No. 16-2015

In the United States Court of Appeals
for the Third Circuit

LEONARD COTTRELL, SANDRA HENON, WILLIAM REEVES, GEORGE HERMAN, SIMON NAZZAL, CAROL FREBURGER, JACK LIGGETT, PATRICIA BOUGH, MACK BROWN, DOLORES GILLESPIE, DEBORAH HARRINGTON, ROBERT INGINO, EDWARD ROGERS, JR., DEBORAH RUSIGNULOLO, DOROTHY STOKES, JOSEPHINE TROCCOLI, HURIE WHITFIELD, THOMAS LAYLOFF, CAROLYN TANNER, PATSY TATE, JOHN SUTTON, JESUS RENTERIA, GLENDELIA FRANCO, and NADINE LAMPKIN, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

ALCON LABORATORIES, INC.; ALCON RESEARCH, LTD.; FALCON PHARMACEUTICALS, LTD.; SANDOZ, INC.; ALLERGAN, INC.; ALLERGAN USA, INC.; ALLERGAN SALES, LLC; PFIZER, INC.; VALEANT PHARMACEUTICALS, INTERNATIONAL, INC.; BAUSCH AND LOMB, INC.; ATON PHARMA, INC.; MERCK & CO., INC.; MERCK, SHARP & DOHME, CORP.; PRASCO, LLC; and AKORN, INC.,
Defendants-Appellees.

On Appeal from the United States District Court for the
District of New Jersey, Case No. 14-5859

BRIEF OF APPELLANTS LEONARD COTTRELL, ET AL.

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INTRODUCTION

The Plaintiffs purchased Defendants' prescription eye drop medication, allege that Defendants' unfair practices in packaging it caused them to waste part of the medication, and now seek reimbursement for the value of the portion that Defendants' unfair conduct forced them to waste. Specifically, Plaintiffs allege that Defendants packaged the medication with eyedropper tips that emit drops so large that nearly half or even more of the drop is invariably wasted.

The Article III injury-in-fact question here is not difficult, and the district court's decision holding that Plaintiffs lack standing should be reversed. Plaintiffs' injury is the amount of money they overspent on prescription medication because of Defendants' allegedly illegal conduct. This is no different than if, at the gas station, half of the gas that you paid for spilled on the ground because of a deliberately wasteful pump design; your injury is the value of the gas that ended up on the ground. Given that this case involves concrete economic harm, it is no surprise that two other district courts that have considered the injury question in cases involving similar claims had no hesitation in holding, at the motion-to-dismiss stage, that this allegation of economic injury was sufficient to permit Plaintiffs to proceed. *Gustavsen v. Alcon Labs., Inc.*, No. 1:14-cv-11961-MLW, Doc. 98, Tr. of Mot. Hr'g Oct. 30, 2015, at 28:5-30:8 (D. Mass. Nov. 2, 2015) (finding injury-in-fact sufficient to confer standing); *cf. Eike v. Allergan, Inc.*, No.

3:12-cv-01141-SMY-DGW, 2014 WL 1040728, at *3 (S.D. Ill. Mar. 18, 2014) (finding actual injury pled).

Further, it is not as if Plaintiffs' allegations are perfunctory. That Plaintiffs overpaid for their medication is supported by numerous scientific studies, factual allegations regarding the pricing decisions of one of the Defendants, as well as factual allegations regarding all Defendants' current pricing scheme, all of which indicate that the too-large size of Defendants' drops needlessly costs Plaintiffs money. At the motion-to-dismiss stage—before Plaintiffs have had any opportunity to take discovery regarding Defendants' pricing practices—these allegations of injury-in-fact are more than sufficient.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d), because at least one member of the Plaintiff-Appellant class is a citizen of a different state or country than at least one Defendant-Appellee, the number of members of the class is at least 100, and the amount in controversy exceeds $5,000,000. The named Plaintiffs-Appellants are citizens of Florida, California, Illinois, New Jersey, North Carolina, or Texas. The various Defendants-Appellees are citizens of Delaware, Texas, New Jersey, California, New York, Ohio, Louisiana, Illinois, and/or Canada.

The district court issued a judgment granting Defendants' motion to dismiss on March 24, 2016, which disposed of all claims and all parties. JA5. Plaintiffs filed their notice of appeal on April 21, 2016. JA1. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether Plaintiffs, who allege that Defendants' conduct caused them money damages, have Article III standing to sue eye drop manufacturers on the basis that their eye-dropper design caused Plaintiffs to incur the cost of medication they could not use in violation of state consumer-protection laws.[1]

RELATED CASES

The following pending cases involve substantially similar claims:

1. *Eike v. Allergan, Inc.*, No. 3:12-cv-01141-SMY-DGW (S.D. Ill.). Decisions in *Eike* include Doc. 282, Memorandum and Order (granting motion for class certification) (S.D. Ill. July 25, 2016), Memorandum and Order, 2015 WL 6082310 (S.D. Ill., Sept. 14, 2015) (denying motion to exclude expert

[1] This issue was raised in Brand-Name Defendants' memorandum in support of their motion to dismiss Plaintiffs' amended complaint, JA42-JA43 (Doc. 86-1), which is adopted and incorporated by the Generic Defendants' memorandum in support of their motion to dismiss, JA42 (Doc. 85-1), and in Brand-Name Defendants reply in support thereof, JA43 (Doc. 94); and opposed in Plaintiffs' opposition thereto, JA43 (Doc. 91). The issue was decided in the March 24, 2016, order, JA4-JA5, and memorandum opinion, JA6-JA26.

testimony), and Memorandum and Order, 2014 WL 1040728 (S.D. Ill. Mar. 18, 2014) (denying motion to dismiss), *reconsideration denied* 2015 WL 603196 (Feb. 12, 2015, S.D. Ill.).

2. *Gustavsen v. Alcon Laboratories, Inc.*, No. 1:14-cv-11961-MLW (D. Mass.). The court ruled that the plaintiffs had Article III standing to bring their claims in federal court. Doc. 98, Tr. of Mot. Hr'g Oct. 30, 2015, at 28:5-30:8 (D. Mass. Nov. 2, 2015).

STATEMENT OF THE CASE

The facts described in this statement of the case are based on allegations in Plaintiffs' Amended Class Action Complaint. JA176-JA340. Because this Court is reviewing the district court's grant of a motion to dismiss that complaint, this Court "must accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the nonmoving party." *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012) (internal quotations omitted); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, [a court] presum[es] that general allegations embrace those specific facts that are necessary to support the claim.") (internal quotations omitted).

1. Defendants' prescription eye drops. Defendants manufacture name-brand and generic prescription eye drops. JA191-JA195. Prescription eye drops play an important role treating serious health conditions including glaucoma, allergies, inflammation, and infection. JA182, JA191-JA195. Given the importance of these drugs and that millions of people take them, these medications are big business, bringing in billions of dollars for their manufacturers. JA182, JA184-JA185 (glaucoma alone affects more than 1.5 million Americans); JA216 (Defendant Pfizer's glaucoma drug Xalatan had retail sales in excess of $500 million in 2010).

Unlike a bottle of pills, prescription eye drops are not labeled with the number of doses or drops contained in each bottle, and the bottles do not state how long the medication is meant to last. Rather, a certain volume of medication—such as 2.5, 10, or 15 microliters (μL)—is sold in a bottle for a certain price. JA182. The only way for consumers to use the medication without compromising its sterility is to squeeze drops out of the bottle via its eyedropper directly into their eyes. JA218.

2. Decades of scientific literature show that Defendants' eyedroppers deliver drops that are far too large, resulting in waste of expensive medication and risk of harm, and that smaller drops would save patients and managed care providers money. The size of the eye drops delivered by Defendants'

eyedroppers—between 24 and 52 µL—far exceeds the size universally recommended by the scientific community. *See* JA208-JA214. The recommended size of 5 to 15 µL is based on studies—including studies funded and conducted by Defendants—that consistently conclude that smaller eye drops deliver medication just as well, or better, than larger drops of medication of the same, or higher, concentration, and that smaller drops are safer because they lower the risk of harmful side effects. JA232-JA243.

Why isn't bigger better? Because the eye's capacity is limited. Although the eye can momentarily hold about 30 µL in the lower eyelid, normal human tear volume is 7 to 9 µL. JA197-JA199. Thus, when eye drops the size of Defendants' are administered, and the volume of liquid in the eye is suddenly increased, rapid reflex blinking and tearing act to quickly drain the liquid from the eye. JA198. As a result, the vast majority of the drop never has the opportunity to enter the inner eye, where the medication is needed to treat the health condition. JA197-JA199. In other words, most of the drop is wasted. Conversely, when the drop is smaller—approximately 15 µL or smaller—a greater portion of the liquid more easily reaches the inner eye. JA201.

The medication wasted by the use of larger-sized drops also creates health risks beyond the nuisance and irritation created by excess medication running

down patients' cheeks. Medication that does not end up being absorbed by the inner eye does more harm than good. JA202-JA205. Sixty to eighty percent of the medication contained in drops similar to the sizes of Defendants' drops is absorbed directly into the bloodstream through the tear duct. JA202-JA203 (citing A. Cox, *Systemic Effects of Ocular Drugs*, 2002 Adverse Drug Reaction Bulletin 823, 823; Arthur D. Charap, *et al.*, *Effect of Varying Drop Size on the Efficacy and Safety of a Beta Blocker*, 21 Ann. Ophthalmol. 351 (1989)). Once in the bloodstream, the medication does not provide any therapeutic benefits but it does increase the risk of serious side effects for often-elderly patients. JA202-JA205. Some types of eye-drop-administered glaucoma medication, for example, can cause hypotension, psychiatric disorders, difficulty breathing (bronchospasms), and fatigue. JA204.

Health risks aside, and of particular salience for this appeal, studies also have concluded that smaller drops would mean cost savings for patients and their managed care providers. JA214-JA217. Because prescription eye drops are sold by the bottle, not by the dose, smaller drops would mean that a purchase of a bottle of prescription eye drops would last longer and have to be purchased less often, saving consumers money. Thirty years ago, studies concluded that reducing the drop size to 15 µL "could greatly diminish the cost of topical glaucoma therapy." JA214-JA215 (quoting Charles M. Lederer & Ralph E. Harold, *Drop Size of*

Commercial Eye Glaucoma Medications, 101 Am. J. Ophthalmology 691, 694 (1986)). Subsequent studies have consistently reached the same conclusion. *E.g.*, JA215 ("Reducing the drop size to 5-15 µL would . . . reduce cost of therapy[.]") (quoting Deepta Ghate & Henry F. Edelhauser, *Barriers to Glaucoma Drug Delivery*, 17 J. Glaucoma 147, 147 (2008)). And studies conducted by Defendants agree that the cost of ophthalmic therapies is linked to the size of the eye drops; the smaller the drops, the cheaper the course of treatment. JA215 ("[A] smaller drop size would mean that more doses could be dispensed from each bottle of medication, providing costs savings to patients and managed care providers.") (quoting Richard Fiscella, *et al.*, *Efficiency of Instillation Methods for Prostaglandian Medications*, 22 J. Ocular Pharmacology and Therapeutics 477, 478 (2006)) (study conducted by Allergan); JA215 (smaller drop size made medications less expensive) (citing David Hartenbaum, *et al.*, *Quantitative and Cost Evaluation of Three Antiglaucoma Beta-Blocker Agents: Timoptoc-XE® versus Two Generic Levobunolol Products*, II Am. J. of Managed Care 157, 162 (1996)) (study conducted by Merck & Co., Inc.).

Because smaller eye drops are equally or more effective, carry less risk of harm from side effects, and make the therapy less expensive, the scientific literature has, since the 1970s, concluded that the ideal eye-drop size is between 5

and 15 µL. JA205-JA208 (*see, e.g.*, Ghate & Edelhauser (2008), *supra*, at 147; M.P. Ventura, *et al.*, *Cost Considerations of the New Fixed Combinations for Glaucoma Mecical Therapy*, 30 J. of Clinical Pharmacy & Therapeutics 251, 253 (2005); Luc Van Santvliet & Annick Ludwig, *Determinants of Eye Drop Size*, 49 Surv. Ophthalmology 197, 198 (2004) (literature review)).

Defendant Allergan and its scientists have funded and conducted studies and written a textbook coming to that same conclusion for the same reasons and advocating the use of smaller eye drops. JA207 (citing J. Walt & F. Alexander, *Drops, Drops, and More Drops*, Glaucoma—Current Clinical and Research Aspects 208 (P. Gunvant ed. 2011)) (J. Walt is an Allergan scientist); JA207 (citing Fiscella *et al.* (2006), *supra*, at 478) (study conducted by Allergan); JA206 (study funded by Allergan recommending drop sizes between 5 and 10 µL) (citing Sukhbir S. Chrai, *et al.*, *Lacrimal and Instilled Fluid Dynamics in Rabbit Eyes*, 62 J. Pharmaceutical Sci. 1112, 1112 (1973)); *see also* JA200-JA201, JA202-JA203, JA207-JA208 (discussing Allergan study finding 20 µL drops to be as effective as 35 µL and 50 µL drops, recommending smaller drops) (citing Charap (1989), *supra*, at 351-52, 355).

3. Designs for eye droppers that emit smaller-sized drops are available for Defendants' use. Despite these conclusions, Defendants have consistently

employed eyedropper designs that emit wasteful and dangerously large 24 to 52 µL drops. This choice was not driven by a lack of viable designs for eyedroppers that would emit smaller drops. In 1985, for example, scientists designed an eyedropper tip that emitted drops between 11 and 19 µL and presented that design in a scientific journal precisely to promote its widespread and commercial use. JA219-JA220. Three years later, the same scientists created an eyedropper tip that consistently released drops of 8 to 10 µL. JA220. Defendant Alcon designed and used a "potentially commercially available eyedrop bottle" that emitted 16 µL as part of its 1992 double-blind study that concluded that 16 µL drops were just as effective, but better tolerated, than 30 µL drops. JA182-JA183, JA200, JA204, JA221. Nevertheless, none of the Defendants' medications at issue here—including Alcon's—is sold in bottles with eyedropper tips that emit drops approaching these smaller sizes.

Further, at least some Defendants *have* changed their eyedroppers over time to alter the size of the drop—though the drops were not made as small as recommended. For example, Alcon's Azopt drop size was listed as 50 µL in a 1997 FDA document, was 40 µL in 2003, and was down to 34 µL in 2008. JA224-JA225. Merck increased the drop size of its Cosopt from 34 µL in 2003 to 45 µL in 2008. JA224. And, relatedly, Defendants' generic medications—of the same

concentration as the brand-name—are often packaged in eyedroppers that emit drops of dramatically different size. JA227-JA231. For example, Merck's Timoptic XE is sold in a bottle that emits 38 µL drops, while Falcon's generic equivalent comes in at 24 µL. JA228.

4. Plaintiffs' complaint. In September 2014, twenty-four prescription eye-drop users sued Defendants on behalf of themselves and other similarly situated people and third-party payors who paid all or part of the purchase price of Defendants' prescription eye drops. JA34, JA186. Defendants are fifteen manufacturers of brand-name and generic prescription eye-drop medications, all of whom package their medication in bottles with tips that emit drops 24 µL or larger. JA191-JA195.

The named Plaintiffs, residents of New Jersey, California, Florida, Illinois, North Carolina, and Texas, bring class claims under each of their respective state consumer-protection laws against the Defendants whose medications they purchased, alleging that Defendants violated the prohibition on unfair trade practices contained in those statutes. JA266-JA302. Five of those states' laws expressly incorporate § 5 of the Federal Trade Commission (FTC) Act, which declares unlawful "[u]nfair or deceptive acts or practices in or affecting commerce." JA263-JA266. Plaintiffs allege that Defendants' practices meet the

criteria for "unfair" practice—laid out in the FTC's Policy Statement and incorporated by state law—because they caused "substantial injury to consumers," are "not reasonably avoidable by consumers" in that consumers purchase the medication prescribed by their doctors to treat serious conditions, and are not "outweighed by countervailing benefits" because there are none. JA263, JA264.

Plaintiffs allege that Defendants' practices injured Plaintiffs in two ways. First, Plaintiffs are injured because they were forced to spend money on unneeded and wasted medication. JA231-JA232. Second, Plaintiffs are injured because they would have paid less for their prescription eye drop therapy if the medication had been packaged with eyedroppers that dispensed smaller drops. JA232-JA245. Both injuries would be remedied by the requested relief: reimbursement for what they paid for wasted medication.

In support of the claims for damages, the amended complaint details at length the amount of money that each named Plaintiff spent on his or her medications—as well as, where available, the expenditures of the managed care provider—each time a Plaintiff purchased a bottle of Defendants' prescription eye drops. JA311-JA340. The amended complaint calculates the value of the wasted medication for each named Plaintiff. JA246-JA254. The amended complaint also

alleges that, in many instances, the price of a bottle of medication varies proportionally with the volume of medication in the bottle.[2]

In further support of their allegations that smaller drops would have meant less expensive therapy, Plaintiffs cite numerous publications concluding that smaller, more therapeutically appropriate drops would mean a cost savings for consumers and managed care providers. JA232-JA245. The complaint alleges that "there are at least 11 published works that have espoused the principle that smaller drops would provide cost savings to patients and third-party payors," including three publications written by Defendants' own scientists. JA243. "Not considering the three company articles, the publications were written by a total of 23 separate scientists and were published in six separate peer-reviewed journals and one textbook. So far as Plaintiffs are aware, those statements are uncontradicted anywhere in the published literature[.]" JA243.[3]

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[2] *E.g.*, JA312 (Allergan's Lumigan's total price was $74.21 or $89.91 for a 2.5 mL bottle and $166.97 for a 5 mL bottle); JA326 (Allergan's Combigan's total price was $89.64 for a 5 mL bottle and between $161.39 and $177.69 for a 10 mL bottle; Plaintiff Jack Liggett's co-pay was $35.00 for a 5 mL bottle and $50.00 or $70.00 for a 10 mL bottle); JA333 (Falcon's Brimonidine's total price was $57.95 or $117.72 for a 5 mL bottle and $171.50 for a 15 mL bottle); JA333-JA334 (Alcon's Travatan Z's total price was $92.23 for a 2.5 mL bottle and $163.45 or $173.66 for a 5 mL bottle).

[3] *See also* JA232-JA234 ("[a]n important benefit of using a smaller instilled volume, in addition to improved drug activity and lower cost . . .") (quoting Chrai

Beyond those studies regarding cost savings, Defendant Alcon's pricing rationale also supports Plaintiffs' theory of injury. Dr. Alan Robin—an Alcon consultant and the senior author on Alcon's study demonstrating that 16 µL drops are just as effective as larger drops—recommended to top Alcon executives, including the CEO, that Alcon reduce the drop size. JA243-JA245. He also asked why Alcon had not done so in light of the study. JA243-JA244. Alcon executives told Dr. Robin that the company kept the drops larger so that it could sell more product and make more money, indicating that Alcon's prices (and profits) were

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(1973), *supra*, at 1119); JA234 ("Drop size and method of delivery are also important from an economic standpoint since tips that deliver large or multiple drops increase costs.") (quoting Reay H. Brown & Mary G. Lynch, *Design of Eyedropper Tips for Topical Beta-Blocking Agents*, 102 Am. J. Ophthalm. 123 (1986)); JA234-JA235 ("Alteration of eyedrop delivery systems and alteration of the medication's physical properties to produce smaller drops could greatly diminish the cost of topical glaucoma therapy[.]") (quoting Lederer (1986), *supra*, at 694); JA235-JA237 (literature review states that eyedrops should be 5 µL to 15 µL, in part, because it would reduce the cost of therapy) (citing Van Santvliet & Ludwig (2004), *supra*, at 198); JA237 (final cost of therapy based on drop size) (Ventura *et al*. (2005), *supra*, at 253); JA237-JA238 (a decrease in drop size would reduce the cost of therapy) (citing Zdenka Šklubalová & Zdenek Zatloukal, *Study of Eye Drops Dispensing and Dose Variability by Using Plastic Dropper Tips*, 32 Drug Devel. & Indus. Pharm. 197, 198 (2006)); JA238 (same) (citing Ghate & Edelhauser (2008), *supra*); JA239 (a negative impact of too-large drops was wasted medication) (citing Denise K. Chun, *et al.*, *Ocular Pharmaceutics* 179, 185 in Albert & Jakobiec's Principles and Practice of Ophthalmology (3d ed. 2008)); JA239-JA240 (discussing three papers published by Defendants explaining that too-large drop size was problematic because it wasted medication and cost patients more).

tied to the volume of medication sold and that patients would save money on their therapy with smaller drops. JA244-JA245.

5. Defendants' motions to dismiss. Two groups of Defendants—brand-name and generic manufacturers—each filed a motion to dismiss. JA35 (Doc. 18); JA36 (Doc. 23). The brand-name manufacturers argued that (1) Plaintiffs failed to "plausibly" allege an Article III injury-in-fact; (2) Plaintiffs' claims are preempted by federal drug regulation; and (3) Plaintiffs failed to state a claim under the various state consumer-protection laws. *See generally* Doc. 23-1. The generic manufacturers adopted the Brand-Name Defendants' arguments and also argued that the claims involving generics are preempted for reasons specific to federal generic drug regulation. *See generally* Doc. 18-1. Plaintiffs opposed all aspects of the motions to dismiss. JA39 (Doc. 52, Doc. 53).

The district court granted both motions to dismiss solely on the basis that Plaintiffs lacked Article III standing, leaving the other arguments unaddressed. JA157-JA175. The district court granted Plaintiffs leave to amend their complaint. JA175. Plaintiffs did so, adding detail quantifying the amount of money each named Plaintiff spent on wasted medication, further discussion of the published scientific works stating that smaller drops mean cost savings for patients and managed care providers, and more detail regarding the interactions of Dr. Robin

with Alcon executives. *See generally* JA176-JA340. Defendants filed motions to dismiss Plaintiffs' amended complaint, raising the same arguments they had raised earlier and contending that Plaintiffs' amendments did nothing to change the analysis. JA42 (Doc. 85); JA42-JA43 (Doc. 86); *see generally* Doc. 85-1; Doc. 86-1.

6. The decision below. Despite Plaintiffs' amendments, the district court granted Defendants' motions to dismiss on the basis that Plaintiffs lacked Article III standing, again expressly declining to address the other issues raised by the Defendants. JA7.[4]

The district court first addressed Plaintiffs' theory that they were injured—and therefore had Article III standing to sue—because, had the Defendants packaged their medication in bottles with smaller tips, Plaintiffs' therapy would have cost less.[5] Though recognizing that "economic injury is one of the

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[4] Because the preemption issue is complex, fact-bound, and has not yet been addressed by the district court, Plaintiffs do not discuss the preemption issue here. *See Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 807-08 (3d Cir. 1992) (declining to address alternative ground for affirmance where the district court had not yet passed on the issue). *Cf. Eike v. Allergan, Inc.*, No. 3:12-cv-01141, 2014 WL 1040728, at *5 (S.D. Ill. Mar. 18, 2014) (in case alleging similar facts and bringing similar claims, denying motion to dismiss on preemption grounds because further factual development was needed before issue could be determined).

[5] The district court misunderstood this allegation. Plaintiffs allege that their therapy would have been less expensive had the drops been smaller because bottles

paradigmatic forms of standing," JA14, the district court found Plaintiffs' claims of economic loss too "speculative" to meet Article III's injury-in-fact requirement. JA19. The district court reasoned that it could disregard the studies concluding that smaller drops would mean cost savings for patients because, according to it, the methodologies of those articles insufficiently supported their conclusions—though the district court acknowledged its limited ability to analyze the methodologies of the studies at this early point in the litigation. JA17. The district court found the allegations stemming from Dr. Robin's interactions with Alcon irrelevant, JA21-JA22, and stated that Plaintiffs "have not offered any facts" that Defendants' pricing of bottles "with smaller dispensing tips would be based on the volume of fluids." JA20.

The district court then held that "Plaintiffs have not pled any basis for alleging that the way Defendants price their products will take into account the drop sizes." JA19. As such, the district court asserted, this case was no different from *Finkelman v. National Football League*, 810 F.3d 187 (3d Cir. 2016), which held that bald assertions about the potential economic impacts of ticket

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containing the same amount of medication would have lasted longer, not "that Defendants would price 'smaller-tipped' bottles less expensively than their current version." JA16.

withholding by the NFL on the ticket resale market were too conjectural to support a finding of injury-in-fact. JA20.

The district court also rejected Plaintiffs' argument that they are injured because they paid for portions of medication they were unable to use because of Defendants' illegal conduct. The district court began its analysis from the incorrect premise that "Plaintiffs' causes of action sound in fraud." JA23. Because Plaintiffs failed to allege that they were deceived in some way and failed to allege that, but for a deception, they "would have purchased cheaper products that dispense small drops," the district court reasoned that Plaintiffs had failed to allege an injury that would entitle them to reimbursement. JA23-JA25. The district court did not address the fact—raised in Plaintiffs' amended complaint and its briefing—that Plaintiffs' causes of action alleging that Defendants' practices are unfair and are not based on any allegation of fraud or deception. *See* JA22-JA25.

SUMMARY OF ARGUMENT

Plaintiffs' amended complaint alleges that Defendants' unfair practice of manufacturing prescription eye drop medication with eyedropper tips that emit too-large drops caused them economic loss because they were forced to spend money on wasted medication. At the motion-to-dismiss stage, where facts must be construed in favor of the non-moving party, Plaintiffs' allegations of economic loss

easily meet the Article III requirements for injury-in-fact: the harm is concrete, particularized, and actual.

Plaintiffs have alleged standing under two theories of injury. First, Plaintiffs allege that the injury is the value of the wasted medication. Plaintiffs paid for it, but because of Defendants' illegal conduct, they were forced to waste it. This sort of economic harm constitutes injury for purposes of Article III standing. The district court was wrong in holding Plaintiffs were not injured under Plaintiffs' wasted-medication theory on the basis that Plaintiffs failed to plead deception. The court was wrong both because whether Plaintiffs pled the elements of the claims alleged is a question that goes to whether they stated a claim on the merits, not whether they were injured, and because Plaintiffs' allegations that Defendants' conduct was unfair do not require them to plead deception.

Second, Plaintiffs allege that the injury arises from the fact that had Defendants packaged their medication with tips emitting smaller droppers, Plaintiffs' overall treatment would have cost less. Had Plaintiffs been able to get more drops out of each bottle of medication, they would have had to purchase fewer bottles for the same therapeutic value and, therefore, would have spent less. The complaint's allegation that smaller drops equate to savings for consumers is backed by meticulous references to scientific studies, facts about Defendants' past

and current pricing, and facts about what Plaintiffs paid for various volumes of Defendants' medication. The district court was thus wrong to hold that the amended complaint was too speculative to give rise to Article III standing.

ARGUMENT

I. STANDARD OF REVIEW

This Court exercises plenary review over a district court's dismissal for lack of standing. *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 137 (3d Cir. 2009). In analyzing whether Plaintiffs have sufficiently alleged standing in their complaint at the motion-to-dismiss stage, a court "must accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the nonmoving party." *In re Schering Plough*, 678 F.3d at 243 (internal quotations omitted). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, [a court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561.

II. PLAINTIFFS HAVE STANDING BECAUSE THEIR AMENDED COMPLAINT ALLEGES PLAUSIBLE, NON-SPECULATIVE CLAIMS OF ECONOMIC INJURY.

This Court has adopted a three-step approach for determining whether a plaintiff's claim of standing has been pled sufficiently to satisfy Article III: First, the Court "must take note of the elements" required; second, the Court should

identify any conclusory allegations "not entitled to the assumption of truth"; and third, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *In re Schering Plough*, 678 F.3d at 243 (internal quotations omitted).

Here, both of Plaintiffs' theories of economic injury satisfy the "elements" for establishing injury-in-fact: that it be "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560. Monetary harm—actual money already lost or spent—is the "paradigmatic," "classic" injury-in-fact that gives rise to standing. *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291, 293 (3d Cir. 2005) (Alito, J.). Plaintiffs allege that Defendants' sale of eyedroppers emitting only overly large drops harmed them monetarily, either because Defendants' action compelled Plaintiffs to pay for wasted medication or because had Defendants' droppers released appropriately sized drops, their supply of medication would have lasted longer and their course of therapy would have been cheaper. JA231-JA245. Because Plaintiffs are seeking reimbursement for past, documented outlays of money, their claims easily satisfy *Lujan*'s requirement that they be "concrete" and "actual." *Lujan*, 504 U.S. at 560. Plaintiffs also easily satisfy the "particularized" requirement by listing, in their amended complaint, each medication that each Plaintiff took, how much they paid for it, and the value of the wasted medication

per bottle, which is the amount of actual damages Plaintiffs seek. JA247-JA254, JA311-JA340; *see Lujan*, 504 U.S. at 560 n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.").[6]

Two other district courts entertaining claims similar to those at issue here—including the only other district court to have addressed standing—found that the plaintiffs had pled injury. In *Gustavsen v. Alcon Laboratories, Inc.*, the District of Massachusetts declined to hold that plaintiffs lacked standing at the motion-to-dismiss stage, explaining that "'[o]verpayment is a cognizable form of injury for standing purposes.'" *Gustavsen v. Alcon Labs., Inc.*, No. 14-cv-11961-MLW, Doc. 98, Tr. of Mot. Hr'g Oct. 30, 2015, at 29:16-30:1 (Nov. 2, 2015) (quoting *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 190-91 (1st Cir. 2009)). The court noted that "whether the defendants would charge the same for smaller bottles or less is a factual issue, one that would need to be addressed at summary judgment or at trial," adding that "it is plausible that the defendants would charge less for smaller bottles or the same size bottles that would last longer

[6] Plaintiffs' claims easily meet the two other Article III standing requirements: causation and redressability. *See Lujan*, 504 U.S. at 560. Plaintiffs allege that it was Defendants' decision to package their medication in eyedroppers that emit large drops that caused them to waste medication, and no one disputes that it is Defendants who made packaging choices. As to redressability, Plaintiffs seek money damages, which, by definition, would remedy their alleged monetary harm.

if they were dispensing 15 microliter drops." *Id.* at 29:20-30:1. Similarly, in *Eike v. Allergan, Inc.*, as here, "plaintiffs allege[d] that [Defendants'] unfair practice caused 'Plaintiffs and Class Members to [have] suffered actual damages measured by the allocated purchase price for the portion of their eye drops in excess of 15 µL.'" No. 3:12-cv-01141-SMY-DGW, 2014 WL 1040728, at *3 (S.D. Ill. Mar. 18, 2014) (citing plaintiffs' complaint).[7] In holding that those allegations sufficiently pled actual injury, the district court rejected arguments similar to the arguments Defendants raise here, albeit in the context of a failure-to-state-a-claim analysis. *Id.*[8]

A. Plaintiffs' Allegation that They Suffered Monetary Damages Because They Were Forced to Purchase Medication They Could Not Use Is an Article III Injury-in-Fact.

Plaintiffs allege that Defendants' unfair conduct forced them to purchase large quantities of medication that they were unable to use and that they are

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[7] The court in *Eike* recently granted plaintiffs' motion to certify the class. *Eike v. Allergan, Inc.*, No. 3:12-cv-01141-SMY-DGW, Doc. 282, Memorandum and Order (S.D. Ill. July 25, 2016).

[8] The district court here stated that another similar case—*Thompson v. Allergan USA, Inc.*, 993 F. Supp. 2d 1007 (E.D. Mo. 2014)—was dismissed "on identical arguments raised by the Defendants in this matter." JA10. However, *Thompson* did *not* rule on plaintiffs' standing. Rather, *Thompson* dismissed the complaint because the plaintiffs failed to state a claim under Missouri consumer-protection law, which is not at issue in this case, and on federal-preemption grounds, which, as noted earlier, the district court has yet to address. *See Thompson*, 993 F. Supp. 2d at 1013-14.

entitled to reimbursement for the value of that wasted medication. JA231-JA232. This theory of economic injury is sufficient to support Plaintiffs' standing.

As this Court explained in *Danvers*, when plaintiffs allege that defendants "forced them to spend money against their will," that allegation is "sufficient to confer Article III standing." *Danvers*, 432 F.3d at 293. In finding that Ford dealerships had standing to challenge the legality of a Ford dealership certification program that had cost the dealerships money—costs that were laid out in detail in the complaint—*Danvers* distinguished the allegations "that the Plaintiffs have suffered injuries because of the [certification program]" from "speculativ[e]" allegations "that they *might* suffer [injuries] in the future." *Id.* at 293 n.4 (emphasis in original). The former give rise to concrete, particularized, actual injury, and the latter do not. *Id.* at 292 n.3, 293 n.4.

Here, as in *Danvers*, Plaintiffs allege that Defendants' illegal conduct compelled them to spend money, and, as in *Danvers*, that allegation is sufficient to confer Article III standing. Like the expenditure of money on required certification programs in *Danvers*, Plaintiffs here allege that Defendants' unfair conduct compelled them to spend money on unnecessary and wasted medication. JA231-JA232.

This is more than sufficient to satisfy Article III. But the district court held that Plaintiffs' theory that they are injured because they paid for wasted medication did not establish standing because, in its view, one of the elements required for Plaintiffs to establish injury under the consumer-protection laws was missing: deception. JA23. The district court reasoned that an allegation of deception was required because it presumed that "Plaintiffs' causes of action sound in fraud" and that Plaintiffs are alleging that they "did not receive the benefit of their bargain." JA23.[9]

But that reasoning is both legally wrong and premised on a factual inaccuracy. First, whether Plaintiffs pled all the elements of their state-law claims goes to whether they have *stated a claim*, which is a merits question, not whether they have Article III standing, and the district court erred in addressing it as part of its standing analysis. *See Bond v. United States*, 564 U.S. 211, 219 (2011) ("the question whether a plaintiff states a claim for relief goes to the merits in the typical case, not the justiciability of a dispute") (internal quotations omitted); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 (1998) (whether there is a statutory

[9] The district court also stated that "out-of-pocket expenses"—the expenses plaintiffs incur from purchasing defective products—is another common theory of economic injury that gives to rise standing under consumer fraud claims. JA23-JA24. However, the district court did not say how that theory of injury does or does not apply here.

claim "has nothing to do with whether there is a case or controversy under Article III"); *In re Processed Egg Prods. Antitrust Litig.*, 851 F. Supp. 2d 867, 886-87 (E.D. Pa. 2012) ("To inject the condition that Plaintiffs must satisfy certain elements of the state antitrust claims into a constitutional standing analysis would result in an impermissible out-of-the-box merits inquiry.").

Second, even assuming (incorrectly) the relevance of the district court's approach, Plaintiffs' state consumer-protection law claims do *not* require Plaintiffs to show deception; as a result, it is not surprising that Plaintiffs do not allege that Defendants' conduct was deceptive. Rather, Plaintiffs, in keeping with the nature of their claim, allege that Defendants' conduct is illegal because it is *unfair*. *See Eike*, 2014 WL 1040728, at *3 ("The benefit-of-the-bargain rule does not apply in this case. Plaintiffs are not asserting a misrepresentation but instead an unfair practice.")

To elaborate: Plaintiffs allege that Defendants' too-large drops violate § 5(a) of the FTC Act, which prohibits "[u]nfair *or* deceptive acts or practices," based on the FTC's Unfairness Policy Statement. 15 U.S.C. § 45(a) (emphasis added); JA263. The disjunctive "or" means that the practice need not be both unfair *and* deceptive to be illegal; either is sufficient. *See Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 158 (3d Cir. 2009) ("or" is disjunctive). The FTC's Unfairness

Policy Statement, in turn, states that, under the FTC Act, a practice is "unfair" if it "causes or is likely to cause [1] substantial injury to consumers [2] which is not reasonably avoidable by the consumers themselves and [3] not outweighed by countervailing benefits to consumers or competition." JA263. Plaintiffs go on to expressly plead each of those elements. JA264-JA266. The Policy Statement's explanation of what constitutes "unfairness" confirms that deception is not required for a practice to be "unfair." JA263.

Five of the six state consumer laws under which Plaintiffs bring suit incorporate the FTC Act (and its policy statements), and the state laws expressly state that they are to be interpreted in the same way as the FTC Act. *See* JA268 (California Unfair Competition Law); JA269 (Florida Deceptive and Unfair Trade Practices Act); JA270 (Illinois Consumer Fraud Act); JA270-JA271 (North Carolina Unfair and Deceptive Trade Practices Act); JA271-JA273 (Texas Deceptive Trade Practices Act). The remaining state consumer law at issue, the New Jersey Consumer Fraud Act, prohibits "unconscionable commercial practice[s]" "whether or not any person has in fact been misled [or] deceived." *See* JA266-JA267.[10]

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[10] Whether Plaintiffs will ultimately prevail on their state- and federal-law consumer claims is a question for another day. As shown here, Plaintiffs have adequately pled standing. Defendants also argued in the district court that

B. Plaintiffs' Allegation that Their Therapy Would Have Been Less Expensive Had Defendants' Bottles Emitted Smaller Drops Is Plausible and Non-Speculative.

Plaintiffs' second theory of economic injury is based on the common-sense proposition that had Defendants manufactured and sold their medications with droppers that emit smaller drops, their treatment would have been cheaper. JA232-JA245. This allegation does not assume—as the district court appears to have concluded—that Defendants would sell smaller-tipped bottles at a lower price. JA16. Rather, Plaintiffs contend that had the same-size bottles of medication come with dropper tips that emitted smaller drops, each bottle would have lasted longer, and Plaintiffs would have had to purchase fewer bottles (or at least less total volume of medication), and, therefore their overall treatment would have been cheaper. JA235. In other words, if Plaintiffs had needed to purchase fewer bottles for the same therapy, they would have spent less money. *See Finkelman v. National Football League*, 810 F.3d 187, 201 (3d Cir. 2016) ("federal courts typically credit allegations of injury that involve no more than 'application of basic economic logic'") (quoting *United Transp. Union v. I.C.C.*, 891 F.2d 908, 912 n.7

Plaintiffs' amended complaint should be dismissed because it failed to state a claim under each of the six state consumer-protection laws. Doc. 86-1, at 21-39. However, the district court did not reach those arguments, which involve the particular and varied requirements of each state's law, and this Court should not do so in the first instance.

(D.C. Cir. 1989)). That Plaintiffs would have spent less money absent Defendants' allegedly illegal conduct is a common path to showing injury-in-fact—and damages—and it is particularly common in the antitrust context. *E.g.*, *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 152-53 (3d Cir. 2002) (plaintiff can prove antitrust damages by relying on difference between free market price and paid price); *In re Pharmaceutical Industry*, 582 F.3d at 190 (standing where allegation was that plaintiffs would have paid less absent defendants' conduct because "overpayment is a cognizable form of injury"); *In re Processed Egg*, 851 F. Supp. 2d at 887 (explaining that "the named Plaintiffs allegedly personally purchased eggs at artificially inflated prices—a monetary injury—which constitutes actual harm" and, therefore, have standing).

There is nothing speculative about the way this claim is presented in the amended complaint. As explained above, in addition to common-sense, Plaintiffs' allegation of cost savings is rooted in (1) the published literature, (2) factual allegations regarding a Defendant's pricing decision, and (3) facts demonstrating how Defendants price their products now. The district court gave short shrift to each.

First, Plaintiffs' amended complaint described *eleven* scientific publications that conclude smaller drops sizes are preferable, in part, because they would make

treatment less expensive. JA232-JA243. Further, Plaintiffs are not aware of *any* contrary scientific literature examining the economic impact of smaller drop sizes. JA243. Thus, Plaintiffs' claim of injury is not an original theory cut out of whole cloth, but rather based on the recommendations and conclusions contained in scientific publications. In the face of this evidence, the lower court's rejection of Plaintiffs' claims at this stage of the litigation is puzzling.

The district court acknowledged that its ability to evaluate the methodology the scientists employed in reaching their cost-savings conclusion at this stage in the litigation was limited, but went ahead and rejected the methodologies and conclusions of all eleven publications as too conclusory anyway. JA17-JA18. The district court did this without the benefit of any record, any expert opinion, or even, apparently, a review of the full text of the publications. *See* JA17 (stating that it was difficult to discern the methodologies of the studies based on the complaint's allegations alone, indicating that the full articles were not reviewed). On the basis of that swift rejection of all of the literature, the district court found Plaintiffs' cost-savings theory speculative. JA20. But a motion to dismiss based only on the allegations in the complaint is not the time to vet the credentials, methodology, or conclusions of the papers described in the complaint. *See Lujan*, 504 U.S at 561 (explaining that only "general factual allegations" are necessary at the motion-to-

dismiss stage). At any rate, that a significant number of scientific papers come to the same conclusion indicates that Plaintiffs' cost-savings theory is neither speculative nor implausible such that dismissing their complaint on a motion to dismiss is warranted. *See also Gustavsen*, Doc. 98, at 29:24-30:3 (holding that this cost-savings theory is plausible).[11]

Second, Plaintiffs allege facts indicating that Defendant Alcon priced its ophthalmic drugs based on volume. Plaintiffs allege that Dr. Alan Robin, a former Alcon consultant, asked Alcon executives why they did not implement the smaller drop sizes that had been unanimously recommended by the scientific community. JA243-JA244. The Alcon executives responded that a larger drop size meant more product was sold and more money was made. JA244-JA245. That response indicates that Plaintiffs' theory is exactly right: smaller drops would mean consumers would purchase less product and spend less money. The district court dismissed these allegations as irrelevant and only limited to one Defendant. JA21-JA22 n.4. But, at a minimum, the allegations—which would be fleshed out in

[11] The district court pointed out that some of the papers cited by Plaintiffs noted that volume of medication was one of several factors that determine drug prices. JA17. True, but irrelevant (at least at this stage of the litigation). As long as volume is *a* factor in pricing, Plaintiffs' have pled economic harm from Defendants' conduct. The district court's point goes only to the extent of the injury, not its existence.

discovery—fatally undermine the district court's view that Plaintiffs' cost-savings theory is inherently speculative or implausible.

Third, Plaintiffs' claim is supported by the allegations that Defendants *do*, in fact, price their drugs based on volume, and consumers and third-party payors *do*, in fact, save money when the drop size is smaller because they are able to get more doses out of each bottle. As the amended complaint alleges—but the district court ignored—the costs for Plaintiffs' medication, in fact, vary depending on the volume of medication in the bottles that they receive; the larger the bottle, the more expensive the medication, in a near-proportional relationship.[12] That Defendants would continue to similarly price by volume if eyedroppers emitted smaller drops is hardly wild speculation.

Further, the amended complaint alleges that, in fact, smaller-sized drops translate to cost savings for consumers. It discusses two studies, one conducted by Defendant Merck, that sought to determine the least expensive available glaucoma

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[12] *E.g.*, JA312 (Allergan's Lumigan's total price was $74.21 or $89.91 for a 2.5 mL bottle and $166.97 for a 5 mL bottle); JA326 (Allergan's Combigan's total price was $89.64 for a 5 mL bottle and between $161.39 and $177.69 for a 10 mL bottle; Plaintiff Jack Liggett's co-pay was $35.00 for a 5 mL bottle and $50.00 or $70.00 for a 10 mL bottle); JA333 (Falcon's Brimonidine's total price was $57.95 or $117.72 for a 5 mL bottle and $171.50 for a 15 mL bottle); JA333-JA334 (Alcon's Travatan Z's total price was $92.23 for a 2.5 mL bottle and $163.45 or $173.66 for a 5 mL bottle).

treatment. JA215 (citing Hartenbaum, *et al.* (1996), *supra*) (study conducted by Merck); JA237 (citing Ventura, *et al.* (2005), *supra*). Both studies determined that one of the major factors driving the cost of therapy to patients was drop size. JA215, JA237. And the least expensive regimens were those with the smaller drops precisely because smaller drops meant patients would be able to purchase less medication. *See* JA215, JA237. Indeed, in the Merck study, the brand-name drug, which would typically be more expensive than its generic equivalents, was found to be less expensive for patients than the generic versions mostly because the drop size was smaller. *See* JA220 (citing Hartenbaum, *et al.* (1996), *supra*). That variations in drop size—even among the various large sizes currently emitted by Defendants' eyedroppers—are *already* a demonstrated determining factor of treatment cost shows that Plaintiffs' cost-saving allegations are neither speculative nor implausible.

Plaintiffs' claims are distinguishable from claims that have been found to be too speculative because the claims here do not involve a "chain of contingencies" or other disconnect between defendants' conduct and the injury alleged. *See Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1148 (2013). Here, Plaintiffs allege that they are directly harmed by Defendants' decisions to use eyedroppers emitting too-large drops because that means they have been forced to purchase more medication

at a higher total cost than they would have had Defendants' conduct been lawful. In contrast, the plaintiffs in *Clapper* would only have been injured if at least *five* different events, dependent in part on third parties, occurred in sequence, including various not-yet-made surveillance targeting decisions by the U.S. Government and particular yet-to-be-issued rulings by a federal court. *Id.* Because the plaintiffs had failed to present summary-judgment evidence that each of those events was non-speculative, the Supreme Court held that the plaintiffs had failed to demonstrate injury-in-fact fairly traceable to the statute at issue. *Id.* at 1148-49 (explaining that the burden of demonstrating standing at the summary-judgment stage is greater than at the motion-to-dismiss stage). No such "chain of contingencies" exists here.

The cases principally relied on by Defendants and the district court exhibit similar distinguishing characteristics. In *Finkelman v. National Football League*, 810 F.3d 187 (3d Cir. 2016), the plaintiff alleged that he was economically harmed by the NFL's decision to make only 1% of Super Bowl tickets available for public purchase. He argued that if the NFL had released more tickets to the public, the prices on the resale market would have been lower, and he would have spent less money on his Super Bowl tickets. *Id.* at 199. In making those allegations, the plaintiff relied only on the "basic principle that a reduction in supply will cause prices [on the resale market] to rise." *Id.* (internal quotations omitted). He did not,

in his complaint, cite to any scientific, economic, or other support for his theory, and this Court held that his claims were based on "nothing more than supposition." *Id.* at 201.

Contrary to the district court's conclusion, this case is worlds apart from *Finkelman* for two reasons. First, unlike Plaintiffs here, Mr. Finkelman, as noted, failed to cite in his complaint to any authority supporting his cost-inflation theory. Though, at oral argument, counsel for Mr. Finkelman promised to produce an expert supporting the theory in discovery, the Court said it was too little too late: Those supporting facts needed to have appeared "within the four corners of the complaint." *Id.* at 202. Second, Mr. Finkelman's theory of supply and demand was not sufficiently linked to the conduct he was complaining about. He argued that the limited supply of Super Bowl tickets drove up the prices of those tickets on the resale market. However, the allegedly illegal conduct—that the NFL made an extremely limited number of Super Bowl tickets available to the public at face-value prices—did not have an appreciable impact on the supply of Super Bowl tickets on the resale market because tickets given to sponsors and teams could have just as easily ended up on the resale market. *Id.* at 200-02. For the reasons explained above, here, Plaintiffs' claims of injury, in contrast, are directly related to Defendants' conduct.

Nor does *Dominguez v. UAL Corp.*, 666 F.3d 1359 (D.C. Cir. 2012), support the ruling below. There, Richard Dominguez alleged that United's policy prohibiting customers from transferring their tickets to others raised the cost of Mr. Dominguez's plane ticket because it eliminated the possibility of a resale market. *Id.* at 1362. As in *Clapper*, Mr. Dominguez's claim of injury required a "chain of contingencies": both that a resale market for plane tickets would develop and that it would operate to drive down the cost of plane tickets. Following discovery and at the summary-judgment stage, the court held the Mr. Dominguez had not come up with evidence to show that either of those contingencies were non-speculative. *Id.* at 1363. And, in fact, the evidence demonstrated that those things would *not* occur. First, though other airlines permitted the transfer of tickets, in fact, no resale market existed. *Id.* Second, United and other airlines charged fees to change or transfer tickets, fees that, once added to the cost of tickets in the resale market, would not likely make tickets on the resale market any cheaper and, therefore, not likely drive down the cost of tickets purchased directly from the airline. *Id.* at 1363-64.

Plaintiffs' claims here are far different from the speculative claims in *Dominguez*, even putting aside that *Dominguez* was reviewed on summary judgment. *See Gustavsen*, Doc. 98, at 29:17-24 (distinguishing *Dominguez* on the

basis that it was decided on summary judgment, not on a motion to dismiss). To start, as noted earlier, there is no "chain of contingencies" here. But also unlike *Dominguez*, the facts alleged by Plaintiffs indicate that Defendants do, in fact, price by volume and that, in fact, smaller drops mean lower costs to consumers.

CONCLUSION

For these reasons, the judgment of the district court dismissing Plaintiffs' amended complaint should be reversed.

Respectfully submitted,

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COMBINED CERTIFICATIONS OF COMPLIANCE

Bar Membership. Leah M. Nicholls, Richard S. Cornfeld, John G. Simon, Kevin M. Carnie, Jr., Jeffrey W. Herrmann, and Brian Wolfman are members in good standing of the Bar of this Court.

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July 25, 2016

CERTIFICATE OF SERVICE

I certify that on July 25, 2016, I electronically filed the foregoing Appellants' Brief and Appendix via the CM/ECF system and served all parties or counsel via CM/ECF system.

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