UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION	)	**MDL No. 2002**
	)	**08-md-02002**
THIS DOCUMENT APPLIES TO:	)	
All Direct Purchaser actions	)	

[PROPOSED] ORDER

AND NOW, this ____ day of _____ 2009, upon consideration of the Defendants' Motion To Dismiss Direct Purchasers' Consolidated Amended Class Action Complaint, it is ORDERED that the Direct Purchasers' Consolidated Amended Class Action Complaint is dismissed without prejudice.

BY THE COURT:

_____
GENE E.K. PRATTER
United States District Judge

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DEFENDANTS' MOTION TO DISMISS DIRECT PURCHASERS' CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

For the reasons set forth in the accompanying Memorandum in Support of Defendants' Motion To Dismiss Direct Purchasers' Consolidated Amended Class Action Complaint, the undersigned Defendants, by and through their counsel, hereby move the Court for an Order dismissing the Direct Purchaser Plaintiffs' Consolidated Amended Class Action Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) without prejudice. A proposed order is attached to this motion as Exhibit A.

Pursuant to Local Rule of Civil Procedure 7.1, Defendants request oral argument on this Motion.

Dated April 30, 2009

Respectfully Submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS DIRECT PURCHASERS' CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the undersigned Defendants ("Defendants") move for an order dismissing the Consolidated Amended Class Action Complaint (the "Complaint" or "CAC") of the direct purchaser plaintiffs ("Plaintiffs").

INTRODUCTION

Plaintiffs' Complaint is a long, complex document, filled with extensive quotes and numerous allegations, in which Plaintiffs allege a number of actions by United Egg Producers, Inc. ("UEP), some of its members (mostly unidentified), and certain other entities, which Plaintiffs contend add up to an illegal agreement to restrain the supply of eggs.[1] Untangling the various threads that Plaintiffs weave throughout the Complaint, however, it is clear that Plaintiffs have failed to state a cause of action under the antitrust laws.

[1] Nothing in this motion should be construed as an admission of any of the alleged facts, which are merely assumed to be true for the purpose of analyzing the legal sufficiency of the allegations. *See Sands v. McCormick*, 502 F.3d 263, 268-69 (3d Cir. 2007) ("[W]hen deciding a motion to dismiss," the Court "accept[s] all factual allegations as true" although it "need not credit a plaintiff's 'bald assertions' or 'legal conclusions.'") (citations omitted).

The connective tissue running through Plaintiffs' supposed overarching conspiracy to restrict supply consists of a number of alleged recommendations by UEP, starting in 1999, that egg producers should follow a common-sense business principle: match egg production to demand. While Plaintiffs' Complaint contains a number of quotes ascribed to UEP's newsletter or UEP officials urging producers to manage their production, Plaintiffs generally do not identify *who* supposedly agreed to follow these recommendations or *when* the alleged agreements were made. Most of the allegations are "factually neutral" as to whether there was any agreement to restrict the supply of eggs – through coordinated early culling of flocks, molting of birds, flock reductions, and refusals to expand operations. In the instances where Plaintiffs are more specific, they fail to allege that any Defendant actually acted upon the recommendations. Indeed, Plaintiffs repeatedly state that UEP's alleged calls for reduction largely went unanswered. As such, Plaintiffs' allegations do not satisfy the pleading requirements established by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Without an overarching supply restriction conspiracy, Plaintiffs are left with isolated, though repeated, calls by UEP for reduction in output as to which Plaintiffs fail to establish a viable cause of action. (*See* Section II *infra*). All that remains are three alleged stand-alone agreements among Defendants: (1) the implementation of the UEP animal husbandry guidelines and certification program; (2) the coordinated exports by members of United States Egg Marketers, Inc. ("USEM"), a shell egg producer cooperative; and (3) the coordinated exports of egg products, as opposed to shell eggs, by unspecified Defendants. None of these remaining allegations sufficiently pleads a violation of the antitrust laws.

First, Plaintiffs attack the validity of UEP's animal husbandry guidelines and corresponding certification program as a "sham" whose *only* alleged purpose was to reduce the

number of egg-laying hens in an attempt to restrict supply. As the Complaint itself makes clear, however, these standards were prompted by customer demand for more humane treatment of egg-laying hens and therefore served a procompetitive purpose. Voluntary standards set by a private organization, such as the guidelines and certification program, are evaluated under the rule of reason due to the potential procompetitive effects of such programs. Plaintiffs' Complaint is clearly deficient in pleading the necessary elements of a rule of reason case. As such, the claim directed at these programs should be dismissed.

Second, Plaintiffs allege that USEM members conspired with each other beginning in 2006 to export eggs in order to reduce the domestic supply of eggs and artificially boost egg prices. Plaintiffs themselves characterize USEM as a "producer cooperative"; such cooperatives are exempt from the antitrust laws that would otherwise prohibit the challenged conduct. Plaintiffs have not alleged any facts that would abrogate this exemption, and therefore the claim directed at the USEM exports should be dismissed. Finally, Plaintiffs' handful of allegations that Defendants joined together to export egg products, separate from the shell egg exports, is conclusory and plainly fails the standard established by *Twombly*.

LEGAL STANDARD

"To withstand a motion to dismiss, the plaintiff's factual allegations must be 'enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact).'" *Gonzales v. Pennsylvania*, 293 F. App'x. 136, 139 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 555). "[W]hen deciding a motion to dismiss," the Court "accept[s] all factual allegations as true" although it "need not credit a plaintiff's 'bald assertions' or 'legal conclusions.'" *Sands v. McCormick*, 502 F.3d 263, 268-69 (3d Cir. 2007) (quotations omitted).

ARGUMENT

I. PLAINTIFFS' VARIOUS ALLEGATIONS OF HORIZONTAL SUPPLY RESTRICTION AGREEMENTS FAIL TO MEET THE PLEADING STANDARD ESTABLISHED BY THE SUPREME COURT IN *TWOMBLY* OR OTHERWISE FAIL TO STATE A CLAIM.

Though long, complex, and riddled with questionable sound bites, the Complaint does not contain allegations that tend to show a unified, functioning agreement to restrict supply. Instead, it is filled with conclusory allegations that UEP urged egg producers to take precautions against excess supply in the face of weaker demand, and egg producers agreed to and did implement those recommendations – though generally the participants in those presumed agreements are not identified, the times and places of the purported agreements are not specified, and, most times, even the fact of agreement is not alleged. *See Hackman v. Dickerson Realtors, Inc.*, 520 F. Supp. 2d 954, 965 (N.D. Ill. 2007) (recognizing that encouraging an action is not the same as an agreement to undertake such action).

"[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly*, 550 U.S. at 557. Plaintiffs must plead "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. Plaintiffs here failed to do this. Plaintiffs' Complaint, like the complaint dismissed in *Twombly*, has furnished "no clue" as to which of the numerous Defendants named supposedly agreed to the illicit agreements alleged, or "when and where" those agreements took place. *Id.* at 565 n.10. *See also Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008) (finding plaintiffs failed to sufficiently plead a Section 1 claim in part because they "only offer bare allegations without any reference to the 'who, what, where, when, how or why'"

of the conspiracy). Indeed, it is unclear whether Plaintiffs contend that only certain named Defendants allegedly participated in the supposed supply-restriction schemes or whether Plaintiffs believe that every one of UEP's more than 200 members agreed to every call for reduction simply because of a suggestion appearing in the UEP newsletter.

In any event, Plaintiffs repeatedly detail a pattern of *increased* supply and *lower* prices in the industry in the period after these supposed supply restraint agreements were made. Plaintiffs point only to brief moments where supply temporarily dropped and prices temporarily increased and, without any basis, attribute those instances to illegal conduct rather than rational, independent business decisions. Thus, the alleged calls for supply restraint – by way of coordinated early culling of flocks, molting of birds, flock reductions, and refusals to expand operations – are not supported by allegations of "parallel conduct . . . placed in a context that raises suggestion of a preceding agreement," as *Twombly* requires. 550 U.S. at 556-57.

The other agreements that Plaintiffs contend are unlawful supply restrictions suffer from different problems. Adherence to the customer-demanded UEP animal welfare program, for example, is to be analyzed under the "rule of reason." Because "product standard-setting by private associations" has the potential to offer "significant procompetitive advantages," such standards are evaluated under the "rule-of-reason" analysis. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988). Plaintiffs here have utterly failed to plead a rule of reason claim as to the animal welfare program. The remaining alleged agreements are coupled with allegations demonstrating that those agreements, if they existed, had absolutely no antitrust impact. *See In Re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (a plaintiff seeking antitrust damages must allege and prove antitrust impact (also called "injury-

in-fact") caused by the alleged antitrust violation). Therefore, Plaintiffs fail to allege a claim based on these alleged agreements too.

A careful analysis of each of the alleged agreements demonstrates that none can survive a motion to dismiss. In the section that follows, Defendants address each of these alleged agreements and the related basis for dismissal.[2]

II. NONE OF THE ALLEGED AGREEMENTS SUPPORTS A CLAIM FOR RELIEF.

A. THE SUPPOSED AGREEMENTS FROM 1999 TO LATE 2002.

Plaintiffs allege that the UEP Marketing Committee in 1999 recommended that members immediately molt 5% of their flock, cut back on flock inventory, and develop a hatch reduction program. (CAC, ¶ 239.)[3] But Plaintiffs never allege which entities, if any, actually agreed to do so. In fact, the text of the very same paragraph demonstrates that no industry-wide agreement was made at the Marketing Committee meeting, as that committee went on to discuss the need to publicize the recommendation. (*Id.*, ¶ 239) ("There was an ensuing discussion regarding the publicity to the industry . . . ."). Similarly, Plaintiffs allege that in 2001, UEP suggested an "emergency flock reduction of 5%" and "[m]any producers signed 'commitment sheets' to the program and others agreed to it in secret," but they fail to allege that all Defendants signed such commitments or agreed in secret or even that any reduction ever occurred. (*Id.*, ¶ 242.) In fact,

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[2] Defendants will not address each allegation in Plaintiffs' 411-paragraph Complaint. Instead, Defendants will fairly address what appear to be the most substantial allegations related to agreements in the Complaint. Defendants believe that the bases for dismissing these claims apply with greater force to the less well-pleaded allegations. The undue burden Plaintiffs have imposed upon Defendants and this Court by filing a Complaint that is not a "short and plain statement" of the claims is outlined in Defendants' Alternative Motion to Dismiss Direct Purchasers Plaintiffs' Consolidated Amended Class Action Complaint for Failure to Comply with Fed. R. Civ. P. 8, filed contemporaneously herewith.

[3] Plaintiffs allege that USEM members voted to adopt a similar plan in 1999 as well. (CAC, ¶ 241.)

according to Plaintiffs' allegations, UEP's Gene Gregory lamented that "[p]lans of action [to reduce hen populations] have not worked and [he was] at a loss of what to say." (*Id.*, ¶ 245.) Significantly, Plaintiffs themselves conclude by alleging that "UEP's previous attempts [those alleged by Plaintiffs in 1999, 2000, and 2001] to voluntarily control supply *had not worked*." (*Id.*, ¶ 248 (emphasis added).)

At most, the materials cited by Plaintiffs demonstrate that, at a time of unprecedented expansion of hen numbers, UEP attempted to educate producers on how to ease free-falling egg prices that were already below the costs of production by managing supply to match demand. (Exhibit A, cited at CAC, ¶ 228 n.55.) Even if Plaintiffs properly pled an agreement, the alleged agreements had no effect, as Plaintiffs themselves recognize, and therefore they have failed to plead a valid damages claim under the antitrust laws. A plaintiff seeking antitrust damages must allege and prove antitrust impact – or "injury-in-fact" – caused by the alleged antitrust violation. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008); *see also Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996) (citing *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 728 (3d Cir. 1991) ("An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services....")).

B. 2002 ANIMAL HUSBANDRY GUIDELINES AND CERTIFICATION PROGRAM.

Having alleged that the "previous attempts to voluntarily control supply had not worked" (CAC, ¶ 248), Plaintiffs go on to theorize that the egg industry needed a better way to attempt to curb supply. They say the result was UEP's animal welfare certification program, used to "implement and enforce its conspiracy to reduce output and artificially sustain prices." (*Id.*, ¶ 249.) However, product standard-setting by private associations, such as the establishment of the animal husbandry guidelines and certification program by UEP, is evaluated under the rule of

reason. Yet Plaintiffs have failed to allege the requisite elements of a rule of reason claim under the Sherman Act, and therefore their claim against these UEP programs must be dismissed.

In an apparent attempt to sidestep the rule of reason standard, Plaintiffs make a conclusory allegation that the UEP animal husbandry guidelines and certification program "are a sham and have no basis in animal husbandry" and that they "do not promote competition." (CAC, ¶ 336.) In a series of allegations that follow, Plaintiffs attempt to disparage the purpose of the program (*id.*, ¶¶ 337–54), again in a seeming attempt to avoid having their claim evaluated under the rule of reason. As a preliminary matter, these allegations cannot convert a rule of reason claim into a *per se* violation, as the whole purpose of the rule of reason analysis is to determine whether a supposed restraint is ultimately anticompetitive or procompetitive. *See, e.g.*, *Pontius v. Children's Hosp.*, 552 F. Supp. 1352, 1371 (W.D. Pa. 1982) ("When performing a rule of reason analysis, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. A given restrictive practice may have both anticompetitive and procompetitive effects. In such a case, the court will find a violation of section 1 only if the anticompetitive effects predominate.") (internal quotations and citations omitted). Indeed, in contrast to Plaintiffs' conclusory assertions, the Complaint and its incorporated materials explain how the UEP animal husbandry guidelines were created in response to customer demands, developed through input from an independent scientific advisory committee made up of USDA officials, academicians, scientists, and humane association members, and vetted and endorsed by customer trade associations.

1. Agreements that Establish Voluntary Standards Are Evaluated Under the Rule of Reason.

"Most restraints [alleged to violate the antitrust laws] are analyzed under the traditional 'rule of reason,'" *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (citing *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)), and voluntary standards set by a private organization, such as the UEP animal husbandry guidelines and certification program, clearly fall within this general rule. Because "product standard-setting by private associations" has the potential to offer "significant procompetitive advantages," such standards are evaluated under the "rule-of-reason" analysis. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988); *Consolidated Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 292-296 (5th Cir. 1988) (holding that "a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not *per se* violate section 1 when, for whatever reason, it fails to evaluate a product favorably to the manufacturer" and recognizing that seals of approval provide product information that is crucial to a competitive market when applying rule of reason analysis); *Roofire Alarm Co. v. Royal Indem. Co.*, 202 F. Supp. 166, 169 (E.D. Tenn. 1962) ("An association formed to foster high standards, to mitigate evils in trade existing through lack of knowledge or information, and to encourage fair competitive opportunities is not to be condemned as an undue restraint of interstate commerce in violation of the Sherman Act merely because it may effect a change in market conditions. The Act sets such standards of reasonableness, and a restraint is not unlawful unless it is unreasonable.") (citations omitted).

The rule of reason analysis "focuses on the competitive significance of the restraint" and "has essentially remained unchanged since it was announced by the Supreme Court" in 1918:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996) (quoting *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918)).

2. The UEP Animal Husbandry Guidelines and Certification Program Are Voluntary Standards for the Treatment of Egg-Laying Hens.

The documents upon which Plaintiffs rely state that the UEP animal husbandry guidelines were established as part of an egg industry effort "to make carefully researched and considered decisions regarding hen welfare." (Exhibit B, cited at CAC, ¶ 340 n.108.)[4] The guidelines provide recommendations to producers, which the producers may voluntarily decide whether to accept and implement, concerning areas relating to hen welfare, including: (1) housing and space guidelines; (2) beak trimming; (3) molting; (4) catching and transport; and (5) euthanasia and on-farm depopulation. (*Id.*)

UEP began development of the guidelines in response to consumers' "growing public concern for the welfare of farm and food animals" (Exhibit C, cited at CAC, ¶ 250 n.74),

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[4] It is clear that when "evaluating a motion to dismiss, [the court] may consider documents that are attached to or submitted with the complaint, and any 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case.'" *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) (citations omitted). *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.").

pressure from animal rights organizations (*id.*), fear of uninformed government regulation (*id.*) and the resulting interest of large institutional customers of egg producers, such as McDonald's[5] (*id.*), Burger King (Exhibit D, cited at CAC, ¶ 252 n.75), and the trade associations for grocers, the Food Marketing Institute, and chain restaurants, the National Council of Chain Restaurants (*id.*). The intention of the guidelines was to allow producers "who incorporate these guidelines into operations [to] 'reassure the public that they are practicing good management and care for their birds.'" (Exhibit C, cited at CAC, ¶ 250 n.74.) UEP's animal welfare committee wrote the guidelines based upon the recommendations of an independent scientific advisory committee, which included "representatives from the USDA, scientists, U.S. Humane Association and academics." (Exhibit E, cited at CAC, ¶ 343, n.111.)

In October 2000, the UEP board adopted animal husbandry guidelines calling for producers to "expand cage space to within a range of 67-86 sq. in. per bird in 12 years and intensify the care and comfort" of laying hens. (Exhibit C, cited at CAC, ¶ 250 n.74.) The cage space requirements were "phased in to avoid market disruption." (Exhibit E, cited at CAC, ¶ 343, n.111.) In December 2001, UEP agreed to implement the transition to the 67-86 square inches per bird requirement in six years—instead of the original twelve years—in response from requests from the Food Marketing Institute. (Exhibit D, cited at CAC, ¶ 252 n.75. *See also* Exhibit F, cited at CAC, ¶ 327, n.105.) UEP's Gene Gregory again made clear that the phase-in was necessary because "de-intensifying houses to 67 sq. in. immediately would be so disruptive to egg production that the U.S. would have insufficient egg supply." (Exhibit F.)

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[5] McDonald's, who concurrently developed its own animal welfare guidelines, based them in part on UEP's draft guidelines, and three members of UEP's scientific committee also served on McDonald's committee. (Exhibit C, cited at CAC, ¶ 250 n.74.)

In 2004, UEP looked into banning "backfilling" under the guidelines and certification program. (*Id.*) "Backfilling is the practice of adding extra pullets from growing houses to cages of older birds to replace mortality." (CAC, ¶ 255 n.76.) The scientific advisory committee argued to the UEP animal welfare committee that the practice should be banned because it "compromises bird welfare by exposing birds from different flocks and of different ages to each other and increases the potential of older birds transmitting" diseases to younger birds that had not yet been vaccinated, in addition to creating "new social competition and associated stress" among the birds. (Exhibit A, cited at CAC, ¶ 228 n.55.) The animal welfare committee developed a resolution to ban backfilling in certain circumstances, but deferred the decision to restrict backfilling until it received more input from the scientific committee. (*Id.*) Plaintiffs allege that the animal welfare committee agreed to prohibit backfilling as part of the guidelines in early 2005. (CAC, ¶ 282.)

In 2002, UEP announced a voluntary certification program to "tell[] restaurants, retailers, and consumers that the eggs come from producers who are committed to good husbandry practices." (Exhibit F, cited at CAC, ¶ 327 n.105.) The guidelines and certification program were announced in a partnership with the Food Marketing Institute and the National Council of Chain Restaurants, who endorsed the UEP guidelines (Exhibit E, cited at CAC, ¶ 343 n.111) after previously naming a "council of animal welfare specialists [to] review the industry-established guidelines." (Exhibit D, cited at CAC, ¶ 252 n.75.) Two major retailers, The Kroger Co. and Wal-Mart Stores, Inc., committed to purchasing only certified eggs. (CAC, ¶ 327.) In order to receive certified status, a company was required to "pass rigorous third-party audits." (Exhibit A, cited at CAC, ¶ 228, n.55.)

As is apparent from the development and functions of the UEP animal husbandry guidelines and certification program, these programs promote voluntary standards established by a private organization in response to significant customer demand. They are properly evaluated under the rule of reason.

3. Plaintiffs Fail to Allege the Necessary Elements of an Antitrust Violation Evaluated Under the Rule of Reason.

"In rule of reason cases, the plaintiff bears the initial burden of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets." *Orson*, 79 F.3d at 1367. To meet this requirement at the pleading stage, the "plaintiff must identify the relevant product and geographic markets and allege that the defendant exercises market power within those markets." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 922 F. Supp 1055, 1060 (E.D. Pa. 1996), *aff'd* 124 F.3d 430 (3d Cir. 1997). Plaintiffs have failed to clearly allege either a relevant product or geographic market in this case.

According to the Third Circuit:

> Where the plaintiff fails to define its proposed relevant market with reference to the rule of . . . cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Queen City Pizza, 124 F.3d at 436. Cross-elasticity means "that a rise in the price of one commodity would tend to increase the demand in another commodity." *Home Health Specialists, Inc. v. Liberty Health Sys.*, No. 92-3413, 1994 WL 463406, at *3 (E.D. Pa. Aug. 24, 1994) (citation omitted). Plaintiffs' Complaint never alleges what the boundaries of the relevant product market at issue are; it is impossible to determine from the Complaint whether the

"relevant product market" includes: (1) all shell eggs; (2) shell eggs produced only from caged layers; (3) UEP certified shell eggs; or (4) shell eggs and egg products.

For instance, Plaintiffs allege that there is no substitute for an "egg" generally (CAC, ¶ 165), but then also allege the class does not include "purchases of 'specialty' shell egg or egg products (such as 'organic,' 'free-range,' or 'cage-free')," (CAC, ¶ 92) suggesting that these are substitutes for eggs from caged hens. Additionally, Plaintiffs do not allege whether "egg products" are part of the same market as "shell eggs" or whether they consist of their own, separately-defined market. (See CAC, ¶¶ 119-122 (describing both "shell eggs" and "egg products" as "related sectors" of "egg production").) Without explaining whether the relevant market includes "specialty" eggs, or whether shell eggs and egg products make up one market or two, Plaintiffs fail to allege a relevant product market. *See Fresh Made, Inc. v. Lifeway Foods, Inc.*, No. Civ.A 01-4254, 2002 WL 31246922, at * 5 (E.D. Pa. Aug. 9, 2002) (granting motion to dismiss antitrust claims where plaintiff did "not allege facts establishing that the market for specialty Russian dairy products, such as kefir, is distinct . . . from other dairy products in general").[6]

Plaintiffs also fail to allege the geographic market where Defendants' conduct supposedly caused an anticompetitive effect. "The relevant geographic market for antitrust purposes consists of the geographic area where buyers can turn for alternative sources of supply." *Home*

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[6] *See also UGG Holdings, Inc. v. Severn*, No. CV 04-1137-JFW, 2004 WL 5458426, at * 4 (C.D. Cal. Oct. 1, 2004) (granting motion to dismiss antitrust claim where plaintiffs failed to allege facts explaining "why other types of boots would not be reasonable substitutes for sheepskin, fleece-lined boots" or "allege a lack of cross-elasticity of demand between the sheepskin, fleece-lined boot market and other boot markets"); *L & J Crew Station, LLC v. Banco Popular de Puerto Rico*, 278 F. Supp. 2d 547, 556 (D.V.I. 2003) (granting motion to dismiss antitrust claim where "the complaint is unclear whether the relevant product market is all banking services or just money remittance services").

Health Specialists, 1994 WL 463406, at *2 (citing *Borough of Lansdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir.1982)). "[T]he geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product." *Id.* (quoting *Tunis Bros. Co. Inc. v. Ford Motor Co.*, 952 F.2d 715, 726 (3d Cir.1991)).

Plaintiffs here reference only the "prices of shell eggs sold in the United States" (CAC, ¶ 98) and the "domestic market" (*id.*, ¶ 147). Plaintiffs also allege that "[h]istorically, the United States egg industry has been oriented toward local consumption" (CAC, ¶ 147);[7] cite materials referencing distinct "Urner Barry Midwest" prices (*id.*, ¶¶ 254, 270, 285, 288, 333), as well as Urner Barry prices for "all regions" (*id.*, ¶ 372); and mention "the market . . . in all regions" falling "by as much as 60 cents or more" (*id.*, ¶ 276), the average price "in the Midwest region" in 2008 (*id.*, ¶ 309), as well as the prices for "all regions east of the Rockies" rising in 2003 (*id.*, ¶ 355). In addition, Plaintiffs mention that Defendants exported eggs, suggesting that the relevant market may be worldwide. (*Id.*, ¶¶ 365-89.) The vague, contradictory statements in the Complaint do not satisfy the "initial burden" of alleging a geographic market. *See Only v. Ascent Media Group, LLC*, No. 06-2123 (FSH), 2006 WL 2865492, at *5 (D.N.J. Oct. 5, 2006) (dismissing antitrust claim where plaintiff "failed to define any relevant product or geographic market and instead only makes vague references to [defendant's] alleged 'monopoly of Earth Station facilities' in the 'New York Metro' area").

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[7] Granted, it is unclear exactly what Plaintiffs mean by "local," as they make this statement when explaining that egg exports are discouraged due to a number of factors. This ambiguity highlights the difficulty of determining the geographic market—or markets—in which Plaintiffs claim anticompetitive effects occurred.

Without particular allegations of the relevant product and geographic markets, Plaintiffs' claim that the UEP animal husbandry guidelines and certification program violated the Sherman Act must be dismissed. *See Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465 (S.D.N.Y. 2001) (dismissing antitrust claims where plaintiff's "only allegations that resemble a geographic market discussion are contradictory" in the complaint stated defendant sold products nationally but attempted to define the product market locally).

4. Plaintiffs' Conclusory Allegations that the UEP Guidelines "Do [Not] Promote Competition" and Are a "Sham" Do Not Convert a Rule of Reason Claim into a Per Se Claim.

As discussed above, claims that voluntary standard-setting by private institutions violate the antitrust laws are evaluated under the rule of reason. Plaintiffs' conclusory allegations that "UEP's certification guidelines are a sham and have no basis in animal husbandry, nor do they promote competition" (CAC, ¶ 336), and allegations that the certification guidelines there is zero tolerance for violating provisions that affect supply (*id.*, ¶ 348) do not change the need for rule of reason analysis and cannot convert plaintiffs' claim into a *per se* claim. By its very definition, the purpose of the rule of reason analysis is to determine whether the anticompetitive effects of an alleged restraint on trade outweigh the procompetitive effects. *See, e.g., Pontius*, 553 F. Supp. at 1371 ("When performing a rule of reason analysis, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. A given restrictive practice may have both anticompetitive and procompetitive effects. In such a case, the court will find a violation of section 1 only if the anticompetitive effects predominate.") (internal quotations and citations omitted).

Under Third Circuit law, if a plaintiff satisfies its initial burden of demonstrating anticompetitive effect in the relevant market, the defendants can "show that the challenged conduct promotes a sufficiently pro-competitive objective." *Orson*, 79 F.3d at 1367-68. If the defendants demonstrate that the alleged restraint has a procompetitive justification, the plaintiff must then "demonstrate that the restraint is not reasonably necessary to achieve the stated objective." *Id.* at 1368. The materials incorporated into the Complaint demonstrate that these programs were developed in response to demands by customers, consumers, and animal rights activists. (*See* Exhibits B, C, D.) In particular, the UEP guidelines and certification program provide a standardized product that customers can identify and evaluate in comparison to other eggs in the marketplace. *See Consolidated Metal*, 846 F.2d at 296 (seals of approval provide "product information [that] is crucial to a competitive market" and "saves buyers the trouble of investigating products themselves and the risk of trying untested products").

It may well be that it costs more to produce eggs when the hens that lay them have 67 square inches of space to move around in, rather than smaller amounts of space. But for customers, such as McDonald's and Burger King, who care about the conditions under which the hens that laid the customers' eggs are kept, eggs that meet the UEP guidelines are of a higher quality than eggs that do not. Price is not the only consideration relevant to the rule of reason analysis. It is beyond dispute that the UEP program promotes competition by creating an industry standard that customers can evaluate in the marketplace. Whether the Plaintiffs can ultimately prove that the UEP programs were not "reasonably necessary" to accomplish these clear procompetitive effects is yet to be seen. But plaintiffs cannot circumvent the rule of reason analysis merely by asserting in their complaint that the program is a "sham" that has no procompetitive effects.

Indeed, it is not clear what Plaintiffs mean by a "sham." Plaintiffs do not claim that UEP certified producers do not actually provide between 67 and 86 square inches of space to their hens. Instead, they suggest that Defendants do not really care about animal welfare and created the program for the sole purpose of reducing the supply of eggs. But this argument fails for two reasons. First, Defendants' motivation is not determinative of whether the procompetitive effects of the program are outweighed by any anticompetitive effects. *See, e.g., Chicago Bd. of Trade*, 246 U.S. at 238 ("a good intention will [not] save an otherwise objectionable regulation or the reverse," although the parties' intentions may help predict the restraint's probable effects). Second, the program itself does nothing to restrict supply, and Plaintiffs do not allege that it does. The certification program does not prevent participants from replacing any birds lost through the cage size requirements "by utilizing previously un-used farms or houses" or by "replac[ing] the missing hens [with] new construction." (CAC, ¶ 255.) And as explained below, any alleged agreements not to build new facilities or otherwise restrict supply are not pleaded sufficiently to meet the *Twombly* requirements. Plaintiffs cannot escape their pleading burden under the rule of reason with respect to the UEP programs by attempting to tie them to conclusory allegations of naked horizontal agreements to restrict supply, and then claim that all these pieces add up to one overarching scheme.

C. VARIOUS STATEMENTS "ENCOURAGING OUTPUT RESTRICTIONS" FROM MAY 2003 THROUGH APRIL 2004.

Plaintiffs go on to allege that once the certification program was in place, UEP made various statements encouraging producers to "wait [to begin building new houses to replace lost production from the UEP certification program] until they have evaluated the extent of improved layer performances before determining the additional housing needed to replace lost production." (CAC, ¶ 265; *see also id.*, ¶¶ 267, 270, 271, 273, 274, 275.) Each of Plaintiffs' allegations,

however, demonstrates nothing more than UEP's encouraging its members to make rational business decisions, not to enter into an unlawful conspiracy. A trade association, which is how Plaintiffs characterize UEP,[8] may encourage its members to take sensible business actions—such as managing production to meet demand. These UEP recommendations do not support the conclusion that trade association members entered into an anticompetitive agreement. *See Maple Flooring Mfrs. Ass'n v. United States.*, 268 U.S. 563, 582-83 (1925); *Hackman*, 520 F. Supp. 2d at 965. Further, Plaintiffs do not allege that any producer, let alone any Defendant, implemented these particular recommendations or entered into an agreement to do so with UEP or any other producer. Thus, Plaintiffs have not pleaded an agreement among Defendants to refrain from building new housing for layers. In fact, Plaintiffs actually allege that cage manufacturers reported brisk sales as producers sought to increase their flock size to offset the effect of the certification program, increasing the number of hens by more than one million in March 2004 compared to January 2003. (CAC, ¶ 273.)

D. THE MAY 2004 RECOMMENDATION TO MOLT FLOCKS AT 62 WEEKS AND DISPOSE OF HENS AT 108 WEEKS THROUGH AUGUST 1, 2004.

In response to building an inventory that "was far too large" for Easter 2004 and causing "the market to free-fall in all regions by as much as 60 cents or more," UEP's marketing committee allegedly recommended that UEP members molt flocks at 62 weeks and dispose of spent hens by 108 weeks. (CAC, ¶ 276.) Plaintiffs allege that UEP asked members to commit to this program, and then identified companies that committed to this plan, including some named Defendants. (*Id.*, ¶ 277.) But there is no allegation that the proposed molting and disposal

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[8] Defendants believe that all of the conduct alleged in the Complaint with respect to UEP and its members is immune from attack under the antitrust laws pursuant to the Capper-Volstead Act, 7 U.S.C. § 291, and other agricultural exemptions. The UEP immunity issue, however, will be addressed at a later time if necessary.

schedule for those producers was a departure from their normal operating practices. Moreover, Plaintiffs' inference that there was something unusual about this schedule runs counter to earlier allegations in the Complaint, which state that in the normal course of the egg business, producers may molt at 60-70 weeks and dispose of hens at about 100-110 weeks in order to "achieve a higher level of egg production." (*Id.*, ¶¶ 134-37.) In addition, most of the defendants (including Michael Foods, Land O'Lakes, Rose Acre Farms, Ohio Fresh, Daybreak Foods, Midwest Poultry Services, NuCal Foods, R.W. Sauder, Sparboe Farms, Hillandale-Gettysburg, L.P., and the non-egg producing Hillandale marketing entities) are not alleged to have made any commitment or agreement to the molting plan. No claim for the alleged molting conspiracy has been stated as to these Defendants.

Nor do Plaintiffs allege any separate impact from the supposed 2004 molting conspiracy. In fact, Plaintiffs' own allegations are that in November 2004 – after this alleged agreement had been made – the projected flock size for the month was "10 million birds larger ... than it was" the previous November and egg prices were "50% lower [in November 2004] than they were [in the previous] year at [that] time." (*Id.*, ¶ 280.)

E. NOVEMBER 2004 STATEMENTS CALLING ON PRODUCERS TO ADDRESS OVERSUPPLY ISSUES.

Plaintiffs allege that in November 2004, when the market had gone from record high to record low prices in one year and production was projected to increase in a way that would continue to have an "adverse effect on pricing," prices would be below production costs "unless . . . the industry comes up with a remarkable way to reduce the flock size" and "get rid of old hens." (CAC, ¶ 281.) Plaintiffs do not identify any producer or Defendant who agreed to follow this alleged recommendation, or any producer or Defendant that actually followed the recommendation or that there in fact was a reduction in hen populations.

F. MAY 2005 FLOCK REDUCTION.

Plaintiffs allege that due to "the large number of hens that were on farms in late 2004 and early 2005, [] UEP and its co-conspirators made other concerted efforts to dispose of hens to reduce supply," which allegedly resulted in a "flock reduction of 3.9 million hens." (*Id.*, ¶ 283.) Plaintiffs do not identify any Defendant or producer that agreed to follow this recommendation or any Defendant or producer that actually reduced its flock. Additionally, considering that egg prices were alleged to have been at "near-historically low prices" in late 2004 (*id.*, ¶ 281), it would have been perfectly consistent with each producer's individual economic interests to reduce flock size based on independent business judgment. That, without more, is not sufficient under *Twombly*.

G. FEBRUARY 2006 FLOCK REDUCTION RECOMMENDATION.

Plaintiffs allege that after prices dropped in January and February 2006, an unnamed UEP member proposed a 2 percent reduction in all members' hen populations. (CAC, ¶ 285.) Plaintiffs do not identify any producer or Defendant who agreed to follow this recommendation, any producer or Defendant that actually followed the recommendation or that there in fact was a reduction in hen populations.

H. RECOMMENDATION TO MOLT AND DISPOSE OF FLOCKS IN 2006.

UEP is alleged to have noted that, in April 2006, an unnamed large producer was independently disposing of flocks and initiating molts four weeks earlier than it had previously scheduled. (CAC, ¶ 286.) Plaintiffs then allege that the UEP Marketing Committee suggested producers dispose of flocks six weeks earlier than previously scheduled and molt flocks six weeks earlier than scheduled (*id.*) and that in May 2006, the flock size decreased by a little over three million birds (*id.*, ¶ 287). They do not, however, identify any Defendant or producer

responsible for this alleged decrease. Moreover, Plaintiffs do allege that in June 2006, flock sizes increased and further allege that Gene Gregory, in a UEP newsletter, asked the UEP membership whether "anyone follow[ed] the recommendation to dispose of flocks six weeks early? . . . Am I wasting my time writing about this and urging producers to be more responsive?" (*Id.*, ¶ 288.) That allegation directly contradicts the notion that there was any agreement. And, although Plaintiffs also claim that in August 2006, UEP urged members to extend the early molting and disposal recommendation by another four weeks (*id.*, ¶ 289), Plaintiffs do not identify any Defendant or producer that agreed to follow these recommendations or any Defendant or producer that actually followed them.

I. AUGUST 2007 RECOMMENDATION TO MOLT HENS EARLY.

Plaintiffs allege that in August 2007, UEP suggested "[i]t could be good timing for egg producers to take care of their business by disposing of or molting hens 2-3 weeks earlier than previously scheduled." (*Id.*, ¶ 290.) Plaintiffs do not identify any Defendant or producer who agreed to follow this recommendation or any Defendant or producer that actually followed it.

J. FEBRUARY 2008 ENCOURAGEMENT TO USE A PRODUCTION PLANNING CALENDAR TO BALANCE SUPPLY AND DEMAND.

Plaintiffs also allege that in the February 2008 newsletter, UEP noted that demand tends to be lower between Easter and Labor Day and that "[e]gg producers should strive to manage their supply to meet the market demand for both the lower and higher demand periods. Producers are encouraged to quickly review their individual company history and, if needed, adjust their egg production to meet the expected demand between the weeks of Easter and Labor Day." (*Id.*, ¶ 291.) Plaintiffs do not identify any Defendant or producer who agreed to follow the Production Planning Calendar or any Defendant or producer that actually followed it.

K. JULY 2008 SUGGESTION TO MOLT A WEEK OR TWO EARLY.

Contrary to all of Plaintiffs' implications of supply restrictions in 2007 and the first half of 2008, Plaintiffs allege that UEP President Gene Gregory noted his concern over an "increased pullet hatch over the [previous] 17 months" that could push down egg prices. (*Id.*, ¶ 292.) Plaintiffs contend that Gregory expressed concern because supply was "currently greater than the demand," which resulted in "surplus eggs [being] available at discounted prices." (*Id.*) Plaintiffs further claim that Gregory suggested that producers "with a planned molt schedule within the next few weeks . . . move up the schedule a week or two." (*Id.*) Plaintiffs do not identify any Defendant or producer that agreed to follow this recommendation or any Defendant or producer that actually followed it.

L. GENERIC REFERENCES TO ACTIONS BY THE EGG "INDUSTRY."

Additionally, isolated public statements referencing "industry" conduct do not sufficiently plead a conspiracy. (*See id.*, ¶ 293 (quoting Cal-Maine's chairman and chief executive officer as saying "the egg industry has taken action to reduce the size of laying flocks and the supply of eggs"); *id.*, ¶ 317 (quoting National Food's Vice-President of Marketing as saying "[w]orking together we can accomplish great things")). Without defining the who, what, when, and where of the alleged concerted conduct, such allegations are meaningless under *Twombly*. Nor do these allegations suggest the plausible existence of a conspiracy as opposed to individual conduct based on rational business decisions. Shorthand characterizations of the net effect of independent conduct as "industry" action does not amount to a successful allegation of a conspiracy by these Defendants. Additionally, the public nature of these comments is inconsistent with any notion that the statements are evidence of a supply-control conspiracy.

* * *

Plaintiffs are counting on the volume of their allegations leaving the impression that some unlawful conduct must have been afoot. But when the alleged conduct is analyzed closely, none of it supports a claim for relief. And while Plaintiffs are entitled to have their Complaint read as a whole, if none of the pieces are individually sufficient, they cannot collectively amount to more.

III. EXPORTS BY COOPERATIVE MARKETING ASSOCIATIONS OF PRODUCERS ARE EXEMPT FROM ANTITRUST LIABILITY.

The Plaintiffs also allege that the members of USEM unlawfully joined together to engage in exports in violation of the Sherman Act. Under the Capper-Volstead Act and other agricultural exemptions, producers of agricultural products are immune from the antitrust laws for many joint activities including the export activities challenged in the Complaint. *See* 7 U.S.C. § 291 (allowing producers to join together in "marketing in . . . interstate and foreign commerce"); *see also* 7 U.S.C. § 455; 15 U.S.C. § 17. Plaintiffs' claims regarding USEM exports must be dismissed because the face of Plaintiffs' Complaint indicates that USEM is an agricultural cooperative whose export activities are exempt from the antitrust laws. *See Leveto v. Lapina*, 258 F.3d 156, 161 (3d Cir. 2001) ("[A] complaint may be subject to dismissal under Rule 12(b)(6) when an affirmative defense . . . appears on its face.") (quotations omitted). Although Plaintiffs allege that members of USEM agreed to export eggs, Plaintiffs also plead that USEM is a "producer cooperative established specifically for the purpose of exporting large quantities of U.S. Shell Eggs." (CAC, ¶ 192 n.45.) And while Plaintiffs' Complaint arduously attempts to undermine UEP's agricultural exemptions, it never alleges that USEM's members are anything other than producers, nor does it allege that USEM's exporting activities are not

protected by the Capper-Volstead Act or other agricultural exemptions. Plaintiffs have pleaded themselves out of court.[9]

IV. PLAINTIFFS' HANDFUL OF CONCLUSORY ALLEGATIONS THAT DEFENDANTS JOINED TOGETHER TO EXPORT EGG PRODUCTS FAIL TO MEET THE TWOMBLY PLEADING STANDARD.

As initially pled, there were two sets of complaints: (a) complaints alleging a conspiracy to reduce the supply of shell eggs[10] and (b) complaints alleging an agreement among egg products companies to allocate customers and markets. Following transfer of all complaints by the Judicial Panel on Multidistrict Litigation to this Court, Defendants moved for an order establishing two tracks for the cases assigned to this Court – one track for the claims alleging that the shell egg producers conspired to reduce the supply of shell eggs and a separate track for the claims alleging that egg products manufacturers conspired to allocate sales territories. Defendants brought that motion as an initial step toward an eventual motion to dismiss the egg products conspiracy claims. *See Defendants' Mem. In Support Of Motion To Establish Separate Tracks For The Shell Egg Cases And The Processed Egg Product Cases* [No. 17, filed Jan. 16, 2009].

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[9] Again, the Defendants do not concede that UEP fails to qualify for the exemption from the antitrust laws. However, Defendants do not challenge Plaintiffs' UEP allegations on this ground by this motion.

[10] *See Bemus Point Inn, Inc. v. United Egg Producers, Inc.*, et al., No. 08-04750 (E.D. Pa.); *Brigiotta's Farmland Produce and Garden Center, Inc. v. United Egg Producers, Inc.*, et al., No. 08-04967 (E.D. Pa.); *Eby-Brown Co. v. United Egg Producers, Inc.*, et al., No. 08-cv-5167 (E.D. Pa.); *Eggology, Inc. v. United Egg Producers, Inc.*, et al., No. 08-cv-5168 (E.D. Pa.); *Goldberg and Solovy Foods, Inc. v. United Egg Producer, Inc.*, et al., No. 08-cv-5166 (E.D. Pa.); *Karetas Foods, Inc. v. Cal-Maine Foods Inc.*, et al., No. 8-04950 (E.D. Pa.); *John A. Lisciandro v. United Egg Producers, Inc.*, et al., No. 08-cv-5202 (E.D. Pa.); *Nussbaum-SF, Inc. v. United Egg Producers, Inc.*, et al., No. 08-04819 (E.D. Pa.); *The Egg Store Inc v. United Egg Producers, Inc.*, et al., No. 08-04880 (E.D. Pa.); *Williams v. United Egg Producers, Inc.*, et al., No. 08-cv-5431 (E.D. Pa.); *Wixon, Inc. v. United Egg Producers, Inc.*, et al., No. 08-cv-5368 (E.D. Pa.); and *Sensoryeffects Flavor Co. v. United Egg Producers, Inc.*, et al., No. 08-cv-5970-JNE-SRN (D. Minn.).

In response to Defendants' motion for separate tracks, Plaintiffs abandoned any claims of a conspiracy among egg products companies to allocate markets and dropped five of the egg products companies that had been defendants in the egg products market allocation cases.[11] However, rather than acknowledge that the dismissal of the egg products complaints results in a case alleging only a conspiracy to reduce the supply of shell eggs, Plaintiffs declare that the CAC continues to allege some sort of conspiracy "regarding egg products." *See Direct Purchaser Plaintiffs' Memorandum Of Law In Opposition To Defendants' Motion To Dismiss Complaints Of Direct Purchaser Plaintiffs That Have Not Joined The Consolidated Amended Complaint And To Confirm That The Consolidated Amended Complaint Supersedes The Allegations Of The Remaining Complaints* [No. 75 filed Mar. 16, 2009] at 8 ("[T]he fact remains that the CAC does allege a conspiracy regarding egg products.").

The dominant accusation of the Complaint is that the Defendants conspired to reduce the supply of shell eggs. (CAC, ¶ 6 ("Defendants conspired to and did reduce and constrain the supply of shell eggs . . . . "); *id.*, ¶ 8 ("These coordinated efforts by Defendants were designed to reduce the supply of shell eggs . . . .").) A few isolated passages in the 132-page Complaint, however, include stray allegations of a conspiracy to reduce the supply of egg products. In these few passages, the Complaint purports to allege a conspiracy to increase exports of egg products as a means to reduce supply and raise prices in the U.S. in violation of Section 1 of the Sherman Act. (CAC, ¶¶ 366, 410(d), 411(c).) But the Complaint fails to allege who among the Defendants participated in the conspiracy or what act any Defendant took in furtherance of the

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[11] *Compare, e.g.*, Complaint at ¶¶ 55-57, *ZaZa Inc. v. Michael Foods, Inc.*, et al., No. 08-cv-05262 (D. Minn. filed Oct. 8, 2008) (alleging conspiracy among egg products companies to allocate markets) *with* CAC (omitting market allocation allegations and dropping most of the egg products company defendants).

alleged conspiracy. As a consequence, the Sherman Act claim of a conspiracy to export egg products should be dismissed.

Twombly made clear that a broad conspiracy charge will not survive a motion to dismiss where, as here, the complaint does not identify facts to support its bald allegations of collusion. The Court indicated that plaintiffs can substantiate such a claim by alleging the "specific time, place [and] person involved in the alleged conspiracies," including "which [defendants] supposedly agreed" or "when and where the illicit agreement took place." *Twombly*, 550 U.S. at 564 n.10. Because the Complaint fails to provide any such detail to support the allegations of a conspiracy to reduce the supply of egg products, Plaintiffs' alleged egg products export conspiracy fails to cross "the line from conceivable to plausible." *Id.* at 547.

Excluding conclusory allegations, Plaintiffs' allegations regarding export orders relate exclusively to shell eggs, not egg products. For example, the Complaint asserts that certain defendant members of USEM participated in a shell egg export order in November 2006. (CAC, ¶ 372.) There are also allegations that USEM accepted four orders between mid-October 2006 and April 2007, as well as another USEM-approved order in August 2007. (*Id.*, ¶¶ 374, 380.) *Plaintiffs do not allege that egg products were included in any of these orders.* Furthermore, the Complaint is notable for what it fails to allege regarding egg product exports. There are no allegations: (i) that any Defendant exported egg products under the auspices of the USEM or UEP; or (ii) that UEP or USEM organized, sold, shipped or facilitated the export of any egg products. The only information alleged relating to egg product exports are three innocuous statistics: (i) egg product exports grew 9% in the first four months of 2007; (ii) export sales of egg products grew 32% by value and 12% by volume in the first six months of 2007; and (iii) egg product exports to Europe were up 183 percent from January 2007 to June 2007. (*Id.*, ¶¶

376, 378, 381.) But no Defendant is alleged to have exported a single egg product, nor has any Defendant been accused of participating in any of the egg product exports alluded to in the Complaint.[12]

In short, Plaintiffs' allegations of a conspiracy to export egg products are conclusory – without any specification of any particular activities by any particular defendant or any facts showing a meeting of the minds between any defendants to export egg products or "when or where the illicit agreement took place." *Twombly*, 550 U.S. at 564 n.10. The Complaint's egg products export conclusions are "nothing more than a list of theoretical possibilities, which one could postulate without knowing any facts whatever." *In re Elevator Antitrust Litig.*, 502 F.3d 47. 50-51 (2d Cir. 2007) (quotation omitted). Such conclusory assertions of agreement do not supply facts adequate to show illegality. *Id.*; *see also Twombly*, 550 U.S. at 555 (when assessing the merits of a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." (quotation omitted)). Accordingly, any purported claim of a conspiracy to export egg products should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss the Complaint in its entirety.

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[12] Even in the Complaint's introductory section naming each Defendant, Plaintiffs purport to allege that certain Defendants participated in a conspiracy to export shell eggs but do not even attempt to claim that any one Defendant agreed to or participated in an egg products export conspiracy. (*See* CAC ¶¶ 24-86).

Dated April 30, 2009

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Eli M. Segal, hereby certify that on this 30th day of April 2009, the foregoing Defendants' Motion To Dismiss Direct Purchasers' Consolidated Amended Class Action Complaint and Memorandum in Support were filed, using the CM/ECF system, and (1) the filing is available for viewing and downloading via the CM/ECF system and (2) the CM/ECF system will send notification of such filing to all attorneys of record who have registered for CM/ECF updates. On this date, Defendants' Motion To Dismiss Direct Purchasers' Consolidated Amended Class Action Complaint and Memorandum in Support were also served by e-mail on all attorneys listed on the attached Panel Attorney Service List.

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In re: Processed Egg Products Antitrust Litigation, MDL No. 2002, No. 08-MD-2002

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