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

A&B CAMPBELL FAMILY LLC, *et al.*,	:	
	:	
Plaintiffs,	:	**No. 3:15-cv-0340-MEM**
	:	
v.	:	
	:	
CHESAPEAKE ENERGY CORPORATION, *et al.*,	:	
	:	
Defendants.	:	

PLAINTIFFS' CONSOLIDATED BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

Plaintiffs respectfully submit this consolidated brief in opposition to the separate motions to dismiss filed by defendants Chesapeake Energy Corporation ("Chesapeake"), Chesapeake Appalachia, L.L.C. ("Chesapeake Appalachia"), Chesapeake Energy Marketing, Inc. ("CEMI") and Chesapeake Operating, Inc. ("Chesapeake Operating" and, together with Chesapeake, Chesapeake Appalachia and CEMI, the "Chesapeake Defendants") [Doc. 117], Anadarko E&P Onshore LLC, as successor by conversion to and f/k/a Anadarko E&P Company LP ("Anadarko") [Doc. 111], Mitsui E&P USA LLC ("Mitsui") [Doc. 113], and Williams Partners, LP f/k/a Access Midstream Partners, L.P. ("Access Midstream"), and its affiliates Access MLP Operating, L.P., n/k/a Williams MLP Operating, L.L.C. ("AMLP Operating"), and Appalachia Midstream Services, L.L.C. ("Appalachia Midstream") [Doc. 115].

PLAINTIFFS' FACTUAL ALLLEGATIONS[1]

Chesapeake is a publicly traded oil and gas company which, through its subsidiaries, including Chesapeake Appalachia, is one of the largest producers of natural gas in the United States.

Beginning in late 2005 and early 2006, Chesapeake and Anadarko embarked on separate acquisition programs to acquire oil and gas leases to properties located above multiple shale formations throughout the United States, including the Marcellus Shale located in Pennsylvania. Am. Comp. ¶130. In Chesapeake's 2010 Annual Report filed on March 1, 2011, Chesapeake described its acquisition program, and openly admitted its goal of locking out competitors from the best new unconventional resource plays:

> … [W]e embarked on an aggressive lease acquisition program, which we have referred to as the "gas shale land grab" of 2006 through 2008…. We believed that the winner of these land grabs would enjoy competitive advantages for decades to come as other companies would be locked out of the best new unconventional resource plays in the U.S.

Id.

Anadarko acquired hundreds of oil and gas leases to properties in Bradford County, Pennsylvania, and in surrounding counties, either itself or through its

[1] Plaintiffs here provide only a brief overview of their extensive factual allegations, which are set forth in full in the Amended Complaint. Additional factual allegations from the Amended Complaint are included in the relevant sections of the Argument below.

predecessor, T.S. Calkins & Associates, Inc., including leases with the plaintiffs or their predecessors in interest, pursuant to which plaintiffs hold royalty interests in the natural gas produced and marketed from underlying leaseholds. In the aggregate, plaintiffs are the owners, or assignees of the owners, and hold royalty interests in the natural gas produced from, over 12,000 acres of leasehold land. (¶¶1, n.1, 8, 41-114, 143-144).

Both Chesapeake and Anadarko also were pursing vertically integrated business models that included not only the production of natural gas, but also related interlocking business opportunities in midstream gathering pipelines and services. (¶131).

Rather than continue to compete for leases in Pennsylvania, Chesapeake and/or Chesapeake Appalachia entered into a 50/50 Joint Exploration Agreement with Anadarko, dated September 1, 2006 (the "JEA"), covering portions of Bradford, Sullivan, Susquehanna and Wyoming Counties within a defined area of mutual interest ("AMI"). Pursuant to the JEA, Anadarko assigned fifty percent (50%) of its interests in its leases within the area, including plaintiff's leases, to Chesapeake Appalachia. (¶136). Pursuant to the JEA or subsequent agreements, Anadarko and Chesapeake also agreed to share ownership in anticipated gas gathering systems to be constructed to service anticipated wells. (¶138). Anadarko subsequently entered into an Appalachia Area Participation Agreement, dated effect

January 1, 2010, with Mitsui, pursuant to which Anadarko assigned interests in the leases to Mitsui. (¶140)

To fund its gas shale land grab, Chesapeake Energy borrowed increasingly greater amounts of money, resulting in it having a highly leverage balance sheet, including current liabilities of $7 billion, and long term liabilities of almost $17 billion, by the end of 2011. Chesapeake also raised additional money by entering into an industry participation agreement with Statoil USA Onshore Properties LLC in November 2008, in consideration for an upfront cash payment of $1.250 billion by Statoil, plus a commitment to pay 75% of Chesapeake's drilling and completion costs in the Marcellus Shale play up to $2.125 billion.[2]

Defendants Chesapeake Appalachia, Anadarko and Mitsui, along with Statoil USA Onshore Properties LLC (together, the "Lessee Defendants") and/or their respective corporate parents or affiliates, which otherwise are competitors in the business of natural gas exploration and production, divided and allocated among themselves and other non-party competitors the geographic markets for Gas Mineral Rights, Operating Rights and Gathering Services (as defined in the Amended Complaint), in multiple counties in Northern Pennsylvania, with the intent and effect of reducing, restraining or eliminating competition for Gas Mineral Right. (¶8).

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[2] Statoil was originally named as a defendant in this action, but Plaintiffs subsequently voluntarily dismissed this action as against Statoil only, without prejudice [Doc. 110]

The Lessee Defendants implemented their scheme by entering into a variety of contracts and establishing a variety of relationships, including joint venture agreements, joint exploration agreements, assignments and partial assignments of oil and gas leases, and agreements to exchange oil and gas assets, including the establishment of contractually designated "areas of mutual interest" ("AMI") located in Bradford County, Pennsylvania, in adjacent portions of Sullivan, Susquehanna and Wyoming Counties, Pennsylvania. (¶9).[3]

By allocating the market for Gas Mineral Rights among themselves, the Lessee Defendants intended to and did: (i) reduce, restrain or eliminate competition for Gas Mineral Rights, and for the right to operate working interests in oil and gas leases, within the defined AMI; (ii) fix, lower or maintain the price that they had to pay to acquire Gas Mineral Rights (in the form of both initial bonus payments and ongoing royalties) to landowners within the defined AMI; and (iii) enable

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[3] Certain of the defendants attempt to paint the agreements by which they implemented their scheme as routine, benign and "not anti-competitive", by impermissibly attempting to supplement the pleadings with opinion and hearsay allegations from extraneous articles and treatises. These extraneous materials, by which defendants seek to bolster their self-serving characterizations of agreements which defendants have elected not to submit to the Court, and which are not publicly available, should not be considered by the Court at this stage of the case. This is particularly true in light of recent increased scrutiny of oil and gas industry collaboration agreements by federal antitrust agencies. *See*, e.g., Edward B. Schwartz, *Toughened Oversight Raises Antitrust Hazards of Oil Industry Collaborations*, Oil & Gas Journal, Vol. 111, Issue 4 (04/01/2013), available at http://www.ogj.com/articles/print/volume-111/issue-4/general-interest/toughened-oversight-raises-antitrust.html (last visited 10/23/2015) ("[p]otentially troublesome collaboration can take forms considered to be routine in the industry, such as area-of-mutual-interest (AMI) agreements….")

themselves to then reduce, restrain or eliminate competition in the markets for Operating Rights and Gathering Services in and around the defined AMI. (¶11). As a result of the market allocation scheme, Chesapeake Appalachia effectively became the sole purchaser of Gas Mineral Rights within the defined AMI, which enabled Chesapeake Appalachia and the other Chesapeake Defendants to effectively control Operating Rights and Gathering Services in the AMI. (¶12).

In August 2010, facing increasing financial difficulties, Chesapeake and investors formed Access Midstream, then known as Chesapeake Midstream Partners, L.P., and began selling Access Midstream much of its midstream assets – including its natural gas gathering and intrastate pipeline operations. (¶¶28, 173).

By 2012, Chesapeake's financial condition had become so dire that its revenue generating scheme took on a new dimension. (¶¶180-181). In December 2012, Chesapeake completed the spinoff of its gathering operations to Access Midstream, which included certain Marcellus Shale midstream assets. (¶¶182-89). Two Chesapeake insiders, J. Michael Stice and Domenic J. Dell'Occo, Jr., were chosen to lead these new operations on behalf of what were supposed to be independent companies. (¶¶182-89). However, the spinoff of these gathering operations was not a true asset sale, but instead amounted to an off-balance sheet loan from Midstream disguised as an asset sale. (¶206).

As part of the deals, Access Midstream also entered into certain new gathering agreements, under which Chesapeake agreed to pay Access Midstream for natural gas gathering and transportation services. (¶196). Although Chesapeake and Access have characterized the fees they negotiated as "cost-of-service based fees", they were not. (¶197). Instead, Chesapeake and Access Midstream negotiated terms which would and did result in the payment supra-competitive, above-market fees to Access Midstream, which, acquired enhanced market power in the transaction. Chesapeake and Access knew and intended that the fees would be passed-on to royalty interest owners, including plaintiffs, as deductions from their royalties -- to the benefit of both Chesapeake (and the Lessee Defendants) and Access Midstream. (¶¶205-207, 210). The arrangement was structured to enable Chesapeake to repay to Access Midstream what amounted to a $5 billion loan, along with a guaranteed, above-market rate of return. (¶206).

To accomplish the scheme, Chesapeake and its affiliates sent through the mail and wires royalty statements and royalty payments reflecting artificially inflated deductions for gas gathering and transportation fees. (¶¶276-84). Each of these statements and payments implicitly and fraudulently represented that the royalty deductions were legitimately incurred. (¶65). They were not.

Defendants' actions led to widespread complaints of fraud and cheating and drew the attention of Governor Corbett, Attorney General Kane and Bradford County Commissioners. (¶¶31-32).

LEGAL STANDARD

Dismissal is appropriate only if, accepting as true all of the facts alleged in the complaint, a plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The facts alleged must be sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 544. This requirement "calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of" necessary elements of the plaintiff's cause of action. *Id*.

The standard for the dismissal of antitrust claims at the motion to dismiss stage is somewhat higher than it is for other claims. *See URL Pharma, Inc. v. Reckitt Benckiser, Inc.*, 2015 WL 5042911, at *3 (E.D.Pa. Aug. 25, 2015); *Sheet Metal Duct, Inc. v. Lindab, Inc.,* 2000 WL 987865, at *2 (E.D.Pa. July 18, 2000). Courts liberally construe antitrust complaints at this stage of the proceeding. *See Commonwealth of Pa. ex rel. Zimmerman v. PepsiCo, Inc.,* 836 F.2d 173, 179 (3d Cir. 1988). "[I]n antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be

granted very sparingly." *Hosp. Bldg. Co. v. Trustees of Rex Hosp.,* 425 U.S. 738, 746 (1976) (quoting *Poller v. Columbia Broad.,* 368 U.S. 464 (1962)).

ARGUMENT

I. PLAINTIFFS STATE LEGALLY COGNIZABLE AND SUFFICIENT ANTITRUST CLAIMS.

Plaintiffs have alleged multiple agreements between and among the respective defendants, pursuant to which they engaged in concerted actions alleged to have constituted unreasonable restraints of trade. Although joint venture agreements are not automatically subject to review under the *per se* rule, "the nomenclature 'joint venture' does not automatically exempt a combination from the *per se* rule which is found to have elements inherently offensive to the antitrust laws." *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, at *8 (1st Cir. 1979) (citing *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951)) (affirming judgment against horizontal competitors for territorial allocation of market under *per se* rule, notwithstanding claim of joint venture). In any case, the Amended Complaint contains far more than bare allegations of joint venture, including facts sufficient to plead a reduction in competition in each of three product markets as a result of the conduct of the defendants.

A. Because Plaintiffs Have At All Times Held, In Addition to Their Royalty Interests, Ongoing Property Rights and Interests in Their Gas Mineral Rights, Which Remained Subject to Injury From Anticompetitive Activity by Defendants After Plaintiffs or Their Predecessors Entered Into Their Lease Agreements With Anadarko, Plaintiffs Have Stated Plausible Antitrust Claims With Respect to the Market for Gas Mineral Rights.

Chesapeake argues that because plaintiffs' leases with Anadarko predated the JEA between Chesapeake and Anadarko (as well as the subsequent agreements among the Defendants), the separate agreements and conspiracy among the defendants could not have affected competition for plaintiffs' Gas Mineral Rights, and that plaintiffs therefore have failed to state any antitrust claim with respect to Gas Mineral Rights, citing *Newman v. Universal Pictures*, 813 F.3d 1519 (9th Cir. 1987). Chesapeake is mistaken. Chesapeake's argument overstates the scope of the Ninth Circuit's holding in *Newman*, and fails to take into account the effect of what the Pennsylvania Supreme Court has described as the "unique characteristics" of oil and gas leases, *T.W. Phillips Gas and Oil Co. v. Jedlicka*, 42 A.3d 261, 267 (Pa. 2012).

In *Newman*, actor Paul Newman and director Roy Hill entered into contracts to supply their services to Universal in connection with two films. The contracts provided for Newman and Hill to receive percentages of certain revenues from the films. Years later, Universal began to distribute the films in a new medium – videocassettes – resulting in a substantial influx of new revenue. When Universal

failed to pay Newman and Hill percentages of the new revenue, they brought antitrust claims alleging that Universal had conspired with other film studios to apply the profit participation clauses in their contracts in a manner that minimized the amounts payable to Newman, Hill and others. The Ninth Circuit found that the alleged anticompetitive conspiracy could not have injured competition for Newman's and Hill's services, because their services predated the alleged conspiracy.

Four years later, in *Z Channel Ltd. Partnership v. Home Box Office, Inc.*, 931 F.2d 1338 (9th Cir. 1991), the Ninth Circuit rejected an attempt by the defendants in that case to "extract from *Newman* a broad rule that interpretation and application of contracts that preexist … anticompetitive activity cannot, as a matter of law, cause antitrust injury." 931 F.2d 1342. Instead, the Court explained, "[t]he key [to *Newman*]… is not merely that Newman's and Hill's *contracts* predated the conspiracy; it was that the only *competition* alleged to be injured predated the conspiracy." *Id.* (emphasis in original). In *Z Channel*, on the other hand, the Court noted that, although *certain* of the competition in which the plaintiff had been engaged ended when they entered into the contracts at issue, the plaintiff continued to engage in *other* forms of competition during the period that the defendants were alleged to have engaged in unlawful anti-competitive conduct. (*Id.* at 142-43). As a result, because the anticompetitive activity of which Z Channel complained *could*

have caused injury to competition by Z Channel, the Court held that *Newman* did not foreclose Z Channel's antitrust claims. (*Id.* at 134-45).

Here, even after executing their leases with Anadarko, the plaintiffs remained prospective participants in the market for Gas Mineral Rights, and therefore subject to potential injury in the market for such rights by the anticompetitive activity of the defendants, due to the unique characteristics of oil and gas leases. Unlike the personal service contracts involved in *Newman*, which had been fully performed by the plaintiffs prior to the alleged anticompetitive conduct by defendants, leaving the plaintiffs with only contractual rights to receive defined percentages of the production revenues generated by their films, plaintiffs' oil and gas leases did not operate to immediately convey *any* estate in the operative Gas Mineral Rights, but instead gave Anadarko only the right to pursue exploration and development of the leasehold properties, unless and until Anadarko commenced production of gas. In addition to royalty interests in any production, Plaintiff retained ongoing vested property rights and interests, which remained subject to potential competition among gas exploration and production companies. Because these retained rights and interests (including the right of reverter that plaintiffs retained even after Anadarko commenced production) could have been (and were) injured by the anticompetitive conduct of the defendants, the pre-existing Leases did not operate to insulate defendants from liability for their subsequent anti-competitive conduct.

Pennsylvania courts have recognized oil and gas leases to be contracts which also involve potential conveyances of property rights. As the Pennsylvania Supreme Court has observed, however, "the traditional oil and gas 'lease' is far from the simplest of property concepts." *Jedlicka*, *supra*, 42 A.3d at 267 (quoting *Brown v. Haight*, 255 A.2d 508, 510 (Pa. 1968)). The habendum (or term) clause in an oil and gas lease typically creates two separate terms – a "primary" term of specified fixed duration, and a "secondary" term of indefinite duration, with the nature and extent of any property conveyed varying depending on whether the lease is in its primary or secondary term.

The title conveyed in an oil and gas lease during the initial or primary term is inchoate, and is for the purpose of exploration and development only. *See Jedlicka, supra.*, 615 Pa. at 208, 42 A.3d at 267; *see also Hite v. Falcon Partners,* 13 A.3d 942 (Pa. Super. Ct. 2011) (same)*; Jacobs v. CNG Transmission Corp.,* 332 F.Supp.2d 759, 772 (W.D.Pa.2004) (same). At the expiration of the primary term, the lease terminates as a matter of law, and no estate vests in the lessee, unless oil or gas is produced during the primary term. If "oil and gas is produced, a fee simple determinable is created in the lessee, and the lessee's right to extract the oil or gas becomes vested." *Jedlicka, supra*., 615 Pa. at 208, 42 A.3d at 267. A fee simple determinable is "an estate in fee that automatically reverts to the grantor upon the occurrence of a specific event." *Jedlicka*, (quoting *Brown*, 255 A.2d at 511). The

interest held by the grantor after such a conveyance is termed "a possibility of reverter." *Higbee Corp. v. Kennedy*, 428 A.2d 592, 595 (1981). The interest is a fee simple because it may last forever in the grantee and his heirs and assigns, "the duration depending upon the concurrence of collateral circumstances which qualify and debase the purity of the grant." Id. at 595 n. 4 (*quoting Slegel v. Lauer*, 23 A. 996, 997 (Pa. 1892)).

The initial construction of gathering and midstream assets within the AMI did not commence until in or about May 2008, which supports a reasonable inference that gas production did not begin on any of plaintiffs' leaseholds until sometime thereafter. *See* Am. Compl. ¶139. Thus, as of September 2006, when Chesapeake and Anadarko entered into their JEA, Plaintiffs' leases were still in their primary terms. As a result, unless and until Chesapeake and Anadarko commenced gas production, they had only an inchoate, unvested interest in plaintiffs' Gas Mineral Rights, which remained subject to termination at the expiration of the primary term, and plaintiffs continued to hold vested property rights in their Gas Mineral Rights, which remained subject to potential competition from other gas exploration and production companies in the event that Chesapeake and the other Lessee Defendants did not undertake production during the primary terms of the leases. Even after the Lessee Defendants commenced production of gas on Plaintiffs' leaseholds, however, plaintiffs continued to hold (and to this day continue to hold) rights of reverter in

their Gas Mineral Rights. As a result, plaintiffs at all relevant times had, and continue to have, ongoing property interests in their Gas Mineral Rights, above and beyond their royalty interests, unlike Paul Newman and Roy Hill, who apparently had no ownership interests in their films. The interests held by plaintiffs remained subject to competition in the market for Gas Mineral Rights. Accordingly, *Newman* does not apply to foreclose plaintiffs' claims.

B. Plaintiffs Sufficiently Allege Antitrust Injury and Antitrust Standing In Connection With Their Claims For Defendants' Unlawful Anticompetitive Activity in the Markets for Gas Mineral Rights, Operating Rights, and Gathering Services.

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519 (1983), the Supreme Court discussed the multiple factors that should be considered in determining whether a party has antitrust standing. The Third Circuit has summarized those factors as follows:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc., 227 F.3d 62, 76 n. 12 (3d Cir. 2000) (citing *In re Lower Lake Erie Iron Ore Antitrust Litig.,* 998 F.2d 1144,

1165–66 (3d Cir. 1993)). The Third Circuit "has refused to fashion a black-letter rule for determining standing in every case," and instead examines these many constant and variable factors on a case-by-case basis. *Merican, Inc. v. Caterpillar Tractor Co.,* 713 F.2d 958, 964–65 (3d Cir. 1983).

The second factor relates to the requirement of "antitrust injury." Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 331 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,* 429 U.S. 477, 489 (1977)). "The injury should reflect the anticompetitive effect *either* of the violation *or* of anticompetitive acts made possible by the violation." *Brunswick,* 429 U.S. at 489 (emphasis added). A plaintiff must show that the challenged conduct affected the prices, quantity or quality of goods or services. *Tunis Bros. Co., Inc. v. Ford Motor Co.,* 952 F.2d 715, 728 (3d Cir. 1991). "Antitrust injury is a necessary but insufficient condition of antitrust standing." *Barton & Pittinos v. Smithkline Beecham Corp.,* 118 F.3d 178, 182 (3d Cir. 1997) (citing *Lake Erie,* 998 F.2d at 1166).

As the Third Circuit has noted, "the existence of antitrust injury is not typically resolved through motions to dismiss." *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.,* 113 F.3d 405, 417 (3d Cir. 1997) (citing *Brader v. Allegheny Gen. Hosp.,* 64 F.3d 869, 876 (3d Cir. 1995))

Defendants argue that plaintiffs lack antitrust standing because they are neither consumers nor competitors in the alleged relevant markets, citing Third Circuit case law which stands for the proposition to antitrust standing is *generally* or *typically* limited to "consumers and competitors in the relevant market, and to those whose injuries are 'inextricably intertwined' with the alleged antitrust conspiracy." *See Ethypharm S.A. Fr. v. Abbott Labs*, 707 F.3d 223, 233 (3d Cir. 2013) and *W. Penn Allegheny Health Syst. v. UPMC*, 627 F.3d 85, 102 (3d Cir. 2010).
As shown by the Third Circuit's decision in *UPMC*, however, the limitation of antitrust standing to consumers and competitors is relevant only in the context of claims against *sellers* of products or services who are alleged to have engaged in traditional horizontal agreements or conspiracies to raise prices to supracompetitive levels. The limitation is not relevant in the context of claims, such as those by plaintiffs in the present case, which are focused on the abuse of market power by *buyers* of Gas Mineral Rights– here, the Lessee Defendants – acting in conspiracy others to restrain trade by artificially reducing the price payable to *sellers* of Gas Mineral Rights– here, the plaintiffs.

The Supreme Court has clearly held that antitrust laws apply not only to restraints on *output* markets, but also to restraints on *input* markets:

> It is clear that the [anti-competitive buyer's price-fixing] agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers.
>
> * * *
>
> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 235–36, (1948) (citations omitted). In *Mandeville Island Farms*, the Court held that the plaintiff sugar beet growers stated valid claims under Sections 1 and 2 of the Sherman Act against a sugar beet buyer who colluded with other buyers to pay uniform prices for beets.

In *UPMC*, the Third Circuit cited and discussed *Mandeville Island Farms in* reversing the dismissal of an antitrust claim brought by a provider of health care services based on claims that the defendant health insurer had unreasonably restrained trade by artificially depressing the reimbursement rates that it paid to the provider plaintiff. The Third Circuit found that the insurer's suppression of reimbursement rates was an improper exercise of its monopsony power in the

Pittsburgh area market, and an anticompetitive aspect of the alleged conspiracy between the defendants, and therefore constituted antitrust injury to the provider. 627 F.3d at 104-105.

Numerous other courts have likewise recognized that the Sherman Act applies to protect sellers from anticompetitive conduct by buyers. *See Telecor Communications, Inc. v. Southwestern Bell Telephone* Co., 305 F.3d 1124, 1133-36 (10th Cir. 2002); *Todd v. Exxon Corp.*, 275 F.3d 191, 201-202 (2d Cir. 2001) (and cases cited therein).

Plaintiffs have alleged antitrust injury and antitrust standing in their capacities as sellers in the market for Gas Mineral Rights. Alternatively, plaintiffs also have alleged that they have antitrust standings because the economic harm they suffered was the means by which the defendants sought to achieve their anticompetitive ends in the markets for Operating Rights and Gathering Services, and therefore was inextricably intertwined with defendants' wrongdoing. Am. Compl. ¶252. The Supreme Court expressly recognized and explained the "inextricably intertwined" test for antitrust standing in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479-81, 491-92 (1982). In *Carpet Group Int'l, supra*, the Third Circuit held that the plaintiff brokers of oriental rugs, who were neither direct competitors of the defendants nor consumers, had antitrust standing because their injury was "inextricably intertwined" with the defendants' alleged anticompetitive conduct in

the market for oriental rugs. 227 F.3d at 76-77. In more recent cases, however, the Third Circuit has noted that, following *Carpet Groups Int'l*, it has "not extended the 'inextricably intertwined' exception beyond cases in which both plaintiffs and defendants are in the business of selling goods and services in the same relevant market." *Ethypharm S.A. Fr. v. Abbott Labs.*, 707 F.3d 223, 233 (3d Cir. 2013) (citing *Broadcom Corp. v. Qualcom, Inc.*, 501 F.3d 297, 320-21 (3d Cir. 2007)). Defendants imply that Third Circuit has adopted an additional bright-line requirement for "inextricably intertwined" standing. Plaintiffs disagree, and instead believe that the Court was simply describing the fact that, since *Carpets Group Int'l*, it has not found a sufficient basis to find "inextricably intertwined" antitrust standing in any cases other than those in which the parties had the characteristics noted. Given that the plaintiff in *McCready* was not in the business of selling goods or services in the relevant market in that case, however, plaintiffs do not presume that the Third Circuit has adopted a standard that would be inconsistent with *McCready*.

C. Plaintiffs Sufficiently Allege Harm From a Reduction in Competition in the Market for Gathering Services.

Plaintiffs allege that the Chesapeake and Anadarko, with the support of the other Lessee Defendants, (i) unlawfully obtained and control of the market for Gas Mineral Rights in the relevant geographic market, (ii) placed that control into the hands of Chesapeake, by granting it exclusive Operating Rights in the relevant geographic market. At that point, Chesapeake held and exercised unlawfully

acquired monopsony power in the market for Gas Mineral Rights, and monopoly power in the market for Operating Rights, in the relevant geographic market. Plaintiffs allege that Chesapeake then leveraged its unlawfully acquired market powers to unlawfully develop and acquire monopoly in the market for Gathering Services in the same geographic market. Finally, plaintiffs allege that, in connection with the CMO Acquisition, Chesapeake and Access Midstream improperly leveraged Chesapeake's existing unlawfully monopoly in the market for Gathering Services, but also by bolstering and extending that power in the hands of Access Midstream by contemporaneously entering into new, long-term gathering agreements. Plaintiffs allege that through the CMO Acquisition and the new gathering agreements executed in connection with the transaction, "*Chesapeake ... not only transferred its existing, unlawfully acquired monopoly power to Access ... but also effectively bolstered and extended that monopoly power.*" Am. Compl. ¶247; ¶¶196, 204-211, 214-15.

The Chesapeake Defendants attempt to frame the CMO Acquisition as the mere transfer of lawfully acquired monopoly power from one entity to another, with no resulting harm to competition in the market for gathering services, and thus no antitrust significance. The facts alleged in the Amended Complaint, construed in favor of plaintiffs, however, show otherwise. Plaintiffs allege that Chesapeake and Access Midstream augmented, bolstered and extended the monopoly power of

Access Midstream by entering into *new*, long-term gathering agreements in connection with CMO Acquisition. (¶¶196-204, 211, 247). As a result of the agreements made between Chesapeake and Access Midstream in connection with the CMO Acquisition, including Chesapeake's guaranty to Access Midstream of an above-market rate of return, costs for Gathering Services increased dramatically following the CMO Acquisition, supporting a strong inference of a reduction in competition in the market. (¶¶205-209, 211, 213-17, 219-22).

Access Midstream argues that plaintiffs' allegations do not support an inference that the supra-competitive gathering fees charged by Access following the CMO Acquisition resulted from any exercise of market power by Access, because they are "consistent with normal commercial incentives facing [the] defendants." *See* Access Brief at 17 (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F.Supp.2d 666, 690 (S.D.N.Y. 2013)) ("*LIBOR I*"). Access essentially argues that there can be no antitrust injury where parties who collude to achieve anticompetitive results had normal commercial incentives to pursue the same results unilaterally, an argument which does not implicate the concept of antitrust injury, and which would effectively impose an additional pleading requirement that has no basis in law. *See In re Foreign Exchange Benchmark Rates Antitrust Litig*., 74 F.Supp.3d 581, 597 (S.D.N.Y. 2015) (disagreeing with *LIBOR* I).

D. Plaintiffs Plead Legally Sufficient and Plausible Geographic and Product Markets.

Although there is no *per se* prohibition against dismissal of antitrust claims for failure to plead a relevant market, "[i]t is true that in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers." *Queen City Pizza, Inc. v. Domino's Pizza Inc.*, 124 F.3d 430 (3d Cir.1997) (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992).

Plaintiffs plead the same proposed geographic and product markets for both their Section 1 claim and their Section 2 claim. *See* Am. Compl. ¶¶ 237, 258. Plaintiffs further plead that, "[b]ecause there are known to be rich deposits of natural gas in the Marcellus Shale located beneath the surface of the land in and around Bradford County, the relevant geographic market, as alternately defined above, is not reasonably interchangeable with other geographic markets." (¶¶237-39, 258-59). Plaintiffs have met their burden of defining the relevant markets, including by expressly defining the proposed relevant product markets with reference to the rule of interchangeability and cross-elasticity of demand between the product or services themselves, and substitutes for them, and have proposed markets that encompass all reasonable substitutes. (¶ 239); *see, also Queen City Pizza*, 124 F.3d at 436-438. Plaintiffs, therefore, have sufficiently alleged relevant geographic and product markets.

Consistent with the general rule articulated in *Eastman Kodak*, plaintiffs cannot reasonably be expected or required to define the proposed markets with any further precision until after they have had the opportunity to conduct factual inquiries into the commercial realities faced by natural gas exploration and production companies in discovery. *See Eastman Kodak*, 504 U.S. at 482.

E. Plaintiffs Sufficiently Allege Agreements Among the Defendants That Imposed Unreasonable Restraints of Trade Within the Markets for Gas Mineral Rights, Operating Rights and Gathering Services.

Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. Under Section 1 of the Sherman Act, a plaintiff must plausibly allege the following three elements: (1) an agreement; (2) imposing an unreasonable restraint of trade within a relevant product market; and (3) resulting in antitrust injury, that is "injury of the type the antitrust laws were intended to prevent and ... that flows from that which make defendants' acts unlawful." *In re Ins. Brokerage Antitrust Litig*., 618 F.3d 300, 315 (3d Cir. 2010).

At the pleading stage, plaintiff's complaint must aver facts creating a plausible inference that defendants entered an agreement to restrain trade. *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965. The plaintiff must "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.; Phillips*, 515 F.3d at 232.

An agreement "requires some form of concerted action, which we define as unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme." *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011) (citations omitted). An agreement may be pleaded by a plaintiff by alleging either direct or circumstantial evidence or a combination of the two. *Id.* Here, plaintiffs' aver detailed factual allegations of overlapping schemes among the defendants which are sufficient to create a plausible inference that the defendants entered into an agreement to unreasonably restrain trade in the relevant markets.

III. PLAINTIFFS STATE RICO CLAIMS UNDER 18 U.S.C. § 1962(c)

The RICO statute provides that "it shall be unlawful for any person employed by or associated with any enterprise engaged in … interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). The statute defines an enterprise as "any individual, partnership, corporation, association or other legal entity, or any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). "RICO is to be read broadly" and "liberally construed to effectuate its remedial purposes." *Tabas v. Tabas*, 47 F.3d 1280, 1291 (3d Cir. 1995) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985)). Indeed, RICO is intended to be used "not only against

mobsters and organized criminals but also against respected and legitimate enterprises," as legitimate enterprises have "neither an inherent incapacity for criminal activity nor immunity from its consequences." *Id*. (quoting *Sedima*, 473 U.S. at 499).

"To plead a RICO claim under 1962(c), the plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *In re Ins. Brokerage Antitrust Litig.*, *supra*, *618* F.3d at 362 (citations omitted). Plaintiffs sufficiently plead each of the required elements of a RICO claim in their Amended Complaint.

A. Plaintiffs Sufficiently Plead the Existence of a Legally Cognizable Association-in-Fact RICO Enterprise.

The RICO statute defines the term "enterprise" to include "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1962(c). The Supreme Court has held that the definition is to be interpreted broadly. *See, e.g., Boyle v. United States*, 556 U.S. 938, 944 (2009); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 257 (1994). Most recently, in *Boyle*, the Supreme Court clarified that "an association-in fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purposes." *Boyle*, 556 U.S. at 946. Although the existence of an enterprise is an element of a

RICO cause of action distinct from the pattern of racketeering activity, and "proof of one does not necessarily establish the other," 556 U.S. at 947 (citing *United States v. Turkette*, 452 U.S. 576, 583 (1981)), the existence of an enterprise may in some instances be inferred from evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity. *Id.* To constitute an association-in-fact enterprise, a group "need not have a hierarchical structure or a 'chain of command'; decisions may be made on an ad hoc basis and by any number of methods – by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different member may perform different roles at different times." *Id.* at 948.

Here, plaintiffs allege an enterprise consisting of the Defendants, together with their respective officers, directors, employees and agents. (¶270).

Plaintiffs allege that the purpose of the enterprise was to defraud the leaseholders of the Lessee Defendants, including plaintiffs, by overcharging them for post-production costs, which the co-conspirators knowingly and improperly deemed to be permitted by the terms of the applicable leases, with the intended effect of reducing the royalties otherwise payable to such leaseholders. (¶272). Plaintiffs allege that the enterprise was "primarily managed" by Chesapeake, which organized the fraudulent scheme and procured the involvement of the other defendants, but that

each of the defendants agreed to, and did, participate in the conduct of the Enterprise and carried out its role, using broad and independent discretion." (¶271).

As to the relationships between and among the defendants alleged to be associated with the enterprise, plaintiffs allege multiple, extensive and overlapping relationships. Defendants Chesapeake Appalachia, CEMI and COI are wholly-owned subsidiaries of defendant Chesapeake Energy. Defendant Access Midstream was formed by Chesapeake Energy in 2010 to own, operate, develop and acquire natural gas gathering systems and other midstream energy assets. Defendant Appalachia Midstream also was initially a direct or indirect subsidiary of Chesapeake Energy. (¶¶114, 116, 117-120, 122 and 124).

The Lessee Defendants hold working interests in each of the oil and gas leases in which plaintiffs hold royalty interests. (¶2). Chesapeake Appalachia, directly or through one or more of its affiliates serves as the operator. (¶3). The Lessee Defendants, and/or their respective corporate parents or affiliates, divided and allocated among themselves and other non-party competitors the geographic markets for Gas Mineral Rights, Operating Rights and Gathering Services in multiple specified counties in Northern Pennsylvania, with the intent and effect of reducing, restraining or eliminating competition. (¶8). The Lessee Defendants implemented their scheme by "entering into a variety of contracts and establishing a variety of relationships, including joint venture agreements, joint exploration agreements,

assignments and partial assignments of oil and gas leases, and agreements to exchange oil and gas assets, including the establishment of contractually designated areas of mutual interest ("AMI") located in Bradford County, and adjacent portions of Sullivan, Susquehanna and Wyoming Counties. (¶9). Plaintiffs allege certain of those agreements with particularity, including the JEA between Chesapeake and Anadarko (¶136), the Appalachia Area Participation Agreement between Anadarko and Mitsui (¶140), and the participation agreement between Chesapeake and Statoil (¶141). The Lessee Defendants also "pooled, unitized and combined each of the respective Leases" into one or more production units. (¶147).

Access Midstream came into existence on or about July 24, 2012, when it changed its name from "Chesapeake Midstream Partners, L.P.", which had originally been formed by defendant Chesapeake.

Access Midstream is managed and directed by several current and former Chesapeake officers, including J. Michael Stice and Dominic J. Del'Osso. Stice, who was formerly President and Chief Operating Officer of Chesapeake Midstream Development, L.P., a wholly-owned subsidiary of Chesapeake, and Senior Vice President—Natural Gas Projects for Chesapeake, became CEO of Access Midstream and a director of its general partner following the CMO Acquisition. (¶¶ 190, 192). Dell'Osso, who served as an EVP of Chesapeake, and had served as CFO of

Chesapeake Midstream, also became a director of the general partner of Access Midstream. (¶¶ 191, 192).

Plaintiffs allege in detail a complex series of transactions by which Chesapeake developed and then spun-off gas gathering systems that services the wells in which the Lessee Defendants hold working interests. (¶¶170-175, 182-196, 198, 200). Significantly, Plaintiffs allege that the corporate parents of defendants Statoil, Anadarko and Mitsui, directly or through their subsidiaries, in the aggregate owned a 53% interest in ten (10) integrated gas gathering systems, consisting of approximately 549 miles of gas gathering pipelines in the Marcellus Shale. (¶184). The other 47% interest was owned by defendant Appalachia Midstream (now a subsidiary or affiliate or defendant Williams Partners, L.P. f/k/a Access Midstream), which also operated the system. *Id.* Plaintiffs further allege that defendant Appalachia Midstream was and is party to long-term (15-year) gas gathering agreements (which are not publicly available) with subsidiaries and affiliates of Chesapeake, Anadarko, Statoil and Mitsui. (¶185). Plaintiffs also allege that, in connection with the 2012 CMO Acquisition, Access Midstream acquired not only existing gas gathering agreements, but also entered into new gas gathering agreements with certain subsidiaries of Chesapeake Energy, including Chesapeake Appalachia. (¶196).

With respect to the required longevity feature, Plaintiffs have alleged that the Lessee Defendants commenced production of gas under the relevant leases, which means that fee simple determinable interests were created in the respective Lessee Defendants, and that their rights to extract gas became vested, subject to the possibility of reverter held by plaintiffs. Plaintiffs also allege that the original gas gathering agreements had 15–year terms.

Based on the foregoing allegations, plaintiffs have alleged facts sufficient to satisfy the required structural elements of an association-in-fact RICO enterprise. *See Pacheco v. Golden Living Center-Summit*, 2011 WL 744656, at *4 (M.D. Pa. Feb. 23, 2011) ("plaintiff properly alleges an enterprise if the complaint sets forth the entities that make up the enterprise sufficiently to place the defendants on notice of the claims against them.").

B. Plaintiffs Sufficiently Plead That Each of the Defendants Participated in the Conduct of the Affairs of the RICO Enterprise.

In *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993), the Supreme Court adopted the "operation or management" test to determine whether a person participated in the conduct of an enterprise's affairs. Under that test, "[i]n order to 'participate, directly or indirectly, in the conduct of [an] enterprise's affairs,' " as required by § 1962(c), "one must participate in the operation or management of the enterprise itself." The Court also found that, to "conduct or participate" in the affairs

of a RICO enterprise, a defendant "must have some part in directing those affairs." *Id.* at 178-179.

A defendant does not necessarily need to have a managerial position in an enterprise to be engaged in the direction of its affairs. To the contrary, as the Third Circuit explained in *United States v. Parise*, 159 F.3d 790, 796 (3d Cir. 1998), "RICO liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control."

Here, plaintiffs have sufficiently alleged that each of the defendants knowingly participated in the conduct of the association-in-fact enterprise alleged in the Amended Complaint to an extent sufficient to meet the "operation or management" test. The allegations cited above to establish the relationships of the Defendants in the RICO enterprise, *supra* at 29, also establish that each of the defendants engaged in the direction of the enterprise's affairs.

Plaintiffs allege that Access Midstream, a former subsidiary of Chesapeake, provided Chesapeake with what amounted to an off-balance sheet loan, which was disguised as an asset sale of existing gathering agreements and pipelines, combined with new gathering agreements, subject to an above-market guaranteed rate of return. (¶¶9-31, 182-196, 205-212, 276.b). The agreements also guarantee that Chesapeake and certain of its affiliates would receive a "rebate" of some of the

monies they paid out to Access Midstream. (¶193). Chesapeake and Access Midstream acted with full knowledge that Chesapeake's ability to pay the guaranteed rate of return would require Chesapeake to treat its payments to Chesapeake as post-production costs, and to pass-on the artificially inflated "costs" to royalty interest owners, including plaintiffs, by deducting them from their royalties. (¶¶209-210). All of the Defendants are alleged to have acted with the intent of using the artificial deduction of royalties due and owing to plaintiffs and other royalty interest owners to finance their scheme. (¶212).

Plaintiffs submit that the foregoing allegations are sufficient to plead that each of the Defendants participated in the conduct of the affairs of the association-in-fact RICO enterprise under the applicable "operation or management" test.

C. Plaintiffs Plead With Sufficient Particularity Predicate Acts Sufficient to Establish a Pattern of Racketeering Activity.

Defendants argue that the Amended Complaint does not allege predicate acts establishing a pattern of racketeering activity with the degree of particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. Defendants are mistaken.

As the Third Circuit stated in *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 76, 791 (3d Cir. 1984):

> Rule 9(b) requires plaintiffs to plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior. It is certainly true that allegations of 'date, place or time' fulfill these functions, but *nothing in the rule requires them*. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.

(emphasis added).

Here, Plaintiffs have plead with particularity the circumstances of the fraud alleged in their RICO claims, by the alternate means allowed by Rule 9(b), in a manner sufficient to place defendants on notice of the precise misconduct with which they are charged, and to substantiate the bona fides of their claims. (*See* Am. Compl. ¶276).

Access Midstream's additional argument that it cannot be held liable for any RCIO violations because it was not involved in calculating royalty deductions is contrary to the law. Access Midstream's alleged intent to seek repayment for its off-balance-sheet loan to Chesapeake is sufficient to establish liability regardless of whether it was directly involved in accounting for and paying royalties to the individual plaintiffs. *See, e.g., Smith v. Berg*, 247 F.3d 532, 537 (3d Cir. 2001) ("[O]ne who opts into or participates in a conspiracy is liable for the acts of his co-

conspirators which violate section 1962(c) even if the defendant did not personally agree to do, or to conspire with respect to, any particular element."); *Hearns v. Parisi*, 548 F. Supp. 2d 132, 140 (M.D. Pa. 2008) (to show liability for a RICO conspiracy, "there is no requirement of some overt act or specific act" on the part of the defendant).

Based on the foregoing, plaintiffs have alleged with sufficient particularity predicate acts sufficient to establish a pattern of racketeering activity.

D. Plaintiffs Sufficiently Plead RICO Injury and Proximate Causation.

RICO plaintiffs must demonstrate that their injuries were the direct result of the defendants' predicate acts. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985)) ("The compensable injury flowing from a violation of [§ 1962(c)] 'necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.' ").

Courts in the Third Circuit consider three factors in determining proximate cause of RICO injury: "(1) whether the plaintiff was directly harmed by the defendant's predicate acts, (2) whether damages are speculative or concrete, and (3) whether alternative potential plaintiffs exist who could better redress the harm alleged." *Lester v. Percudani*, 556 F. Supp. 2d 473, 483 n.16 (M.D. Pa. 2008) (citing

Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 443 (3d Cir. 2000)). Here, plaintiffs have sufficiently alleged that their injuries were proximately caused by defendants' scheme.

Plaintiffs allege that they were directly harmed by their reliance of defendants' predicate acts in issuing misleading monthly royalty statements. (¶¶ 19, 277, 286). In particular, plaintiffs allege that each of the Lessee Defendants sent royalty statements to the plaintiffs that either: (a) fraudulently represented that deductions shown for gas gathering and transportation costs were legitimately incurred and permissible under the terms of the respective Plaintiffs' leases; or (b) fraudulently concealed, omitted or otherwise failed to disclose that such deductions had in fact been taken in calculating the royalties paid to the respective Plaintiffs. (¶233, 277-81, 283-84, 286). In either case, the Lessee Defendants understated and underpaid the royalties due and owing to plaintiffs.

Plaintiffs allege facts sufficient to support a plausible inference that the amounts of deductions increased after the CMO Acquisition. In particular, the Marcellus Gathering Agreement, through which they allege the inflated gathering expenses were justified under the guise of legitimacy, "provides that, on January 1 of each year, the Marcellus fee will be recalculated." (¶207). Plaintiffs further allege that Chesapeake reported to investors in September 2013 (*i.e.,* after the CMO Acquisition) that its expenses related to pipeline and marketing business had roughly

doubled in the months after it sold certain pipelines, and that its revenues for that part of its business had also increased accordingly, covering the new costs. (¶219). Plaintiff also allege statements by industry analysts (as reported by *Pro Publica*) who were unable to explain the "staggering" increase in gathering and transportation expenses. (¶220).

In essence, Plaintiffs allege that they were initially lulled into a false sense of security by the royalty statements. The Third Circuit has held that mailings "designed to lull victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place" are sufficient to support a claim for mail fraud. *See U.S. v. Lebovitz*, 669 F.2d 894, 896 (3d Cir.1982) (quoting *U.S. v. Maze*, 414 U.S. 395, 403 (1974). That is precisely what Plaintiffs allege here.

In sum, plaintiffs have alleged that they suffered direct harm as a result of defendants' predicate acts. The damages alleged by plaintiffs are concrete, and not speculative. No alternative potential plaintiffs exist who could better redress the harm alleged by the plaintiffs. Plaintiffs therefore sufficiently plead RICO injury and causation.

IV. PLAINTIFFS STATE A RICO CONSPIRACY CLAIM UNDER 18 U.S.C. § 1962(d).

To be liable under 18 U.S.C. § 1962(d), a RICO conspirator need only to have acted in furtherance of the alleged conspiracy, not necessarily to have committed (or even agreed to commit) any predicate act. *See Salinas v. United States*, 522 U.S. 52, 65 (1997). Uunlike claims under 18 U.S.C. § 1962(c), claims under § 1962(d) claims are subject to Fed. R. Civ. P. 8(a)'s pleading standards, not the heightened standard of Rule 9(b). *See Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989).

Here, plaintiffs allege a scheme in which all of the Defendants understood that inflated charges would have to be passed along to lessors; otherwise, Chesapeake would have been unable to make good on its obligations under the Marcellus Gas Gathering Agreement. The foregoing allegations, as well as the additional allegations discussed with respect to Plaintiffs' claim under 18 U.S.C. § 1962(c), are more than sufficient to demonstrate that all of the defendants knowingly acted to further the alleged conspiracy. No more is needed for Plaintiffs to state a claim under 18 U.S.C. § 1962(d).

V. PLAINTIFFS STATE CLAIMS FOR BREACH OF CONTRACT AGAINST EACH OF THE LESSEE DEFENDANTS.

In their Fifth Cause of Action, Plaintiffs state claims for breach of contract against the Lessee Defendants, on four alternative grounds. First, Plaintiffs contend that under the terms of their leases, the Lessee Defendants are not entitled to deduct post-production costs in calculating the royalties payable to Plaintiffs, and breached their obligations under the leases by deducting such costs. *See* Am. Compl. ¶¶ 303-304, 307. Second, Plaintiffs contend that, even if the Lessee Defendants are entitled to deduct post-production costs, they are not entitled to retroactively recoup any such costs which they did not deduct from royalties previously paid to the Lessee Defendants by offsetting such costs against royalties currently payable to the Plaintiffs, and breached their obligations under the leases in doing so. *See* Am. Compl. ¶¶ 305, 307. Third, Plaintiffs contend that, if the leases permit deduction of post-production costs in calculating their royalties, the amounts of any such deductions are implicitly limited to the a pro rata share of the reasonable and actual charges actually paid by the Lessee Defendants for bona fide post-production services, and that the Lessee Defendants violated their obligations under the leases by deducting amounts where were not for bona fide post-production costs, or were otherwise artificially inflated, grossly excessive or unreasonable in amount. *See* Am. Compl. ¶¶ 306, 307. Fourth, Plaintiffs contend that the Lessee Defendants violated their implied covenants of good faith and fair dealing inherent in the leases by selling

gas produced pursuant to the leases to their own affiliates, in non-arms'-length transactions, at artificial, self-serving and unreasonably low prices, and by charging, deducting, imposing, and passing along, and also by retroactively recouping, artificially inflated, grossly excessive, improper and unreasonable charges for purported post-production costs to reduce the royalties payable to Plaintiffs. *See* Am. Compl. ¶¶ 308-310.

The Lessee Defendants suggest that the Pennsylvania Supreme Court's decision in *Kilmer v. Elexco Land Services, Inc.*, 605 Pa. 413, 990 A.2d 1141 (2010) precludes Plaintiffs' breach of contract claims in this case. The Lessee Defendants are mistaken. A close reading of *Kilmer* shows that the Lessee Defendants have overstated the scope of the Court's holding in subtle but material respects, and that the Supreme Court's holding in *Kilmer* does not control the outcome of Plaintiffs' breach of contract claims.

In *Kilmer,* landowners filed a declaratory judgment action seeking to invalidate an oil and gas lease based on their assertion that the lease, which provided for payment of a royalty in the amount of one eighth (1/8th) of the proceeds actually received by lessee from the sale of production, less the same percentage share of defined post-production costs, violated the one-eighth minimum royalty requirement imposed by the Guaranteed Minimum Royalty Act ("GMRA"), 58 P.S. § 33, because the contractually permitted deduction of post-production costs (which the Court

referred to as the "net-back method") resulted in payment of a royalty of less than one-eighth of the value of the gas. After the trial court granted summary judgment in favor of the defendant gas companies, the Supreme Court granted extraordinary jurisdiction to consider whether the GMRA precludes parties from contracting to use the net-back method to determine the royalties payable under an oil or natural gas lease.

The issue at the heart of *Kilmer* arose from the fact that, although the GMRA requires an oil and gas lease to guaranty the lessor "at least one-eighth royalty" of all oil or natural gas removed or recovered from the subject property, the statute does not define the term "royalty." Accordingly, as the Supreme Court itself stated at the outset of its opinion, the case "concerns the proper construction of the term 'royalty' *as it is used in the [GMRA]*." 605 Pa. at 415, 990 A.2d at 1149 (emphasis added). In particular, the case required the Supreme Court to address and resolve the question of the site at which the amount of the minimum royalty must be calculated to establish compliance with the statute – at the wellhead or at the point of sale:

> Although the plain language of the GMRA clearly provides that the lessor must receive a one-eighth royalty, it is silent regarding the definition of royalty and the method for calculating the royalty….
>
> * * *
>
> This requires us to define royalty. Under the standard dictionary definitions cited by Landowners, royalty contemplates the proceeds of a sale, which would move the point of valuation from the wellhead to the point of

> sale. The Statutory Construction Act, however, counsels us to reject this common definition of "royalty," in favor of the definition it has acquired in the oil and gas industry. The rules instruct, "Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition." 1 Pa.C.S. § 1903.

Kilmer, *supra.*, 605 Pa. at 428-29, 990 A.2d at 1157. Based on the express requirements of the Statutory Construction Act, the Court determine that the word "royalty" is a technical term which has acquired a "peculiar and appropriate meaning" in the oil and gas industry, adopted that definition, and held that "the GMRA should be read to permit the calculation of royalties at the wellhead, as provided by the net-back method in the Lease." *Id.,* 605 Pa. at 430, 990 A.2d at 1158.

The declaratory judgment claim asserted by the plaintiffs in *Kilmer*, and the Pennsylvania Supreme Court's decision of the case, thus were based on the construction of the meaning of statutory language used in the GMRA – *not* on the meaning of the language of the plaintiffs' lease, which expressly permitted the deduction of specified post-production costs. The breach of contract claims asserted by Plaintiffs in the present case, on the other hand, are not based on the GMRA, or any other statute. Instead, they are based on the express language of the relevant leases (and related implied covenants). As a result, the Pennsylvania Supreme

Court's determination in *Kilmer* of the meaning of the term "royalty," as used in the GMRA, and its related finding as to permissible methods for calculating the minimum royalty required by the GMRA, do not establish the meaning of the term "royalty" as it is used in the leases at issue in the present case, or the contractually agreed method for calculating royalties for purposes of the present case.

Under Pennsylvania law, an oil and gas lease "is in the nature of a contract and is controlled by principles of contract law." *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 615 Pa. 199, 208, 42 A.3d 261, 267 (Pa.2012); *see also Stewart v. SWEPI, LP*, 918 F.Supp.2d 333, 339 (M.D.Pa.2013) (Conner, J.); *Jacobs v. CNG Transmission Corp*., 332 F.Supp.2d 759, 772 (W.D.Pa.2004). "It must be construed in accordance with the terms of the agreement as manifestly expressed, and the accepted and plain meaning of the language used, rather than the silent intentions of the contracting parties, determines the construction to be given the agreement." *T.W. Phillips*, 615 Pa. at 208, 42 A.3d at 267 (internal quotation marks and brackets omitted); *see also Stewart*, 918 F.Supp.2d at 339.

As the Pennsylvania Supreme Court stated in *Murphy v. Duquesne University*, 565 Pa. 571, 777 A.2d 418 (2001):

> Only where a contract's language is ambiguous may extrinsic or parol evidence be considered to determine the intent of the parties. A contract contains an ambiguity if it is reasonably susceptible of different constructions and capable of being understood in more than one sense….

Id.. 565 Pa. at 590-91, 777 A.2d at 429–30 (internal quotation marks and citations omitted).

Plaintiffs believe that the relevant lease language unambiguously precludes the deduction of post-production costs. *See* Am. Compl. ¶ 310. In the alternative, however, Plaintiffs submit that their interpretation of the relevant lease language as precluding the deduction of post-production costs is reasonable when applied to the facts, and therefore plead that the relevant provisions of their leases are ambiguous as a matter of law. *Id.* Under either scenario, the Lessee Defendants' motions to dismiss the breach of contract claim must be denied. *See Masciantonio v. SWEPI LP*, 2014 WL 4441214, at *5-14 (M.D.Pa. Sept. 9, 2014) (denying motion to dismiss breach of contract claim; "[a]t this stage of the litigation, the question before the Court is whether the bonus provision of the lease agreements at issue is susceptible to more than one reasonable interpretation, and thus ambiguous. Thus, to prevail at this point, SWEPI must demonstrate that its interpretation is the only reasonable interpretation. It has failed to do so.")

By invoking *Kilmer* in an attempt to foreclose Plaintiffs' breach of contract claims, the Lessee Defendants implicitly assume that the word "royalty" as used in Plaintiffs' lease contract must have the same meaning as it does in the GMRA. There is, however, no basis in law or in fact for any such assumption. To the contrary, "[t]he same words may require a different construction when used in different

documents, as, for instance, in a contract, and a statute; and identity of words is not decisive of identity of meaning where they are used in different connections and for different purposes. In a contract, the technical rights of the parties only are involved; in a statute, an important question of public policy." *Knights Templars' & Masons' Life Indemnity. Co. v. Jarman*, 187 U.S. 197, 201 (1902). As Justice Holmes famously observed in *Towne v. Eisner*, 245 U.S. 418, 425 (1918): "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary in color and content according to the circumstances and the time in which it is used." As a result, "[e]ven where the same term is used in different parts of the same act, linguistic symmetry is not mandatory." *FTC v. IFC Credit Corp.*, 543 F.Supp.2d 925, 939 (N.D.Ill. 2008) (citing *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 202 (2001)).

Unlike the lease at issue in *Kilmer*, the leases at issue in this case do not expressly permit the deduction of post-production costs. As a result, the Court must determine what the parties intended by their use of the terms "royalty" and "at the well" in the leases, based on applicable rules of contract interpretation, which differ in significant respects from the provisions of the Statutory Construction Act applied by the Pennsylvania Supreme Court in *Kilmer* with respect to when it is permissible to consider industry custom and usage.

Under established rules of contract interpretation, evidence of industry custom and usage may be admissible in determining what the parties intended by particular contractual terms, even in the absence of an ambiguity, but only under certain circumstances; "[w]here terms are used in a contract which are known and understood by a particular class of persons in a certain special or peculiar sense, evidence to that effect is admissible, for the purpose of applying the instrument to its proper subject matter." *Daset Mining Corp. v. Industrial Fuels Corp.*, 473 A.2d 584, 592 (quoting *Electrical Reduction Co. v. Colonial Steel Co.*, 120 A. 116, 119 (1923)). Significantly, agreements are interpreted in accordance with relevant custom and usage only "if each party knew or had reason to know of the usage and neither party knew, or had reason to know, that the meaning attached by the other was inconsistent with the usage." *Daset Mining Corp.*, *supra*. (quoting Restatement (Second) of Contracts § 220(1)). *Accord Lustig v. Facciolo*, 188 A.2d 741, 742-43 (1963) ("Where the parties do not agree upon a custom or usage, it is not binding upon them unless it is so 'notorious, uniform and well established that a knowledge of them will be presumed.") (quoting *Makransky v. Weston*, 155 A. 741, 743 (1931)). Moreover, the question of what constitutes custom or usage in a trade or industry for purposes of contractual interpretation is an issue of fact for the jury or factfinder. *See Daset Mining Corp., supra.* (citing *Ingrassia Constr. Co., Inc. v. Walsh*, 337 Pa.Super. 58, 68, 486 A.2d 478, 483-84 (1984)). Here, there is no evidence that

plaintiffs knew of any of the industry custom or usage relied upon the Supreme Court in *Kilmer.* A*s* a result, the Lessee Defendants cannot rely on any such purported industry custom or practice in support of their argued interpretation of the relevant lease language for purposes of their motion to dismiss.

Even if the Lessee Defendants are permitted to deduct post-production costs in calculating the royalties payable to Plaintiffs, the Lessee Defendants were and are subject to an implied duty to act in good faith in connection with the leases, including the manner in which they marketed gas produced pursuant to the leases, and the deduction of post-production costs. *See Zaloga v. Provident Life & Accident Ins. Co. of Am.*, 671 F.Supp.2d 623, 629–30 (M.D.Pa.2009) (predicting that the Supreme Court of Pennsylvania would recognize an implied covenant of good faith and fair dealing in all contracts); *Kamuck v. Shell Energy Holdings GP, LLC*, No. 4:11–CV–1425, 2012 WL 1463594, at *6 (M.D.Pa. Mar.19, 2012) (magistrate judge's report) (relying on *Zaloga* in the context of oil and gas leases), *adopted in relevant part* by 2012 WL 1466490 (M.D.Pa. Apr.27, 2012) (Conner, J.); *Cole v. Philadelphia Co.*, 345 Pa. 315, 26 A.2d 920, 922–23 (Pa.1942) (holding that oil and gas lease provision permitting surrender at any time lessee deemed lease unprofitable did not permit arbitrary surrender); *see also Interwave Tech. Inc. v. Rockwell Automation, Inc.*, No. Civ. A. 05–398, 2005 WL 3605272, at *9-12 (E.D.Pa. Dec. 30, 2005). Plaintiffs

assert that the Lessee Defendants violated their obligations of good faith. (¶¶308-309).

Chesapeake suggests that the Supreme Court of Pennsylvania "rejected the invitation to create such an implied obligation" in *Kilmer*. *See* Chesapeake Br. at 35. Plaintiffs disagree. The plaintiffs in *Kilmer* were not asserting any claim for breach of the implied covenant of good faith and fair dealing. Instead, they were seeking a declaratory judgment voiding their lease based on violations of the GMRA. In that context, the Court observed as follows:

> While Landowners present a concern that gas companies may inflate their costs to drive down the royalties paid, we find that claim unconvincing because gas companies have a strong incentive to keep their costs down, as they will be paying seven-eighths of the costs. If a landowner suspects that a gas company is charging higher costs than the gas company is actually paying, then the landowner can seek a court ordered accounting.

Kilmer, 605 Pa. 430, 990 A.2d at 1158. In light of the context, the Court's dismissal of the "concern" presented by the landowner plaintiffs in *Kilmer* constitutes mere *dicta*, rather than the decision of any claim on the merits. With respect to the Court's observations about the gas companies' "incentives," the gas companies involved in *Kilmer* were not those involved in this case, and there is no indication that the gas companies in *Kilmer* also shared ownership in the gathering pipelines which were the recipients of the

costs being paid, as the Lessee Defendants do in this case, which dramatically alters the economic "incentives."

Chesapeake attempts to frame a portion of plaintiffs' breach of contract claim as a claim for royalties on pure financial "hedging" transactions. Plaintiffs make no such claim. Instead, plaintiffs claim that the Chesapeake has failed to properly account for and pay royalties due on actual physical sales of gas, or commitments to sell gas, at appropriate prices, in connection with futures contracts or other contractual commitments to deliver minimum quantities of gas in the future, including any hedges in which Chesapeake is obligated or permitted to satisfy the contract by in-kind delivery of gas. Am. Compl. ¶¶ 157-162.

VI. PLAINTIFFS STATE A CLAIM FOR AN ACCOUNTING AT LAW

Plaintiffs agree that they do not state a claim against the Lessee Defendants for an equitable accounting because they have adequate remedies at law for breach of contract and conversion. However, plaintiffs plead facts sufficient to establish each of the elements required to state a claim for a legal accounting against each of the Lessee Defendants under *Haft v. United States Steel Corp.*, 499 A.2d 676 (1985), including: (i) a valid contract under which the defendant received monies in a capacity which imposed upon it a legal obligation to account to the plaintiffs for the monies received; and (ii) a breach by the defendant of its duty under the contract.

In particular, plaintiffs allege that: (i) the Lessee Defendants hold working interests in the Gas Mineral Rights in which plaintiffs hold royalty interests pursuant to written lease agreements; (ii) each of the Lessee Defendants is responsible for accounting for and distributing its share of the royalties due to plaintiffs; and (iii) the Lessee Defendants have breached their duty to pay royalties to plaintiffs in accordance with the leases. These allegations sufficiently plead a claim for a legal accounting under *Haft. See Berger & Montague, P.C. v. Scott & Scott, LLC*, 153 F.Supp.2d 750 (E.D.Pa. 2001). Moreover, in reviewing a request for a legal accounting, "it is reasonable for the court to permit some latitude since often times it is not certain what claims a plaintiff may have until the accounting is completed." *In re Estate of Hall*, 517 Pa. 115, 136, 535 A.2d 47, 58 (1987).

VII. PLAINTIFFS STATE A CLAIM FOR CONVERSION

Under Pennsylvania law, "[c]onversion is the deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification." *Shonberger v. Oswell*, 530 A.2d 112, 114 (Pa.Super.1987). Money may be the subject of conversion where the funds are specifically identifiable. *Pioneer Commercial Funding Corp. v. Am. Fin. Mortgage Corp.*, 855 A.2d 818, 827 n.21 (Pa. 2004) ("Identifiable funds are deemed a chattel for purposes of conversion.")

Plaintiffs acknowledge that this Court has held that "[t]he right to payment of money under a contractual agreement does not constitute a property interest for purposes of conversion." *It's Intoxicating, Inc. v. Maritim Hotelgesellshaft*, No. 11-cv-2379, 2013 WL 3973975, at *21-22 (M.D. Pa. Jul. 31, 2013) (Mannion, J.). While plaintiffs acknowledge the Court's holding to be correct as a general matter, there is an important exception under Pennsylvania law. In *Shonberger, supra,* the Pennsylvania Superior Court held that the failure to remit proceeds as required in connection with a consignment agreement is sufficient to support an action for conversion. *Shonberger*, *supra.*, 530 A.2d at 114.

In reliance on *Shonberger,* the court in *Levert v. Philadelphia International Records*, 2005 WL 2271862, at *4 (E.D.Pa. Sept. 16, 2005) (Shapiro, J.), held that royalty payments allegedly owed to plaintiffs in connection with recording contracts were analogous to payments made under a consignment contract, and denied the individual defendant's motion to dismiss plaintiffs' conversion claim based on allegations that the defendant had improperly withheld royalties due and owing to the plaintiffs under recording contracts.

The Wyoming Supreme Court has likewise specifically held that net profit interests in oil fields, which the court found to be akin to royalty interests not subject to payment in kind, are personal property subject to conversion. *See Ferguson v. Coronado Oil Co.*, 884 P.2d 971 (Wyo. 1994).

Certain of the defendants argue that the conversion claims asserted against them are barred by the gist of the action doctrine and/or the economic loss doctrine. Plaintiffs note that no contract is alleged to exist between any of the plaintiffs, on the one hand, and Chesapeake, CEMI or Chesapeake Operating, on the other. The only contracts at issue are those between Plaintiffs and the Lessee Defendants. Plaintiffs also note that several courts have held that the gist of the action doctrine does not bar a plaintiff from "proceeding on both a breach of contract and [a] conversion claim." *Berger & Montague, P.C. v. Scott & Scot*, 153 F.Supp.2d 750, 754 (E.D.Pa.2001) (plaintiff can plead both breach of contract and tort of conversion); *see also Bernhartdt, III, P.C. v. Needleman*, 705 A.2d 875 (Pa.Super.1997) (in a dispute between lawyers over a referral fee, lawyer could proceed on theories of breach of contract and conversion); see also Fed.R.Civ.P. 8(d)(2) (a party may set forth two or more statements of a claim in the alternative; if one of them independently would be sufficient, the pleading is not insufficient).

As this Court noted in denying motions to dismiss the similar conversion claims asserted against Access Midstream and Chesapeake in *The Suessenbach Family Limited Partnership v. Access Midstream Partners, L.P., et al.,* C.A. No. 3:14-1197, 2015 WL 1470863, *19 (M.D.Pa. Mar. 31, 2015) (Mannion, J.), "[i]n the context of the gist of the action doctrine, '[c]aution must be exercised in dismissing a tort action on a motion to dismiss because whether tort and contract claims are separate and

distinct can be a factually intensive inquiry.' " (citations omitted) Plaintiffs respectfully submit that, for the same reasons, and the additional reasons discussed above, the Court should deny the motions to dismiss the conversion claims in the present case.

VIII. PLAINTIFFS STATE A CLAIM FOR CIVIL CONSPIRACY

Under Pennsylvania common law, a civil conspiracy requires that two or more conspirators reached an agreement to commit an unlawful act or perform a lawful act by unlawful means. *See Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa.1979); *Burnside v. Abbott Laboratories,* 505 A.2d 973, 980 (Pa.Super.1985). Additionally, a plaintiff must show an overt act and actual legal damage. *Phillips v. Selig*, 959 A.2d 420 (Pa.Super.2008) (internal citations omitted). Finally, "[p]roof of malice, i.e., an intent to injure, is essential in proof of a conspiracy." *Commerce Bank/Pennsylvania v. First Union Nat. Bank*, 911 A.2d 133, 143 (quoting *Thompson Coal Co*., 412 A.2d at 472). "Malice requires ... that the sole purpose of the conspiracy was to injure the plaintiff," and that this intent was without justification. *Doltz v. Harris & Assoc.*, 280 F.Supp.2d 377, 389 (E.D.Pa.2003).

For the reasons discussed above, plaintiffs have alleged facts sufficient to establish each of the required elements of a claim for civil conspiracy.

Plaintiffs allege that the defendants, acting with knowledge that artificially inflated gathering and transportation fees would be passed-on to Plaintiffs, and

deducted from their royalties, engaged in a scheme to defraud and deprive Plaintiff of their duly owed royalty payments by manipulating and misrepresenting certain post-production costs incurred and charged. *See e.g.* Am. Compl. ¶¶260, 272, 276, 328. Plaintiffs allege that these inflated costs were deducted from plaintiff's royalties and used by the Defendants to fund repayment of the $5 billion off-balance sheet loan made by Access Midstream to Chesapeake. Thus, plaintiffs have allege an agreement to commit the underlying tort of conversion.

As to the required allegation of malice, knowingly misusing another's property for one's own ends qualifies as malice. *See e.g., Strayer v. Bare*, 2008 WL 1924092 (M.D.Pa. April 28, 2008).

IX. PLAINTIFFS WITHDRAW THEIR CLAIM FOR DECLARATORY JUDGMENT

Upon review of the arguments asserted by Defendants and the applicable case law, Plaintiffs withdraw their claim for declaratory judgment.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court to deny the motions to dismiss filed by each of the Defendants. If for any reason the Court finds that Plaintiffs have not sufficiently stated any of their claims, Plaintiffs respectfully request leave to amend.

Dated: October 25, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.8(b)(2)

I Thomas S. McNamara hereby certify that the text of the foregoing Plaintiffs' Consolidated Brief in Opposition to Defendants' Motions to Dismiss, excluding the caption, Table of Contents, Table of Authorities, and signature block, contains 12,482 words, as calculated by the word-count feature of Microsoft Word, which is within the 12,500 word limit requested in Plaintiffs' Unopposed Motion for Leave to Enlarge Length of Brief being filed contemporaneously with the Brief.

Dated: October 25, 2015 /s/ Thomas S. McNamara