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

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| In Re: Plastic Cutlery Antitrust Litigation | : | CIVIL ACTION MASTER FILE NO. 96-CV-728 |

**MEMORANDUM OF DECISION**

**McGlynn, J.** **March , 1998**

Before the court is plaintiffs' motion for class certification. Defendant Amcel Corp. has submitted an opposition brief, in which codefendant Dispoz-O Plastics Corp. has joined. For the following reasons, plaintiffs' motion for class certification will be granted.

## I. Background

Plaintiffs allege defendants violated section 1 of the Sherman Act, 15 U.S.C. § 1,[1] by conspiring to fix, raise, maintain and stabilize prices of medium weight polypropylene

[1] Section 1 of the Sherman Act provides:

> Every 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C.A. § 1 (West 1997).

cutlery ("plastic cutlery") from January 1, 1990 through December 31, 1992. Plaintiffs are: (1) Eisenberg Brothers, Inc.; (2) Servall Products, Inc.; (3) Clark Foodservices, Inc.; and (4) the St. Cloud Restaurant Supply Company. This action commenced in February 1996 with the filing of four separate complaints against the same group of defendants. The court consolidated those actions (96-CV-728; 96-CV-1116; 96-CV-1618; and 96-CV-1619) under Civil Action No. 96-728 by its Pretrial Order No. 1 of April 30, 1996.

Plaintiffs' motion for class certification follows close on the heels of a criminal antitrust action against two of the current defendants, Amcel Corp. and Dispoz-O Plastics, Inc., and their respective presidents, Lloyd Gordon and Peter Iacovelli. That trial ended on July 22, 1997, with a jury verdict of guilty against all four defendants.

Plaintiffs and the members of the class they seek to represent are direct purchasers of plastic cutlery. The proposed class consists of:

> [a]ll purchasers in the United States of plastic cutlery directly from the defendants or their respective wholly-owned subsidiaries or affiliates, at any time from as early as January 1, 1990 to and including at least December 31, 1992 (excluded from the Class are the Defendants, subsidiaries and affiliates of defendants and co-conspirators of the defendants.) [sic]

Defendants are several major producers of plastic cutlery in the United States. They are: (1) Amcel Corp.; (2) Clear Shield National, Inc.; (3) Dispoz-O Plastics Corp., and (4) Benchmark

Holdings, Inc.[2]

Plaintiffs claim that they and the members of the proposed class have been injured in their respective businesses because they had to pay more for plastic cutlery during the relevant time period than they would have paid under conditions of free and open competition. Plaintiffs seek treble damages, costs of suit, including reasonable attorneys' fees, and injunctive relief against defendants to prevent and restrain them from further violations of section 1 of the Sherman Act.

Defendant Amcel opposes the motion for class certification on three grounds: (1) plaintiffs cannot prove that antitrust "impact" -- the fact of injury to each putative class member from the alleged price-fixing conspiracy -- is a common issue; (2) even if it was a common issue, plaintiffs cannot establish that "impact" is provable on a class-wide basis by generalized proof; and (3) market factors such as geography, customer demands, and individualized transactions create individual issues which would overwhelm common class issues.

**II. Discussion**

Class actions are widely-recognized as being particularly appropriate for the litigation of antitrust cases alleging a price-fixing conspiracy because price-fixing schemes presumably impact all purchasers in the affected market, so that common

[2] One of the defendants, Amcel Corp., has already "agreed in principle to settle" with plaintiffs, Pls. 1/29/98 Letter to Ct., although a settlement agreement has not yet been submitted.

questions on the issue of liability predominate. See Cumberland Farms, Inc. v. Browning-Ferris Indus., Inc., 120 F.R.D. 642, 645 (E.D. Pa. 1988) (Bechtle, J.) (citations omitted); 5 James W. Moore's Federal Practice § 23.47[3][a] (3d ed. 1997) (citations omitted). "With that in mind, in an alleged horizontal price-fixing conspiracy case when a court is in doubt as to whether or not to certify a class action, the court should err in favor of allowing the class." Cumberland Farms, 120 F.R.D. at 645 (citing Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir.), cert. denied, 474 U.S. 946 (1985)).

In evaluating a motion for class certification, the district court should not decide the merits of a case. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974). The court should rather perform a "rigorous analysis" to ensure that all the requirements of Federal Rule of Civil Procedure 23 are met. See In re Chlorine & Caustic Soda Antitrust Litig., 116 F.R.D. 622, 625 (E.D. Pa. 1987) (citing General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982); Glick v. E.F. Hutton & Co., Inc., 106 F.R.D. 446, 447 (E.D. Pa. 1985)). A plaintiff seeking class certification bears the burden of proving that the action satisfies the four threshold requirements of Federal Rule of Civil Procedure 23(a) and also falls within one of the three categories of Rule 23(b). Baby Neal v. Casey, 43 F.3d 48, 55 (3d Cir. 1994).

Rule 23(a) provides:

> (a) Prerequisites to a Class Action. One or

> more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

A plaintiff relying on Rule 23(b)(3) must also meet two additional criteria: (1) questions of law or fact common to class members must predominate over any questions affecting individual members; and (2) the class action device must be superior to any other method of adjudication. Fed. R. Civ. P. 23(b)(3).

**B. Numerosity (Rule 23(a)(1))**

Rule 23(a)(1) requires the class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no magic number which satisfies the numerosity requirement, and plaintiffs do not have to allege the precise number or identity of the class members. See Cumberland Farms, 120 F.R.D. at 645. A court may instead "accept commonsense presumptions in order to support a finding of numerosity." Id. at 646.

In this case, plaintiffs believe "that the number of purchasers of plastic cutlery numbers in the thousands." Pls. Br. at 9. They further contend that "joinder would be impracticable in each action because many of the smaller

purchasers of defendants' plastic cutlery would be unable to assume the financial burdens associated with litigation of individual antitrust lawsuits." Id. Defendants do not contest plaintiffs' assertion that they have satisfied the numerosity requirement.

The typical considerations in evaluating the impracticability of joinder are: (1) the size of the putative class; (2) the geographic location of the members of the class; and (3) the relative ease or difficulty in identifying members of the class for joinder purposes. See Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 110 (E.D. Pa. 1992).

Plaintiffs' proposed class is estimated to number in the thousands, to be located across the United States, and to be identifiable only through examination of defendants' sales records. Under these circumstances, joinder would clearly be impracticable and the numerosity requirement is therefore met. See In re Fine Paper Antitrust Litig., 82 F.R.D. 143, 149-50 (E.D. Pa. 1979).

**B. Common Questions of Law or Fact (Rule 23(a)(2))**

Rule 23(a)(2) requires there to be questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). Courts have generally taken a liberal view of the commonality requirement in cases of conspiracy. See Cumberland Farms Inc. v. Browning-Ferris Indus., Inc., 120 F.R.D. 642, 645 (E.D. Pa. 1988). Furthermore, courts have noted that "[a]ntitrust price-fixing conspiracy cases, by their nature, deal with common legal and

factual questions about the existence, scope and effect of the alleged conspiracy." In re Sugar Indus. Antitrust Litig., 73 F.R.D. 322, 335 (E.D. Pa. 1976); see also Cumberland Farms, 120 F.R.D. at 645; In re South Central States Bakery Prod. Antitrust Litig., 86 F.R.D. 407, 415 (M.D. La. 1980); In re Fine Paper Antitrust Litig., 82 F.R.D. 143, 150 (E.D. Pa. 1979).

Here, plaintiffs allege the existence of a horizontal price-fixing conspiracy by defendants. Defendants do not oppose plaintiffs' claim that common questions of law or fact exist. Two common questions which are immediately apparent are: (1) whether defendants, their respective wholly-owned subsidiaries, and their affiliates conspired to raise, fix, maintain and stabilize the prices of their plastic cutlery products during the relevant time period; and (2) whether the prices paid by plaintiffs and the proposed class members were higher than they would have been absent the alleged conspiracy. Plaintiffs admit that the amount of damages to each particular class member may be an individual issue, but that is not fatal to a claim of commonality. See Siedman v. American Mobile Sys., Inc., 157 F.R.D. 354, 360 (E.D. Pa. 1994) (holding that potential need for individual damages calculations in securities fraud action did not defeat certification because common questions of liability predominated). Rule 23(a)(2)'s commonality requirement is therefore satisfied.

**C. Typicality (Rule 23(a)(3))**

Under Rule 23(a)(3), the claims of the representative plaintiffs must be typical of the claims of the class. Fed. R. Civ. P. 23(a)(3). "The typicality requirement is met if the plaintiff's claim arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." Cumberland Farms Inc. v. Browning-Ferris Indus., Inc., 120 F.R.D. 642, 646 (E.D. Pa. 1988); see also Eisenberg v. Gagon, 766 F.2d 770, 786 (3d Cir.), cert. denied, 474 U.S. 946 (1985). "Typical" does not mean "identical" -- so long as the representative plaintiffs' individual circumstances and legal theories upon which they base their claims are not markedly different from those of the other class members, the typicality requirement is satisfied. Eisenberg, 766 F.2d at 786.

This litigation arises from an alleged price-fixing conspiracy by the defendants in violation of the section 1 of the Sherman Act. In order to prevail on the merits, plaintiffs will have to prove: (1) concerted action by the defendants; (2) that produced an anticompetitive effect within the relevant product and geographic markets; (3) that the objects of the conduct pursuant to the concerted action were illegal; and (4) that plaintiffs were injured as a proximate result of the concerted action. Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1229 (3d Cir. 1993). These are the same elements the other class members would have to prove if they

brought individual actions. Defendants do not argue that the proposed class fails to meet the typicality requirement. The requirements of Rule 23(a)(3) are therefore satisfied.

**D. Adequacy of Representation (Rule 23(a)(4))**

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy of representation rests upon two considerations: (1) the plaintiffs' attorneys must be qualified, experienced, and generally able to conduct the litigation; and (2) the representative plaintiffs must not have interests antagonistic to those of the class. Hosworth v. Blinder Robinson & Co., Inc., 980 F.2d 912, 924 (3d Cir. 1992).

Plaintiffs' counsel asserts that they are experienced in class and antitrust litigation. They also claim that there are no actual or potential conflicts of interest between the members of the class and representative plaintiffs because of their common interest in seeing the defendants' antitrust liability established. Defendants do not question the adequacy of plaintiffs and their attorneys as representatives of the proposed class. The court therefore finds plaintiffs and their attorneys to be adequate class representatives under Rule 23(a)(4).

**E. Predominance (Rule 23(b)(3))**

In order to certify a class under Rule 23(b)(3), the court must find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). An essential

element in any class action is "impact" or "fact of damage" -- i.e., that each putative class member was damaged by the defendants' wrongful conduct. In a price-fixing antitrust class action, plaintiffs must "establish that both the defendants' violations of law and the impact of those violations on the class members involve predominantly common issues." 5 James W. Moore's Federal Practice § 23.47[3][a] (3d ed. 1997) (citations omitted). Plaintiffs must therefore "make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class." Lumco Indus. v. Jeld-Wen, Inc., 171 F.R.D. 168, 174 (E.D. Pa. 1997).

As the district court noted in Jeld-Wen, "[s]everal courts have held that when a defendant is alleged to have participated in a nationwide price-fixing conspiracy, impact will [be] presumed as a matter of law, and the predominance requirement of Fed. R. Civ. P. 23(b)(3) will be satisfied." Jeld-Wen, 171 F.R.D. at 173.[3]

In spite of this trend, Amcel argues that plaintiffs cannot prove that all members of the proposed class were impacted by

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[3] Citing In re Citric Acid Antitrust Litig., 1996-2 CCH Trade Cases ¶ 71,595, 1996 WL 655791 (N.D. Cal. Oct. 2, 1996); In re Amino Acid Lysine Antitrust Litig., MDL No. 1083, 1996 WL 69699 (N.D. Ill. Feb. 15, 1996); In re Sugar Indus. Antitrust Litig., MDL Dkt. No. 201, 1976 WL 1374, at *24 (N.D. Cal. May 21, 1976); Newberg on Class Actions, § 18.28 at 18-98, 18-99 (3d ed. 1992) (stating, "[a]s a rule, the allegation of a price-fixing conspiracy is sufficient to establish predominance of common questions" for purposes of Fed. R. Civ. P. 23(b)(3)).

defendants' alleged price-fixing conspiracy because: (1) the alleged conspiracy did not have the market power to impact all class members; (2) Amcel applied individual pricing strategies to the various categories of its customers; and (3) even if there was class-wide impact, plaintiffs cannot prove that impact by generalized proof.

**1. Market Power**

Amcel first argues that because the alleged conspiracy did not include significant competitors of the conspirators, including Dart, a leading price cutter in the industry, defendants did not have the nationwide pricing power to impact the proposed class. The court does not agree. Simply because Dart and other competitors were not a part of the alleged conspiracy does not invalidate plaintiffs' allegation of class-wide impact. Defendants rely on In re Agricultural Chemicals Antitrust Litigation for the proposition that a price-fixing conspiracy which does not include substantial competitors in the industry eliminates the conspirators' pricing power and their impact on the proposed class. No. 94-40216-MMP, 1995 WL 787538 (N.D. Fla. Oct. 23, 1995). That case is inapposite. The Agricultural Chemicals case involved a vertical price-fixing scheme in which Zeneca, Inc., a manufacturer of pesticides, allegedly entered into a conspiracy with its distributors to market Zeneca products at or above a set minimum price imposed by Zeneca. Id. at *1. The district court rejected the plaintiffs' proposed class in part because Zeneca and its distributors had

insufficient market power to charge supracompetitive prices and therefore could not have impacted the purchasers of Zeneca products. Id. at *8-9. This was largely because Zeneca had a market share of only 8-9%. Id. at *5 n.7. That is not true here, where the four defendants possessed a 65% national market share of the polypropylene cutlery industry from 1990 through 1992. Amcel Br. at 6. That market power is sufficient to meet plaintiffs' threshold showing that defendants had the market power to impact the putative class members,[4] especially in light of plaintiffs' evidence that Dart was tacitly raising its prices in line with defendants' price increases.[5] Pls. Reply Br. 13-14.

Amcel further argues that the plastic cutlery market is too regionally fragmented -- with various manufacturers pricing

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[4] Plaintiffs cite Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1437 (9th Cir. 1995), in support of their statement that "[m]arket share in excess of 50% has been found sufficient to presume market power." Pls. Reply Br. at 12. In that case, the Court of Appeals for the Ninth Circuit noted, "[w]ith a dominant share of the market's productive assets, a firm may have the market power to restrict marketwide output and, hence, increase prices, as its rivals may not have the capacity to increase their sales quickly to make up for the reduction by the dominant firm." Id. While Rebel Oil dealt with an "attempt-to-monopolize" claim against a wholesale and retail oil marketer and its affiliated gas stations, its reasoning with regard to market power is equally cogent in a horizontal price-fixing case such as this one.

[5] Plaintiffs point to a fax dated June 10, 1993 from Michael N. Phillips, Dispoz-O's Vice President of Sales and Marketing, in which he noted the announcement of price increases by other competitors and wrote, "[t]his leaves only us, Dart and Jet to announce." Pls. Reply Br. at 14. Further, in a June 17, 1993, letter to its customers, Amcel states its assumption that Jet Plastica, Dispoz-O and Dart will "also increase their prices." Id.

differently and achieving dominance in different regional markets -- to permit a finding that impact is a predominant common issue. The Court of Appeals for the Third Circuit addressed this problem in Bogosian v. Gulf Oil Corp., stating,

> [i]f the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage.

Bogosian v. Gulf Oil Corp., 561 F.2d 434,455 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

In this case, plaintiffs contend that "Amcel and its co-conspirators implemented list price increases that had a uniform impact on the transaction prices paid by their customers." Pls. Reply Br. at 2. This nationwide price-fixing scheme, plaintiffs allege, caused the price of plastic cutlery to be higher than it would have been in a competitive market. Compl. at 8, ¶ 21. Plaintiffs plan to prove each member of the proposed class was damaged by introducing generalized evidence which controls for regional price differences. Pls. Reply Br. at 18.

In support of their objection, Amcel offers the statements of Miguel Milich, its Vice President of Marketing and Sales since 1990, to show that Amcel's market power in certain regions was weaker than Dart's. Amcel Br. at 23-24. These self-serving

statements, however, fail to show that the alleged price-fixing agreement did not have at least some impact on the putative class members' purchase of plaintiffs' plastic cutlery, even in regions where Dart may have been more dominant than Amcel.[6] As a result, the court does not view defendants' claim of geographic market fragmentation as a barrier to class certification. See Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 173 (E.D. Pa. 1997); Cumberland Farms v. Browning-Ferris Indus., Inc., 120 F.R.D. 642, 647 (E.D. Pa. 1988); In re Fine Paper Antitrust Litig., 82 F.R.D. 143, 153 (E.D. Pa. 1979).

**2. Individual Pricing Strategies & Generalized Proof of Impact**

Amcel's arguments regarding individual pricing strategies and the difficulty of showing impact by generalized proof basically boil down to the contention that too many variables enter into setting prices in the plastic cutlery industry to permit common proof of impact in this case. Specifically, Amcel contends that the different pricing strategies it applied to bid customers, master distributors and repackers require their exclusion from the class because they could not have been impacted.[7] Amcel also argues that a determination of impact

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[6] Moreover, "[e]ven if the variation in price dynamics among regions or marketing areas were such that in certain areas the free market price would be no lower than the conspiratorially affected price it might be possible to designate subclasses to conform with these variations." Bogosian, 562 F.2d at 454-55.

[7] Amcel explains that the prices charged to bid customers were determined on a customer-by-customer basis and were always below Amcel's list price due to competitive conditions. Amcel

would involve proving the price each class member actually paid for plastic cutlery and then comparing it to the hypothetical price the class member would have paid in the absence of the alleged conspiracy. This is impossible by common proof, says Amcel, because: (1) rebates and discounting programs caused actual transaction prices to vary according to competitive conditions and the needs of individual customers; and (2) determining the hypothetical competitive market price would require individualized calculations involving a multiplicity of market factors during different time periods and tailored to the nature of the class members' respective businesses.

These objections are unavailing. Plaintiffs have submitted letters sent by defendants to their customers announcing uniform price list increases on plastic cutlery. Pls. Reply Br., Exs. F, G & H. None of these letters indicate that different categories of purchasers -- such as bid customers, master distributors and repackers -- were exempted from the price list increases, or that special rebates and discounts would counteract the effect of the price increases. Inasmuch as these letters alerted putative class members that the bar had been raised with regard to the cost of defendants' plastic cutlery, these letters are strong

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also contends that distributors and repackers could not have been impacted by the alleged conspiracy because they purchase large volumes at low prices under contracts that are negotiated on an individual basis. In support of these arguments, Amcel again offers the declarations of Miguel Milich, as well as the testimony of one of the government's witnesses in the criminal trial, who testified that the price-fixing agreement did not refer to these three categories of purchasers.

proof of class-wide impact by the defendants' alleged price-fixing conspiracy.

This reasoning is supported by a notable line of cases in the Eastern District of Pennsylvania rejecting similar arguments by defendants in price-fixing class actions.[8] As the district court explained in In re Industrial Diamonds Antitrust Litigation,

> [i]n a number of price-fixing cases concerning industries where discounts and individually negotiated prices are common, courts have certified classes where the plaintiffs have alleged that the defendants conspired to set an artificially inflated base price from which negotiations for discounts began.[9] The theory that underlies these decisions is, of course, that the negotiated transaction prices would have been lower if the starting point for negotiations had been list prices set in a competitive market. Hence, if a plaintiff proves that the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price suffered some injury.

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[8] See Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 173-75 (E.D. Pa. 1997); Cumberland Farms v. Browning-Ferris Indus., 120 F.R.D. 642, 647 (E.D. Pa. 1988); Hedges Enters., Inc. v. Continental Group, 81 F.R.D. 461, 475 (E.D. Pa. 1979); In re Fine Paper Antitrust Litig., 82 F.R.D. 143, 151-52 (E.D. Pa. 1979).

[9] Citing In re Potash Antitrust Litig., 159 F.R.D. 682, 696 n.19 (D. Minn. 1995); In re Domestic Air Transp. Litig., 137 F.R.D. 677, 689 (N.D. Ga. 1991); Fisher Bros. v. Mueller Brass Co., 102 F.R.D. 570, 578 (E.D. Pa. 1984); In re Glassine & Greaseproof Paper Antitrust Litig., 88 F.R.D. 302, 306-07 (E.D. Pa. 1980); Hedges Enters., Inc. v. Continental Group, Inc., 81 F.R.D. 461, 475 (E.D. Pa. 1979); In re Catfish Antitrust Litig., 826 F. Supp. 1019, 1040-41 (N.D. Miss. 1993); In re Screws Antitrust Litigation, 91 F.R.D. 52, 55 (D. Mass. 1981).

In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 383 (S.D.N.Y. 1996).

Thus, even if bid customers, master distributors and repackers, as well as other types of purchasers who received rebates and discounts, paid less than the floor price agreed to by the conspirators, information that the uniform price lists were a factor in negotiating these purchases would provide adequate proof of impact. See Hedges Enters., Inc. v. Continental Group, 81 F.R.D. 461, 475 (E.D. Pa. 1979) (proof of inflated base price from which all negotiations began found sufficient to establish fact of damage); Industrial Diamonds, 167 F.R.D. at 384 (evidence that supracompetitive list prices "formed the basis for subsequent individualized negotiations" sufficient to satisfy common impact requirement).

In addition, plaintiffs proffer two methods of proving antitrust impact by generalized proof. The first method, multiple regression analysis, compares prices and pricing patterns before and during the relevant time period, "using regression analysis to determine actual customer prices after controlling for various characteristics of the market, including regional price differences and various types of rebates." Pls. Reply Br. at 18. The court of appeals has noted that multiple regression analysis is reliable when based upon complete and accurate data. Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co., Inc., 998 F.2d 1224, 1238 (3d Cir. 1993); see also Jeld-Wen, 171 F.R.D. at 174. The second method, called the

"yardstick model," involves a comparison of the characteristics of the plastic cutlery industry with the characteristics of a comparable, or "yardstick," industry that is not affected by the price-fixing conspiracy. Pls. Reply Br. at 19. The district court in Jeld-Wen found this to be a "logical and feasible" method of determining damages. 171 F.R.D. at 174. Defendants have not challenged plaintiffs' ability to prove class-wide impact through multiple regression analysis and the "yardstick model." The proffer of these analytical methods is therefore sufficient to meet plaintiffs' threshold showing that they can prove impact on the proposed class by generalized proof.

Amcel cites several horizontal price-fixing cases where class certification was denied, despite the existence of base prices of some sort, because individual questions regarding proof of impact predominated over common questions. See Burkhalter Travel Agency v. MacFarms Int'l, Inc., 141 F.R.D. 144, 154 (N.D. Cal. 1991) (differences in pricing and submarkets for macadamia nuts precluded class action); American Custom Homes v. Detroit Lumberman's Ass'n, 91 F.R.D. 548, 549 (E.D. Mich. 1981) (class action unmanageable where plaintiffs purchased lumber "in a myriad of different ways involving literally tens of thousands of transactions"); In re Beef Indus. Antitrust Litig., 1986- 2 Trade Cases (CCH) ¶ 67,277, at 61,414 (S.D. Tex. 1986) (prices published in industry "yellow sheet"); Dry Cleaning& Laundry Institute of Detroit, Inc. v. Flom's Corp., 91-CV-76072-DT (E.D. Mich. Sept. 28, 1992). Despite these rulings, the court finds

the line of opinions allowing class certification in cases such as this to be more persuasive.

Accordingly, Rule 23(b)(3)'s predominance requirement is satisfied.

**F. Superiority (Rule 23(b)(3))**

Rule 23(b)(3) also requires that the class action device be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Plaintiffs argue that class action treatment is superior here because: (1) the members of the proposed class number in the thousands, Compl. ¶ 13(b); (2) "many of the smaller purchasers of defendants' plastic cutlery would be unable to assume the financial burdens associated with litigation of individual antitrust lawsuits," Pls. Reply Br. at 9; and (3) other methods of adjudication would be less expeditious and economical. Id. at 25. Defendants do not specifically contest the superiority of the class action device here.

The court's 23(b)(3) superiority finding requires at a minimum

> (1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication of each method.

Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974).

In making its superiority determination, the court should take into account the interests of the judicial system, the putative class, the instant plaintiffs and defendants and their attorneys, as well as the general public. See id. at 760. The four fairness and efficiency criteria of Rule 23(b)(3) should also be considered.[10] Bogosian v. Gulf Oil Corp., 561 F.2d 434, 448 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

In view of the above factors, the court finds class action treatment to be the best means of adjudicating this controversy. First, the injury to each putative class member arises from a single alleged price-fixing scheme by the defendants. Individual actions would be needlessly duplicative, expensive, and time-consuming, especially in light of the predominance of common questions. See Hedges Enters., Inc. v. Continental Group, 81 F.R.D. 461, 477 (E.D. Pa. 1979). Second, identification and notification of the putative class members do not appear to

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[10] Those criteria are:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

present manageability problems, as class members names and addresses are allegedly contained in defendants' own business records. Id. Third, if successful, defendants would only have to defend against these allegations of liability for price-fixing a single time. Id.; see also In re Fine Paper Antitrust Litig., 82 F.R.D. 143, 155 (E.D. Pa. 1979). Lastly, refusing to certify the proposed class might preclude recovery for many putative class members who lack the resources to pursue individual claims, or whose financial injuries are insufficiently grave to make pursuit of individual claims worthwhile. See Lake v. First Nationwide Bank, 156 F.R.D. 615, 626 (E.D. Pa. 1994).

As a consequence, Rule 23(b)(3)'s superiority requirement is satisfied.

**III. Conclusion**

For the foregoing reasons, the court finds that plaintiffs' proposed class meets all the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(3). Plaintiffs' motion for class certification is therefore granted, and this action will be maintained as a class action pursuant to Rule 23(a).

An appropriate order follows.