18-3567

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

In Re: REMICADE (DIRECT PURCHASER) ANTITRUST LITIGATION

JOHNSON & JOHNSON; JANSSEN BIOTECH, INC.,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR DEFENDANTS-APPELLANTS
AND JOINT APPENDIX
VOLUME I OF III
(Pages A1 to A78)

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CORPORATE DISCLOSURE STATEMENT

Defendant Johnson & Johnson certifies that no other publicly held corporation owns 10% or more of Johnson & Johnson's stock.

Defendant Janssen Biotech, Inc. certifies that its parent corporation is Johnson & Johnson, and that apart from Johnson & Johnson, no other publicly held company owns more than 10% of Janssen's stock.

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STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Pennsylvania (the "District Court") had subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1337(a), and 15 U.S.C. § 15, because Plaintiff's claims arise under the federal antitrust laws. On October 25, 2018, the District Court issued a memorandum and order, J.A. 34, in which it denied the motion of Defendants Johnson & Johnson and Janssen Biotech, Inc. (together, "Janssen") to compel individual arbitration of the claims brought by Plaintiff Rochester Drug Cooperative, Inc. ("RDC"). Janssen filed a timely notice of appeal on November 21, 2018. This Court has jurisdiction over this matter pursuant to 9 U.S.C. § 16(a).

STATEMENT OF ISSUE PRESENTED

Under the Federal Arbitration Act, there is a strong presumption in favor of arbitrability, and agreements to arbitrate must be enforced unless "the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Here, RDC purchased Remicade pursuant to an agreement in which the parties agreed to arbitrate "[a]ny controversy or claim arising out of or relating to" the agreement, waived their rights to a jury trial on "ANY ISSUE," and confirmed that the arbitrator could award statutory remedies. Under this quintessentially broad arbitration clause, must RDC arbitrate its antitrust claims alleging that it was overcharged for the Remicade it purchased from Janssen?

STATEMENT OF RELATED CASES

This case has not previously been before this Court, and Janssen is unaware of any related cases pending before this Court or any state or federal agency. The District Court presides over several related and pending actions concerning Remicade, including: *Pfizer Inc. v. Johnson & Johnson*, No. 17-cv-4180 (E.D. Pa.) (filed Sept. 20, 2017); *Nat'l Emps. Health Plan v. Johnson & Johnson*, No. 17-cv-4326 (E.D. Pa.) (filed Sept. 28, 2017); and *Walgreen Co. v. Johnson & Johnson*, No. 18-cv-2357 (E.D. Pa.) (filed June 6, 2018).

STATEMENT OF THE CASE

RDC, a drug wholesaler, alleges that it purchased Remicade (infliximab) directly from Janssen and was overcharged as a result of Janssen's anticompetitive conduct. *See* J.A. 91–144, Amended Direct Purchaser Class Action Complaint ("Compl.") ¶¶ 1, 173–86. It asserts federal antitrust claims and seeks to represent a class of direct purchasers, including all other persons or entities that directly purchased Remicade from Janssen. J.A. 102, 132–33, Compl. ¶¶ 35, 148.

RDC's purchases of Remicade are governed by an October 1, 2015 Distribution Agreement (the "Agreement") between RDC and JOM Pharmaceuticals Inc. ("JOM"), a Johnson & Johnson entity that handles distributor contracting on Janssen's behalf. The Agreement lists Janssen Biotech, Inc. as the

entity from which RDC will purchase Remicade. J.A. 190, 203, Agreement, Schedule A, p. 22 & Schedule C, p. 35.

The Agreement comprehensively governs the relationship between RDC and Janssen. Among other things, it states that RDC will purchase Remicade at its Wholesale Acquisition Cost ("WAC"). J.A. 172, § 1.12. This published price is defined by federal law, and reflects the manufacturer's price to direct purchasers before applying any applicable discounts and rebates. J.A. 120, Compl. ¶ 102; 42 U.S.C. § 1395w–3a(c)(6)(B). The Agreement further provides that Janssen will abide by all applicable federal laws. J.A. 186, § 4.19.

The Agreement also contains a dispute resolution mechanism that governs "[a]ny controversy or claim ***arising out of*** or ***relating to***" the Agreement. J.A. 188, § 4.21(a) (emphasis added). It requires that any such claim be submitted to an initial mediation and, if mediation fails, an arbitration proceeding be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. *Id.* § 4.21(b). Each side explicitly and irrevocably waives the "RIGHT TO TRIAL OF ANY ISSUE BY JURY." *Id.* § 4.21(d) (capitalization in original). The Agreement also expressly preserves RDC's statutory remedies in arbitration by providing that the arbitrator will not award enhanced damages, interest, or attorneys' fees "EXCEPT AS MAY BE REQUIRED BY STATUTE." *Id.* (capitalization in original).

Further, the Agreement provides that there "shall be no right or authority for any claims to be arbitrated on a class action basis." *Id.* § 4.21(c). Finally, the Agreement provides that it governs any controversy or claim "involving the parent company, subsidiaries, or affiliates under common control" of either company. *Id.* § 4.21(a).

Janssen moved to compel individual arbitration and stay proceedings in the District Court on April 9, 2018. The District Court denied the motion in a memorandum opinion and order entered on October 26, 2018. This appeal followed.

STANDARD OF REVIEW

The District Court's decision denying Janssen's motion to compel individual arbitration and stay proceedings presents an issue of law that this Court reviews *de novo*. *See Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 100 n.61 (3d Cir. 2018).

SUMMARY OF THE ARGUMENT

Federal law creates a strong presumption in favor of arbitration under the FAA and mandates that a broad construction be given to arbitration provisions that encompass all claims "arising out of or relating to" an agreement. The District Court committed reversible error when it failed to apply these well-established principles, ruling instead that RDC's statutory antitrust claims were implicitly

excluded from the scope of the Agreement's arbitration provision because they were not specifically mentioned. RDC's claims that it has been "overcharge[d]" on the price it paid to purchase Remicade necessarily "aris[e] out of" and "relate to" the Agreement that governs those purchases. Arbitration provisions including such broad and sweeping language are routinely held to encompass statutory antitrust claims. In concluding otherwise, the District Court misinterpreted applicable precedent and misconstrued or ignored several key provisions in the Agreement.

For example, the District Court erroneously concluded that RDC's overcharge claims are not subject to arbitration because the Agreement did not "specify purchase prices" for Remicade or "impose obligations" not to engage in conduct that violates the federal antitrust laws. J.A. 5, 23, District Court Opinion ("Op.") at 2, 20. The District Court ignored the fact that the Agreement explicitly incorporates the published WAC for Remicade as the agreed-upon price. J.A. 120, Compl. ¶ 102; 42 U.S.C. § 1395w–3a(c)(6)(B). The District Court also disregarded the fact that the Agreement explicitly obliges Janssen to abide by federal laws. Moreover, the District Court failed to acknowledge that RDC would not have direct purchaser status to bring its antitrust claims for overcharge damages but for the existence of the Agreement pursuant to which it buys Remicade from Janssen. These claims, therefore, easily fall within the ambit of the provision

mandating arbitration of "[a]ny controversy or claim arising out of or relating to" the Agreement. J.A. 188, Agreement § 4.21(a).

The District Court also misconstrued the legal framework for resolving Janssen's motion. Under this Court's long-established precedents, questions regarding the *scope* of an arbitration provision should be answered under federal law applying the presumption in favor of arbitrability. New Jersey law applies only to the threshold question whether there is a valid and enforceable agreement to arbitrate *anything*. Here, the District Court correctly recognized that the arbitration provision's enforceability is not in dispute—but then misapplied New Jersey law to the question whether the scope of that provision included RDC's statutory antitrust claims.

The District Court also erred by applying irrelevant New Jersey precedents setting forth a heightened "clear and unambiguous" waiver standard for arbitration agreements involving unsophisticated employees and consumers, and ultimately concluding that those precedents precluded arbitration of RDC's claims. But in New Jersey, as under federal law, sophisticated commercial parties like RDC are held to the terms of their bargain, including agreements to arbitrate their disputes. Thus, regardless of which law is applied, the arbitration provision encompasses RDC's claims, and Janssen's motion to compel arbitration should have been granted.

Finally, to the extent that New Jersey law's heightened "clear and unambiguous" waiver standard for arbitration agreement does apply and would produce a contrary result, that standard disfavors arbitration and therefore is preempted by the FAA.

The decision of the District Court should be reversed.

ARGUMENT

I. RDC IS REQUIRED TO ARBITRATE ITS CLAIMS UNDER GOVERNING FEDERAL LAW

A. Federal Law Governs Whether RDC's Claims Fall Within the Scope of the Arbitration Provision

Congress enacted the FAA to reverse "centuries of judicial hostility to arbitration agreements." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 232 (2013). The FAA "creates a body of federal substantive law establishing and governing the duty to honor agreements to arbitrate disputes" and expresses "a strong federal policy" in favor of resolving disputes, including federal statutory claims, through arbitration. *Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 522 (3d Cir. 2009); *see also Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc.*, 247 F.3d 44, 55 (3d Cir. 2001) ("[F]ederal policy favors arbitration."). Under the FAA, an arbitration agreement must ordinarily be treated as "valid, irrevocable, and enforceable," subject only to traditional principles of contract formation and interpretation. 9 U.S.C. § 2; *Century Indem. Co.*, 584 F.3d at 524 (quoting *AT&T*

Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986) (alterations in original)).

The FAA's presumption of arbitrability applies with the same force to statutory claims. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012). The Supreme Court has recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also Am. Express Co. v. Italian Colors Rest*., 570 U.S. 228, 242 (2013) (same); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (same); *accord Gay v. CreditInform*, 511 F.3d 369, 382 (3d Cir. 2007); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000) ("[W]hen arbitration will preserve a plaintiff's substantive rights, compelling arbitration in accordance with an arbitration clause will not impede a statute's deterrent function.").

Under this Court's precedent, a court determining whether to compel arbitration should conduct a two-step inquiry into "(1) whether there is a valid arbitration agreement between the parties and (2) whether a particular merits-based dispute must be arbitrated because it is within the scope of the valid arbitration agreement." *Century Indem. Co.*, 584 F.3d at 525. The first question—validity (or enforceability) of an arbitration provision—can be subject to state law, to the

extent it is consistent with the FAA.[1] Here, there is no dispute as to the existence of a valid underlying arbitration agreement. *See* J.A. at 10 ("[T]he parties do not contest the enforceability of the Agreement's arbitration provision . . . .").

"[O]nce a court has found that there is a valid agreement to arbitrate . . . the determination of whether 'a particular dispute is within the class of those disputes governed by the arbitration clause . . . ***is a matter of federal law***.'" *Century Indem. Co.*, 584 F.3d at 524 (quoting *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 290 (3d Cir. 2003)) (emphasis added). Under this framework, the FAA's strong presumption of arbitrability applies "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *AT&T Techs., Inc.*, 475 U.S. at 650.

[1] *See Century Indem. Co.*, 584 F.3d at 524 ("To determine whether the parties have agreed to arbitrate, we apply 'ordinary state-law principles that govern the formation of contracts.'" (citations omitted)). The Supreme Court has cautioned, however, that the validity analysis under state law cannot be used to circumvent the FAA. *See Kindred Nursing Ctrs. Ltd. P'Ship v. Clark*, 137 S. Ct. 1421, 1428 (2017) (rejecting argument that the FAA "applies only after a court has determined that a valid arbitration agreement as formed"). Instead, the Court has noted, the FAA "cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]'—that is, about what it takes to enter into them." *See id.* (quoting 9 U.S.C. § 2); *accord John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 137 (3d Cir. 1998) ("In conducting this limited [validity] review, the court must apply ordinary contractual principles, with a healthy regard for the strong federal policy in favor of arbitration.").

To avoid the federal law strongly favoring arbitrability, RDC sought to muddy the waters before the District Court by arguing that New Jersey law, which the parties selected as the governing choice of law, *see* J.A. 188, Agreement § 4.21(c), should apply to determine the "question of arbitrability." For this argument, RDC relied on the statement in *CardioNet, Inc. v. Cigna Health Corp.*, 751 F.3d 165 (3d Cir. 2014) that the FAA does not "take[] courts outside [the] settled framework" of using principles of contract interpretation to determine the scope of an arbitration clause." *Id.* at 172–73. But *CardioNet* did not alter the basic analytical framework articulated in *Century Indemnity*, nor did it refer to the arbitration agreement's choice of law provision or to state law to determine the scope of the narrow arbitration provision at issue there. Rather, *CardioNet* instructed courts confronted with a motion to compel arbitration to look to the "plain language of the contract" to determine whether the parties intended to arbitrate the dispute at hand. *Id.* at 173. *CardioNet* further confirmed that, in the event there is some "ambiguity" about whether the arbitration provision covers the dispute, "the [FAA's] presumption of arbitrability applies." *Id.* As set forth by this Court in *Century Indem. Co.*, therefore, the question whether a dispute falls within the scope of an arbitration clause is a matter of federal law to be construed consistent with the FAA.

B. RDC's Overcharge Claims Must Be Arbitrated Because the Agreement Broadly Requires Arbitration of Any Disputes "Arising Out of" or "Relating to" the Agreement

The arbitration provision here encompasses "[a]ny controversy or claim arising out of or relating to" the Agreement. The Supreme Court has emphasized that such language creates a "broad clause." *Mitsubishi Motors Corp.*, 473 U.S. at 624 n.13 (rejecting argument that clause compelling arbitration of disputes "which may arise . . . out of or in relation to" provisions in a contract "should be read narrowly to exclude the statutory claims" brought under the Sherman Act). Likewise, this Court has repeatedly held that "when phrases such as 'arising under' and 'arising out of' appear in arbitration provisions, they are normally given broad construction." *Battaglia v. McKendry*, 233 F.3d 720, 727 (3d Cir. 2000). A clause providing for arbitration of all matters "arising from" an agreement "overwhelmingly suggests that a given dispute is arbitrable" and is given "expansive interpretation." *Medtronic AVE Inc. v. Cordis Corp.*, 100 F. App'x 865, 868 (3d Cir. 2004). And this Court has further held that an arbitration provision applying to disputes "arising out of the agreement" covers "any dispute between the contracting parties that is in any way connected with their contract." *Id.* (citing *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Inc.*, 1 F.3d 639, 642 (7th Cir. 1993)).

Under this Circuit's precedent in *Battaglia*, the inclusion of the phrase "related to" encompasses an even broader range of claims than does "arising under" language. 233 F.3d at 725. The Third Circuit has thus held that, "[i]f the allegations underlying the claims 'touch matters' covered by [an arbitration clause in a contract], then those claims must be arbitrated, whatever the legal labels attached to them." *Brayman Constr. Corp. v. Home Ins. Co.,* 319 F.3d 622, 626 (3d Cir. 2003) (alteration in original) (quoting *Genesco, Inc. v. T. Kakiuchi & Co., Inc.*, 815 F.2d 840, 846 (2d Cir. 1987)).

The provision at issue here submitting to arbitration "[a]ny controversy or claim arising out of or relating to the agreement" is the "paradigm of a broad clause." *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995). Courts routinely hold that an arbitration provision containing such language encompasses statutory claims, including antitrust claims.

The decision in *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999), is instructive. There, the plaintiffs and the defendant entered into a joint development agreement, a license agreement, and a supply agreement—collectively referred to in the Ninth Circuit's opinion as a single "Agreement"—each containing an identical provision subjecting to arbitration all disputes "arising in connection with this Agreement." *Id.* at 719–20. The plaintiff alleged a variety of statutory and common law claims, including that defendant's purported

anticompetitive conduct created "a monopoly by illicit means, and unreasonably restrain[ed] trade, the effects of which damage [the plaintiff] and cause adverse competitive effects with negative impact on the safety interests of United States citizens." *Id.* at 721. Construing the "arising in connection with" language in the arbitration clauses to reach "every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract," the Ninth Circuit held that the plaintiffs' antitrust claims were arbitrable. *Id.* This was so despite the fact that, as here, the plaintiffs alleged market-wide effects stemming from the defendant's conduct. *See* J.A. 27, Op. at 24 (noting that RDC's allegations include its claims that it paid inflated prices for other manufacturers' drugs that are "biosimilars" to Remicade, thus producing "marketwide [anticompetitive] effects").

The Second Circuit reached a similar conclusion in *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004). There, the plaintiffs entered into shipping contracts with owners of parcel tankers to transport liquid chemicals. The contracts contained an arbitration provision, requiring arbitration of "[a]ny and all differences and disputes of whatsoever nature *arising out of*" the shipping contracts. *Id.* at 167 (emphasis added). The plaintiffs later brought a class action, alleging conspiracy under the Sherman Act and various related claims. The Second Circuit concluded that the plaintiffs' Sherman Act claim necessarily was

encompassed within the shipping contracts despite the fact that the plaintiff's "antitrust claims will not focus exclusively upon the parties' conduct under the terms of the [contract]" and would instead focus on conduct "independent[] of the specific contractual undertakings between the parties." *Id.* at 175 (alterations in original and internal quotation marks omitted).

Significantly, as is the case here, the plaintiffs claimed damages resulting "from the fact that [they] entered into the charters, each of which specifies price terms which are variously characterized in the amended complaint as 'artificially high' and as 'overpayments.'" *Id.* Because the plaintiffs would not have suffered their alleged damages had they not entered into the contracts with the defendants, the plaintiffs' dispute arose out of the charters, and therefore was "within the scope of the . . . arbitration clause." *Id.*

Similarly, district courts routinely hold that arbitration provisions with "arising under" or "relating to" language encompass statutory antitrust claims. *See, e.g.*, *Abrams v. Chesapeake Energy Corp.*, No. 4:16-CV-1343, 2017 U.S. Dist. LEXIS 209905, at *35 (M.D. Pa. Dec. 21, 2017) (compelling arbitration of Sherman Act antitrust claims where the plaintiffs' alleged injury was "premised on" their status under the relevant agreement containing an arbitration provision with broad "arise out of or relate to" scope); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 410 (S.D.N.Y. 2003) (plaintiffs' antitrust

claims "touch matters" covered by the relevant cardholder agreements and, thus, fell within the scope of those agreements' "quite broad" arbitration provision encompassing claims "arising from or relating in any way" to the relevant cardholder agreement); *B-S Steel of Kan., Inc. v. Tex. Indus., Inc.*, 229 F. Supp. 2d 1209, 1226–27 (D. Kan. 2002) (arbitration provision covering "[a]ny controversy or claim arising out of or related to" the relevant agreements covered "not only claims or controversies tied to the parties' contract," but also "Plaintiff's antitrust and tort claims"); *PPG Indus., Inc. v. Pilkington PLC*, 825 F. Supp. 1465, 1478 (D. Ariz. 1993) (observing that "the phrase 'arising out of and relating to' has been construed as creating a broad arbitration clause" and extending that clause to statutory antitrust claims).

Here, RDC alleges that it paid supracompetitive prices in relation to Remicade and that its damages consist of "overcharges." J.A. 101, 102, 132, Compl. ¶¶ 27, 35, 146, 147. The Agreement establishes the terms on which RDC purchases Remicade, including the price (J.A. 172, Agreement § 1.12) and the annual purchase volume requirements (J.A. 171, Agreement § 1.10 and Schedule C). Indeed, as the District Court acknowledged, the Agreement is so comprehensive with regard to all aspects of the parties' relationship that it even governs such "mundane day-to-day minutiae as the type of wooden pallets RDC should use for product storage." J.A. 22, Op. at 19. The Agreement further

explicitly imposes a contractual obligation on Janssen to abide by applicable federal laws, which necessarily includes federal antitrust law. *See* J.A. 186, Agreement § 4.19. Because RDC's statutory antitrust claims and alleged overcharge damages flow from its purchase of Remicade, which are governed by the Agreement, its claims are certainly "connected with the[] contract." *Medtronic*, 100 F. App'x at 868. As such, they "arise from"—and indeed, would not plausibly exist without—the Agreement. *Id*. Even assuming *arguendo* that the District Court had correctly determined that the claims at issue do not "arise out of" the Agreement (which they obviously do), there can be no doubt that RDC's antitrust claims "relate to" the Agreement because they "touch upon" matters therein. *Battaglia*, 233 F.3d at 727.

Significantly, the District Court's one-paragraph discussion of the broad "relating to" language of the arbitration provision completely ignored this Court's precedents construing such language. Instead, the District Court relied solely upon a Fifth Circuit decision applying a "significant relationship" test to the phrase "relating to" in an arbitration agreement. J.A. 32, Op. at 29 (citing *Pennzoil Expl. & Prod. Co. v. Ramco Energy*, 139 F.3d 1061, 1067 (5th Cir. 1998)). That test has not been adopted by this Court, and in any event the antitrust claims asserted by RDC clearly do have a "significant relationship" to the Agreement.

More broadly, the District Court incorrectly relied upon a series of easily distinguishable false advertising or trade secret cases to support its refusal to compel arbitration. *See* J.A. 21–22, 24–26, 28, Op. at 17–18, 21–23, 25 (citing *CardioNet*; *Ford v. NYLCare Health Plans*, 141 F.3d 243, 252 (5th Cir. 1998); and *PDC Machines, Inc. v. Nel Hydrogen*, No. 17-5399, 2018 U.S. Dist. LEXIS 142444 (E.D. Pa. Aug. 22, 2018)). In *CardioNet*, this Court held that plaintiffs' various claims did not relate to a narrow arbitration clause requiring the arbitration of "[d]isputes that might arise between the parties *regarding the performance or interpretation of the Agreement*." 751 F.3d at 173–75 (emphasis added). That clause was far more limited than the very broad "arising out of or relating to" arbitration provision in this case, and it has no relevance here. *See Ass'n of N.J. Chiropractors v. Aetna, Inc*., No. 09-3761, 2014 U.S. Dist. LEXIS 178585, at *19 n.10 (D.N.J. Dec. 31, 2014) (concluding that *CardioNet*'s holding "is tied directly to the facts of that case" because the arbitration clause in *CardioNet* was "substantially narrower than the arbitration clause at issue," which required arbitration of "[a]ny controversy or claims arising out of or relating to" the agreement).

Moreover, the plaintiffs in *CardioNet*, *Ford*, and *PDC Machines* brought claims that could stand separate and apart from the underlying contract containing the arbitration provision. *See CardioNet*, 751 F.3d at 175 (trade libel, Lanham Act,

and tortious interference claims did not relate to the provider agreement at issue); *Ford*, 141 F.3d at 252 (physician's false advertising claim under the Lanham Act); *PDC Mach., Inc.*, 2018 U.S. Dist. LEXIS 142444, at *19–20 (claims based on alleged misappropriation of trade secrets did not fall within scope of underlying agreement containing arbitration provision when that agreement did not impose confidentiality obligations on the defendant or address misuse of proprietary data—issues critical to the plaintiff's claims). By contrast, here, RDC's claims necessarily rely on its status as a direct purchaser of Remicade pursuant to the Agreement and would not exist but for that Agreement. Those claims are plainly encompassed within the sweeping ambit of the "arising out of or relating to" arbitration provision utilized by the parties.

The District Court was also wrong to infer that RDC's antitrust claims fall outside the ambit of the arbitration provision because "they are not mentioned" therein. J.A. 15, Op. at 12. The "arising out of or relating to" language is more than sufficiently broad to encompass antitrust claims, even without an express reference to such claims in that provision. Likewise, the Court's observation that the provision "does not expressly exempt certain kinds of claims," J.A. 18, Op. at 15, should have led it to hold that the arbitration claims were encompassed within the arbitration provision.

C. Other Subsections of the Arbitration Provision Demonstrate that RDC's Claims Are Arbitrable

The fact that the arbitration provision broadly encompasses claims "arising out of or relating to" the Agreement is sufficient, without more, to compel arbitration for the reasons stated above. But other parts of the arbitration provision further reaffirm the parties' intentions to arbitrate these antitrust claims. For example, RDC clearly and unmistakably waived its right to a jury trial. The Agreement could not be clearer—"EACH PARTY IRREVOCABLY WAIVES ITS RIGHT TO TRIAL OF ANY ISSUE BY JURY." *See* J.A. 188, Agreement § 4.21(d) (capitalization in original). The Agreement also expressly provides that the arbitrator may not award enhanced damages, interest, or attorneys' fees "EXCEPT AS MAY BE REQUIRED BY STATUTE." *Id.*

The District Court held that the inclusion of the word "issue" in the jury trial waiver in § 4.21(d) did not "broaden the scope of arbitrable disputes" under § 4.21(a). J.A. 15, Op. at 12. The District Court similarly disregarded the import of the preservation of statutory remedies under § 4.21(d) because the provision "presupposes the claim at issue is subject to arbitration under § 4.21(a)." *See* J.A. 16, Op. at 13. In other words, the District Court ignored these provisions because of its unduly restrictive interpretation of the scope of the arbitration clause. When the broad "arising under or relating to" clause is properly construed, however, these additional clauses only further confirm the clarity of the parties' intentions:

any and all disputes are to be addressed through arbitration, not a jury trial, and the arbitrator is fully empowered to grant statutory remedies.

D. RDC's Contentions Why Its Claims Are Unrelated to the Agreement All Fail

Even if there were some uncertainty as to whether the arbitration provision in the Agreement encompasses statutory claims—and there is not—that ambiguity should have been resolved in Janssen's favor based on an application of the FAA's strong presumption of arbitrability. *CardioNet*, 751 F.3d at 172 ("We must resolve any doubts concerning the scope of arbitrable issues . . . in favor of arbitration." (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24–25 (1983) (internal citations omitted))). But the District Court nonetheless concluded that RDC's claims do not fall within the scope of the Agreement based on several arguments advanced by RDC. Those contentions are without merit and led the District Court to commit reversible error.

1. The Agreement Specifies the Purchase Price for Remicade

The District Court repeatedly emphasized that the Agreement does not specify purchase price, including as its first substantive point. J.A. 5, 22, 30, Op. at 2, 19, 27. Accordingly, the District Court suggested, price overcharge claims were unrelated to the Agreement. *Id.* But the Agreement does specify a price: it explicitly states that RDC will purchase Remicade at the drug's published WAC prices. J.A. 120–21, Compl. ¶ 102; *see also Nat'l Ass'n of Chain Drug Stores v.*

New Eng. Carpenters Health Benefits Fund, 582 F.3d 30, 36 (1st Cir. 2009) ("Drug manufacturers typically sell to drug wholesalers at a list price—called in the industry the 'wholesale acquisition cost' ('WAC')—although discounts may be provided to the wholesaler (e.g., for volume sales)."). The Agreement does not state the price in dollars and cents, which is not surprising because then every price change would require a formal contractual amendment. But the use of a cross-reference certainly does not mean, as the District Court suggested, that the Agreement does not "set or state a specific purchase price for Remicade." J.A. 22, Op. at 19.

2. The Agreement Imposes Explicit Obligations on Janssen to Abide by Federal Law

The District Court also stated that the Agreement does not "expressly prohibit anticompetitive conduct or impose obligations to uphold specific antitrust statutes." J.A. 23–24, Op. at 20–21. But in doing so, the District Court ignored that the Agreement explicitly provides that Janssen will abide by federal law. *See* Agreement § 4.19. As a result, RDC's statutory antitrust claims are not just rooted in the Agreement—they constitute an alleged breach of an express term of the Agreement. The District Court erred in concluding that "nothing in the agreement" addresses Janssen's obligations or the purportedly unlawful conduct at issue. J.A. 24, Op. at 21.

3. RDC's Claims Arise from and Relate to the Distribution Agreement, Regardless of How RDC Re-characterizes Them

The District Court concluded that RDC's overcharge claims do not fall within the scope of the arbitration provision because RDC framed its allegations not as breach of the Agreement, but rather on Janssen's purported "Biosimilar Readiness Plan." J.A. 18, Op. at 15. But RDC's artful pleading cannot camouflage the fact that its claims arise from and relate to the Agreement. It is well-established that "[i]f the allegations underlying the claims touch matters covered by [an arbitration provision], then those claims must be arbitrated, whatever the legal labels attached to them." *Brayman Constr. Corp*, 319 F.3d at 626; *Medtronic AVE Inc.*, 247 F.3d at 55 ("[T]he focus is on the factual underpinnings of the claim rather than the legal theory alleged in the complaint." (internal citations omitted)).[2] RDC's reference to the alleged "Biosimilar Readiness Plan" in its complaint hardly prevents its claims from "arising under or

[2] *See also Microbilt Corp. v. Chex Sys. (In re Microbilt Corp.)*, 588 F. App'x 179, 181 (3d Cir. 2014) (plaintiff could not avoid application of broad arbitration provision extending to disputes "arising out or relating to this Agreement" by "nominally fram[ing its claims] as tort claims"); *Third Party Advantage Adm'rs, Inc. v. J.P. Farley Corp.*, No. 3:06-CV-0534, 2006 U.S. Dist. LEXIS 85456, at *19–20 (N.D. Tex. Nov. 27, 2006) ("But for the contractual relationship between [the defendant] and the plaintiffs, [the defendant] could not have committed the alleged torts . . . The asset purchase agreement served as the conduit through which these alleged acts were made possible . . . .Because the tort disputes necessarily arise from the contractual relationship established by the asset purchase agreement, the arbitration clause . . . is applicable to all of the plaintiffs' claims against [the defendant].").

relating to" the Agreement under which RDC purchases Remicade. *See In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d at 410 (antitrust allegations against defendant credit card issuers were within the scope of plaintiffs' cardholder agreements' "quite broad" arbitration clause, which applied to any claim "arising out of or relating to" a cardholder's account).

4. Unlike Certain Other Plaintiffs, RDC Could Not Have Brought Its Claims But-For the Distribution Agreement

The District Court also attached significance to the fact that certain other plaintiffs, such as Janssen's competitor Pfizer Inc., have also brought antitrust claims against Janssen despite having not entered into a distribution agreement with Janssen. J.A. 23, 27, Op. at 20, 24. But RDC has a direct purchase contract with Defendants containing an arbitration clause and its antitrust claims are direct purchaser claims. The nature of other plaintiffs' antitrust claims is legally irrelevant to the arbitration analysis in *this* case.

Pfizer is a manufacturer of a competing biosimilar infliximab pharmaceutical product. Unlike RDC, then, Pfizer's purported antitrust injury relates to its sales of its own product, and not to any purchases from Remicade in accordance with a contract. Likewise, the indirect purchaser plaintiffs do not directly purchase Remicade from Janssen. Moreover, the question before this Court is not whether any given plaintiff has a valid antitrust claim, but rather in which forum that claim must be resolved. RDC entered into an agreement to

arbitrate rather than litigate any claims arising out of or relating to its Remicade purchases. The fact that others are situated differently has no bearing on the arbitrability of RDC's own antitrust claims.

II. EVEN IF NEW JERSEY LAW APPLIED TO DETERMINE THE SCOPE OF THE ARBITRATION CLAUSE, RDC'S CLAIMS MUST STILL BE ARBITRATED

As noted previously, motions to compel arbitration raise two questions: (1) whether there is an agreement to arbitrate; and, if so, (2) whether a particular dispute falls within the scope of the arbitration clause. *Century Indem. Co.*, 584 F.3d at 523–24. The first question may be answered by state contract law insofar as state law does not conflict with the FAA. *Kindred Nursing*, 137 S. Ct. at 1428; *Century Indem. Co.*, 584 F.3d at 524. But as the District Court acknowledged, RDC is not disputing that it is subject to a valid and enforceable arbitration agreement. *See* J.A. at 10 ("the parties do not contest the enforceability of the Agreement's arbitration provision…"); *id.* at 13 *et seq.*, Op. at 10 *et seq*.

As a result, the District Court then turned to the distinct question whether RDC's claims are within the scope of the arbitration provision to which it is legally bound. As discussed above, that question is governed by federal law. *E.g.*, *Century Indem. Co.*, 584 F.3d at 524. The District Court initially appeared to be applying federal law insofar as it stated that it was "unnecessary" to analyze *Moon v. Breathless*, 868 F.3d 209 (3d. Cir. 2017), a case applying New Jersey substantive

law, to determine whether RDC must submit its claims to arbitration. *See* J.A. 16, Op. at 13 n.2. But on the very next page of its opinion, the District Court then relied upon *Moon,* as well as *Atalese v. U.S. Legal Servs. Grp.*, *L.P.*, 99 A.3d 306 (N.J. 2014) and *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 773 A.2d 665 (N.J. 2001), utilizing New Jersey law to resolve the question of scope and concluding that RDC's statutory claims fell outside the scope of the arbitration provision. This was error because the question of scope is governed by federal law.

But even if New Jersey law did apply to determine the scope of the arbitration clause, the result would be no different: RDC must be held to the bargain it struck to arbitrate its statutory claims. Just as under federal law, New Jersey law "favor[s] arbitration as a means of resolving disputes," including statutory claims. *Martindale v. Sandvik, Inc.*, 800 A.2d 872, 877 (N.J. 2002); *see also Marchak v. Claridge Commons, Inc.*, 633 A.2d 531, 535 (N.J. 1993) ("[A]rbitration is a favored form of relief."); *Quigley v. KPMG Peat Marwick, LLP*, 749 A.2d 405, 409 (N.J. App. Div. 2000) ("[P]ublic policy . . . favor[s] arbitration," which does not require the parties to "forgo any substantive rights, but merely change[s] the forum in which the claim [will] be heard"); *Alamo Rent A Car, Inc. v. Galarza*, 703 A.2d 961, 963 (N.J. App. Div. 1997) (recognizing "strong

public policy in [New Jersey] favoring arbitration as a means of dispute resolution and requiring a liberal construction of contracts in favor of arbitration").

In concluding that New Jersey law somehow compelled an opposite result here, the District Court incorrectly relied on cases that do not apply outside the employment and consumer context. It then misinterpreted that New Jersey law to exclude RDC's statutory claims from the scope of the broad and sweeping arbitration provision. And it applied New Jersey's heightened "clear and unambiguous" waiver standard for arbitration agreements without addressing Janssen's argument that this standard was in any event preempted by the FAA.

A. Case Law from the Employment and Consumer Contexts Cannot Be Extended to this Commercial Dispute Between Sophisticated Parties

To determine whether the Agreement encompassed statutory claims, the District Court relied upon *Moon*, *Garfinkel*, and *Atalese*. *See* J.A. 17, Op. at 14. All these cases arose in the consumer or employment context, where concern over an individual plaintiffs' understanding of arbitration provisions is most acute. Taken together, these cases suggest that under New Jersey law a court cannot require arbitration unless it is *clear and unmistakable* that the parties agreed to arbitrate their statutory claims. *See Atalese*, 99 A.3d at 313 (explaining that a "waiver of rights clause" must be sufficiently clear because an "average member of the public may not know . . . that arbitration is a substitute for the right to have

one's claim adjudicated in a court of law"); *Garfinkel*, 773 A.2d at 672 ("The Court will not assume that employees intend to waive those rights [to pursue statutory claims in court] unless their agreements so provide in unambiguous terms.").

The reasoning of these decisions clearly applies with most force to the initial question of validity, *i.e.*, whether an "average member of the public" has knowingly agreed to submit *any* disputes to arbitration. But even if they can be read to address the question of scope as well, the fact remains that RDC is not an "average member of the public." It is a highly sophisticated participant in the pharmaceutical market, as well as a frequent litigant that has pursued numerous antitrust class actions as a named plaintiff. *See*, *e.g.*, Direct Purchaser Class Plaintiffs' Consolidated Am. Class Action Compl., *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, MDL No. 2819, No. 1:18-cv-00970 (E.D.N.Y. Apr. 4, 2018) (RDC among direct purchaser plaintiffs claiming that defendant violated the Sherman Act by maintaining unlawful monopoly power on the sale of cyclosporine ophthalmic emulsion); *In re Opana Er Antritrust Litig.*, 162 F. Supp. 3d 704, 710 (N.D. Ill. 2016) (RDC among direct purchaser plaintiffs claiming that defendant violated Sherman Act by entering into reverse payment agreements to keep generics off the market); *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 375 (D. Mass. 2013) (RDC among direct purchaser plaintiffs and welfare benefit funds claiming that defendants violated

state and federal antitrust laws by entering into reverse payment agreements to keep generics off the market); *Rochester Drug Coop., Inc. v. Braintree Labs.*, 796 F. Supp. 2d 560, 562 (D. Del. 2011) (RDC among plaintiffs claiming Sherman Act violation based on defendant's alleged improper maintenance of its monopoly, resulting in artificially high prices for the generic); *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 367 (D.D.C. 2007) (RDC among plaintiffs alleging that defendants conspired to restrain the sale of a generic hypertension drug in violation of the Sherman Act).

Accordingly, the public policy rationale underpinning the New Jersey decisions relied on by the District Court simply does not apply to this dispute between RDC and Janssen. The New Jersey Supreme Court recently confirmed this principle when it explained that the "consumer context of the contract mattered" in *Atalese*. *See Kernahan v. Home Warranty Admn'r*, A-15-17, --- A.2d ----, 2019 N.J. LEXIS 3, at *28–29 (N.J. Jan. 10, 2019); *see also id.* at *28 ("The decision [in *Atalese*] repeatedly notes that it is addressing a form consumer contract, not a contract individually negotiated in any way; accordingly, basic statutory consumer contract requirements about plain language implicitly provided the backdrop to the contract under review.").

Other courts applying New Jersey law have repeatedly limited the holdings in *Atalese* and *Garfinkel* to the consumer and employment contexts. For example,

in *Emcon Associates, Inc. v. Zale Corp.*, No. 16-1985, 2016 U.S. Dist. LEXIS 172721 (D.N.J. Dec. 14, 2016), a district court analyzing New Jersey federal and state precedents concluded that "New Jersey state courts and courts in this district have all limited the holdings in *Atalese* and *Garfinkel* to the consumer and employment contexts in which those cases were decided," *id.* at *15. The *Emcon* court cited the New Jersey Appellate Division ruling in *Gastelu v. Martin*, stating that "*Atalese*'s analysis should be confined to arbitration agreements that seek to bind 'an average member of the public.'" *Id.* at 16 (citing No. A-0049-I4T2, 2015 N.J. Super. Unpub. LEXIS 1639, at *14 n.4 (App. Div. July 9, 2015)). The *Emcon* court also quoted *Gastelu* with approval in finding that "[p]arties to a commercial contract can express their intention to arbitrate their disputes rather than litigate them in court, without employing any special language" and that where courts are dealing with "commercial business transaction[s] . . . the standard is not as stringent [as the one put forward in *Atalese*]." *Id.* The *Emcon* court also cited additional federal and state cases in support of its conclusion.[3]

[3] *See Emcon*, 2016 U.S. Dist. LEXIS 172721, at *16–17 (citing *Hayden v. Hartford Life Ins. Co.*, No. 10-3424, 2010 U.S. Dist. LEXIS 130079, at *18 (D.N.J. Dec. 8, 2010) ("Thus, it was only in the context of a statutory employment claims [sic] that *Garfinkel* requires a clear and explicit waiver of a statutory right."); *Alfano v. BDO Seidman, LLP*, 925 A.2d 22, 31–32 (N.J. Super. Ct. App. Div. 2007) (concluding that *Garfinkel's* clear waiver requirement is only applicable where a plaintiff seeks to enforce its statutory employment rights).

Similarly, in *Gold Mine Jewelry Shoppes, Inc. v. Lise Aagaard Copenhagen, A/S*, another district court applying New Jersey law reached the same conclusion, and agreed with defendants' contention that "*Atalese* does not control the result in this case because the arbitration provision is not part of a consumer contract, but, instead, is contained in a 'contract negotiated at arm's length and entered into by two sophisticated commercial entities.'" 240 F. Supp. 3d 391, 395 (E.D.N.C. 2017) (citation omitted). The *Gold Mine* court also agreed with defendants that "subsequent to *Atalese*, the New Jersey state courts have limited the holding in *Atalese* to employment and consumer contexts." *Id.* The court cited the Appellate Division ruling in *Gastelu* in support of that conclusion, as well as another New Jersey appellate ruling, *Myska v. New Jersey Manufacturers Insurance Co.*, 114 A.3d 761, 778 (N.J. App. Div. 2015), which similarly emphasized that *Atalese* was limited to "consumer contracts." *Id.*

Courts applying New Jersey law have also affirmed that, unlike consumers or employees, commercial entities like RDC should be held to their contractual undertaking to arbitrate statutory claims, and that the *Atalese* and *Garfinkel* decisions do not apply to commercial disputes. For instance, in *Affordable Dentures-Audubon v. Affordable Care, LLC*, a district court judge noted that "caselaw suggests that even under New Jersey law, a waiver-of-rights requirement may only exist for consumer contracts and employment contracts, not commercial

contracts such as those at issue here." No. 17-12136, 2018 U.S. Dist. LEXIS 78059, at *20 n.43 (D.N.J. May 9, 2018); *accord Kernahan*, 2019 N.J. LEXIS at *30 (New Jersey Supreme Court noting that "in the context of" *Atalese*, "we were unwilling to attribute knowledge" of the definition of the word arbitration "to consumers"); *Victory Entm't v. Schibell*, No. A-3388-16T2, 2018 N.J. Super. Unpub. LEXIS 1467, at *21 (App. Div. June 21, 2018) ("*Atalese* did not extend the requirement of an express waiver of the right to pursue a claim in court to commercial contracts."); *White v. Camden Cty. Bd. Of Chosen Freeholders*, No. A-4938-14T3, 2016 N.J. Super. Unpub. LEXIS 1769, at *6–7 n.1 (App. Div. July 28, 2016) ("*Atalese* was decided in the context of a consumer service agreement . . . . That is not the situation here, where the County and the Union membership specifically bargained for the comprehensive grievance process that forms an integral part of the CBA."); *Columbus Circle NJ, LLC v. Island Constr. Co.*, No. A-1907-15T1, 2017 N.J. Super. Unpub. LEXIS 606, at *6–7 (App. Div. Mar. 13, 2017) ("Unlike the plaintiff in *Atalese*, neither the LLC nor Kovacs was 'an average member of the public,'" but instead the contract "was a negotiated agreement between sophisticated business entities"); *Tedeschi v. D. N. DeSimone Constr., Inc.*, No. 15-8484, 2017 U.S. Dist. LEXIS 69695, at *10 (D.N.J. May 8, 2017) (distinguishing *Atalese* because "[t]his situation is not one where an

unsophisticated consumer unwittingly agrees to binding arbitration and is uninformed that arbitration waives her right to go to court").

In support of a contrary conclusion, RDC previously cited *Flaghouse, Inc. v. Prosource Development, Inc.*, 528 F. App'x 186, 190 (3d Cir. 2013), which applied *Garfinkel* in the corporate context but with very little analysis. Reliance on *Flaghouse* would be misplaced. As at least one District Court has observed, *Flaghouse* is "nonbinding [and] unpublished"; did not contain "any discussion" of New Jersey precedents recognizing that *Garfinkel* is inapplicable outside the employment or consumer context; and "is seemingly contrary" to those precedents. *Emcon*, 2016 U.S. Dist. LEXIS 172721, at *17. Notably, the Third Circuit brief filed by the defendant in *Flaghouse* made no mention of the relevant precedents cited above, nor did it argue that *Garfinkel* is inapplicable to commercial disputes.

Here, there is "no reason these obviously sophisticated parties should not be bound by the covenants into which they freely and voluntarily entered." *McMahon v. City of Newark*, 951 A.2d 185, 197 (N.J. 2008) (compelling arbitration in multi-million dollar dispute involving sophisticated parties). RDC, a highly sophisticated participant and frequent litigant in the pharmaceutical market, agreed to arbitrate all disputes "arising out of or relating to" the Agreement, and must now be held to its bargain.

B. The District Court Misapplied the New Jersey Precedent on Which It Relied

Even if the New Jersey cases cited by the District Court were applicable to commercial parties—and they are not—its conclusion would still be reversible error. This is because the District Court erroneously concluded that the arbitration provision does not encompass statutory claims because it is "more like the clauses in *Moon*, *Garfinkel*, and *Atalese*," where statutory claims were not found to be not arbitrable, than it is like the clause in *Martindale v. Sandvik, Inc*., 800 A.2d 872 (N.J. 2002), where statutory claims were found arbitrable, J.A. 17, Op. at 14. The plain language of the Agreements and the precedent on which the District Court relied does not support this conclusion.

In *Martindale*, the New Jersey Supreme Court addressed an arbitration clause providing:

> As a condition of my employment, I agree to waive my right to a jury trial in any action or proceeding related to my employment with [the employer] . . . . I agree that all disputes relating to my employment with [the employer] or termination thereof shall be decided by an arbitrator.

800 A.2d at 875. The New Jersey Supreme Court concluded that the provision was "sufficiently broad to encompass reasonably plaintiff's statutory causes of action" because, despite not expressly referencing statutory claims, the provision nonetheless put the plaintiff on sufficient notice that "all claims relating to employment with and termination from [the employer]" would be committed to

arbitration. *Id.* at 883–84. The Court further noted that the waiver of the right to a jury trial was clear and unmistakable because it "augment[ed] the notice to all parties to the agreement that claims involving jury trials would be resolved . . . through arbitration." *Id.* The Court thus upheld arbitration as "fair and equitable." *Id.*[4]

It follows *a fortiori* that if compelling arbitration of the employee's claims in *Martindale* was "fair and equitable," it is likewise "fair and equitable" to compel arbitration of the antitrust claims of RDC, which is a sophisticated commercial enterprise. The same logic applies: the arbitration clause in the Agreement is "sufficiently broad to encompass reasonably plaintiff's statutory causes of action," *Martindale*, 800 A.2d at 883, and put the parties on sufficient notice that they would have to arbitrate "[a]ny controversy or claim arising out of or relating to this Agreement." Not only is the provision broad in scope, but the parties expressly and irrevocably waived the right to trial by jury. These provisions render the provision analogous to the provision in *Martindale*, in which the New Jersey Supreme Court held that the statutory claims were arbitrable even though they

[4] Relying on *Martindale*, the New Jersey Appellate Division recently held that a trial court erred in denying arbitration where the arbitration clause did not expressly mention statutory claims. *See Griffoul v. NRG Residential Solar Sols. LLC*, No. A-5535-16T1, 2018 N.J. Super. Unpub. LEXIS 1051, at *13 (App. Div. May 4, 2018) (compelling arbitration where the arbitration provision "clearly and unambiguously" waived the plaintiffs' right to a jury trial and required arbitration of all disputes).

were not expressly referenced in the agreement. Moreover, unlike in *Martindale*, the arbitration provision here expressly refers to statutory remedies.

By contrast, where the New Jersey Supreme Court rejected arbitration in consumer and employee contexts in *Atalese* and *Garfinkel*, the relevant clauses did not even mention a waiver of the jury trial right. *See, e.g.*, *Atalese*, 99 A.3d at 315 ("Nowhere in the arbitration clause is there any explanation that plaintiff is waiving her right to seek relief in court for a breach of her statutory rights."). Moreover, the agreement in *Atalese* did not mention statutory claims, *id.*, while the agreement in *Garfinkel* "implicitly exempted all other statutory claims by explicitly exempting some." *Moon*, 868 F.3d at 215. The arbitration provision here is entirely different: it clearly and unmistakably waives the right to a jury trial; expressly references damages, attorneys' fees and interest "as may be required by statute"; and does not exempt any statutory claims.

This Court's decision in *Moon* does not compel a different result. *Moon* was an employment case brought by an unsophisticated plaintiff. This Court surveyed New Jersey law from prior employee and consumer cases and set out three requirements for an arbitration provision to be given effect in that context. Even if that three-part test applied here—and it does not—it is satisfied. *First*, the arbitration provision "must identify the general substantive area that the arbitration clause covers, *i.e.*, "[t]o pass muster, [it] . . . should at least provide that the

employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination." *Moon*, 868 F.3d at 213 (citing *Garfinkel*, 773 A.2d at 672). The Agreement here expressly commits statutory remedies to the arbitrator and specifies that it applies to "[a]ny controversy or claim arising out of or relating to this agreement." *Second*, the provision must reference the type of claims waived by the provision, though it "need not . . . mention the specific statutory rights at issue." 868 F.3d at 214–15. Again, the arbitration provision here does not waive any substantive statutory rights but rather commits them to arbitration. The right to a jury trial is waived, and the waiver is unambiguous and applies to "ANY ISSUE." Agreement § 4.21(d) (capitalization in original). *Third*, the provision must explain the difference between arbitration and litigation. *Id.* Once again, while this employee and consumer-oriented test is inapplicable here, the Agreement's jury trial waiver contains language that New Jersey courts have approved as adequate to explain the distinction between arbitration and litigation.[5] Even under *Moon*, therefore, arbitration must be compelled.

[5] *See Atalese*, 99 A.3d at 314 (observing agreements are "clear and unambiguous" if they state that "disputes . . . shall be decided by an arbitrator," and the parties agree "to waive [their] right to a jury trial") (citing *Martindale*, 800 A.2d at 884)); *see also Griffin v. Burlington Volkswagen, Inc.*, 988 A.2d 101, 102 (N.J. App. Div. 2010) (upholding arbitration clause providing that "[b]y agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes").

C. The FAA Preempts the New Jersey Case Law as Interpreted by the District Court

If this Court concludes both that New Jersey law applies to determine the scope of the arbitration clause, and that New Jersey law would compel a denial of arbitration, then this Court is faced with the question whether the FAA preempts New Jersey law. If the District Court's broad reading of the New Jersey cases at issue is correct, then this Court should conclude that the relevant New Jersey law is preempted.

The FAA preempts state law to the extent it conflicts with the FAA's "liberal federal policy favoring arbitration." *Litman v. Cellco P'ship*, 655 F.3d 225, 230 (3d Cir. 2011) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24). The Supreme Court has emphasized the supremacy of the FAA by holding that the FAA preempts not only states' laws that expressly discriminate against arbitration, but also those facially neutral laws or judicial precedents that have the same effect. For instance, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Supreme Court considered whether a California rule that forbade class waivers in adhesion contracts violated the FAA's presumption in favor of arbitrability. The Supreme Court held that California's rule was preempted because it "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." *Id.* at 344.

More recently, in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), the Supreme Court considered the propriety of Kentucky's "clear-statement" rule. That rule provided, in words remarkably similar to New Jersey's "clear and unambiguous" test, that an attorney-in-fact could not agree to arbitration on behalf of a principal and waive a right to trial by jury unless that waiver was "unambiguously expressed" in the power-of-attorney document. *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 328 (Ky. 2015). As the Supreme Court put it, "a power of attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so." *Kindred Nursing*, 137 S. Ct. at 1426 (emphasis in original).

The U.S. Supreme Court held that Kentucky's "clear-statement" rule, even though ostensibly neutral on its face, nevertheless violated the FAA because it singled out arbitration provisions for disfavored treatment and failed to place such provisions on an "equal plane" with other contracts. *Id.* at 1427. Justice Kagan's opinion for the Court observed that the FAA not only preempts state rules "discriminating on [their] face against arbitration," but also those that "covertly accomplish[] the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.* at 1426. Kentucky's clear-statement rule failed this test. *Id.* at 1427.

The Supreme Court's reasoning regarding the Kentucky "unambiguously expressed" waiver standard applies with equal force to New Jersey's "clear and unambiguous" waiver standard. Not only is the relevant language exceedingly similar, but so is the effect: New Jersey's heightened scrutiny of arbitration agreements "interferes with fundamental attributes of arbitration," and "creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344.

This Court has not yet squarely ruled on this issue. But this Court and district courts have noted in very similar contexts that New Jersey's "clear and unambiguous" arbitration standard may be subject to FAA preemption. For instance, in *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 639 F. App'x 824 (3d Cir. 2016), this Court considered whether an arbitration clause was unenforceable under *Atalese* and New Jersey's doctrine of unconscionability. The Court decided the appeal on other grounds but noted "[w]hether these state law grounds remain viable as not preempted by the Federal Arbitration Act . . . presents an important and challenging question." *Id.* at 827; *see also Smith v. Lindemann*, 710 F. App'x 101, 104–05 (3d Cir. 2017) (rejecting plaintiff's argument that, under New Jersey law, arbitration clause in attorney-client engagement letter did not encompass malpractice claims because it did not specifically use the word "malpractice," and holding that a New Jersey rule prohibiting the inclusion of an arbitration provision in an engagement letter "would be preempted by the FAA");

Bacon v. Avis Budget Grp., Inc., No. 16-5939, 2017 U.S. Dist. LEXIS 88868, at *17 n.6 (D.N.J. June 9, 2017) (noting that "*Kindred* seems to signal a more aggressive approach to FAA preemption" and suggesting that it would be relevant to determining whether the FAA preempts New Jersey's arbitrability regime).[6]

Further, if the District Court was correct that New Jersey requires parties to show a "clear and unmistakable" intent to "waive" litigation of statutory claims, this is a more "burdensome" approach that is at odds with New Jersey's treatment of other contractual provisions, particularly those negotiated between sophisticated parties. In that latter context, a court does not look to whether the parties "clearly and unmistakably" agreed to arbitrate, but rather examines whether the plain language of the contract supports the parties' intention to arbitrate. *See, e.g.*, *Borough of Princeton v. Bd. of Chosen Freeholders of Cty. of Mercer*, 755 A.2d 637, 645 (N.J. App. Div. 2000) ("[T]he polestar of contract construction is to discover the intention of the parties as revealed by the language used by them."

[6] *See also Ragab v. Howard*, 841 F.3d 1134, 1141 (10th Cir. 2016) (Gorsuch, J., dissenting) ("Whether or not the FAA would preempt New Jersey's special 'extra clarity' rule [for arbitration provisions], that possibility undoubtedly exists."); Philip Kirchner, *Will My Arbitration Agreement Be Enforced?*, N.J. L.J. (Apr. 26, 2018) ("New Jersey's state courts, in many cases, appear to have applied a more stringent standard of review to arbitration agreements in consumer and employment contracts than their federal court counterparts. Indeed, it can be argued that many New Jersey state court arbitration enforcement decisions are inconsistent with the FAA's mandates."); *accord Kernahan*, 2019 N.J. LEXIS 3 at *35 (noting, but declining to address, the question whether *Atalese* has been preempted).

(citing *Jacobs v. Great Pac. Century Corp.*, 518 A.2d 223 (N.J. 1986)), *aff'd*, 777 A.2d 19 (N.J. 2001)); *see also Gastelu*, 2015 N.J. Super. Unpub. LEXIS 1639, at *10–11 ("It is a basic rule of contractual interpretation that a court must discern and implement the common intention of the parties. . . . The court has no right to remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other.").

New Jersey's "clear and unambiguous" rule imposes a heightened standard of contract construction on arbitration provisions, which impermissibly places arbitration on an unequal plane. This is the very approach that the Supreme Court condemned in *Kindred Nursing*: ostensibly neutral rules that "covertly accomplish[] the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." 137 S. Ct. at 1426. New Jersey law cannot disfavor arbitration, and RDC cannot use New Jersey law to avoid arbitration of its claims against Janssen.

CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed, and the case should be remanded with instructions to stay the proceedings pending arbitration of RDC's individual claims.

Dated: January 22, 2019

Respectfully submitted,

By: /s/ William F. Cavanaugh

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CERTIFICATES

William F. Cavanaugh, attorney for Defendants-Appellants Johnson & Johnson and Janssen Biotech, Inc., hereby certifies as follows.

1. I was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit on June 3, 1996 and am presently a member in good standing at the Bar of said Court.

2. This brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains 9,845 words, excluding the items identified in Rule 32(f).

3. The printed copies of Defendants-Appellants' brief filed with the Court are identical to the text in the electronic versions filed with the Court.

4. The electronic versions of Defendants-Appellants' brief were virus checked using Bitdefender Endpoint Security Tools, product version 6.2.18.884, engines versions 7.70079 (last updated January 22, 2019), on the date of filing and were found to have no viruses.

5. Defendants-Appellants' brief and Joint Appendix (Volume I of III) was served and filed with the Court via the Court's ECF system, with paper copies being submitted via Federal Express, postage prepaid, in accordance with Rule 25(a)(2)(B) of the Federal Rules of Appellate Procedure.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: New York, New York
January 22, 2019

By: /s/ William F. Cavanaugh
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

In re REMICADE ANTITRUST LITIGATION	Civil Action
This document relates to: Direct Purchaser Action	No. 18-cv-00303 (JCJ)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendants Johnson & Johnson and Janssen Biotech, Inc. appeal to the United States Court of Appeals for the Third Circuit from the District Court's Memorandum and Order (ECF Nos. 64 and 65), entered on October 26, 2018, denying Defendants' Motion to Compel Individual Arbitration and Stay Proceedings.

Dated: November 21, 2018

By: */s/ Leslie E. John*

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2018, I electronically filed the foregoing Notice of Appeal using the CM/ECF system, which will send notification of such filing to all parties of record.

/s/ Leslie E. John

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE REMICADE ANTITRUST LITIGATION	:	CIVIL ACTION
This document relates to:	:	
Direct Purchaser Actions	:	No. 18-cv-00303 (consolidated)

MEMORANDUM

JOYNER, J. **OCTOBER 25, 2018**

Before the Court are Defendants' Motion to Compel Individual Arbitration and Stay Proceedings (Doc. No. 29-1), Plaintiff's Opposition thereto (Doc. No. 41), Defendants' Reply in Further Support of their Motion to Compel (Doc. No. 48), and Plaintiff's Sur-Reply in Further Opposition to Defendants' Motion to Compel (Doc. No. 56). We deny Defendants' Motion for the following reasons.

I. BACKGROUND

Defendants, Johnson and Johnson, and Janssen Biotech, Inc. ("J&J"), manufacturers of the biologic infliximab drug Remicade, move to compel arbitration on an individual basis of all claims asserted against them in this action by Plaintiff Rochester Drug Cooperative, Inc. ("Rochester"), a drug wholesaler and direct purchaser of Remicade, pursuant to an arbitration provision in a 2015 Distributor Agreement ("the Agreement") that Plaintiff entered with JOM, Pharmaceuticals Inc., a J&J entity. (Motion to

Compel at 2, Doc. No. 29-1). Plaintiff opposes the motion, arguing the arbitration clause does not encompass their federal antitrust claims alleging a complex scheme of anticompetitive conduct by Defendants that resulted in supracompetitive prices for infliximab products marketwide.

The Agreement establishes Rochester as an "Authorized Distributor of Record (ADR) and sets out various logistical obligations for distribution of J&J's pharmaceutical products. (Ex. A at 1, Doc. No. 29-3). Yet, the Agreement does not specify purchase prices. Included in the range of the parties' obligations under the Agreement are the products Rochester is authorized to distribute (§1.2) and in what geographic areas (§1.5); limitations on Rochester's authorization to distribute (it may not buy products from other than an authorized source, nor may it distribute expired, damaged, re-packaged or unauthorized products) (§1.4); requirements Rochester must meet for data reporting (§1.6); minimum annual volume of covered product purchases Rochester must meet to maintain ADR status (§1.9); terms for delivery and return of covered products (§§1.17 and 1.40), and other general terms related to distribution of a variety of J&J products (Ex. A, Schedule C).

A Dispute Resolution section in the Distributor Agreement provides that

> [a]ny controversy or claim arising out of or relating to this agreement. . . . shall be resolved by arbitration in accordance with the. . .Federal Arbitration Act, 9 U.S.C. § 1 et seq.
>
> The arbitrator must interpret any dispute arising out of or relating to this agreement in accordance with the laws of New Jersey. . . .There shall be no right or authority for any claims to be arbitrated on a class action basis.
>
> THE ARBITRATOR WILL NOT AWARD PUNITIVE, COVER, EXEMPLARY, MULTIPLED OR CONSEQUENTIAL DAMAGES, PREJUDGMENT INTEREST OR ATTORNEYS' FEES OR COSTS, EXCEPT AS MAY BE REQUIRED BY STATUTE AND EACH PARTY IRREVOCABLY WAIVES ANY RIGHT TO SEEK OR COLLECT ANY SUCH DAMAGES, PREJUDGMENT INTEREST, FEES OR COSTS IN ARBITRATION OR ANY JUDICIAL PROCEEDING. EACH PARTY IRREVOCABLY WAIVES ITS RIGHT TO TRIAL OF ANY ISSUE BY JURY.

§§ 4.21 (a), (b), (c), (d) (capitalization in original).

In February of 2018, Plaintiff filed an action on behalf of themselves and a proposed class of direct purchasers of infliximab products asserting claims against Defendants for violations of federal antitrust statutes, the Sherman Act (15 U.S.C. §§1 and 2) and Clayton Act (15 U.S.C. §§14, 15, 26).[1] Plaintiff claims they sustained antitrust injury through overcharges they paid as a result of Defendants' monopolizing the biologic infliximab drug market and artificially inflating infliximab prices marketwide.

Biologic drugs are made from living tissue (unlike chemically synthesized drugs) and are used to treat chronic auto-immune inflammatory diseases such as Chron's disease and Rheumatoid arthritis. Infliximab is a biologic infusion drug

[1] Unless otherwise noted, the following facts are taken from the Direct Purchasers' Amended Complaint (Doc. No. 12).

that has been engineered to inhibit auto-immune inflammatory conditions that chemically-synthesized drugs tend not to target. (Doc. No. 12, ¶4, ¶42). Biosimilars are biologic drugs that are "highly similar" to a "reference drug" that was already approved by the FDA, with "no clinically meaningful differences between the [biosimilar] product and the reference product in terms of safety, purity, and potency of the product." Id. at ¶13. In 2009, Congress passed the Biologics Price Competition and Innovation Act (BPCIA) in order to provide a shortcut to FDA approval and market entry for biosimilars. Id. at ¶11. The regulatory shortcut was intended to increase treatment options and lower health care costs by spurring biosimilar competition. Id. at ¶14.

Infliximab products can only be administered intravenously because if ingested orally they would be destroyed by the digestive system. Id. at ¶5. Due to their in-office administration and high cost (a single treatment costs thousands of dollars) id. at ¶60, fn 18, the drugs are usually purchased by health care providers who depend on reimbursement by insurance companies. Id. at ¶54, 55. When a "significant portion of a provider's patients are insured by plans that have agreed to exclude biosimilars to Remicade, (e.g, Inflectra, Renflexis)" due to the terms of J&J's exclusive contracts, the chances are low that any competitor biosimilar drug will be covered by insurance.

Id. at ¶60, fn 18. Facing a risk that they might not be reimbursed if a biosimilar is not covered, providers are less likely to stock biosimilars. On the other hand, providers can trust that Remicade (the reference drug) will be reimbursed, which allows Remicade to dominate the market even when competitors offer lower-priced biosimilars.

Rochester alleges that J&J's exclusive contracts, multi-product bundling, bundling of demand, and rebate penalties that threaten significant financial losses for administering or insuring a biosimilar comprise Defendants' "Biosimilar Readiness Plan" (the "Plan"). Id. at ¶24, ¶74, ¶79, ¶95. The Plan made it financially impossible for insurers and providers to cover or purchase lower-priced biosimilars. The alleged exclusion of biosimilars from the infliximab market enabled Defendants to maintain Remicade at supracompetitive prices and continually raise Remicade's list price. Id. at ¶127, ¶162. Rochester claims they paid artificially inflated prices for infliximab products "substantially greater than the prices they would have paid absent the unlawful conduct." Id. at ¶146. Plaintiffs seek damages for J&J's alleged antitrust violations, on behalf of itself and members of a proposed direct purchaser class. Id. at ¶28.

In a related action, Pfizer Inc., v. J&J, 17-cv-04180, Pfizer brought claims of antitrust violations by J&J, alleging

that J&J's anticompetitive conduct had blocked Pfizer's competitor biosimilar, Inflectra, from the infliximab market. In August, 2018, this Court denied Defendants' motion to dismiss Pfizer's Sherman Act claims. (Doc. No. 58). This Court found that Pfizer's complaint alleged "sufficient factual matter" to make it facially plausible under the Iqbal and Twombly pleading standard that J&J "engaged in anticompetitive conduct and that Pfizer suffered antitrust injury as a result." Id. at 11. "J&J's efforts to foreclose Pfizer from the market, as Pfizer has alleged, have led to increased prices for consumers and limited competitive options for end payors, providers, and patients." Id. at 10, 14.

II. LEGAL STANDARD

"When it is apparent, based on the 'face of a complaint, and documents relied upon in the complaint,' that certain of a party's claims 'are subject to an enforceable arbitration clause, a motion to compel arbitration should be considered under a Rule 12(b)(6) standard without discovery's delay.'" Abrams v. Chesapeake Energy Corp., No. 4:16-CV-1343, 2017 U.S. Dist. LEXIS 209905, at *23 (M.D. Pa. Dec. 21, 2017) (quoting Guidotti v. Legal Helpers Debt Resolution, L.L.C., 716 F.3d 764, 766 (3d Cir. 2013)). See Somerset Consulting, LLC v. United Capital Lenders, LLC, 832 F. Supp. 2d 474, 481 (E.D. Pa. 2011) (explaining that a motion to dismiss standard is applicable, before discovery has

occurred, "where the affirmative defense of arbitrability of claims is apparent on the face of the complaint."). See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985) (discussing the FAA's policy goals of enforcement of private agreements between parties and "efficient dispute resolution"). We consider Defendants' motion to compel arbitration of Plaintiff's statutory claims under a Rule 12(b)(6) standard, since the parties do not contest the enforceability of the Agreement's arbitration provision, only whether Plaintiff's statutory claims "aris[e] out of" the valid Agreement so to be arbitrable.

III. DISCUSSION

Although Sherman Act claims are not precluded from resolution through arbitration, the Supreme Court has qualified its holding in Mitsubishi Motors Corp., noting "'not…all controversies implicating statutory rights are suitable for arbitration.'" Abrams v. Chesapeake Energy Corp., No. 4:16-CV-1343, 2017 U.S. Dist. LEXIS 209905 (M.D. Pa. Dec. 21, 2017) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 627 (1985)). Essentially, only those claims the parties have agreed to arbitrate should be submitted to "'an arbitral, rather than a judicial, forum.'" Id.

The Third Circuit has set forth "several long established principles" that should guide a court "in analyzing the arbitrability of a dispute":

> First, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit."
>
> Second, "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."
>
> Third, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims."
>
> Fourth, . . . "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'"

Emplr. Trs. of W. Pa. Teamsters v. Union Trs. of W. Pa. Teamsters, 870 F.3d 235 (3d Cir. 2017) (quoting United Steelworkers of Am., AFL-CIO-CLC v. Lukens Steel Co., Div. of Lukens, Inc., 969 F.2d 1468, 1473-74 (3d Cir. 1992); see AT&T Techs., Inc. v. Communs. Workers of Am., 475 U.S. 643 (1986)).

Because arbitration is a matter of contract, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964), before compelling arbitration pursuant to the Federal Arbitration Act, a court must determine that (1) a valid agreement to arbitrate exists, and (2) the particular dispute falls within the scope of

that agreement. Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 160 (3d Cir. 2009). "[I]n the FAA [Congress] expressed a strong federal policy in favor of resolving disputes through arbitration." Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513, 522 (3d Cir. 2009). However, this policy does not lead automatically to the submission of a dispute to arbitration upon a movant's request. The Third Circuit has emphasized that "the Supreme Court has repeatedly warned "against 'overread[ing its] precedent[]' concerning the presumption of arbitrability. E.g. Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 130 S. Ct. 2847, 2857 (2010). The presumption does not "take[] courts outside [the] settled framework" of using principles of contract interpretation to determine the scope of an arbitration clause." CardioNet, Inc. v. Cigna Health Corp., 751 F.3d 165, 172-173 (3d Cir. 2014) (quoting Granite Rock, 130 S. Ct. at 2859).

"[T]he basis for contractual arbitration is consent, not coercion." Century Indem. Co., 584 F.3d at 523 (citing Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 115 S. Ct. 1212 (1995)). Consent is a key factor in the determination of whether an arbitration clause encompasses a disputed claim. "[E]ven if a court finds that the parties have agreed to arbitrate *some disputes it must find, to order arbitration, that the parties have agreed to arbitrate the dispute in issue.*

Because an arbitrator's authority derives solely from the parties' agreement to submit their disputes to arbitration, AT&T Technologies, Inc., 475 U.S. at 648-49, a party cannot be compelled to submit a dispute to arbitration unless it has agreed to do so. U.S. Small Bus. Admin. v. Chimicles, 447 F.3d 207, 209 (3d Cir. 2006).” Id. at 523 – 524.

A. Scope of the Arbitration Clause

*“‘[W]hether a dispute falls within the scope of an arbitration clause depends upon the relationship between (1) the breadth of an arbitration clause, and (2) the nature of the given claim.’” PDC Machs., Inc. v. Nel Hydrogen, No. 17-5399, 2018 U.S. Dist. LEXIS 142444 at *13, (E.D. Pa. Aug. 22, 2018) (quoting CardioNet, Inc., 751 F.3d 172). Defendant asks this Court to consider the Distributor Agreement as a whole, in accordance with CardioNet’s instructions that “courts ‘are required to read contract language in a way that allows all the language to be read together, reconciling conflicts in the language without rendering any of it nugatory if possible,’” id. at 174, and with New Jersey contract principles directing that “words and phrases are not to be isolated but related to the context and the contractual scheme as a whole.” Newark Publishers' Asso. v. Newark Typographical Union, 126 A.2d 348, 352-53 (1956). Here, considering the language of the Dispute Resolution provision as a whole, we find the scope of arbitrable disputes is limited to*

claims "arising out of" the Distributor Agreement, and that this scope applies across all subsections of the Dispute Resolution section, including the damages provision and class action waiver.

In CardioNet, the Third Circuit interpreted the use of the word "disputes" across two sections of the contract that both applied to dispute resolution, in order to determine which issues were encompassed by the arbitration clause. An "Internal Dispute Resolution" provision preceded the "Arbitration" provision and narrowed the scope of arbitrable issues to those "disputes that might arise between the parties regarding the performance or interpretation of the Agreement. [§6.3]." CardioNet, Inc., 751 F.3d 173, (emphasis added). The subsequent Arbitration section provided "[a]rbitration is the exclusive remedy for the resolutions of *disputes* under this Agreement. [§6.4]" Id. (emphasis added). The Court found that the arbitration provision's reference to "disputes," which appears after the Internal Dispute Resolution, does not broaden the scope of arbitrable issues because "[w]ere we to hold that 'disputes' as used here signifies a broader swath of disagreements, it would render the first sentence of Section 6.4 devoid of meaning. . . .the words 'dispute' and 'disputes' . . .clearly refer[] to the narrower set of disputes concerning the Agreement's performance and interpretation." Id.

Here, the Dispute Resolution section of the Agreement begins with an arbitration provision directing that "[a]ny *controversy or claim* arising out of or relating to this agreement. . . .shall be resolved by arbitration." §§4.21 (a), (b) (emphasis added). A later subsection states that "EACH PARTY IRREVOCABLY WAIVES ITS RIGHT TO TRIAL OF ANY *ISSUE* BY JURY." §4.21 (d) (emphasis added). Defendants argue first that the arbitration provision is broad enough to encompass statutory claims, although they are not mentioned, and second, that the jury waiver establishes "there can be no doubt that [Rochester] was aware it was giving up the right to a jury trial." (Def. Reply at 11).

The Restatement (Second) of Contracts §202 provides guidance that "a word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph." So we find that the word "issue" in the jury trial waiver does not broaden the scope of arbitrable disputes, and applies only to those disputes "arising out of or relating to this agreement." §4.21 (a). The scope of the class action waiver providing that "[t]here shall be no right or authority for any *claims* to be arbitrated on a class action basis," §4.21(c)(emphasis added), is similarly limited to "claims" "arising out of or relating to this agreement." §4.21(a).

While Defendant argues that §4.21 (d) of the Agreement, providing that "an arbitrator is empowered to grant statutory

remedies," "leaves no doubt as to the parties' intention: statutory claims are to be addressed through arbitration," (Def. Reply at 9), we agree with Plaintiff that this provision presupposes the claim at issue is subject to arbitration under §4.21(a). "*If* a claim, such as for breach of the Distributor Agreement, falls within §4.21 (a), *then* §4.21(d) provides 'the arbitrator will not award punitive, cover, exemplary, multiplied, or consequential damages, prejudgment interest or attorney's fees or costs except as may be required by statute." (Pl. Sur-Reply at 12). We also note that the arbitration clause itself does not refer to statutory claims of any kind, and the damages provision "does not address, or even reference statutory claims (much less mention 'antitrust' or 'overcharge' claims." Id. at 13. As Plaintiff argues, "'[e]xcept as may be required by statute,' simply preserves certain damages as may be required by New Jersey statutes for claims otherwise encompassed by [the arbitration clause] §4.21 (a)," id., since any dispute arising out of the agreement must be interpreted "in accordance with the laws of New Jersey." §4.21(c). [2]

[2] In their responsive motions to Defendants' Motion to Compel, the parties debate whether New Jersey's "clear and unambiguous" waiver standard should be applied to Plaintiff's federal antitrust claims; and if so, whether the arbitration clause satisfies Moon's three requirements in order for a clause to cover statutory claims (incorporating the New Jersey Supreme Court's standard for knowing waiver of statutory rights in Garfinkel and Atalese): "First, it must identify the general substantive area that the arbitration clause covers. . . .Second, it must reference the types of claims waived by the provision. . . .It need not, however, mention the specific statutory rights at issue. . . .Third, it must explain the difference between arbitration and litigation." Moon, 868 F.3d at 214.

Here, the parties agreed that New Jersey law would govern interpretation of disputes "arising out of" the agreement. (§4.21 (c), Ex. A at 20, Doc. No. 29-3). In Volt Info. Scis. v. Bd. of Trs, the Court held that the parties' agreement to specify that the law of the state where the subject of the agreement was located was "fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the [FAA] would otherwise permit it to go forward." Ford v. Nylcare Health Plans, 141, F.3d 243, 248 (5th Cir. 1998) (quoting Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 479 (1989)). However, for the above and forthcoming reasons, we find it possible to say "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." United Steelworkers of Am., AFL-CIO-CLC v. Lukens Steel Co., Div. of Lukens, Inc., 969 F.2d 1468, 1473-74 (3d Cir. 1992). So, we find it unnecessary to analyze whether Moon's application of New Jersey's "clear and unmistakable" waiver test is preempted by the FAA, and similarly unnecessary to apply Moon's three-part test, since Plaintiff's antitrust claims are not within the scope of arbitrable disputes "arising out of" the Agreement.

In Moon, the Third Circuit applied similar principles of contract interpretation when it emphasized the difference between arbitration agreements that contain a phrase limiting the scope of arbitrable issues to "this agreement" and those without one. See Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 773 A.2d 665, 668 (2001); Atalese v. U.S. Legal Servs. Grp., L.P., 99 A.3d 306, 310 (2014) (finding statutory claims not covered by arbitration clauses that limited the scope of arbitral disputes to those arising from or relating to "this Agreement."). In Moon, the Court found Appellants' statutory claims were not covered by the arbitration clause because "the clause likewise only include[d] 'a dispute between Dancer and Club under this Agreement.' (citation omitted)" Moon v. Breathless Inc., 868 F.3d 209, 211, 216 (3d Cir. 2017). The Court distinguished the arbitration clause in Martindale v. Sandvik, Inc., 173 N.J. 76, 800 A.2d 872 (2002), which covered statutory claims, because it "lacked a limiting principle, such as a reference to an agreement." Id. at 216. We find the arbitration clause here to be more like the clauses in Moon, Garfinkel and Atalese, because it applied to disputes arising from "this agreement."

Along the same lines, we find no "manifestation of intention" that antitrust claims should be encompassed within the scope of arbitrable disputes. Newark Publishers' Asso. v. Newark

Typographical Union, 22 N.J. 419, 126 A.2d 348, 352 (1956). In Newark Publishers' Asso., which encompassed "'any dispute' arising under the contract. . . *except as 'otherwise herein provided*,'" id. at 351 (emphasis added), the express exemption of claims showed that the parties clearly intended for any claims not exempted to be arbitrable. Yet here, the arbitration clause does not expressly exempt certain kinds of claims, therefore, only claims "arising out of. . .this agreement" are subject to arbitration. We read the arbitration clause within context, "related to the relevant circumstances and the apparent objects the parties were striving to attain," id., and find no intention to include statutory antitrust claims within the scope of arbitrable disputes.

B. Whether Plaintiff's Antitrust Claims "Arise Out Of" the Agreement

Defendants argue that Plaintiff's antitrust claims must be arbitrated because they would not have standing to sue without having entered the Distributor Agreement, while Plaintiff argues their statutory claims are not arbitrable because they arise out of Defendants' "Biosimilar Readiness Plan," distinct from the Agreement. It is settled that "claims under the Sherman Act 'are appropriate for arbitration.'" Spinelli v. NFL, 96 F. Supp. 3d 81 (S.D.N.Y. 2015) (quoting Mitsubishi, 473 U.S. at 633-34). However, we must consider "whether the factual underpinnings of

those claims 'touch' matters covered by the arbitration provision –i.e., matters 'in connection with' or 'arising out of or relating [to]' the []Agreement." PDC Machs., Inc. v. Nel Hydrogen, No. 17-5399, 2018 U.S. Dist. LEXIS 142444, at *13, (E.D. Pa. Aug. 22, 2018). The Third Circuit has emphasized that "the arbitrability of a given dispute depends not on the particular cause of action pleaded, but on the relationship of the arbitration clause at issue to the facts underpinning a plaintiff's claims." The Court noted because some statutory claims "often fall within the scope of. . .arbitration clauses," as CIGNA argued in CardioNet and as J&J argues here (Def. Reply at 10), "that bears little relevance to whether *these* [statutory claims] fall within the scope of *this* arbitration clause." CardioNet, Inc., 751 F.3d at 176 (emphasis in original).

Here, J&J asks us to apply the Second Circuit's expansive view that Plaintiff's standing as a direct purchaser and their allegations of overcharges due to supracompetitive infliximab prices makes their statutory claims "arise under" the Agreement. In JLM Indus., the Second Circuit, assessing whether Sherman Act claims were covered by a "broad" arbitration clause, focused on "the factual allegations in the complaint rather than the legal causes of action asserted." JLM Indus. v. Stolt-Nielsen SA, 387 F.3d 163, 173, 2004 AMC 2805 (2d Cir. 2004) (quoting Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 77 (2d Cir. 1998)). The

Court noted that the damages Plaintiffs suffered due to Defendants' conspiracy "result from the fact that it entered into the charters, each of which specifies price terms which are variously characterized in the amended complaint as 'artificially high' and as 'overpayments.' . . .[T]his is a dispute 'arising out of' the charters." Id. at 17. Even where Plaintiffs' factual allegations concerned matters beyond contract formation and performance, id. at 175, the Second Circuit found sufficient factual relationship to hold the statutory claims arose from the underlying agreement.

Here, Rochester argues for a different analytic approach, in line with the "breach of contract" analysis adopted by the Fifth Circuit in Ford; the Third Circuit in CardioNet, Flaghouse, and Moon; and the Eastern District of Pennsylvania in PDC Machs, Inc. Plaintiff argues the "factual underpinnings," Medtronic AVE Inc. v. Advanced Cardiovascular Sys., 247 F.3d 44, 55 (3d Cir. 2001), of their statutory claims are not premised on the Agreement, so they do not "arise from" the Agreement, for two reasons. First, their antitrust claims are "not narrowly focused on Remicade, [the drug covered by the Agreement] but instead concern the entire market for infliximab including overcharges on biosimilar infliximab products manufactured by J&J's rivals." (Pl. Sur-Reply at 12). Second, their antitrust claims do not amount to a claim of breach of the Distributor Agreement, so resolving their claims

will not depend on "resolving some dispute over the meaning or terms of the Distributor Agreement, but on application of the antitrust statutes to J&J's Plan." Id.

Even applying JLM Indus.'s standard, we still find Plaintiff's antitrust claim does not "touch matters covered by the parties' [Distributor Agreement]," JLM Indus. 387 F.3d at 172, because neither the complaint nor Defendant's motion to dismiss references the Agreement, and the Agreement does not specify price terms, instead only generally providing that the "Company and its affiliates will sell Products to the Distributor at the applicable. . .'List price'" and logistical provisions on when "List Price changes will be effective." (§1.12, Ex. A at 4, Doc. No. 29-3). Further, Plaintiffs explain that "even [their] direct purchases of Remicade, both the volume of purchases and prices paid, will not be proven by the Distributor Agreement, but through Defendants' computerized sales transaction data." (Pl. Sur-Reply at 10).

In PDC Machs., Inc., Plaintiff PDC, a company that developed and provided technology for the "specialty gas and chemical processing industries worldwide," had entered several agreements with Defendant Nel, a hydrogen company, covering PDC's development of hydrogen compressors for Nel. PDC Machs., Inc. v. Nel Hydrogen, No. 17-5399, 2018 U.S. Dist. LEXIS 142444, at *3-4 (E.D. Pa. Aug. 22, 2018). "The Cooperation Agreement govern[ed]

'[a]ll purchase of goods between [Nel] and [PDC],' and addresse[d] how orders are to be placed, confirmed, and cancelled, and issues such as quality standards for the goods, the applicable warranty, procedures for complaints and for repair and replacement of defective materials, shipping, payment terms, technical support, and insurance." Id. at *4. Additionally, "PDC and Nel entered into a 'Confidential Non Disclosure Agreement' (the Nel NDA) which 'set forth the rights and obligations of the Contract Partners [i.e., PDC and Nel] with respect to . . . safeguarding of Proprietary information...." Id. at *3.

The Distributor Agreement here similarly "covers various topics related to the distribution of pharmaceutical products, including such mundane day-to-day minutiae as the type of wooden pallets [Plaintiff] should use for product storage. [§] 1.43." (Def. Opp. at 3, fn 2). Notably, the Agreement only includes general terms for purchasing products at a "list price," §1.12, and at an "annual minimum purchase volume," §1.9, though those products are not limited to Remicade. The Agreement does not set or state a specific purchase price for Remicade.

Contrary to J&J's arguments, the Agreement's general reference to pricing terms (§1.12) and its establishment of Rochester as a distributor of various J&J products, hardly constitutes a factual basis for Plaintiff's allegations of complex anticompetitive conduct resulting in monopolization of

the infliximab market. PDC Machs., Inc. is analogous, where Plaintiff brought statutory claims relating to trade secrets. Defendant Nel argued that PDC's statutory claims were sufficiently factually "related to" the Cooperation Agreement because the Agreement covered the sale of compressors that plaintiff alleges defendant misused. No. 17-5399, 2018 U.S. Dist. LEXIS 142444, at *15. However, the analysis is not as rudimentary as Defendants in both PDC and here make it out to be. Here, J&J argues that because the Distributor Agreement relates to purchases of Remicade, Plaintiff's allegation that it paid overcharges for its purchases of infliximab products means that those claims "arise out of" the Agreement. Yet, in PDC Machs., Inc., that the underlying agreement concerned "purchases" of compressors did not sufficiently connect Plaintiff's statutory claims to the agreement to make them arbitrable. "The Cooperation Agreement does not. . .'expressly prohibit[] the misuse of proprietary information' or otherwise impose any confidentiality obligations on Nel.'" PDC Machs., Inc. v. Nel Hydrogen, No. 17-5399, 2018 U.S. Dist. LEXIS 142444, at *19 (E.D. Pa. Aug. 22, 2018) (quoting Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999)). We apply this reasoning to Rochester's federal antitrust claims.

Here, the Distributor Agreement does not expressly prohibit anticompetitive conduct or impose obligations to uphold specific

antitrust statutes. Here, Rochester's antitrust claims do not "relate to the parties' obligations under the [Agreement]," id. (quoting Microbilt Corp. v. Chex Sys., Inc. (In re Microbilt Corp.), 588 F. App'x 179, 180-81 (3d Cir. 2014)), and therefore are not encompassed by the arbitration clause where there is nothing in the agreement "'covering the [the anticompetitive] conduct at issue.'" Id. See PNY Techs., Inc. v. Samsung Elecs. Co., No. 10-4587, 2011 U.S. Dist. LEXIS 26784, 2011 WL 900154, at *2-6 (D.N.J. Mar. 14, 2011) (finding statutory claims "subject to arbitration based on arbitration clauses in three subsequent agreements between the parties. . .[which] all contained confidentiality provisions covering the disclosures at issue.").

The Third Circuit's reasoning in CardioNet also applies here. In CardioNet, Plaintiffs, providers of outpatient medical services used by physicians for monitoring cardiac arrhythmias, had entered an Administrative Services Agreement (the "Agreement") with Defendant, CIGNA Health Corporation, which had provided coverage for these services for several years before abruptly ending it. The Agreement set the reimbursement rate for covered services. CardioNet, Inc.,751 F.3d at 169. Defendants subsequently released a policy update ("the Physician Update") to hundreds of thousands of physicians in its network claiming it would not cover Plaintiff's device because defendants considered

it "experimental, investigational, and unproven." Id. at 169. Among other claims, Plaintiffs' complaint alleged "that the Physician Update constituted a misleading and deceptive commercial or promotion, in violation of. . .the Lanham Act." Id. at 170. Defendant moved to compel arbitration of Plaintiffs' statutory claims, arguing they were encompassed by an arbitration clause in the Agreement.

However, the Third Circuit found Plaintiffs' Lanham Act claims did not arise from the Agreement under which Defendants were obligated to cover Plaintiffs' cardiac services because the source of the statutory injury was distinct from the Agreement. Id. at 175. Applying CardioNet, we look to the relationship between the harm alleged in Plaintiff's Sherman Act allegations and the Defendants' obligations under the Distributor Agreement. We find Plaintiff's Sherman Act claims are separate from the Agreement, as the Physician Update was distinct from Plaintiffs' Lanham Act claims. Similar to CardioNet, "whether [J&J, as an affiliate of JOM] performed its obligations under the Agreement has no bearing on whether it harmed [Rochester]," id., by coercing insurers and providers into exclusive contracts, threatening to withdraw substantial rebates, and effectively inflating prices for infliximab products marketwide.

The CardioNet court also noted, in deciding Plaintiff's statutory claims were beyond the scope of arbitration, that

resolving them "does not require construction of, or even reference to, any provision in the Agreement. . . .Quite the contrary, whether CIGNA performed its obligations under the Agreement has no bearing on whether it harmed the Providers by providing physicians with misleading information on [Plaintiffs'] services." Id. Here, Plaintiff Rochester argues that the harm from J&J's anticompetitive Biosimilar Readiness Scheme exists independent of the Distributor Agreement and therefore does not rely on the Agreement for resolution. In fact, identical claims have been brought by plaintiffs who did not enter distributor agreements with JOM. (Sur-Reply at 27). CardioNet anticipated this argument when it held "theoretically, any [services] manufacturer, whether it had entered into an in-network Agreement with CIGNA or not, would be harmed by the misleading statements ostensibly made by CIGNA about the [Plaintiffs'] technology and would have a basis for bringing claims identical to the Providers' claims here." Id. That is the case here, where plaintiffs who did not enter into agreements with JOM or its affiliate allege they were harmed by the anticompetitive conduct that is the basis for Rochester's statutory claims. See National Employees Health Plan, et al., v. J&J (17-cv-04326, Doc. No. 53); See Walgreen Co. and The Kroger Co., v. J&J (18-02357, Doc. No. 1). Thus, applying the Third Circuit's approach in

CardioNet, we find Plaintiff's Sherman Act claims are separate from, and cannot be resolved based on, the Distributor Agreement.

Third Party Advantage Adm'rs, Inc., also found that "[b]ut for the contractual relationship between [the defendant] and plaintiffs, [the defendant] could not have committed the alleged torts and violation of the Texas Theft Liability Act." (No. 3:06-CV-0534-G ECF, 2006 U.S. Dist. LEXIS 85456, at *19. Not so here. Rochester alleges that it was injured by overcharges it paid for infliximab products – including, but not limited to the drug covered by the Agreement, Remicade. In other words, Defendant's alleged anticompetitive scheme to inflate prices for Remicade had marketwide effects and could have been committed without the Distributor Agreement with Rochester. Unlike in Third Party Advantage Adm'rs, Inc., where "it [was] the existence of the asset purchase agreement that gave rise to the possible assertion of the claims alleged," id., here, even if Rochester had not entered the Distributor Agreement with JOM, they still could have alleged antitrust injury from the "overcharges on biosimilar infliximab products manufactured by J&J's rivals." (Pl. Sur-Reply at 12).

Abrams is distinguishable on similar grounds. There, Sherman Act claims were found to be arbitrable where Plaintiffs only had standing to bring their statutory claims because of their status as leaseholders receiving royalties under the

Agreement, and because Plaintiffs' alleged antitrust injury was premised on the specific terms of their underlying agreement – providing for "signing bonuses and royalties paid." Abrams v. Chesapeake Energy Corp., No. 4:16-CV-1343, 2017 U.S. Dist. LEXIS 209905 at *33 (M.D. Pa. Dec. 21, 2017). Here, by contrast, Rochester's Sherman Act injury is not "premised on the amount" of overcharge they paid for Remicade alone.

A related approach to whether an arbitration clause encompasses statutory claims focuses on whether the claims are "in essence a breach of contract claim or based on a breach of the [contract]." Ford v. Nylcare Health Plans, 141 F.3d 243, 250 (5th Cir. 1998). Here, Rochester argues that their statutory claims are not a claim of breach, (Pl. Sur-Reply, at 28), nor does the antitrust claim "involve a core issue of the contract[] between the parties," JLM Indus., 387 F.3d at 176, because the "Biosimilar Readiness Plan" reaches beyond causing overcharges for Remicade. Instead, the alleged anticompetitive conduct extends beyond obligations under the Agreement and caused overcharges not only for Remicade, but also for Inflectra and Renflexis, neither of which Plaintiff purchased from J&J under the Agreement.

In Ford, Plaintiff, a health care provider, had entered into an agreement with Defendants, HMOs, to provide medical services to patients covered under Defendants' insurance plans. Plaintiff

brought false advertising claims against Defendants, alleging violations of the Lanham Act. Ford, 141 F.3d at 245. Defendants moved to compel arbitration of Dr. Ford's statutory claims, based on an arbitration agreement that stated, "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by arbitration. . . ." Id. at 246.

The District Court had decided not to compel arbitration of Plaintiff's false advertising statutory claims because "these claims would exist in the absence of the agreement between Dr. Ford and the HMOs and, therefore, did not arise out of or relate to that agreement." Id. at 247. Applying Texas law to determining whether the statutory claims were within the scope of arbitrable disputes, the Fifth Circuit analyzed whether the Plaintiff's Lanham Act claims could exist "without reference to a contract," or whether the allegations of statutory violation were "so interwoven with the contract that [they] could not stand alone." Id. at 250, (quoting X.L. Ins. Co. v. Hartford Accident & Indem. Co., 918 S.W.2d 687 (Tex. App. 1996)).

Here, J&J argues that Rochester's statutory claims are arbitrable because they will, according to Defendants, need to reference the Distributor Agreement in order to assert their status as direct purchasers. However, we find Ford persuasive. The factual relationship test for determining whether a statutory claim is sufficiently related to an agreement to be arbitrable is

not done "to identify whether the facts in support of the action will implicate the agreement as an item of evidence but to uncover whether an action formally labeled a [statutory] tort is in essence a breach of contract claim or based on a breach of contract." Id. at 250.

Defendant tries to avoid application of Ford in the FAA context by citing cases where courts compelled arbitration of statutory claims found to "arise from" underlying agreements. Yet In re Pharmacy Benefit Managers Antitrust Litig. is distinguishable because there, the underlying agreement "establishe[d] the terms and conditions under which the Plaintiffs were to provide prescription drugs and services to plan members, and set[] forth an agreed reimbursement rate." In re Pharmacy Benefit Managers Antitrust Litig., 700 F. 3d 109, 112 (3d Cir. 2012), while here, the Distributor Agreement does not set an "agreed" price and it references price only in the context of logistical obligations such as when "list price changes will be effective" and "invoiced." §1.12.

Simula, Inc. v. Autoliv, Inc., is similarly distinguishable. Plaintiff's antitrust claim in Simula, unlike Rochester's claim here, included an allegation that the agreement it had signed with the defendant was "a primary reason why competition" had been suppressed in the relevant market. 175 F.3d 716, 722 (9th Cir. 1999). The causative relationship between the allegation

and the agreement meant the antitrust claims did "arise under" the agreement because resolving them would "necessitate interpreting the 1995 Agreement [containing the arbitration clause] to determine its meaning." Id. at 721, 722.

By contrast, here neither party has alleged or claimed that the Distributor Agreement is integral to the Defendants' anticompetitive conduct. As Plaintiff argues, resolving the antitrust claims will not require interpretation of the Distributor Agreement because the Agreement is irrelevant to the allegations that Defendant undertook anticompetitive conduct to maintain supracompetitive prices for Remicade and block lower-priced competitor biosimilars. For these reasons, the Agreement here is not like the agreement in Simula, which was integral to the anticompetitive conduct at the heart of Plaintiffs' antitrust claims. It is more like the agreement in CardioNet (discussed supra), separate and distinct from statutory claims. Thus the statutory claims do not "arise from" the Distributor Agreement and therefore are beyond the scope of arbitrable disputes.

Defendants cite Innerwireless, Inc. v. Johnson Controls, Inc., as authority for the proposition that Ford is inapplicable because the Fifth Circuit did not analyze whether the arbitration clause was broad or narrow, "as is the circuit's practice when considering cases under federal arbitration law," Innerwireless, Inc., Civil Action No. 3:07-CV-312-M, 2007 U.S. Dist. LEXIS

63030, at *14, (N.D. Tex. Aug. 27, 2007). However, we have analyzed the breadth of the arbitration clause.

Courts have distinguished "'narrow' arbitration clauses that only require arbitration of disputes 'arising out of' the contract from broad arbitration clauses governing disputes that 'relate to' or 'are connected with' the contract". Pennzoil Expl. & Prod. Co. v. Ramco Energy, 139 F.3d 1061, 1067 (5th Cir. 1998). However, Pennzoil addresses how to classify an arbitration clause, like the one in the Distributor Agreement, which "uses not only the phrase 'arising out of,' but also 'in connection with or relating to.'. . .[T]his is a 'broad' clause. . .not limited to claims that literally 'arise under the contract,' but rather embrace all disputes between the parties having a *significant relationship to the contract*" (emphasis added, Pennzoil Expl. & Prod. Co. v. Ramco Energy, 139 F.3d 1061, 1067 (5th Cir. 1998)). We find Plaintiff's antitrust claims are not embraced by even the broad arbitration clause because the alleged anticompetitive conduct does not have a "significant relationship to the [Distributor Agreement]."

Furthermore, in Third Party Advantage Adm'rs, Inc., applying federal law the court found that "plaintiffs' tort claims were 'embraced' by the underlying contract, which 'served as the conduit through which these alleged acts were made possible.'" Innerwireless, Inc., Civil Action No. 3:07-CV-312-M, 2007 U.S.

Dist. LEXIS 63030, at *14 (quoting Third Party Advantage Adm'rs, Inc. v. J.P. Farley Corp., No. 3:06-CV-0534-G ECF, 2006 U.S. Dist. LEXIS 85456, at *19 (N.D. Tex. Nov. 27, 2006). Even when we apply the "circuit practice" of characterizing the breadth of the arbitration clause, and consider whether the underlying contract "served as the conduit through which [Defendant's alleged anticompetitive antitrust violations] were made possible," we find that Plaintiff's antitrust claims do not arise from their Distributor Agreement with Defendant.

IV. CONCLUSION

For the foregoing reasons, J&J's Motion to Compel Arbitration is denied. An appropriate Order will follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE REMICADE ANTITRUST LITIGATION	:	CIVIL ACTION
This document relates to:	:	
Direct Purchaser Actions	:	No. 18-cv-00303 (consolidated)

ORDER

AND NOW, this 25th day of October, 2018, upon consideration of Movants J&J's Motion to Compel Individual Arbitration and Stay Proceedings (Doc. No. 29-1), Plaintiff's Opposition thereto (Doc. No. 41), Defendants' Reply in Further Support of their Motion (Doc. No. 48), and Plaintiff's Sur-Reply in Further Opposition to Defendants' Motion (Doc. No. 56), it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE REMICADE ANTITRUST LITIGATION	:	CIVIL ACTION
This document relates to:	:	
Indirect Purchaser Actions (consolidated)	:	No. 17-cv-04326
Direct Purchaser Actions	:	No. 18-cv-00303

MEMORANDUM

Joyner, J. **December 4, 2018**

Before the Court are Defendants' Johnson & Johnson and Janssen Biotech, Inc. (collectively "Janssen") ("J&J") Motion to Dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) (Doc. No. 67-1), Indirect and Direct Purchaser Plaintiffs' Joint Opposition thereto (Doc. No. 73), and Defendants' Reply in Support thereof (Doc. No. 75).

I. Background

This case arises from an antitrust action brought by Direct and Indirect Purchasers of Defendants' drug Remicade, against Johnson & Johnson, along with its wholly owned subsidiary, Janssen Biotech, Inc. (collectively, "J&J"), alleging artificially inflated prices and monopolization of the pharmaceutical market for biologic infliximab drugs. The Direct and Indirect Purchasers' principle claim is that J&J undertook

an anticompetitive scheme, consisting of exclusive agreements and coercive bundled rebates, to foreclose competition posed by biosimilar versions of Remicade, specifically Pfizer's Inflectra and Merck's Renflexis. The scheme allegedly caused providers and insurers to pay overcharges for infliximab products that they would not have paid absent J&J's anticompetitive conduct.

Under consideration is J&J's Motion to Dismiss the Indirect Purchasers' Consolidated Amended Complaint and to Dismiss the Amended Direct Purchaser Class Action Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) (Doc. No. 67-1). This Motion is fully briefed and ripe for the Court's adjudication. The Court has considered the parties' submissions and decides this matter without oral argument. Fed. R. Civ. P. 78; Loc. R. Civ. P. 7.1(f).

II. Alleged Facts

This case arises from essentially the same facts that have been described in detail in this Court's related decision denying Defendants J&J's motion to dismiss Pfizer's complaint alleging federal antitrust violations. Pfizer Inc. v. Johnson & Johnson, No. 17-cv-4180, 2018 U.S. Dist. LEXIS 135261 (E.D. Pa. Aug. 8, 2018); Doc. No. 58). For the purposes of considering

Defendants' motion, we will summarize facts relevant to Indirect and Direct Purchaser Plaintiffs' claims.[1]

The medications at the center of this litigation are biologic infliximab products, used as treatment for maintaining chronic auto-immune inflammatory conditions. Dir. AC ¶2, ¶41. Infliximab products cannot be taken orally and are only administered intravenously, generally by an in-office health care provider. Id. at ¶5. J&J's drug Remicade was the first biologic infliximab to enter the market in 1998. Ind. CAC ¶21. In 2009, Congress enacted the Biologic Price Competition and Innovation Act (BPCIA), an analog to the shortcut for FDA approval that the Hatch-Waxman amendments provide for chemically synthesized medications. Dir. AC ¶8-9. To attain approval as a "biosimilar" under the BPCIA, a manufacturer must demonstrate that "there are no clinically meaningful differences between the biological product and the reference product in terms of safety, purity and potency." Ind. CAC ¶38. Once J&J's patent on Remicade expired in 2016, the FDA approved three other medications including Pfizer's Inflectra and Merck's Renflexis.

[1] Unless otherwise noted, the following facts are taken from the Direct Purchaser's Amended Complaint (Dir. AC, Doc. No. 12) and the Indirect Purchasers' Consolidated Amended Complaint (Ind. CAC, Doc. No. 53). On consideration of a Rule 12(b)(6) motion to dismiss, the allegations in the plaintiff's complaint are generally taken as true and all reasonable inferences are drawn in favor of the claimant. See Phillips v. Cty. of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008).

Dir. AC ¶16-19, Ind. CAC ¶4. Competition from the introduction of biosimilars into the infliximab market was expected to lower prices for potentially lifesaving biologic medications that otherwise might have been unaffordable for some patients.[2] Dir. AC ¶14, ¶20.

The Direct and Indirect Purchaser Plaintiffs argue that insurance coverage is key to biologic infusion products like infliximab because treatment is so expensive that most patients will not be able to pay out of pocket. Id. at ¶54. Therefore, infliximab products are either reimbursed by insurance companies, or they are paid for by health care providers who administer the drug through a "buy and bill" system where they pay upfront for the drug then bill an insurer or third-party payor for reimbursement. Id. at ¶57. Plaintiffs argue that this system incentivizes providers to choose a biologic that is "widely covered by insurance" to avoid the risk that their reimbursement claim could be denied. Id. at ¶58, ¶60.

Defendants' Biosimilar Readiness Plan

1. Exclusive agreements

Plaintiffs allege that Defendants' exclusive contracts with insurers block biosimilar competition in more than one way.

[2] Biologics can cost from $15,000 to $150,000 to administer to one patient. Dir. AC ¶15. A single treatment of Remicade can cost approximately $4,000, totaling approximately $26,000 for a full year of infusion treatment. Ind. CAC at ¶3.

Ind. CAC ¶47, 48. Some contracts require insurers to deny coverage for biosimilars altogether. Other contractual preconditions effectively preclude biosimilar competition. For example, the "fail first" exception, under which providers cannot choose a biosimilar unless a patient has first failed to respond to treatment with Remicade. Dir. AC ¶23.

2. Bundled rebates

J&J allegedly uses bundled rebates as leverage over insurers by threatening a rebate penalty in "many millions of dollar[s] annually" if insurers do not enter contracts that foreclose them from reimbursing competitor biosimilars. Dir. AC ¶76. First, J&J engages in multi-product bundling, linking rebates for Remicade to other J&J drugs and medical devices that their competitors do not offer. Through this "portfolio approach," "insurers and providers that refuse to grant exclusivity to Remicade would be forced to pay higher prices or forego enhanced rebates on multiple J&J products." Id. at ¶84.

Second, J&J also bundles demand from "contestable" patients (new users of infliximab or those who have switched to a biosimilar product) and "incontestable" patients (those "already controlling their chronic conditions with Remicade are less likely to switch to a lower-priced biosimilar."). Id. at ¶77. J&J's contracts threaten to deny rebates "on *all* Remicade prescriptions if *any* infliximab biosimilar prescriptions are

reimbursed." Id. at ¶79. Plaintiffs call this the "rebate trap." Id. at ¶80, ¶139.

3. Anticompetitive Effects

Pricing data, insurance coverage, and overpayment are among the anticompetitive effects of Defendants' plan. Although Pfizer's Inflectra and Merck's Renflexis entered the market with WAC's (Wholesale Acquisition Cost or list price) at up to a 35% discount to Remicade, Remicade's WAC has increased since Pfizer and Renflexis entered the market in 2016 and 2017. Notably, J&J "still has over a 90% market share." Id. at ¶102.

Additionally, Plaintiffs show evidence that "between 2007 and 2017, Remicade's Average Sales Price ("ASP") increased more than 62 percent. Despite Remicade's price hikes, unit sales of Remicade have actually grown 15 percent. . .from 2012 to 2016." Ind. CAC. ¶109. Providers, seeking to avoid rebate penalties, allegedly choose not to stock Inflectra even when it is covered by Medicare and other government programs, id. at ¶105, shifting costs to the government, which is "forced to continue reimbursing for Remicade, the more expensive product." Id. Both Direct and Indirect Purchaser Plaintiffs allege they have paid artificially inflated prices that are "substantially greater than the prices they would have paid absent the unlawful conduct alleged." Id. at ¶146; Ind. CAC ¶¶131-132, 137.

III. Legal Standard

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, Plaintiffs are required only to plead "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests, and . . . this standard does not require detailed factual allegations." Phillips v. Cty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008). To survive a motion to dismiss, a complaint "must 'state a claim for relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). We must accept well-pleaded allegations in the complaints as true and construe them in the light most favorable to Plaintiffs, drawing all reasonable inferences in Plaintiffs' favor. Hartig Drug Co. Inc. v. Senju Pharm. Co., 836 F.3d 261, 268 (3d Cir. 2016); Santiago v. Warminster Twp., 629 F.3d 121, 128 (3d Cir. 2010). "'Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice'" to defeat a Rule 12(b)(6) motion to dismiss. UniStrip Technologies, LLC v. LifeScan, Inc. 153 F.Supp.3d 728, 735-6 (E.D. Pa. 2015) (quoting Iqbal, 556 U.S. at 663).

The plausibility standard "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the claim]." Twombly, 550 U.S. at 556. We also consider

Plaintiffs' allegations "about [Defendants'] anti-competitive conduct as a whole, and [our] legal analysis must not 'tightly compartmentaliz[e] the various factual components' of [Plaintiffs'] allegations, 'wiping the slate clean after scrutiny of each.'" In re Thalomid and Revlimid Antitrust Litig., No. 14-6997 (KSH)(CLW), 2015 WL 9589217, at *16 (D.N.J. Oct. 29, 2015). "Antitrust complaints, in particular, are to be liberally construed at this stage of the proceeding," id. because "inherent in such an action is the fact that all details and specific facts relied upon cannot properly be set forth as part of the pleadings." In re Neurontin Antitrust Litig., No. 1479, 2009 U.S. Dist. LEXIS 77475 at *36 (D.N.J. Aug. 27, 2009) (citing Lucas Indus. v. Kendiesel, Inc., No. 93-4480, 1995 U.S. Dist. LEXIS 7979, 1995 WL 350050, at *2 (D.N.J. June 9, 1995)).

IV. Discussion

1. Direct and Indirect Purchaser Plaintiffs' Joint Sherman Antitrust Act Claims

Plaintiffs have asserted claims under Section 1 and 2 of the Sherman Act and Section 3 of the Clayton Act.[3] Ind. ¶¶138-144, ¶¶147 -152, ¶155, ¶¶159 – 162; Dir. AC ¶¶182-186, ¶174-177. As it applies to J&J's motion to dismiss Plaintiffs' federal

[3] Plaintiffs and Defendants agree that Indirect Purchasers' claims under Section 3 of the Clayton Act, and Direct Purchaser's Claim under Section 1 and 2 of the Sherman Act are "effectively the same." (J&J Mot. at 11, Pls' Opp. at 28).

antitrust claims, Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 402 n.11 (3d Cir. 2016) controls. To sufficiently plead an actionable federal antitrust violation, Plaintiffs must allege facts establishing that J&J engaged in anticompetitive conduct and that as a result, Plaintiffs suffered antitrust injury. Id.

J&J attacks Plaintiffs' federal antitrust allegations in two primary ways. First, J&J argues Plaintiffs have failed to sufficiently plead antitrust injury. Second, they argue Plaintiffs have failed to sufficiently plead anticompetitive conduct by Defendants.

A. General Antitrust Injury

"It is only anticompetitive conduct, or 'a competition-reducing aspect or effect of the defendant's behavior,' that antitrust laws seek to curtail." Philadelphia Taxi Ass'n, Inc. v. Uber Techs., Inc., 886 F.3d 332, 338 (3d Cir. 2018) (quoting Alt. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990)). To establish antitrust injury, Plaintiffs "must show both that [Defendants] engaged in anticompetitive conduct and that [they] suffered antitrust injury as a result." Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 402 (3d Cir. 2016). Antitrust injury is "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" Atl. Richfield Co., 495 U.S. at 334

(quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). "This standard, on a motion to dismiss, requires an antitrust plaintiff to allege facts capable of supporting a finding or inference that the purported anticompetitive conduct produced increased prices, reduced output, or otherwise affected the quantity or quality of the product." In re EpePen ((Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., No. 2785, 2017 U.S. Dist. LEXIS 209710, at *64, 65 (D. Kan. Dec. 21, 2017) (citing National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 113 (1984); Cohlmia v. St. John Medical Center, 693 F.3d 1269, 1281 (10th Cir. 2012); Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996)).

"The existence of antitrust injury is not typically resolved through motions to dismiss" but rather "after discovery, either on summary judgment or after trial." Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 876 (3d Cir. 1995); In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., No. 13-md-2445, 2017 WL 4910673, at *14 (E.D. Pa. Oct. 30, 2017) ("Suboxone II") (following "the Third Circuit's caution that the existence of antitrust injury is not typically resolved through motions to dismiss.").

"[A plaintiff] need not allege proximate cause or antitrust injury separately for each component of the alleged scheme. . .

[rather] [t]he injuries inflicted by [the defendant's] allegedly anticompetitive activities should, instead, be viewed as a whole.'" In re Gabapentin Patent Litig., 649 F. Supp. 2d 340, 355-56 (D.N.J. 2009).

We find that Direct and Indirect Purchaser Plaintiffs' Amended Complaints sufficiently allege antitrust injury because they show facts that make it plausible that J&J's Biosimilar Readiness Plan "prevent[ed] competition in the relevant product market within the relevant geographic [and pharmaceutical] market." Brader, 64 F.3d 869. See Fuentes, 946 F.2d 196, 202 (3rd Cir. 1991) (finding sufficient to survive a motion to dismiss where plaintiff pled that defendants' actions excluded him from access to the relevant medical care market and "by eliminating him as a competitor. . . successfully reduced competition for the defendants' cardiological services."). In this Court's decision denying J&J's motion to dismiss Pfizer's complaint, we found sufficient allegations of antitrust injury:

> J&J's efforts to foreclose Pfizer from the market, as Pfizer has alleged, have led to increased prices for consumers and limited competitive options for end payors, providers, and patients. Pfizer provides detailed allegations regarding J&J's exclusionary terms with many of the nation's largest insurers, the incentive structure that forces end payors and providers into accepting those terms, Pfizer's efforts to compete, including its guarantees that Inflectra would cost less than Remicade, and showed how market participants on many levels are injured from J&J's ability to sell Remicade without having to compete with Inflectra and other biosimilars.

Pfizer Inc. v. Johnson & Johnson and Janssen Biotech, Inc., 17-cv-04180 at 14, Doc. No. 58. Applying the same reasoning here, since Plaintiffs allege antitrust injury based on the same anticompetitive scheme at the heart of Pfizer's complaint, they have sufficiently pled antitrust injury.

B. Anticompetitive Conduct

"Anticompetitive conduct is the hallmark of an antitrust claim. An allegation of anticompetitive conduct is necessary both to: (1) state a claim for attempted monopolization; and (2) aver that a private plaintiff has suffered an antitrust injury." Philadelphia Taxi Ass'n, Inc. v. Uber Techs., Inc., 886 F.3d 332, 338 (3d Cir. 2018). "Allegations of purportedly anticompetitive conduct are meritless if those acts would cause no deleterious effect on competition." Id. at 339. In assessing whether Plaintiffs have stated a plausible claim that J&J's conduct is anticompetitive, we follow the Third Circuit's approach and consider J&J's alleged conduct "as a whole rather than considering each aspect in isolation." LePage's Inc. v. 3M, 324 F.3d 141, 162 (3d Cir. 2003) (en banc).

J&J poses three arguments for why Direct and Indirect Purchaser Plaintiffs fail to sufficiently allege anticompetitive conduct. First, they argue that Plaintiffs "benefitted from" "millions of dollars in rebates" and therefore made a free choice in their own economic interest to purchase or reimburse

Remicade. (J&J Mot. at 24). Yet it is the coercive threat of losing these rebates, under J&J's contract terms, that is the basis for Plaintiffs' allegations of anticompetitive conduct.

Plaintiffs argue that regardless of discounts and rebates attached to their purchases of Remicade, as in Castro I, "[it is that] because of [J&J's] anticompetitive behavior which reduced competition, they paid more for the [infliximab products] than they would have absent [J&J's] anticompetitive behavior," Castro v. Sanofi Pasteur Inc., No. 11-cv-7178 (JLL), 2012 WL 12516572 at *6 (D.N.J. Aug. 6, 2012). Eisai acknowledged that since exclusive dealing arrangements have the potential to confer "economic benefits" on consumers, "such as assuring them the availability of supply and price stability," this kind of exclusive agreement "does not constitute a *per se* violation of the antitrust laws." Eisai, 821 F.3d 394, 403. A Plaintiff must go further and show that "'the "probable effect" of the arrangement is to substantially lessen competition, rather than merely disadvantage rivals.'" Id. (quoting ZF Meritor, LLC v. Easton Corp., 696 F.3d 254, 271 (3d Cir. 2012)).

We find that Plaintiffs have cleared this hurdle by alleging that J&J's exclusive contracts and rebate bundles make it impossible for competitors like Pfizer's Inflectra to compete. Plaintiffs alleged that Pfizer could never effectively offset J&J's rebates because the rebates are linked to such a wide

proportion of the patient market (the incontestable demand for Remicade, comprised of patients unlikely to switch treatment), and also linked, through J&J's rebate bundles, to other J&J products that Pfizer and Merck cannot offer. Dir. AC ¶138. Therefore, Plaintiffs have pled facts that make it plausible that the "probable effect" of the Biosimilar Readiness Plan is to "substantially lessen competition."

Compare Philadelphia Taxi Association, 886 F.3d 332, 340 (3d Cir. 2018) (noting "it is well established that lower prices, as long as they are not predatory, benefit consumers – 'regardless of how those prices are set;'" where the inundation of the taxi market with Uber vehicles "bolstered competition by offering customers lower prices, more available taxicabs") with LePage's Inc. v. 3M, 324 F.3d 141, 163 (3d Cir. 2003)(finding price increases following defendant's rebate program "'did not benefit the ultimate consumer.'"). The "benefit" Plaintiffs receive through coercive rebates does not extinguish the plausibility of their claim that they would have paid less for infliximab products absent J&J's anticompetitive scheme. Dir. AC, ¶¶21-24, 102, 146. See Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968); Castro I, 2012 WL 12516572, at *5-*8; In re Hypodermic Prods. Antitrust Litig., MDL No. 1730, 2007 WL 1959225 at *7-*9 (D.N.J. June 29, 2007).

Along the same lines, Defendants argue that Direct Purchaser Plaintiff Rochester is "free to purchase Inflectra and Renflexis whenever it likes, at prices it alleges to be lower than Remicade's." (J&J Mot. at 25). Yet Rochester has alleged that it's decision to purchase Remicade at supracompetitive prices is a response to demand from providers who will not buy biosimilars due to fear that they will not be widely reimbursed as a result of exclusive agreements and rebate penalties faced by insurers.

When Plaintiffs allege Defendants have monopolized a relevant market, the Third Circuit inquires into whether a monopolist's anticompetitive conduct has "deprive[d] customers of the ability to make a meaningful choice [between products]." Eisai, 821 F.3d at 404 (quoting ZF Meritor, 696 F.3d at 285). In the context of federal antitrust violations where Plaintiffs' allegations "of exclusive dealing are not centered on pricing practices alone," "the 'rule of reason' test applies to determine if the arrangement will 'foreclose on competition in such a substantial share of the relevant market so as to adversely affect competition.' In applying this test, the court can consider 'a showing of significant market power by the defendant ..., substantial foreclosure [of the market] ..., contracts of sufficient duration to prevent meaningful competition by rivals ..., and whether there is evidence that the dominant firm engaged in coercive behavior.'" UniStrip

Technologies, LLC v. LifeScan, Inc. 153 F. Supp. 3d 728, 736 (E.D. Pa. 2015) (quoting Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) (citations omitted)).

Here, as in UniStrip, Plaintiffs have "[pled] that . . . . the exclusivity of the arrangements that [Defendant] has imposed on [purchasers] of its products prevents competitors from entering the market, not price competition," UniStrip, 153 F. Supp. 3d at 736; Dir. AC ¶27; Ind. CAC ¶131. So, we find that what Defendants describe as "preference" for Remicade is plausibly the effect of their coercive agreements.

Third, Defendants attack Plaintiffs' allegations of anticompetitive conduct by arguing that biosimilar manufacturers have failed to compete using multi-product bundles. (Mot. at 28). We addressed this same argument in denying J&J's motion to dismiss Pfizer's claims. Although bundling can be anticompetitive when it "forecloses portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer," Eisai, 821 F.3d at 405, Pfizer is a multi-product manufacturer and it did not allege that J&J hindered its ability to compete on a bundle-to-bundle basis. "J&J's multi-product bundles, on their own, therefore do not present antitrust concern." (17-cv-04180 at 19, Doc. No. 58).

See also LePage's, 324 F.3d at 144 (focusing on whether alleged monopolist's bundling of its "Scotch brand transparent tape with other products enabled it to unlawfully maintain its monopoly power," not on whether competitor was able to offer competitive bundles.). See also SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir. 1978) (although a competitor manufacturer could have offered a competing bundle of products, the Third Circuit did not require SmithKline to allege an inability to compete using multi-product bundles).

In addition to multi-product bundling, Plaintiffs argue that Defendants' bundling of demand has anticompetitive effects. Dir. AC ¶79. The threat of losing rebates on all Remicade prescriptions (including incontestable demand) is similar to the effect of defendants' anticompetitive conduct in Dentsply, where "the threat to cut off supply ultimately provided customers with no choice but to continue purchasing from the defendants." Eisai, 821 F.3d at 406 (quoting United States v. Dentsply Int'l, Inc., 399 F.3d 181, 189–96 (3d Cir. 2005)).

Here, Plaintiffs allege that Defendants' exclusive agreements pose precisely that kind of threat. First, through "fail first" provisions that function effectively as exclusive agreements (Plaintiffs allege it is highly unlikely a physician would prescribe a biosimilar that has "no clinically meaningful difference" to Remicade once a patient has not responded to

treatment with the reference drug). Dir. AC ¶73. Second, through the "rebate trap" in which J&J threatens "a financial penalty of withholding rebate payments if insurers reimburse for any infliximab product other than Remicade." Dir. AC ¶77. Unlike in Eisai, where plaintiff "customers did not risk penalties . . . for terminating the [defendant's program] or violating its terms," 821 F.3d at 406, here, Plaintiff purchasers allege the risk of rebate penalties forecloses competition by biosimilars who cannot financially offset the losses posed to purchasers through J&J's rebate threats. See LePage's, 324 F.3d at 160 (finding actionable Sherman Act claims where plaintiff showed evidence that defendant's rebates coerced distributors to "forego purchasing from [plaintiff competitor tape manufacturer] if they wished to obtain rebates on 3M's products," and to "either drop any non-Scotch products, or lose the maximum rebate.").

Assessing anticompetitive conduct, we look to whether Defendants' alleged conduct "as a whole, caused or was likely to cause anticompetitive effects in the relevant market." Eisai at 408. See LePage's, 324 F.3d 141 ("The relevant inquiry is the anticompetitive effect of [Defendant manufacturer's] exclusionary practices considered together. As the Supreme Court recognized in Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962), the courts must look to the

monopolist's conduct taken as a whole rather than considering each aspect in isolation. Plaintiffs' allegations of bundled rebates make it plausible that Defendants' conduct had the effect of foreclosing competition in the infliximab market, resulting in Plaintiffs paying supracompetitive prices for infliximab products.

C. Allegations Supporting Competitors' Efforts to Compete

Last, Defendants argue that Plaintiffs have failed to allege specific facts showing that biosimilar manufacturers were unable to offer competitive prices, rather than simply unwilling to engage in price competition. (J&J Mot. at 12). See J&J Mot. at 33-34 (suggesting that "[t]he fact that Pfizer and Merck's list prices were lower does not establish an actual effort to compete," and arguing that Average Sales Price is not an accurate measure of whether prices paid by purchasers are increasing or decreasing since it factors in rebates and discounts.). Defendants also argue that Remicade's ASP has declined since Plaintiffs' pleadings, invalidating Plaintiffs' allegations of competitive harm. Plaintiffs argue that competitive pricing is not a pleading requirement and that nevertheless they have so alleged. See Direct AC, ¶102.

We agree with Plaintiffs that the accuracy of ASP pricing data cannot be resolved on a motion to dismiss. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d

Cir. 1997) ("[A] district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings.") See In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712, 720 (S.D.N.Y. 2017) ("While discovery may ultimately prove plaintiffs' pricing data less than accurate, on a motion to dismiss the Court takes all well-plead allegations as true[.]"). Essentially, what makes Plaintiffs' complaints plausible is not the allegation that competitors have priced their biosimilars lower than Remicade, but that J&J has maintained dominance over the infliximab market, despite the entry of biosimilars, "not through price competition, but through its exclusionary contracting scheme." (Pls' Opp. at 41). Discovery will help determine "whether [J&J] foreclosed a substantial share of the market such that competition has been harmed." ZF Meritor, 696 F.3d at 283 (citing Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 326–28 (1961)). For the foregoing reasons, we deny J&J's Motion to Dismiss Direct and Indirect Purchaser Plaintiffs' federal antitrust claims.

2. Indirect Purchasers' Additional Arguments

A. Sham Litigation and Walker Process Patent Fraud

Indirect Purchaser Plaintiffs additionally allege that J&J aimed to delay the entry of biosimilars through sham patent litigation and a Citizen's Petition to the FDA. Ind. CAC ¶¶, 100-102, 193-194. Defendants argue they are immune from patent

suit where Plaintiffs fail to sufficiently plead that the patent litigation was meritless when filed or that it delayed the entry of competitor biosimilars into the infliximab market. (J&J Mot. at 35).

Under the Noerr-Pennington doctrine, "'[t]hose who petition [the] government for redress are generally immune from antitrust liability.'" Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 56 (1993) ("PRE"). Noerr-Pennington immunity, however, is not absolute. "[A]ctivity 'ostensibly directed toward influencing governmental action' does not qualify for [first amendment] immunity if it 'is a mere sham to cover ... an attempt to interfere directly with the business relationships of a competitor.'" Id. at 51 (quoting E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961)).

To establish that a lawsuit qualifies as a "sham," and will not be immune from suit under Noerr-Pennington, a two-part test is applied. First, we assess whether the lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and we apply a "probable cause" standard, assessing whether the litigant at the time of filing, has a "reasonable belief that there is a chance that a claim may be held valid upon adjudication." Id. (quoting PRE, 508 U.S. at 62). Second, "[o]nly if challenged

litigation is objectively meritless may a court examine the litigant's subjective motivation." Then, "the court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor through the use of the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." In re Wellbutrin XL Antitrust Litig., 868 F.3d 132, 148 (3d Cir. 2017) (quoting PRE, 508 U.S. at 60-61). To establish that Noerr immunity should not apply, the plaintiff must then prove "the challenged lawsuit is 'causally linked' to an antitrust injury." Id. at 149.

We first ask "whether [J&J] could have perceived 'some likelihood of success' in their case at the time of filing." Id. at 150, (quoting PRE, 508 U.S. at 65; Rohm & Haas Co. v. Brotech Corp., 127 F.3d 1089, 1093 (Fed. Cir. 1997). Plaintiffs argue that Janssen's patent lawsuit against Celltrion and Hospira (later acquired by Defendants' competitor Pfizer) lacked a legitimate basis and was intended to forestall competition, Ind. CAC ¶102-106, based on three allegations: first, that the patent was held invalid by the U.S. District Court for the District of Massachusetts because the antibodies they were claiming protection for "had been disclosed and claimed in an earlier patent," id. at ¶102; second that the U.S. Court of Appeals for the Federal Circuit affirmed the U.S. Patent and

Trial Appeal Board's ruling that the same patent was invalid; and third, after filing a patent infringement suit against Samsung (manufacturer of the competitor biosimilar, Renflexis) Defendants' eventually voluntarily dismissed their remaining infringement claims against Celltrion and Hospira. Id. at ¶105.

Plaintiffs try to imply that if Defendants already had patent protection for an antibody in Remicade, filing a subsequent patent suit for the same antibody makes it plausible that they knew the suit was meritless. Yet, the Third Circuit warned against using the outcome of a patent case as evidence that the defendants knew the litigation was a sham at the time of filing. See In re Wellbutrin XL Antitrust Litig. 868 F.3d at 149 (directing that a court should "resist the . . . temptation to engage in post hoc reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation" just because an antitrust defendant "has lost the underlying [patent] litigation.").

In lieu of Noerr-Pennington's test for sham litigation, Plaintiffs argue that under Hanover's "more flexible standard[,]. . . appropriate when dealing with a pattern of petitioning," we should apply a "holistic review that may include looking at the defendant's filing success – i.e., win-loss percentage – as circumstantial evidence of the defendants' subjective motivations." Hanover 3201 Realty, LLC v. Vill.

Supermarkets, Inc., 806 F.3d 162, 180-81 (3d Cir. 2015). We are unpersuaded. The cases Plaintiffs cite are distinguishable because the "series of legal proceedings" that trigger holistic review under Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) involve instances where defendants filed "fourteen state and administrative lawsuits." Waugh Chapel S., LLC v. United Food & Commer. Workers Union Local 27, 728 F.3d 354, 365 (4th Cir. 2013). Even recognizing that as few as "'four lawsuits and a [Citizen's] petition'" could satisfy Noerr-Pennington, In re Wellbutrin, 868 F.3d at 157, here, by contrast, Plaintiffs allege only two proceedings against competitors, not the plaintiffs themselves. See Id. ("When the Appellants' serial petitioning claim is reduced to only the lawsuits against Anchen and Abrika, both of which GSK withdrew from, it must fail. . . .two proceedings — each against an independent defendant — does not constitute a pattern."). Here, Plaintiffs' allegations do not show "a pattern of baseless, repetitive claims," Cal. Motor, 404 U.S. at 513, that are part of Defendants' alleged scheme of monopolization.

Additionally, Indirect Purchaser Plaintiffs fail to allege that biosimilar competitors were forestalled from entering the infliximab market. See In re Wellbutrin, 868 F.3d at 147 (dismissing sham litigation claims even where Plaintiffs did allege that delayed entry of generics stalled competition). We

find Indirect Purchaser Plaintiffs' sham litigation allegation lacks "some reasonable particularity in pleading," In re Neurontin Antitrust Litig., No. 1479, 2009 U.S. Dist. LEXIS 77475 at *36 (D.N.J. Aug. 27, 2009), and therefore dismiss it.

Defendants also argue that Plaintiffs' allegations are too vague to meet the Supreme Court's Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 86 S. Ct. 347 (1965) standard, under which "[f]raudulent procurement of a patent. . . . can provide the basis for antitrust liability" such as monopolization of a relevant market. In re Lipitor Antitrust Litig., 868 F.3d 231, 266 (3d Cir. 2017).

A plaintiff alleging fraud must "state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). See United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC, 812 F.3d 294, 307 (3d Cir. 2016) (quoting In re Rockefeller Ctr. Props., Inc. Sec. Litig., 311 F.3d 198, 217 (3d Cir. 2002)). ("A plaintiff alleging fraud must therefore support its allegations 'with all of the essential factual background that would accompany the first paragraph of any newspaper story – that is, the who, what, when, where and how of the events at issue.'").

To establish a Walker Process fraud, "a plaintiff must, in part, demonstrate '(1) a false representation or deliberate

omission of a fact material to patentability, (2) made with the intent to deceive the patent examiner, (3) on which the examiner justifiably relied in granting the patent, and (4) but for which misrepresentation or deliberate omission the patent would not have been granted.'" In re Lipitor, 868 F.3d at 266 (quoting C.R. Bard, Inc. v. M3 Sys., 157 F.3d 1340, 1364 (Fed. Cir. 1998)).

Indirect Purchaser Plaintiffs' Walker Process patent fraud allegations lack the requisite specificity to allow us to draw a "reasonable inference" that J&J is liable for Walker Process fraud. As the Third Circuit directed in In re Lipitor, "under Twombly, the question is actually whether the Complaint *plausibly* alleges [that Defendants materially misrepresented facts to a patent examiner, without which the patent would not have been granted]."'" 868 F.3d 231, 266 (3d Cir. 2017) (quoting Wyeth Holdings Corp., 2012 U.S. Dist. LEXIS 26912, at *11). Submitting "affirmatively 'false' or 'misleading' CSI data to the PTO. . ., [where] that data was intended to, and did, deceive the PTO into issuing the '995 patent" constituted plausible a Walker Process claim in In re Lipitor Antitrust Litig., No. MDL No. 2332, 2013 U.S. Dist. LEXIS 126468 at *70 (D.N.J. Sep. 5, 2013) ("Lipitor I").

Here, by contrast, Indirect Purchaser Plaintiffs do not plead with specificity the substance of alleged "misleading

statements," Ind. CAC ¶196, or Janssen's specific "manipulative and deceptive practices" before the PTO, or how specifically Defendants "breached its duty of candor and engaged in inequitable conduct before the Patent Office to obtain its '396 patent.'" Id. ¶¶97-98. Furthermore, "[a] finding of inequitable conduct does not, by itself, suffice to support a finding of Walker Process fraud." King Drug Co. of Florence v. Cephalon, Inc., Civ. A. No. 2:06-cv-1797, 2014 U.S. Dist. LEXIS 32508 at *36 (E.D. Pa. March 12, 2014) (quoting Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337, 1346 (Fed. Cir. 2007)).

For the aforesaid reasons, we grant Defendants' motion to dismiss Count VI of Indirect Purchaser Plaintiffs' Consolidated Amended Complaint, alleging Walker Process Fraud.

B. Indirect Purchasers' State and Consumer Protection Antitrust Claims

1. Standing to bring state antitrust claims

Indirect Purchaser Plaintiffs, employee benefit health plans covering and reimbursing health care for "thousands of beneficiaries in states throughout the country" (Opp. at 39), allege that Defendants violated state antitrust statutes in twenty-nine states. Ind. CAC ¶¶169-185. Defendants argue that these state antitrust and consumer protection claims should be dismissed because Plaintiffs lack Article III standing to sue under the laws of states where they have not yet paid or

reimbursed for Remicade.[4] Defendants concede Plaintiffs have standing in Florida, Michigan, New York, and West Virginia, where "plaintiffs either reside or allege that their members purchased Remicade." (J&J Mot. at 32). Plaintiffs argue they do have standing even where they have "not yet identified purchases or reimbursements," because Defendants' alleged anticompetitive scheme "makes it likely [Plaintiffs] will be required to reimburse for purchases at higher prices for fewer choices of drugs in all jurisdictions alleged." (Pls' Opp. at 39).

For Article III standing, a plaintiff must show "'(1) an injury-in-fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 157 (E.D. Pa. 2009) (quoting Winer Family Trust v. Queen, 503 F.3d 319, 325 (3d Cir. 2007)). "The injury-in-fact requirement is 'very generous' to claimants, demanding only that the claimant

[4] Defendants argue that "[t]he Indirect Purchasers lack [Article III] standing to bring claims under the antitrust and/or consumer protection laws of the following states: Arizona, Arkansas, California, District of Columbia, Hawaii, Iowa, Kansas, Maine, Montana, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Wisconsin, Vermont, and the Virgin Islands." (J&J Mot. at 33).

'allege[ ] some specific, "identifiable trifle" of injury.'" Bowman v. Wilson, 672 F.2d 1145, 1151 (3d Cir. 1982) (quoting SCRAP, 412 U.S. 669, 686-90 & 689 n.14). See Cottrell v. Alcon Labs., 874 F.3d 154, 162 (3d Cir. 2017). "'In the context of a motion to dismiss, we have held that the [i]njury-in-fact element is not Mount Everest." Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 278 (3d Cir. 2014) "'At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice.'" Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992). "[T]he Supreme Court has repeatedly recognized that financial or economic interests are 'legally protected interests' for purposes of the standing doctrine." Cottrell v. Alcon Labs., 874 F.3d 154, 164 (3d Cir. 2017). "Both federal law and state law — including state statutes – 'can create interests that support standing in federal courts.'" Id. at 165 (quoting Cantrell v. City of Long Beach, 241 F.3d 674, 684 (9th Cir. 2001)(internal citations omitted)).

We find Indirect Purchaser Plaintiffs have Article III standing to bring their state law claims. Drawing 'all reasonable inferences in Plaintiffs' favor, Hartig Drug Co. Inc., 836 F.3d at 268, Defendants' alleged ongoing anticompetitive scheme resulting in overcharges to Plaintiffs makes it plausible that Plaintiffs are "imminently threatened

with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014)). "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 758 (E.D. Pa. 2014) (quoting Lewis v. Casey, 518 U.S. 343, 357 (1996). "The Supreme Court has repeatedly affirmed the ability of Congress to 'cast the standing net broadly' and to grant individuals the ability to sue to enforce their statutory rights." In re Horizon Healthcare Servs. Data Breach Litig., 846 F.3d 625, 635 (3d Cir. 2017)(quoting FEC v. Akins, 524 U.S. 11, 19 (1998)).

Defendants try to argue that named, as distinct from absent, Indirect Purchaser Plaintiffs have not alleged an injury in fact in states where Remicade has not yet been paid for or reimbursed. This argument, however, cannot overcome the Third Circuit's holding that so long as one named plaintiff has established Article III standing, unidentified members of the class will not block class standing on a motion to dismiss. See

In re Horizon Healthcare Servs. Data Breach Litig., 846 F.3d 625, 634 (3d Cir. 2017) ("at least one of the four named Plaintiffs must have Article III standing in order to maintain this class action."). It plausible that named Plaintiffs suffered antitrust injury by paying overcharges for infliximab in four states where they paid for or reimbursed Remicade. Accordingly, since Plaintiffs cover beneficiaries in numerous other states, they face an imminent threat of injury in fact in those states as well. Therefore, under Krell v. Prudential Ins. Co. of Am. (in Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 306-07 (3d Cir. 1998), "[o]nce Article III standing 'is determined vis-à-vis the named parties ... there remains no further separate class standing requirement in the constitutional sense.'"

As in In re Chocolate Confectionary Antitrust Litig. and Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295 (1999) and Amchem Prods. v. Windsor, 521 U.S. 591 (1997), Indirect Purchaser Plaintiffs' "capacity to represent individuals from [states other than where Indirect Purchasers reside] depends upon obtaining class certification." Therefore, "[t]hese class certification issues are 'logically antecedent' to the standing concerns," and deferring ruling on them until class certification is appropriate. In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 579-80 (M.D. Pa. 2009).

2. Plausibility of Alleged State Antitrust Violations

Defendants also argue that Indirect Purchaser Plaintiffs fail to allege sufficient facts to make their state antitrust claims plausible under the requirements of various state laws. Plaintiffs withdraw their claims under the law of the Virgin Islands and Rhode Islands' consumer protection statute; therefore, those claims are dismissed with prejudice.

First, Defendants argue that Indirect Purchaser Plaintiffs fail to allege a "significant nexus to the state," as required by state antitrust laws in the District of Columbia, Mississippi, North Carolina, South Dakota, Tennessee, and West Virginia. (J&J Mot. at 46).

District of Columbia:

We find that under Sun Dun, Inc. of Wash. v. Coca-Cola Co., 740 F. Supp. 381 (D. Md. 1990), Indirect Purchaser Plaintiffs' allegations are sufficient to survive Defendants' motion. Plaintiffs allege that "District of Columbia Purchasers paid supracompetitive, artificially inflated prices for infliximab." Ind. CAC ¶167. As the Court held in Sun Dun, "[a]lthough the allegations in the Amended Complaint are vague in terms of the *situs* of harm, . . . they are sufficient to withstand defendants' motions to dismiss the claims based on the D.C. Code." 740 F. Supp. at 396. We apply Sun Dun's reasoning that the question whether Indirect Purchaser Plaintiffs' state

antitrust claims under D.C. Code are barred because they are "interstate in nature," "must await discovery and any motions for summary judgment which defendants choose to file." Id. at 397.

Mississippi:

We agree with Plaintiffs that Standard Oil Co. of Ky. v. State, 107 Miss. 377, 65 So. 468 (1914) controls, and they are not, as Defendants argue, required to plead "at least some conduct by defendant which was performed wholly intrastate." In re Microsoft Corp. Antitrust Litig., MDL No. 1332, 2003 WL 22070561 at *7 (D. Md. Aug. 22, 2003). Here, Plaintiffs have alleged more than the single factual allegation that warranted dismissal in In re Microsoft Corp. Antitrust Litig., instead alleging that Defendants acted in restraint of trade which resulted in Mississippi purchasers paying supracompetitive, artificially inflated prices for infliximab. Ind. CAC ¶174.

North Carolina:

Plaintiffs concede that the law is unsettled as to whether indirect purchasers claiming violations of North Carolina antitrust laws are required to allege "a substantial in-state effect on North Carolina trade or commerce," Lawrence v. UMLIC-Five Corp., No. 06 CVS 20643, 2007 NCBC LEXIS 20, at *51 (N.C. Super. Ct. June 18, 2007). We are persuaded that Plaintiffs' allegations that Defendants restrained trade by monopolizing the

North Carolina infliximab market, resulting in North Carolina purchasers paying artificially inflated prices for infliximab, and substantially affecting North Carolina commerce, Ind. CAC ¶180, are sufficiently pled to survive this motion. The fact-based inquiry can take place after discovery, at summary judgment. See In re Refrigerant Compressors Antitrust Litig., No. 2:09-md02042, 2013 WL 1431756 (E.D. Mich. Apr. 9, 2013); In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 540-41 (E.D. Pa. 2010).

South Dakota:

Under In re DRAM Antitrust Litigation, 516 F. Supp. 2d 1072, 1098-99 (N.D. Cal. 2007), directing that "South Dakota's antitrust statute should be read to cover unlawful anticompetitive conduct, . . . as long as any part of it takes place or has an effect within the state," here, Plaintiffs' claim may proceed because they allege that anticompetitive effects of Defendants' conduct took place within the state: "South Dakota purchasers paid supracompetitive, artificially inflated prices for infliximab." Ind. CAC ¶184.

Tennessee:

We find that Indirect Purchaser Plaintiffs have sufficiently alleged a violation of Tennessee's antitrust laws under the rule from Standard Oil Co. v. State, 100 S.W. 705 (Tenn. 1906) that challenged conduct is sufficiently

"intrastate" to proceed under Tennessee antitrust laws where "it occurred after the product had been imported, not before. . . .the products arrive in Tennessee." FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 51 (D.D.C. 1999). Here, Plaintiffs allege that the defendants engaged in anticompetitive behavior by forcing providers and other companies to enter into anticompetitive agreements on a state by state basis, and that Remicade is administered in person – suggesting that the anticompetitive conduct had not been completed by the time Remicade was imported to Tennessee. Indir. CAC ¶¶122-123. Therefore, their Tennessee state antitrust claims may proceed.

West Virginia:

We find that Plaintiffs have alleged a sufficient "causal connection," In re Magnesium Oxide Antitrust Litig., No. 10-5943 (DRD), 2011 WL 5008090, at *8 n.10 (D.N.J. Oct. 20, 2011), between Defendants' alleged anticompetitive conduct and the resulting in-state effect. Here, Indirect Purchaser Plaintiffs have pled that "Defendants agreed to, and did in fact, act in restraint of trade or commerce by illegally monopolizing and attempting to monopolize the market for infliximab in West Virginia. West Virginia purchasers paid supracompetitive, artificially inflated prices for infliximab." Indir. CAC ¶188. Thus, where they have pled that anticompetitive conduct caused

purchasers in West Virginia to sustain overcharges for infliximab, their West Virginia antitrust claims may proceed.

Second, Defendants argue that Indirect Purchaser Plaintiffs fail to allege requisite concerted activity under the laws of California, Kansas, New York, and Tennessee.[5] We find Plaintiffs have sufficiently pled allegations that Defendants "engaged in a vertical price-fixing scheme and attempted and conspired to monopolize the respective markets by coercing major insurers into exclusive agreements." Indir. CAC ¶¶51-58. See Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986), opinion modified on denial of reh'g, 810 F.2d 1517 (conspiracy based on coercion actionable under California law). Therefore, Plaintiffs' state antitrust claims under California, Kansas, New York, and Tennessee may proceed.

3. Consumer Protection Claims

Defendants move to dismiss Indirect Purchaser Plaintiffs' allegations that J&J violated state consumer protection statutes of Arkansas, California, District of Columbia, Florida, Hawaii, Montana, Nevada, New Hampshire, New Mexico, New York, North

[5] See Cal. Bus. & Prof. Code § 16720 ("A trust is a combination of capital, skill, or acts by two or more persons") (emphasis added); See Kan. Stat. Ann. § 50-101 (prohibiting participation in trusts); See N.Y. Gen. Bus. Law § 340(1) (declaring a "contract, agreement, arrangement, or combination" in restraint of trade to be illegal) (emphasis added); See Tenn. Code Ann. § 47-25-101 (outlawing "arrangements, contracts, agreements, trusts, or combinations" in restraint of trade) (emphasis added). (J&J Mot. at 50).

Carolina, Rhode Island, Utah, Vermont, and West Virginia. Ind. CAC ¶¶225-242.

First, Defendants argue that District of Columbia consumer protection claims can only be asserted by consumers, not indirect purchaser plaintiffs. (J&J Mot. at 47).

District of Columbia:

"'[A valid claim for relief under the [D.C. Consumer Protection Procedures Act, D.C. Code §28-3901 to -3913] CPPA must originate out of a consumer transaction.'" In re Cast Iron Soil Pipe & Fittings Antitrust Litig., No. 1:14-md-2508, 2015 WL 5166014, at *30 (E.D. Tenn. June 24, 2015). The CPPA defines a consumer transaction as a "purchase . . . for personal, household, or family purposes," D.C. Code §28-3901(a)(2)(B)(i). Under Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1005 (1989), a "consumer transaction" will be covered by the CPPA if it involves "the ultimate retail customer," a "purchaser not engaged in the regular business of purchasing this type of goods or service and reselling it." Here, where health-plan members' use of Remicade is "personal" (the drug is used to treat chronic autoimmune diseases), and where the Indirect Purchasers (employee benefit plans) do not resell the drug to their members, the sale of Remicade falls within the protection of the CPPA because it involves the "ultimate retail customer, . . . the individual member of the consuming public." Id. at 1005.

Additionally, we find Indirect Purchasers are "non-profit" organizations under the CPPA, and therefore may "on behalf of itself or any of its members, . . . bring an action seeking relief from the use of a trade practice in violation of a law of the District." D.C. Code §28-3901(a)(14), D.C. Code §28-3905(k)(1)(C).

Second, Defendants' argument that Indirect Purchaser Plaintiffs' state consumer protection claims are insufficiently pled under the "substantial nexus" requirement of California, New York and North Carolina fails because Plaintiffs allege that Defendants' exclusionary scheme resulted in Remicade and other infliximab products being sold at artificially inflated prices and caused overcharges in those states. See Cast Iron, 2015 WL 5166014 at *31; In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 669 (E.D. Pa. 2014) 699, 702 ("The End Payors have alleged that overcharges occurred in California, which is sufficient to establish an intrastate nexus." "As with California, the End Payors have pleaded that overcharges occurred in New York. Therefore, I do not agree with Reckitt's argument that this claim should be dismissed."). See In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d 869 (E.D. Mich. 2014) (finding a sufficiently alleged nexus with North Carolina where indirect purchaser plaintiffs

pled they were "were harmed by paying supracompetitive, artificially inflated prices.").

Third, Defendants argue that Indirect Purchaser Plaintiffs fail to state a claim under consumer protection laws of New Mexico, New York, and Utah, which require an unconscionable, unfair or deceptive act.[6] Defendants' argument here is essentially that made by defendants in In re Dynamic Random Access Memory Antitrust Litig., that the consumer protection statutes "are not meant to cover, and cannot be interpreted to cover, antitrust violations brought by indirect purchasers of goods." 516 F. Supp. 2d 1072, 1106 (N.D. Cal. 2007).

Nevertheless, although we find Plaintiffs' allegations fail to establish "deceptive" conduct (we have dismissed their sham patent litigation and Walker Process patent fraud claims), they have sufficiently alleged "unconscionable" or "unfair" acts under the consumer protection statutes of New Mexico and Utah. See In re Dynamic Random Access Memory Antitrust Litig., 516 F. Supp. 2d 1072, 1118 (N.D. Cal. 2007) (finding "a single

[6] See "N.M. Stat. Ann. § 57-12-2(E) (2009) (unconscionable conduct constitutes acts or practices that "take[] advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree" or "result[] in a gross disparity between the value received by Case 2:17-cv-04326-JCJ Document 67-1 Filed 04/09/18 Page 52 of 56 42 10300721 a person and the price paid"). See New York General Business Law § 349(h) (conferring a private right of action only to a "person who has been injured by reason of" a deceptive act or practice)." (MTD at 53). See Utah Code Ann. § 13-11-1 et seq. (requiring deceptive and unconscionable acts).

statement" alleging that "defendants' publicly provided pre-textual and false justifications regarding their price increases'. . . .insufficient" to qualify as "deceptive" conduct under the [Utah] Consumer Sales Practice Act.).

Here, in contrast to the DRAM plaintiffs' "bare allegation" of deception, Plaintiffs have pled "unconscionable" conduct by alleging Defendants coerced insurers and providers into covering or buying only Remicade, to the exclusion of lower-priced biosimilars, resulting in overcharges to purchasers in, among other states, Utah. Ind. CAC ¶¶236 (a), 237 (a), 240 (c)). See In re Packaged Seafood Prods. Antitrust Litig., 242 F. Supp. 3d 1033, 1081 (S.D. Cal. 2017 (holding that allegations of "'significant artificial increases' to product price and even allegations solely of 'pa[ying] more for' products as validly pled for purposes of the [New Mexico Unfair Trade Practices Act ("NMUTPA")]; finding Plaintiffs' allegations of "price increases, sales tactics, and refusal to offer certain products under flagship labels that, taken together, plausibly allege a gross disparity in pricing.").

However, Plaintiffs' New York consumer protection claim (under General Business Law §349) must fail because New York's law requires a plaintiff to "allege *both* a deceptive act or practice directed toward consumers and that such act or practice resulted in actual injury to a plaintiff." Blue Cross & Blue Shield of

N.J., Inc. v. Philip Morris USA Inc., 3 N.Y.3d 200, 785 N.Y.S.2d 399, 818 N.E.2d 1140, 1143 (2004) (emphasis added).

Fourth, Defendants argue that Indirect Purchaser Plaintiffs are barred from bringing claims under West Virginia's Consumer Credit and Protection Act because they failed to provide pre-suit written notice under W. Va. Code § 46A-6-101 *et seq*. The 2015 amendment to the statute added the provision that an action may only be brought once a seller has been given "ten days [from receipt of the notice of violation] *in the case a cause of action has already been filed* to make a cure offer" (emphasis added). W. Va. Code §46A-6- 106(c). Plaintiffs argue that the 2015 amendment evidences an intent not to bar actions where a plaintiff has sent notice post-suit so long as notice was eventually sent and provided seller with ten days to make a cure offer. Although "courts have interpreted this statute as a 'mandatory prerequisite[ ]' to commencing a consumer protection claim under the Act," In re Effexor Antitrust Litig., Civil Action No. 3:11-cv-5661 (PGS)(LHG), 2018 U.S. Dist. LEXIS 158904, at *11 (D.N.J. Sep. 18, 2018), we agree with Plaintiffs that those courts have relied on pre-amendment reasoning.[7]

[7] In re Effexor relied on Harrison v. Porsche Cars N. Am., Inc., No. 15-0381, 2016 W. Va. LEXIS 245, at *5 (W.Va. 2016), which relied on pre-amendment Stanley v. Huntington Nat'l Bank, No.11-54, 2012 U.S. Dist. LEXIS 9448, at *20-21 (N.D.W.Va. Jan. 27, 2012)). See Mullins v. Ethicon, No. 2:12-cv-02952, 2017 WL 319804, at *3 (S.D. W. Va. Jan. 20, 2017) (relying on two cases that predate the amendment:

Here, Plaintiffs sent Defendants notice on May 21, 2018, three months after filing their CAC, an instance contemplated by the amendment, where "a cause of action [had] already been filed". (J&J Reply at 29). In keeping with the West Virginia Legislature's intention that the state's consumer protection laws as amended "not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest," W. Va. Code § 46A-6-101 (LexisNexis, Lexis Advance through all 2018 Regular Session Legislation), we find Plaintiffs fulfilled their notice obligation.

Fifth, Defendants argue that Plaintiffs fail to meet the venue requirements[8] of Arizona's antitrust and the District of Columbia's consumer protection statutes. We find federal case law persuasive that "[w]hether the state law that provides for the requisite state court jurisdiction is couched in permissive or mandatory terms has never been thought to affect the federal courts' jurisdiction." D.C. ex rel. Am. Combustion, Inc. v. Transamerica Ins. Co., 254 U.S. App. D.C. 374, 797 F.2d 1041, 1045 (1986). Additionally, considering that the Arizona Supreme

Corp., 52 F. Supp. 3d 796, 812 (N.D. W. Va. 2014) and Stanley, No. 1:11-cv-54, 2012 WL 254135, at *8).

[8] See Ariz. Rev. Stat. § 44-1405 ("An action for violation of this article shall be brought in the superior court."). See D.C. Code § 28-3905(k)(2) ("Any claim under this chapter shall be brought in the Superior Court of the District of Columbia . . . ."). (J&J Mot. at 53).

Court "expressly declined to apply Illinois Brick" in an effort to "afford greater protection to Arizona citizens" by broadening instead of limiting the standing requirements for antitrust claims, Bunker's Glass Co. v. Pilkington PLC, 206 Ariz. 9, 22 (2003), we decline to read Arizona's antitrust statute's permissive language as a bar to federal jurisdiction. See id. (noting that the plain language of [Ariz. Rev. Stat.] § 44-1408 is "almost identical to its federal counterpart, section 4 of the Clayton Act.").

Unless Congress has "expressly provide[d] that removal [to federal court] is improper," D.C. ex rel. Am. Combustion, Inc. v. Transamerica Ins. Co., 254 U.S. App. D.C. 374, 797 F.2d 1041, 1047 (1986), federal jurisdiction may be upheld. See also Eckert v. Fitzgerald, 550 F. Supp. 88 (D.D.C. 1982) (action brought in D.C. Superior Court under statute providing that suit may be brought in D.C. Superior Court was removable to federal district court)).

V. CONCLUSION

For the foregoing reasons, Indirect Purchaser Plaintiffs' sham litigation and Walker Process claims, as well as their claims under the consumer protection statutes of Rhode Island and New York are dismissed. For all other claims, J&J's Motion to Dismiss is denied.

An appropriate Order will follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE REMICADE ANTITRUST LITIGATION	:	CIVIL ACTION
This document relates to:	:	
Indirect Purchaser Actions (consolidated)	:	No. 17-cv-04326
Direct Purchaser Actions	:	No. 18-cv-00303

ORDER

AND NOW, this 4th day of December, 2018, upon consideration of Defendants' Motion to Dismiss (Doc. No. 67-1), Indirect and Direct Purchaser Plaintiffs' Joint Opposition thereto (Doc. No. 73), and Defendants' Reply in Support thereof (Doc. No. 75), it is hereby ORDERED that Indirect Purchaser Plaintiffs' sham litigation and Walker Process claims (Count VI, Doc. No. 53), and their claims under the consumer protection statutes of Rhode Island and New York (Count VII, Doc. No. 53) are DISMISSED. For all other claims, J&J's Motion to Dismiss is DENIED.

BY THE COURT:

J. CURTIS JOYNER, J.