchaser Plaintiffs' state-law claims. Additionally, the Eighth Circuit's rulings in *Propane En Banc* and *Ortiz III* do not support the conclusion that Indirect Purchaser Plaintiffs only pled a conspiracy as of 2010. As such, Indirect Purchaser Plaintiffs have standing to pursue their state antitrust claims. Accordingly, for these reasons and those provided above, Defendants' Motion for Judgment on the Pleadings is DENIED.

IT IS SO ORDERED.

s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

DATED: April 15, 2019