No. 13-___

IN THE

# Supreme Court of the United States

US FOODS, INC.,

*Petitioner,*

v.

CATHOLIC HEALTHCARE WEST *et al.*, CASON, INC., AND FRANKIE'S FRANCHISE SYSTEMS INC., ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether contract-expectation damages are a permissible remedy in a civil RICO action based on alleged fraud, and if so, whether such damages are available even where any expectation was created only by the alleged fraudulent conduct.

2. Whether but-for causation in a civil RICO class action may be satisfied by a class-wide presumption of reliance on alleged fraudulent conduct in the absence of any individualized proof that any member of the class actually relied on that conduct.

3. Whether a nationwide class asserting state-law claims under multiple state laws may be certified under Rule 23(b)(3) of the Federal Rules of Civil Procedure in the absence of any showing that the state laws at issue are uniformly interpreted and applied.

## PARTIES TO THE PROCEEDING

Petitioner US Foods, Inc. ("US Foods"; formerly known as U.S. Foodservice, Inc.) was a defendant in the district court and the appellant in the court of appeals.

Respondents Catholic Healthcare West, Thomas & King, Inc., Waterbury Hospital, Cason, Inc., and Frankie's Franchise Systems Inc., on behalf of themselves and others allegedly similarly situated, were plaintiffs in the district court and appellees in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

US Foods is a wholly owned subsidiary of USF Holding Corp., which in turn is owned jointly by funds affiliated with the private equity firms Kohlberg, Kravis, Roberts & Co., and Clayton, Dubilier & Rice. No publicly held company has a 10% or greater ownership interest in US Foods, Inc.

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## PETITION FOR A WRIT OF CERTIORARI

US Foods respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-41a) is reported at 729 F.3d 108. The court's order denying panel rehearing and rehearing *en banc* (Pet. App. 90a-91a) is not reported. The district court's opinion granting class certification (Pet. App. 42a-89a) is not reported.

## JURISDICTION

The Second Circuit issued its opinion on August 30, 2013. The court denied US Foods' timely-filed petition for panel rehearing or rehearing *en banc* on October 22, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS AND RULE INVOLVED

1. 18 U.S.C. § 1964(c) provides in relevant part: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ."

2. 18 U.S.C. § 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

3. 18 U.S.C. § 1961(1)(B) provides in relevant part: "As used in this chapter . . . 'racketeering activity' means . . . any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . ."

4. Federal Rule of Civil Procedure 23(b) provides in relevant part:

> A class action may be maintained if Rule 23(a) is satisfied and if . . . (3) the court finds that the questions of law or fact common to class members pre-dominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

## STATEMENT

This case raises important issues concerning the damages and causation elements of civil claims brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, in the class-action context. In the decision below, the

Second Circuit announced a novel interpretation of RICO's damages requirement that, in conflict with the approaches of numerous other circuits, permits recovery of contract-expectation damages for alleged fraudulent conduct rather than limiting damages to out-of-pocket losses—and does so even where any expectation was created by the RICO violation itself. As to RICO's causation element, the Second Circuit again placed itself in conflict with other circuits by holding that causation may be demonstrated even without any individualized proof that a plaintiff entered into a transaction by reason of the RICO violation. By virtue of both rulings, the Second Circuit avoided the individualized issues that otherwise would have precluded class certification. The decision below also raises a circuit conflict not involving RICO as to whether state-law claims may receive national class-action treatment under Rule 23(b)(3) without inquiry into the relevant state-law differences among the multiple state jurisdictions at issue.

Petitioner US Foods is a food distributor and respondents are institutional purchasers of food. Respondents brought a RICO claim and state-law breach-of-contract claims against US Foods alleging that US Foods had inflated the prices it charged to respondents by misrepresenting the cost component used to calculate final sale prices under the food-distribution contracts to which US Foods was a party. Respondents sought to pursue their claims in a nationwide class action on behalf of some 75,000 class members, despite the fact that their claims arose from thousands of differing food-procurement contracts and millions of individual food purchases, implicating the contract laws of 48 different states and a Native American tribe. The district court certified the class under Rule 23(b)(3), concluding that common issues

predominated as to both the RICO and the state-law claims and that a class action was a superior method for litigating those claims.

On interlocutory appeal, the Second Circuit affirmed the class certification with respect to all claims. The court held that the class could pursue contract-expectation damages, not merely out-of-pocket losses (the ordinary measure of RICO fraud damages), and that no individual class member would be required to show that US Foods' alleged fraud was the cause-in-fact of its claimed RICO injury. Both of these holdings conflict with the decisions of other circuits. As to the contract claims, the Second Circuit concluded that there are no material variations in the multiple state and tribal laws at issue based solely on the finding that each of those jurisdictions has adopted the Uniform Commercial Code ("UCC") in some form. This decision too conflicts with other circuits' requirement of more extensive inquiry into relevant state-law differences.

The decision below warrants this Court's review to resolve these circuit conflicts. It also warrants review because allowing private RICO claimants to seek treble damages based on the damages and causation theories embraced below will have a significant economic impact that is magnified in the class-action context. Certiorari should be granted.

### A. The Distribution Agreements

US Foods is the second-largest foodservice distributor in the country. Pet. App. 3a. It purchases food and related products from vendors, and then sells those products—including under its own brand names—to restaurants, hotels, hospitals, cafeterias, and other entities that serve meals. Pet. App. 2a-3a.

Respondents and the absent members of the putative class are institutional customers who purchased products from US Foods between 1998 and 2005. Pet. App. 2a-3a. The Consolidated and Amended Class-Action Complaint alleges RICO and breach-of-contract claims arising out of thousands of varying distribution agreements between US Foods and the members of the putative class. Pet. App. 44a-45a.

US Foods' distribution agreements with its customers, often referred to as "cost-plus" contracts, did not specify total final prices for the goods on offer, but instead provided a methodology for calculating such prices: prices would be calculated by taking the "landed cost" of the product (*i.e.*, the cost of the product when it "landed" at an individual distribution center) and then adding a mark-up or "plus," expressed as a percentage of the "cost." Pet. App. 3a. The contracts provided a number of ways for USF to determine "landed cost," including basing it on an invoice issued to US Foods by a vendor.[1] US Foods' contracts with its vendors permitted it to receive rebates, often called "promotional allowances," when (for instance) it placed an order of a specified minimum amount. Pet. App. 4a. In turn, US Foods' "cost-plus" agreements with its customers permitted US Foods to retain the benefit of these rebates, and thus not to deduct them from the "landed cost" used in setting its customers' prices. Pet. App. 4a. US Foods published its final delivered prices in "order guides," which its customers

[1] In addition, for the large percentage of products sold under US Foods' own brands, US Foods was permitted to set the "landed cost" component of pricing in its own discretion, using price lists, as brand owners typically do. See, *e.g.*, C.A. J.A. 1503; 1546; 1760.

used in making their purchasing decisions. See, *e.g.*, C.A. J.A. A1904.

The "cost-plus" agreements were non-exclusive, did not obligate customers to buy any goods from US Foods, and were terminable without cause. C.A. J.A. A1560, A1735, A2420-21, A2425. Respondents testified that they typically purchased from US Foods when it offered the lowest available prices, and purchased from competitors when those competitors' prices were lower. C.A. J.A. A2420-21, A2521-22, A1905, A1924-25, A1952-53, A1939 (customers' statements that they purchased from US Foods based on its prices compared to competitors' prices or based on its customer service compared to competitors' customer service). Many of US Foods' customers (including two of the named plaintiffs) focused on the prices alone and were not even aware of the "cost-plus" contract terms by which those prices had been calculated. C.A. J.A. A1903, A1958-59, A1961.

### B. The VASPs

Respondents' allegations center on US Foods' calculation of its "landed cost" under the "cost-plus" agreements. Specifically, respondents allege that US Foods created and controlled six companies (called value added service providers, or "VASPs") whose alleged purpose was to inflate the invoice cost paid by US Foods to its vendors and thus the "landed cost" portion of the "cost-plus" price US Foods charged its customers. Pet. App. 4a. According to respondents, the original food suppliers billed the VASPs for the goods at a cost allegedly negotiated by US Foods, and then the VASPs sold the products to US Foods, issuing new invoices with increased cost figures. Pet. App. 5a. In turn, US Foods allegedly used the VASP invoice prices as the "landed cost" when

computing the overall prices that it published in its order guides and ultimately charged its customers. Pet. App. 5a-6a. Finally, US Foods allegedly received promotional allowances from the VASPs, and thereby retained the value of the VASPs' markups. Pet. App. 6a-7a.[2]

The "VASP system" was in place by about 1998, well before many of the putative class members' cost-plus contracts had been executed. *E.g.*, C.A. J.A. A1543-52 (respondent Thomas & King, Inc.); *id.* at A1554-A1729 (respondent Waterbury Hospital). Indeed, in deciding whether to enter into a US Foods distribution agreement, customers relied on US Foods' prices for sample "baskets" of goods, which prices had been calculated on the basis of the VASP-issued invoices. C.A. J.A. A3089-90. Respondents allege that they learned of the VASPs in October 2003, when US Foods' parent described them in public regulatory filings. Pet. App. 9a.

### C. District Court Proceedings

Three years after public disclosure of the VASPs, the respondents filed federal lawsuits against US Foods and other defendants in Connecticut, California, and Illinois, asserting claims for, *inter alia*,

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[2] Although respondents contend that the VASPs had no legitimate purpose, US Foods put on substantial evidence at the class-certification stage to show that they were in fact legitimate businesses serving legitimate business purposes. Pet. App. 11a. Specifically, US Foods showed that the VASPs provided "(1) quality control services; (2) purchasing; (3) brand and product development; (4) merchandising services; (5) marketing support; and (6) customer service." Pet. App. 51a. Both the district court and the Second Circuit recognized that the legitimacy of the VASPs is an unresolved question of fact. Pet. App. 11a, 50a.

breach of contract and violation of RICO. Pet. App. 9a. The Judicial Panel on Multidistrict Litigation transferred the California and Illinois cases to the District of Connecticut, where respondents filed the Consolidated and Amended Class Action Complaint. Pet. App. 10a.

Respondents' RICO claim is predicated on US Foods' alleged commission of mail and wire fraud, 18 U.S.C. §§ 1341, 1343, by making allegedly false representations concerning the existence of the VASPs and their role in establishing the "landed cost" component of the prices reflected on the invoices it sent to its customers. Pet. App. 14a. The contract claim is likewise predicated on US Foods' alleged practice of overcharging its customers by means of the VASP system. Pet. App. 14a. Respondents moved to certify a nationwide class with respect to both the RICO claim and the contract claims.

### D. The Class-Certification Decision

Granting respondents' motion, the district court certified under Rule 23(b)(3) a class comprising:

> Any person in the United States who purchased products from USF pursuant to an arrangement that defined a sale price in terms of a cost component plus a markup ("cost-plus contract"), and for which USF used a VASP transaction to calculate the cost component.

Pet. App. 10a-11a. The district court found that all class members could predicate their mail- and wire-fraud claims an "alleged overriding uniform misrepresentatio[n]"—to wit, "the invoices that [US Foods] sent to its cost-plus customers containing cost-plus prices that were inflated through the use of the VASP enterprise." Pet. App. 64a. The district court

concluded that, even though each invoice accurately reflected the "order guide" price offered to a customer before it chose to purchase, "the invoices each contained a 'common misrepresentation,' the cost-plus price derived from the VASP system." Pet. App. 64a. The district court also found that customers' reliance on US Foods' alleged misrepresentations could be established on a class-wide basis by the simple fact of the plaintiffs' "payment of the allegedly fraudulent invoices." Pet. App. 67a. And the district court found that individualized issues concerning the calculation of damages would not predominate over class-wide issues because respondents' damages model "provides for a universal calculation of damages" based on lost contract expectations—in other words, based on the difference between the "landed costs" that US Foods allegedly should have used to calculate the prices that it listed in its order guides (*i.e.*, the costs to the VASPs) and the allegedly VASP-inflated "landed costs" that US Foods actually used. Pet. App. 79a. The court rejected US Foods' argument that only out-of-pocket losses (as opposed to contract-expectation damages) are recoverable in a civil RICO action based on alleged mail and wire fraud. Pet. App. 78a-79a.

The district court also ruled that individualized questions of law and fact would not predominate even though the contracts (which were not standardized form agreements) were governed by the laws of 48 different states and one Native American tribe, reasoning that all of these jurisdictions have adopted the UCC. Pet. App. 72a-73a. The court did not require respondents (as the parties bearing the burden of proof on their own certification motion) to submit evidence showing that the differences in state law are immaterial; nor did the court perform its own analysis

of varying state interpretations of the UCC. Instead, the court placed the burden *on US Foods* to show that class certification would be *inappropriate*. Pet. App. 73a.

### E. The Second Circuit's Decision

US Foods obtained leave to appeal the certification decision under Fed. R. Civ. P. 23(f). Pet. App. 12a. The Second Circuit affirmed. Pet. App. 2a-3a.

As to the RICO claim, the Second Circuit concluded that "the district court did not abuse its discretion in determining that USF's alleged misrepresentation was uniform and susceptible to generalized proof." Pet. App. 15a-16a. It reasoned that, "[w]hile each invoice obviously concerned different bills of goods with different mark-ups," each made "the same fraudulent misrepresentation," namely that "the cost component of [US Foods'] billing was based on the invoice cost from a legitimate supplier and not from a shell VASP controlled by [US Foods] and established for the purpose of inflating the cost component." Pet. App. 16a. Because US Foods' bills did not identify the suppliers of food or the "landed cost," the court described the allegedly common misrepresentation as an "implicit" one. Pet. App. 19a.

Based on that view, the Second Circuit held that individualized questions of causation did not predominate. Pet. App. 18a. The court reasoned that the allegation that the class members paid the allegedly fraudulent invoices was enough to support a presumption of reliance, and thus causation,[3]

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[3] Respondents ground their causation showing on the class members' reliance on US Foods' alleged misrepresentations. See Pet. App. 66a-67a & n.21; Pet. App. 18a. While this Court held in *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008),

reasoning that "payment . . . 'may constitute circumstantial proof of reliance upon a financial representation.'" Pet. App. 18a (quoting *McLaughlin* v. *Am. Tobacco Co*., 522 F.3d 215, 225 n.7 (2d Cir. 2008)). The Second Circuit also held that the district court had not abused its discretion in holding that RICO damages could be ascertained on a class-wide basis. Pet. App. 24a. Rejecting US Foods' argument that "the proper measure of RICO damages here is the difference between the price paid by each plaintiff for the goods it purchased and the market price available when the goods were bought," the Second Circuit instead found that each member of the plaintiff class was entitled to recover "the difference between the amount . . . paid on fraudulently inflated cost-plus invoices and the amount they should have been billed." Pet. App. 25a. It thus found that RICO damages predicated on the alleged fraud are not limited to out-of-pocket losses, but instead extend to a lost "protectable interest in th[e] cost-plus contracts," a figure that could be measured by "the amount of overcharge." Pet. App. 25a. Respondents admitted that they could not prove out-of-pocket losses—*i.e.*, the difference between what a customer actually paid and the market value of the good—on a class-wide basis. C.A. J.A. A1918, A1967.

As to the contract claims, the Second Circuit ruled that individual questions of law and fact would not predominate because the relevant state and

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that a RICO plaintiff need not prove that *it* relied on a fraudulent statement, *id.* at 649, the Court was careful to note that such a plaintiff typically "will not be able to establish even but-for causation if *no one* relied on the misrepresentation," *id.* at 658 (emphasis added).

tribal laws do not "differ in a material manner that precludes the predominance of common issues." Pet. App. 33a. The court relied principally on the fact that "all the jurisdictions implicated have adopted the UCC," disregarding the fact that *application* of the UCC differs from state to state with respect to, *inter alia*, the implied duty of good faith and the relevance and weight of extrinsic evidence in contract interpretation. Pet. App. 34a. The court thus shifted onto *US Foods* the onus of *refuting* the asserted basis for class certification: "In the absence of any showing *by* [*US Foods*] disputing [that the states have adopted the UCC], . . . the district court did not abuse its discretion in determining that variations in state contract law do not preclude certification." Pet. App. 34a (emphasis added).

## REASONS FOR GRANTING THE WRIT

### I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

The decision below implicates three circuit splits, each of which warrants this Court's review. Had the Second Circuit applied the tests used by other circuits, it could not have found that class-wide issues would predominate over individualized questions and could not have affirmed the decision to certify the class.

*First*, with respect to RICO damages, four circuits hold that a civil RICO action predicated on fraudulent conduct permits recovery only of out-of-pocket losses and not contract-expectation damages, and three others allow contract-expectation damages to be recovered but only where the underlying RICO violation did not create the expectation. Here, the

Second Circuit rejected both approaches in permitting the recovery of contract-expectation damages even where the alleged underlying fraud created the supposed expectation.

*Second*, the decision below deepens a circuit split concerning RICO's but-for causation requirement. The Second Circuit held that generalized, circumstantial evidence is sufficient to prove that an alleged RICO violation caused the injury. Other circuits have held instead that a RICO class action may not proceed absent individualized evidence that any class member was harmed as a result of the alleged RICO violation.

*Third*, as to the breach-of-contract claim, the Second Circuit departed from decisions by other circuits that require a district court to conduct an "extensive analysis" of state-law variances before certifying a multi-state class under Rule 23(b)(3).

Each of these conflicts, separately and collectively, warrants this Court's review.

### A. The Second Circuit's Decision Permitting Contract-Expectation Damages In A Civil RICO Fraud Case Conflicts With Decisions Of The Fifth, Sixth, Eighth, And Ninth Circuits, And Additionally With Decisions of the First, Third, And Seventh Circuits

RICO permits a private party to recover treble damages and attorneys' fees if he can show that he was "injured in his business or property" by a racketeering enterprise. 18 U.S.C. § 1964(c). This Court has admonished, in the context of the Clayton Act's identically-worded injury requirement, that "[t]he phrase 'business or property' . . . retains

restrictive significance." *Reiter* v. *Sonotone Corp*., 442 U.S. 330, 339 (1979). The courts of appeals have divided into three camps in deciding the frequently arising question whether contract-expectation (*i.e.*, "benefit of the bargain") damages fall within this statutory language in the RICO context.

1. The Fifth, Sixth, Eighth, and Ninth Circuits categorically refuse to permit contract-expectation damages. As the Fifth Circuit held: "Injury to mere expectancy interests or to an 'intangible property interest' is not sufficient to confer RICO standing." *Price* v. *Pinnacle Brands, Inc*., 138 F.3d 602, 607 (5th Cir. 1998) (*per curiam*) (footnotes omitted); accord, *Chaset* v. *Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1087 (9th Cir. 2002) (relying on *Price*, 138 F.3d at 607, as authoritative). The *en banc* Sixth Circuit has similarly held that expectation damages are not available in a RICO fraud case, ruling that "a loss or diminution of benefits the plaintiff expects to receive under a workers' compensation scheme does not constitute an injury to 'business or property' under RICO." *Jackson* v. *Sedgwick Claims Mgmt. Servs., Inc*., 731 F.3d 556, 566 (6th Cir. 2013) (*en banc*). See also *Regions Bank* v. *J.R. Oil Co., LLC*, 387 F.3d 721, 730 (8th Cir. 2004) (harm to a plaintiff's "contractual right to repayment . . . is not injury that may support standing to bring RICO claims").

In both *Price* and *Chaset*, the plaintiffs were purchasers of packages of trading cards that did not contain the valuable "chase" cards that the plaintiffs hoped or expected to obtain. See *Price*, 138 F.3d at 605; *Chaset*, 300 F.3d at 1083. Both courts held that, even if the plaintiffs could establish that the defendants' business constituted an illegal gambling operation, RICO did not provide a remedy because the

plaintiffs had no RICO-protected property interest in the expected value of the "chase" cards. *Chaset*, 300 F.3d at 1087; *Price*, 138 F.3d at 607. Because any possible recovery would be limited to out-of-pocket losses, and because the plaintiffs could not show that the cards they did receive were worth less than they had paid, they could not maintain a claim under RICO.

2. The First, Third, and Seventh Circuits, in contrast, allow recovery of contract-expectation damages under RICO, but only if the plaintiff can show that the claimed expectation interest pre-dated (and hence was *not* created by) the defendant's RICO violation. See *Liquid Air Corp.* v. *Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987); *Wishnefsky* v. *Carroll*, 44 F. App'x 581, 582 (3d Cir. 2002) ("'Where, as here, the only property to which a plaintiff alleges injury is an expectation interest that would not have existed but for the alleged RICO violation, it would defy logic to conclude that the requisite causation exists.'") (quoting *Heinold* v. *Perlstein*, 651 F. Supp. 1410, 1412 (E.D. Pa. 1987)); *Scivally* v. *Graney*, 1994 WL 140413, at *3 (1st Cir. Apr. 15, 1994) (*per curiam*; panel including Breyer, C.J.) (quoting the same passage of *Heinold*); see also *Heinold*, 651 F. Supp. at 1411 (expectation damages recoverable only where "the conduct constituting the RICO violation interfered with a contract extant at the time of that conduct").

In *Liquid Air*, for example, the Seventh Circuit allowed an award of expectation damages where the defendant (D&R) had a contract to lease compressed gas cylinders from Liquid Air, D&R terminated the agreement but retained possession of more than 3,000 of the cylinders, and D&R then conspired with a disloyal Liquid Air employee to submit falsified

documents suggesting that D&R had returned all of the cylinders. 834 F.2d at 1300. The court permitted Liquid Air to pursue RICO damages for the rental and cylinder-replacement fees it would have been due under the parties' contract, rejecting D&R's argument that recovery under RICO should be limited to the replacement value of the converted cylinders. *Id.* at 1309. The Court explained that "[t]o restrict damages to the fair market value of the cylinders would deprive Liquid Air of its rights under the contract and would not compensate it for its losses. The damages that Liquid Air was entitled to under its contract with D&R provide the appropriate measure of full compensation." *Id.* at 1310. The court thus concluded that Liquid Air had a RICO-protected "business or property" interest in its expectation of rental income under a contract that predated (and existed independently of) D&R's fraudulent scheme to deprive it of that expectancy.

3. The Second Circuit's decision below departs from both of these two camps in holding that "customers are entitled to the difference between the amount they paid on fraudulently inflated cost-plus invoices and the amount they should have been billed [under the cost-plus agreements]." Pet. App. 25a. By allowing contract-expectation damages at all, the decision conflicts with the approach of the Fifth, Sixth, Eighth, and Ninth Circuits, which never allow such damages.

The decision below also conflicts with the approach of the First, Third, and Seventh Circuits by allowing contract-expectation damages where the expectation was created by the RICO violation itself. Unlike in *Liquid Air*, many of the "cost-plus" contracts here (the source of the class members' allegedly RICO-protected

interests) were entered into *after* the inception of, and as part of, the allegedly fraudulent scheme. See *supra* p. 7. That is, the alleged contract-expectation interest those class members seek to vindicate by their RICO claim did not pre-exist the alleged RICO violation; instead, the RICO violation created the expectation that they would be charged prices free of VASP markups. A customer could only have such an expectation if and to the extent that US Foods misrepresented or concealed the VASPs' existence.[4] Thus, respondents are seeking to recover for injuries to a contract-expectation interest that was created by the alleged RICO violation, which would not be recoverable under the approach taken in the First, Third, and Seventh Circuits.

In short, none of the other courts of appeals to have considered this issue would have certified a RICO class here based on the Second Circuit's damages theory below: Under the rule applied in the Fifth, Sixth, Eighth, and Ninth Circuits, the customers' abstract contract expectancy would *never* be available in a RICO case, while in the First, Third, and Seventh Circuits, the claim would have been condemned by the fact that the expectancy was created after, and predicated upon, the alleged RICO violation. By allowing contract-expectation damages in a RICO case in which even the most generous of its sister circuits

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[4] Even for those customers whose "cost-plus" agreements pre-dated the VASPs, much of the purported expectation interest in markup-free prices was created in part by the alleged scheme: A customer whose *initial* expectation of VASP-free prices was not created by concealment of the VASPs' existence (because the VASPs did not yet exist) would still have had its expectations regarding post-VASP purchases shaped by US Foods' alleged nondisclosure of the VASPs' inception and role.

would have denied such recovery, the Second Circuit has created a three-way circuit split that warrants this Court's review.[5]

4. The result that would obtain outside the Second Circuit is the correct one: A plaintiff does not have a RICO-protected "business or property" interest in an abstract contract expectation, especially one that was created by, and predicated upon, the alleged RICO violation. The plaintiff may have an interest in having the contract honored, but "RICO does not provide a federal treble-damages action for breach of contract." *Oak Park Trust & Sav. Bank* v. *Therkildsen*, 209 F.3d 648, 651 (7th Cir. 2000) (Easterbrook, J.); see also, *e.g.*, *Carr* v. *Tillery*, 591 F.3d 909, 918 (7th Cir. 2010) (Posner, J.) ("allegations amount[ing] merely to a breach of contract claim . . . cannot be transmogrified into a RICO claim by the facile device of charging that the breach was fraudulent, indeed criminal").

5. Applying the correct measure of damages to a RICO fraud claim is dispositive of class certification here. Respondents avoided a finding that individualized damages issues would predominate over class-wide questions, and thus secured class certification, by relying on a damages formula that purports to measure the difference between the prices that the class members paid and the prices purportedly called for in their "cost-plus" contracts.

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[5] While the Second Circuit purported to apply *Heinold* and *Liquid Air* (see Pet. App. 25a), as explained in text, the rule for which its decision stands diverges from those cases. And even if the court of appeals could be said to have faithfully applied *Liquid Air*, there would remain a circuit split between courts adhering to that approach and those (the Fifth, Sixth, Eighth, and Ninth Circuits) that deny contract-expectation damages in every case.

If the Second Circuit below had followed its sister circuits and limited plaintiffs to out-of-pocket damages, it could not have certified the class, for respondents concede that they cannot prove out-of-pocket damages on an individual basis. C.A. J.A. A1918, A1967. Proof of out-of-pocket damages would require determining the actual value of the goods in each of hundreds of millions of individual sales, which occurred over a period of years and in numerous different regional markets. Thus, if the Second Circuit had limited respondents to recovery of out-of-pocket losses in connection with their RICO claim, individualized calculations would have overwhelmed any potentially triable class-wide issues.

### B. The Second Circuit's Decision That Class-Wide Causation May Be Established By Generalized Proof Conflicts With Decisions Of The Fifth And Ninth Circuits

Certiorari should also be granted to resolve a circuit split regarding whether RICO's causation element may be established on a class-wide basis by generalized proof, so as to avoid individualized issues of reliance and causation that would otherwise preclude a finding of predominance under Rule 23(b)(3). Under 18 U.S.C. § 1964(c), a plaintiff is entitled to recover only for injuries sustained "by reason of" the defendant's racketeering activity. This Court has repeatedly stated that this element of the private RICO cause of action requires proof of "but for" causation, as a predicate to "proximate causation," *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 9 (2010); *Anza* v. *Ideal Steel Supply Corp*., 547 U.S. 451, 457 (2006); *Holmes* v. *Sec. Investor Prot. Corp*., 503 U.S. 258, 268 (1992), but has not articulated how

this requisite must be established. Lacking specific guidance on this question, the courts of appeals have taken conflicting approaches.

1. The Ninth Circuit has construed RICO's causation element to require particularized evidence of causation in a RICO fraud class action that (as here) alleged reliance by differently situated class members on similar misrepresentations. In *Poulos* v. *Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), a putative RICO class action alleging that the defendant casinos and gaming machine manufacturers had committed mail fraud in their marketing of the machines to gamblers, the Ninth Circuit affirmed the district court's denial of class certification on the ground that the plaintiff class could not establish reliance and causation through generalized, circumstantial proof. See *id.* at 660-61. Although all of the class members had received similar misrepresentations, the Ninth Circuit concluded that they could not maintain a class action, explaining that "[c]ausation lies at the heart of a civil RICO claim" and that, "[e]ven . . . assuming that all plaintiffs . . . suffered financial loss . . . , it does not necessarily follow that plaintiffs' injuries are causally linked to [defendants'] alleged misrepresentations." *Id.* at 664-65. Instead, the court held that "an individualized showing of reliance [and causation was] required" with respect to each member of the class, and that such individualized issues precluded certification by predominating over any class-wide issues. See *id.* at 666. Further, the court rejected the plaintiffs' attempt to support a class-wide finding of causation through circumstantial evidence that it is "common sense" that a person who lost money at a gambling machine relied on misrepresentations concerning the machine in deciding to wager. *Id.* at 667-68.

The Fifth Circuit took an approach similar to the Ninth Circuit's in *Sandwich Chef of Texas* v. *Reliance National Indemnity Insurance Co*., 319 F.3d 205 (5th Cir. 2003), rejecting the attempt by a putative class of RICO plaintiffs to prove causation via an "invoice theory" similar to that advanced by respondents in the instant case. *Id.* at 220. While the Second Circuit below purported to distinguish *Sandwich Chef* on factual grounds,[6] it ignored the Fifth Circuit's *legal* determination that "the invoice theory does not [establish] reliance . . . and eliminate individual issues of reliance and causation that preclude a finding of predominance of common issues of law or fact." *Id.* at 221.

2. In contrast, the First and Eleventh Circuits have approved certification of RICO classes on the basis of generalized, circumstantial proof of reliance and causation. In *Klay* v. *Humana, Inc*., 382 F.3d 1241 (11th Cir. 2004), on which the Second Circuit relied below (Pet. App. 16a), a putative class of doctors asserted RICO mail- and wire-fraud claims against health maintenance organizations that had allegedly systematically underpaid the doctors' claims for reimbursement over a period of years. The defendants

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[6] Specifically, the Second Circuit purported to distinguish *Sandwich Chef* on the ground that the defendants there "had produced evidence" showing that individual customers had not relied on the alleged misrepresentations, whereas in this case US Foods supposedly had presented "no such individualized proof." Pet. App. 20a (emphasis omitted). This characterization of the record ignores US Foods' evidence that particular class members—*the named plaintiffs themselves*—had not relied on the alleged misrepresentations in choosing to purchase from US Foods, but would have made the same choices even if the VASPs had been disclosed because of US Foods' lower prices or superior customer service. See *supra* p. 6.

opposed class certification on the ground that individualized issues of causation and reliance would predominate over any issues common to a nationwide class of doctors, but the Eleventh Circuit affirmed certification. According to the Eleventh Circuit, individualized issues would not predominate because "the circumstantial evidence that can be used to show reliance is common to the whole class": even absent any particularized evidence, "[a] jury could quite reasonably infer that guarantees concerning physician pay—the very consideration upon which those agreements are based—go to the heart of these agreements, and that doctors based their assent upon them." *Id.* at 1259.

The First Circuit similarly holds that a RICO mail- and wire-fraud class may be certified even in the absence of individualized proof of but-for causation. See *Harden Mfg. Corp.* v. *Pfizer, Inc. (In re Neurontin Mktg. & Sales Practices Litig.*), 712 F.3d 60, 68-69 (1st Cir. 2013), cert. denied, 2013 WL 4763873 (U.S. Dec. 9, 2013). *Harden* involved a putative class of insurance companies and self-insured employers that claimed to have paid excessively for pharmaceuticals as an alleged result of Pfizer's purportedly fraudulent marketing campaign despite the fact that the prescriptions resulted from the innumerable prescribing decisions of doctors exercising their independent discretion. See *id.* at 62. The First Circuit held that there was no need for any individualized proof that the fraud had actually caused any given transaction or any given financial loss, ruling instead that an expert witness's aggregate statistical analysis of a correlation between Pfizer's marketing expenditures and the number of prescriptions, together with other generalized circumstantial evidence, shifted to the defendant the burden to show that the plaintiff's

injury was the result of some other causal factor. See *id.*; see also *Kaiser Found. Health Plan, Inc.* v. *Pfizer, Inc. (In re Neurontin Mktg. & Sales Practices Litig.)*, 712 F.3d 21, 29 (1st Cir. 2013) (describing expert's report).

3. The Second Circuit's decision below deepens this circuit split: Siding with the First and Eleventh Circuits, the Second Circuit affirmed the certification of respondents' RICO class despite the absence of individualized evidence of reliance or causation, and despite US Foods' evidence that individual customers did not make purchasing decisions in reliance on the alleged misrepresentations.

The Second Circuit found that respondents could adequately prove causation on a class-wide basis solely by reference to an "inference" that any customer who paid an allegedly inflated invoice must have relied on its contents. Pet. App. 18a-19a. It did not consider the processes by which respondents and the members of their proposed class made their purchasing decisions, under which each customer (i) chose to enter a US Foods distribution agreement, in most cases after reviewing sample prices based on allegedly inflated VASP invoice prices; (ii) reviewed US Foods' published order guide, which offered products at their full delivered prices inclusive of the VASPs' mark-up; (iii) chose to purchase food from US Foods, at the published, VASP-inclusive price, rather than from one of its competitors; and (iv) paid US Foods the final, published price to which it had agreed, which was the same price reflected in US Foods' invoice. Respondents did not offer evidence that any individual class member bought goods from US Foods at the offered price *because of* the alleged concealment of the VASPs, nor did they present evidence that any

customer would have purchased from US Foods' competitors at *higher* prices had they been aware of US Foods' supply chain. To the contrary, respondents testified that they purchased from US Foods when it offered the lowest available prices, and purchased from the competitors when those competitors' prices were lower. See *supra* p. 6.

The Second Circuit below thus disregarded the individualized evidence regarding particular customers' decisions to purchase from US Foods rather than its competitors, instead focusing only on the invoice step of the relationship and holding that mere payment of an invoice was enough to presume reliance and causation as to the entire class. Pet. App. 18a ("[P]ayment may constitute circumstantial proof of reliance based on the reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed."). The Fifth and Ninth Circuits, in contrast, would have required on these facts that each plaintiff provide individualized proof of this chain of causation.

4. By certifying respondents' class in the absence of any individualized evidence of causation, the Second Circuit adopts the First and Eleventh Circuits' approach to RICO causation rather than the Fifth and Ninth Circuits', and thus deepens a circuit split warranting this Court's review. As this Court recently explained, "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,'" and accordingly "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." *Wal-Mart Stores, Inc.* v. *Dukes*,

131 S. Ct. 2541, 2550, 2560-61 (2011) (citation omitted). Rule 23 thus permits a representative plaintiff to pursue claims on behalf of other, similarly situated individuals *only* where the named plaintiff has the necessary evidence to prove the absent class members' claims and to provide the defendant with all the discovery necessary to its defenses. The Second Circuit's interpretation of RICO and Rule 23, however, allows respondents to try their case by proxy and effectively to eliminate US Foods' ability to challenge causation as to individual purchases. Tens of thousands of customers thus may recover treble damages from US Foods even if they admit that they purchased based on US Foods' overall price and customer service, rather than as a result of alleged misrepresentations concerning US Foods' pricing practices.

Such a result would "sacrifice[e] procedural fairness" in the name of expedience, *Amchem Prods., Inc*. v. *Windsor*, 521 U.S. 591, 615 (1997) (quoting Fed. R. Civ. P. 23 advisory committee's note (1966)), and would contravene the Rules Enabling Act's proscription of certification decisions that may "'abridge, enlarge or modify any substantive right,'" *Ortiz* v. *Fibreboard*, 527 U.S. 815, 845 (1999). Accord, *Phillip Morris USA, Inc.* v. *Scott*, 131 S. Ct. 1 (2010) (Scalia, J., in chambers) (granting stay of class certification decision that "eliminated any need for plaintiffs to prove, and denied any opportunity for applicants to contest, that any particular plaintiff" relied on a fraud; noting that the certification decision presents "an important question" that "implicates constitutional constraints on the allowable alteration of normal process in class actions"); *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (due process requires that a defendant be provided "an opportunity to present every available defense") (citation omitted).

5. As with the RICO damages question, this causation question is dispositive of class certification. Had the Ninth Circuit's approach been applied by the Second Circuit in this case, questions of fact concerning what caused particular food-purchase transactions would necessarily predominate over class-wide issues and thus require denial of class certification: A court attempting to try the case collectively would be forced to address tens or hundreds of thousands of individualized questions concerning whether customers with full knowledge of the VASP scheme would still have chosen to buy from US Foods *to the extent that* its prices and customer service were better than the prices and customer service offered by US Foods' competitors. Certiorari should be granted to resolve the circuit split.

### C. The Second Circuit's Approval Of A Nationwide Class Of Contract Plaintiffs Without "Extensive Analysis" Of Variations In State Law Conflicts With The Decisions Of Other Circuits

Certiorari should also be granted to resolve the additional question, arising in connection with respondents' contract claims, of what showing is required under Rule 23(b)(3) to justify certification of a nationwide class of plaintiffs asserting claims governed by the laws of dozens of states and/or other jurisdictions.

"An overwhelming number of federal courts have denied certification of nationwide state-law class actions" because the prospect of applying several states' laws often renders a class-wide trial so unmanageable as to preclude the requisite finding of predominance. Ryan, Comment, *Uncertifiable?: The Current Status of Nationwide State-Law Class*

*Actions*, 54 Baylor L. Rev. 467, 470 & n.5 (2002) (collecting cases). Recognizing these limits on certification of multi-state classes, the weight of authority follows then-Judge Ginsburg's directive in *Walsh* v. *Ford Motor Co*., 807 F.2d 1000 (D.C. Cir. 1986): "[T]o establish commonality of the applicable law, nationwide class action movants must creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'" *Id.* at 1017 (quoting *In re Sch. Asbestos Litig*., 789 F.2d 996, 1010 (3d Cir. 1986)) (emphasis added). See, *e.g.*, *Sacred Heart Health Sys., Inc.* v. *Humana Military Healthcare Servs., Inc*., 601 F.3d 1159, 1180 (11th Cir. 2010); *Powers* v. *Lycoming Engines*, 328 F. App'x 121, 124 (3d Cir. 2009) (quoting *In re Sch. Asbestos Litig*., 789 F.2d at 1010); *Cole* v. *Gen. Motors Corp*., 484 F.3d 717, 724 (5th Cir. 2007) (all requiring "extensive analysis"); see also, *e.g.*, *Ward* v. *Dixie Nat. Life Ins. Co*., 257 F. App'x 620, 629 (4th Cir. 2007) (denying certification where the movant failed in her obligation to "identify all governing state laws and compare any variations") (citing *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 370 (4th Cir. 2004)); *In re Am. Med. Sys., Inc*., 75 F.3d 1069, 1085 (6th Cir. 1996) (reversing certification where the district court "failed to consider how the law . . . differs from jurisdiction to jurisdiction," because "[i]f more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law"); accord, 7AA Wright *et al*., Federal Practice & Procedure § 1780.1, at nn.12-20 and accompanying text (3d ed.); 2 Newberg on Class Actions § 4:61 (5th ed.).

In the specific context of contract law, *Walsh* explained that it is insufficient for a moving party simply

to "say no variations in state . . . laws relevant to this case exist":

> A court cannot accept such an assertion "on faith." Appellees, as class action proponents, must show that it is accurate. We have made no inquiry of our own on this score and, for the current purpose, simply note the general, unstartling statement made in a leading treatise: "The Uniform Commercial Code is not uniform."

*Walsh*, 807 F.2d at 1016 (quoting White & Summers, Uniform Commercial Code 7 (2d ed. 1980)) (emphasis added); see also *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (quoting *Walsh*).

The Fifth Circuit's decision in *Cole* is illustrative. The plaintiffs sought to proceed as representatives of a nationwide class of car owners alleging breaches of express and implied warranties. 484 F.3d at 718. These claims implicated the law of all fifty states and the District of Columbia; recognizing this problem, the plaintiffs undertook substantial efforts to show that individualized issues would not defeat predominance: They provided an "extensive catalog of the statutory text[s] . . . implicated in this suit," as well as an "overview of textual variations in the relevant UCC provisions" and a "report from an expert on contract law who opined . . . that the few variations . . . are such that they do not affect the result." *Id.* at 725 (quotation marks omitted). The Fifth Circuit nevertheless found the plaintiffs' presentation insufficient, "because they failed both to undertake the required 'extensive analysis' of variations in state law concerning their claims and to consider how those variations impact predominance." *Id.* Their analysis was inadequate because it "relied primarily on the textual similarities of each jurisdiction's applicable

law and on the general availability of legal protection in each jurisdiction for express and implied warranties"; this "largely textual presentation of legal authority oversimplified the required analysis and glossed over the glaring substantive legal conflicts among the applicable laws of each jurisdiction." *Id.* at 725-26.

The Second Circuit's decision below to approve the proposed class without inquiry into state-law differences is thus contrary to the holdings of other circuits. Respondents presented no evidence identifying or comparing variations in interpretation and application of these statutes; nor did the Second Circuit attempt to assess the state-law issues itself. As a result, the Second Circuit rested its ruling not on an "extensive analysis" of the variations in state law, but *solely* on its observations that the States[7] have adopted versions of the UCC provisions pertaining to the duty of good faith and the use of extrinsic evidence in interpreting a contract. Pet. App. 29a-30a. Respondents' bare-bones demonstration that there are "textual similarities" between the states' statutory provisions falls far short even of the showing that the Fifth Circuit found inadequate in *Cole*, 484 F.3d at 725. Nor would this presentation have survived the scrutiny required by the other courts that follow the D.C. Circuit's admonition that an assertion that laws are similar cannot be accepted "on faith," and that instead the "class action proponents . . . must show that it is accurate." *Walsh*, 807 F.2d at 1016.[8] Had the

[7] The Second Circuit did not purport to analyze the applicable tribal law.

[8] The Second Circuit brushed aside the existence of differences in state law by asserting that "state contract law defines breach consistently such that the question will usually be the same in all

Second Circuit followed the lead of those other circuits rather than shifting the burden of proof onto US Foods, it could not have approved certification of the proposed class.[9] Certiorari should be granted to clarify the degree of scrutiny necessary prior to certification of a class action implicating the law of multiple states.

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jurisdictions." Pet. App. 33a. Even if true, that contention ignores that US Foods highlighted differences in state law that pertain not to the existence of a *breach*, but to the antecedent question of the scope of the relevant contractual *duties*: what the duty of good faith required of US Foods, and how the contracts' expressed terms should be interpreted in view of the parties' individual contract negotiation histories and courses of performance.

[9] Even setting aside the Second Circuit's failure to analyze the statutes and its decision to shift the burden of proof onto US Foods, its affirmance of the class certification decision is in error. For instance, the applicable state contract laws vary in their definitions of the duty of good faith: At least Alabama, Idaho, Virginia, Hawaii, Illinois, and Nebraska have adopted modified versions of U.C.C. § 1-201(b)(20), none of which incorporates the model UCC's "reasonable commercial standards of fair dealing" standard. See Ala. Code § 7-1-201(b)(20); Haw. Rev. Stat. Ann. § 490:1-201(b); Idaho Code Ann. § 28-1-201(b)(20); 810 Ill. Comp. Stat. Ann. 5/1-201(b)(20); Neb. Rev. Stat. Ann. UCC § 1-201(b)(20); Va. Code. Ann. § 8 1A-201 (b)(20). And with respect to extrinsic evidence, respondents' own evidence shows that the States have adopted at least two versions of the UCC's "course of performance" provision; the differences are left unexplored. See C.A. J.A. A2647-49.

## II. THE PETITION PRESENTS IMPORTANT QUESTIONS REGARDING THE ROLE OF CIVIL RICO IN PRIVATE LITIGATION, ESPECIALLY IN THE CLASS-ACTION CONTEXT

The questions presented in the petition are important and recurring, presenting additional need for this Court's review.

1. A decision clarifying the scope of civil RICO—including what damages theories are viable, and whether generalized, circumstantial evidence is sufficient to prove causation—would provide guidance in numerous cases where RICO's draconian treble damages and substantial awards of attorneys' fees are at stake.

Civil RICO has taken on an increasingly significant role in private business litigation in recent years, despite the lower courts' frequently expressed misgivings about "widespread abuse." *Parker & Parsley Petroleum Co.* v. *Dresser Indus*., 972 F.2d 580, 588 (5th Cir. 1992). The litigation and settlement leverage provided by the threat of automatic awards of treble damages and attorneys' fees has been appropriately described as "the litigation equivalent of a thermonuclear device." *Miranda* v. *Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Yet despite this Court's efforts to rein in civil RICO overuse through recognition of the proximate-causation element in *Holmes* and its progeny, invocation of the statute has continued apace: Over the past three years, an average of more than 800 civil RICO cases have been filed annually; more than 7,500 such cases have been

filed in the last decade.[10] Only a fraction of those cases (6 cases out of 739 in the year 2012; 1 case out of 917 in 2011) were filed on behalf of the government; the remainder were filed by private plaintiffs.

Concerns about RICO's overuse are only magnified in the context of *class-action* litigation, in which hundreds or thousands of plaintiffs—here, a sprawling class of 75,000—may join together to assert cripplingly large treble-damages claims. The result of combining the class-action device with RICO treble damages is to bestow inordinate settlement leverage upon plaintiffs and their lawyers, unfairly disadvantaging defendants who are unwilling to risk multi-billion-dollar damages claims or the destruction of their lawful businesses. By expanding RICO damages theories while relaxing RICO's causation requirement, the decision below will inevitably lead to more such lawsuits—and thus to an increase in the already substantial threat that RICO class actions pose to the business community.

2. The first question presented (concerning RICO damages) is important for the additional reason that it implicates this Court's recent decision in *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013). *Comcast* clarified and affirmed the rule that, "at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case." *Id.* at 1433 (citation and internal quotation marks omitted). If US Foods is correct on

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[10] See U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit (2012), *available at* http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C02Mar12.pdf; U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/ FederalJudicialCaseloadStatistics/2011/ tables/C02Mar11.pdf.

the damages point discussed above, then allowing class certification of respondents' RICO claim would pave the way for using Rule 23 to end-run this basic principle: A group seeking to recover on what is fundamentally a fraud theory of liability would be permitted to shift to a contract-law theory of damages when necessary to obtain certification.

3. Finally, resolving the circuit split created by the Second Circuit's approval of a nationwide class action under multiple state contract laws is a matter of considerable national importance. Prior to the decision below, the law was settled that the representative of a proposed class seeking recovery under the laws of multiple states bears the burden of demonstrating through "extensive analysis" that material variations in the applicable state legal regimes will not render the case unmanageable. Under the Second Circuit's new approach (permitting certification on no greater showing than a cursory chart of statutory texts), nationwide class action filings based on multiple state laws will proliferate and present burdensome management difficulties for the lower courts. And with or without the additional threat of RICO treble damages, approval of a large nationwide class involving multiple state laws confers tremendous litigation leverage on the class representatives. This Court should review the Second Circuit's decision to allow such complex and unmanageable class actions to proceed without any meaningful threshold scrutiny of variations among the relevant state laws.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 21, 2014

# APPENDIX

**APPENDIX 1**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 12-1311-cv

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IN RE U.S. FOODSERVICE INC. PRICING LITIGATION

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CATHOLIC HEATHCARE WEST, THOMAS & KING, INC., WATERBURY HOSPITAL O/B/O THEMSELVES & OTHERS SIMILARLY SITUATED; CASON INC., O/B/O THEMSELVES & OTHERS SIMILARLY SITUATED; FRANKIE'S FRANCHISE SYSTEMS INC. O/B/O THEMSELVES & OTHERS SIMILARLY SITUATED,

*Plaintiffs-Appellees*,

v.

US FOODSERVICE INC.,

*Defendant-Appellant*,

KONINKIJKE AHOLD N.V., GORDON REDGATE, BRADY SCHOEFIELD,

*Defendants.*

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August 30, 2013

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Appeals from the United States District Court
for the District of Connecticut

Hon. Christopher F. Droney, *U.S. District Judge*

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*Ryan Phair*, Hunton & Williams LLP, Washington, D.C. (*James E. Hartley, Jr.*, Drubner, Hartley & Hellman; *Richard Laurence Macon*, Akin Gump Strauss Hauer & Feld LLP; *Joe R. Whatley, Jr.*, Whatley Drake & Kallas, LLC; *Richard Leslie Wyatt, Jr.*, Hunton & Williams LLP, on the brief), for Plaintiffs-Appellees.

*Glenn M. Kurtz* (*Douglas P. Baumstein*, on the brief), White & Case LLP, New York, New York, for Defendant-Appellant.

Before: STRAUB, LIVINGSTON, and LYNCH, *Circuit Judges.*

DEBRA ANN LIVINGSTON, *Circuit Judge:*

This case concerns allegations of fraudulent overbilling by U.S. Foodservice, Inc. ("USF"), the country's second largest food distributor whose customers have included the United States government, as well as hospitals, schools, restaurant chains, and small businesses across the United States. This interlocutory appeal requires us to determine whether the district court abused its discretion in certifying a nationwide class consisting of about 75,000 USF "cost-plus" customers. The gravamen of plaintiffs' complaint is that USF devised and executed a fraud to overbill these customers in violation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-68, and state and tribal contract law. Despite the size of the class and the fact that it implicates the laws of multiple jurisdictions, the district court correctly concluded that both the RICO and contract claims are susceptible to generalized proof such that common issues will predominate over individual issues and a class action is superior to other methods of adjudication. Accordingly, we affirm the

district court's certification of this class pursuant to Federal Rule of Civil Procedure 23(b)(3).

## BACKGROUND

### *A. USF and Cost-Plus Pricing*

Defendant-Appellant USF was a relatively small player in the food distribution industry in the early 1990s, but by 2000 had tripled in size and become the country's second largest food distributor with over 250,000 customers, 75,000 of whom comprise the class here. USF purchases food products, including meats, seafood, produce, and condiments, from suppliers and in turn sells the items to its customers. USF distributes national brands, such as Heinz and Sara Lee, under their own label; non-branded goods, usually meats and produce; and its own private label brands, which are designed to compete with national brands and require USF to invest in marketing, branding, and similar services.

USF sells many of its food products on a cost-plus basis that is common in the industry. Under this pricing model, the final cost to the customer is computed based on the "cost" (also "landed cost" or "delivered cost"), meaning the price at which USF purchases the goods from its supplier, and the "plus," or additional surcharge that USF charges on top of the cost, often expressed as a percentage increase over this cost. Thus, when a customer enters into a contract with USF, its contract does not guarantee it a set price such as $1 per pound of coleslaw, but rather a set increase over the cost at which USF will purchase the coleslaw (*i.e.*, a 5% mark-up). If a supplier increases the price of goods to USF, that cost is passed on to the customer. USF's contracts with its cost-plus customers provide various methods for calculating cost: some

contracts base cost on nationally-published price lists, for instance, while others dictate that cost is set by USF's distribution centers based on the local market. This class action centers on contracts that set cost based on the "invoice cost," which refers to the price on the invoice from the supplier to USF.

Finally, promotional allowances—discounts provided to distributors from suppliers generally in exchange for fulfilling certain conditions, such as order minimums—are central to cost-plus pricing in the food service distribution industry. Such allowances are more readily available to large distributors and are offered by many (but not all) suppliers to promote their products. USF's customer contracts typically permit USF to keep the benefit of any promotional allowances for itself and do not require that it pass these savings on to the customer. According to USF, without the right to retain these promotional allowances, it would not be able to realize a profit in an extremely competitive market with razor thin margins.

*B. The Alleged Fraud and Its Discovery*

Plaintiffs allege that USF, beginning at least as early as 1998, engaged in a fraudulent scheme by which it artificially inflated the cost component of its cost-plus billing and then disguised the proceeds of its own inflated billing through the use of purported promotional allowances. The scheme centered on six Value Added Service Providers ("VASPs"), which plaintiffs allege were shell companies established and controlled by USF for the purpose of fraudulently inflating USF's cost to its customers.[1] According to

[1] The six VASPs in questions are: (1) Seafood Marketing Specialists, Inc.; (2) Frozen Farms, Inc.; (3) Produce Solutions,

plaintiffs, USF executives Mark Kaiser (who was convicted of securities fraud stemming from a separate fraudulent scheme orchestrated while at USF, *see United States v. Kaiser*, 609 F.3d 556 (2d Cir.2010)) and Tim Lee created the VASPs and installed two confederates, Gordon Redgate and Brady Schofield, in leadership positions at the VASPs in order to hide USF's involvement and control. Though Redgate and Schofield ostensibly owned the VASPs, USF funded the VASPs with multimillion dollar, interest-free loans. As noted by the district court, USF retained irrevocable assignment of the VASP shares, controlled "to whom and when the VASPs made payments," and guaranteed their payments to suppliers.

According to plaintiffs, the purpose of the VASPs was not to provide legitimate services, but to permit USF to overcharge its customers via the generation of fraudulent marked-up invoices that misrepresented USF's cost for the goods provided to its customers. USF allegedly negotiated the purchase of goods from suppliers without input from the VASPs. USF then directed suppliers to bill goods to the VASPs, but often to deliver them directly to USF.[2] The VASPs then generated a second invoice, ostensibly to "sell" the goods to USF, using a higher price dictated by Kaiser or Lee. USF purported to pay the VASPs and then used the higher VASP prices in setting the landed cost for its cost-plus pricing. USF customers unwittingly paid the inflated amounts and the VASPs then completed the scheme by kicking back the fraudulent mark-ups to USF disguised as legitimate promotional

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Inc.; (4) Private Label Distribution, Inc.; (5) Speciality Supply and Marketing, Inc.; and (6) Commodity Management Systems, Inc.

[2] Title for the purchased goods often passed directly from suppliers to USF without being transferred to the VASPs.

allowances. The VASPs retained nominal transaction fees sufficient to cover operating expenses, including handsome salaries for Redgate and Schofield.

Plaintiffs contend that the operation of the VASP fraud was known only to a small cadre of USF employees. According to plaintiffs, the VASP kickbacks, unlike legitimate promotional allowances, were deposited into a single account that Kaiser and Lee controlled. As for USF customers, they were also kept in the dark. Although some of these customers had the right to audit USF's invoices, the invoices generated by the VASPs revealed nothing about the kickbacks to USF or USF's funding and control of the shell companies. The district court cited evidence, moreover, "that USF actually took steps to conceal the VASP system from its customers." The court's opinion refers, among other things, to a contemporaneous email in which Rob Soule, USF's Chief Accounting Officer, noted that the company's auditors were raising concerns about funds advanced to one of the VASPs: "They do not understand why USF would advance funds to any vendor." Soule further observed that the VASP in question "is not just any 'vendor,' but we do not want to publicize this fact." J.A. at 623.

In 2000, The Royal Ahold Group ("Ahold") presented USF with a proposal to acquire the rapidly growing company. In the course of conducting due diligence for the purchase, Paul Ekelschot, head of Ahold's audit committee, sent a memo to members of Ahold's executive board in which he noted that USF used brokers for its private label products in order to earn promotional allowance rebates on these products and

"shelter" these rebates from its clients' auditors.[3] The memo concluded that "[t]his technique needs to be researched to assess the tax and legal implications and associated business risks." J.A. at 795. One recipient of the memo, reacting to this information, wrote in the margin "AVISO! MOLTO PELIGROSA," meaning "Warning! Very Dangerous" in Italian. Ahold nonetheless went forward with the acquisition, and the fraud, according to plaintiffs, thereafter continued.

In January 2003, Ahold management and its auditors, Deloitte & Touche, received an anonymous letter warning that: "US Foodservice . . . ha[s] been requiring some of [its] suppliers to ship product to Ahold companies, but send the invoices to companies[ ] which are not owned by Ahold." J.A. at 902. The letter identified three of the VASPs at issue here as companies to which the suppliers were directed to send invoices. Deloitte subsequently conducted an inquiry and produced a memo regarding USF's VASP transactions in which it observed that the "primary beneficiary of the VASP transactions appears to be USF," but that USF has no legal ownership interest in the VASPs. J.A. at 901. The memo queried whether the VASPs should be consolidated into USF's financial statements and whether "the practice of using the VASP's invoice cost to USF as USF's invoice cost for

[3] Earlier in the year, when USF's finance department became concerned about large payments between USF and the VASPs, David Eberhardt, USF's Deputy General Counsel, drafted agreements to formalize the relationship between USF and the entities created by Kaiser and Lee. Notably, a provision in each of the agreements prohibited the VASPs from publicly indicating any affiliation with USF and required them, if asked, to disavow any suggestion that they acted on USF's behalf.

billing customers under cost plus contracts create[s] any legal exposure." *Id.*

Ahold thereafter procured a letter from its outside counsel, White & Case, concluding that USF faced no "serious exposure to damages from any potential claims arising from USF's use of VASPs." J.A. at 927. The opinion, however, was based on assurances from USF, *inter alia*: that USF had no affiliation with the VASPs and none of its officers, directors, or employees had any ties, directly or indirectly, with them; that "[t]itle to products procured for USF by a VASP pass[ed] through the VASP"; that USF's cost-plus customers were "aware that USF is utilizing the VASPs to service their account"; and, finally, that the VASPs provided valuable services, that USF had "legitimate business reasons for outsourcing certain functions to independent VASPs," and that there was "no improper motive" behind the arrangement. *Id.* White & Case withdrew the letter in March 2003, citing "reason to doubt whether the assumptions on which we based our conclusions are valid." J.A. at 939.

Also in 2003, following the discovery of other accounting irregularities at USF, Ahold's audit committee retained the law firm of Morvillo, Abramowitz, Grand, Iason & Silberberg, which in turn engaged PricewaterhouseCoopers LLP ("PwC") to conduct an independent forensic accounting investigation of USF to address, among other things, whether consolidation of the VASPs was required and "whether legal issues exist relative to cost-plus contracts vis a vis VASP passback earnings." PwC's subsequent report concluded that USF effectively controlled the VASPs, which raised "significant questions" concerning USF's potential liability to its cost-plus customers; PwC

concluded that USF's control of the VASPs "clearly required" consolidation. J.A. at 1258, 1295.

On October 17, 2003, Ahold publicly disclosed the VASP system and consolidated the VASPs into restated financial statements for the relevant years. Its filings outlined the financial relationship between USF and the VASPs, asserted that the "VASPs provide varying degrees of support to USF," and concluded that Generally Accepted Accounting Principles "require the recognition . . . of the VASPs within [Ahold's] consolidated financial statements." J.A. at 2684. Shortly thereafter, Ahold ordered USF to phase out its use of VASPs. It subsequently sold the company for $7.1 billion, agreeing to indemnify USF for any liability to cost-plus customers over $40 million arising from the VASP scheme.

*C. The Class Action*

The first lawsuit against USF in the wake of Ahold's disclosures was filed by Waterbury Hospital, a community and teaching hospital in Connecticut. Other plaintiffs followed suit, including Thomas & King, the owner and operator of 88 Applebee's franchises, and Catholic Healthcare West, the largest not-for-profit hospital system in California.[4] The pending cases were found to involve "common factual

[4] The United States also brought suit, alleging that USF "falsely and fraudulently inflated the prices it charged the United States under its cost-based contracts to supply agencies of the United States with food products." Complaint, *United States v. U.S. Foodservice, Inc.*, 1:10–cv–06782 (S.D.N.Y. Sept. 13, 2010). These claims were brought pursuant to the False Claims Act, 31 U.S.C. § 3729, and the common law of fraud and unjust enrichment. *See id*. The parties settled upon USF's agreement to pay approximately $30 million. Appellee's Br. at 2.

questions concerning the propriety of USF's performance of cost-plus contracts" and were consolidated for pretrial proceedings in the District of Connecticut, *see In re U.S. Foodservice, Inc. Pricing Litig.,* 528 F.Supp.2d 1370 (J.P.M.L. 2007), after which a consolidated amended class action complaint was filed. The district court subsequently denied USF's motion to dismiss the RICO and breach-of-contract claims. *See In re U.S. Foodservice Inc. Pricing Litig.,* Nos. 3:07–md–1894, 3:06–cv–1657, 3:08–cv–4, 3:08–cv–5, 2009 WL 5064468 (D. Conn. Dec. 15, 2009).

Following class discovery, plaintiffs moved to certify the class on these claims on July 31, 2009. Both sides submitted considerable evidence at the class certification stage, including representative samples of the contracts at issue, evidence as to the structure, operation, and concealment of the VASPs, and competing expert testimony on industry standards and damages calculations. USF argued, in particular, that the VASPs provided legitimate services; that because VASPs are common in the industry, customers were aware that USF could set cost in the manner it did; and that its customers based their purchasing decisions on the total prices USF charged—which were competitive with the prices available from competitors—and not on a belief that the "cost" component of USF's invoice price reflected the price at which the supplier provided the goods.

After hearing oral arguments, the district court granted the motion for class certification in full and certified a Rule 23(b)(3) class as:

> Any person in the United States who purchased products from USF pursuant to an arrangement that defined a sale price in terms of a cost component plus a markup ("cost-plus contract"),

> and for which USF used a VASP transaction to calculate the cost component.

*In re U.S. Foodservice Inc. Pricing Litig.*, Nos. 3:07–md–1894, 3:06–cv–1657, 3:08–cv–4, 3:08–cv–5, 2011 WL 6013551, at *1 (D. Conn. Nov. 29, 2011). The district court found that plaintiffs had presented evidence that supported their fraud allegations, including: (1) that USF placed orders directly with the suppliers for "delivery" to the VASPs; (2) that USF "intentionally concealed the VASPs from its cost-plus customers"; and (3) that USF controlled the VASPs' finances, guaranteeing their obligations, dictating to whom and when they made payments, and funding many of the VASPs through short-term, interest-free loans. *Id.* at *2–3. The court noted that the magnitude of the VASP operation was "substantial," with one VASP alone passing back over $58 million to USF in a single year based on about $500 million in sales. PwC, the district court observed, "found that the '[t]otal VASP pass-back receipts over the period from April 2000 to December 2002 were $388 million.'" *Id.* at *3.

The court did not reach the merits whether the VASPs were shell companies created to perpetrate a fraud or whether, as USF contends, they were employed to provide legitimate services to USF in keeping with industry practice. The court noted that the legitimacy of USF's use of the VASPs is contested and that evidence in the record indicates that some VASPs performed legitimate business functions, including: "(1) quality control services; (2) purchasing; (3) brand and product development; (4) merchandising services; (5) marketing support; and (6) customer service." *Id.* Regardless, the court determined that certification was appropriate because plaintiffs had demonstrated, and USF had failed to rebut, that the

relevant issues were susceptible to generalized proof such that individualized questions would not predominate and render the class unmanageable.

USF moved this court for leave to file an interlocutory appeal challenging class certification, and that motion was granted on April 3, 2012.

## DISCUSSION

We review a district court's decision to certify a class under Rule 23 for abuse of discretion, the legal conclusions that informed its decision *de novo,* and any findings of fact for clear error. *Parker v. Time Warner Entm't Co.*, L.P., 331 F.3d 13, 18 (2d Cir. 2003); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 40-41 (2d Cir. 2006). A district court abuses its discretion when "(1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Parker*, 331 F.3d at 18 (alteration in original) (quoting *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168-69 (2d Cir. 2001)).

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013) (internal quotation marks and citation omitted). Federal law permits individual claims to be litigated as a class action provided that the party seeking certification "affirmatively demonstrate[s] his compliance with Rule 23." *Id.* (internal quotation marks omitted). The party must establish that the four threshold requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of

representation—are satisfied and demonstrate "through evidentiary proof" that the class satisfies at least one of the three provisions for certification found in Rule 23(b). *Id.* USF does not dispute that the Rule 23(a) factors are met, but protests that the district court erred in finding Rule 23(b)(3)'s requirements satisfied.

To certify a class pursuant to Rule 23(b)(3), a plaintiff must establish: (1) predominance—"that the questions of law or fact common to class members predominate over any questions affecting only individual members"; and (2) superiority—"that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). To certify a class, a district court must "make a 'definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues,' . . . must resolve material factual disputes relevant to each Rule 23 requirement," and must find that each requirement is "established by at least a preponderance of the evidence." *Brown v. Kelly*, 609 F.3d 467, 476 (2d Cir. 2010); *Myers v. Hertz Corp.*, 624 F.3d 537, 548 (2d Cir. 2010) (plaintiffs bear the burden of "establish[ing] by a preponderance that common questions [will] predominate over individual ones"); *see also*, *In re IPO,* 471 F.3d at 33 ("[T]he important point is that the requirements of Rule 23 must be met, not just supported by some evidence.").

Upon a complete review of the record, we conclude that the district court conducted a rigorous analysis based on the relevant evidence, properly resolved factual disputes, and did not abuse its discretion in concluding that common issues predominate as to plaintiffs' RICO and breach of contract claims and that a class action is a superior method of litigating these claims.

We first briefly outline the substance of plaintiffs' claims against USF. To prevail on their civil RICO claim, plaintiffs must show "(1) a substantive RICO violation under § 1962; (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation." *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 131 (2d Cir. 2010) (citation omitted). Here, plaintiffs allege that USF and its VASPs constituted an enterprise as defined in 18 U.S.C. § 1961(4) that engaged in a pattern of racketeering activity, namely mail and wire fraud, *see* 18 U.S.C. §§ 1341, 1344, in violation of 18 U.S.C. § 1962(c).[5] Specifically, they assert that USF devised a scheme to defraud its customers in which it mailed to customers phony invoices generated by the VASPs to inflate prices above what the customers were contractually obligated to pay. Similarly, the plaintiffs assert that USF breached the terms of its cost-plus contracts by using the VASP invoices to calculate the cost component of the amounts billed to customers, thereby causing these customers to pay prices higher than they should have paid under the contracts.

A. Predominance

*i) The RICO Claim*

The predominance requirement is satisfied "if resolution of some of the legal or factual questions that

[5] Section 1962(c) makes it "unlawful for any person employed by or associated with" an enterprise engaged in or affecting interstate or foreign commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). "Racketeering activity" is in turn defined to include a litany of so-called predicate acts, including "any act which is indictable" under the mail and wire fraud statutes. 18 U.S.C. § 1961(1)(B).

qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Eli Lilly & Co.*, 620 F.3d at 131 (quoting *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002)); *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, —— U.S. ——, 133 S.Ct. 1184, 1196, 185 L.Ed.2d 308 (2013) (in securities fraud class action, explaining that "Rule 23(b)(3) . . . does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof[,]" but rather, requires "that common questions *predominate* over any questions affecting only individual class members" (internal quotation marks and alterations omitted)). USF argues that this has not been shown as to the RICO claim because: (1) a misrepresentation necessary to prove mail or wire fraud cannot be established through common evidence; (2) plaintiffs' reliance on any purported misrepresentation by USF, necessary here to prove causation, cannot be shown using common evidence; and (3) plaintiffs suffered no injury to their business or property that can be shown with common evidence. We disagree with each of these contentions.

*a) Misrepresentation*

We have previously observed that fraud claims based on uniform misrepresentations to all members of a class "are appropriate subjects for class certification" because, unlike fraud claims in which there are material variations in the misrepresentations made to each class member, uniform misrepresentations create "no need for a series of mini-trials." *Moore*, 306 F.3d at 1253. Here, the district court did not abuse its discretion in determining that USF's

alleged misrepresentation was uniform and susceptible to generalized proof. Specifically, plaintiffs allege that the VASP-related invoices mailed from USF to its cost-plus customers included the same fraudulent misrepresentation: namely, that the cost component of USF's billing was based on the invoice cost from a legitimate supplier and not from a shell VASP controlled by USF and established for the purpose of inflating the cost component. While each invoice obviously concerned different bills of goods with different mark-ups, the material misrepresentation—concealment of the fact of a mark-up inserted by the VASP—was the same in each.

The allegations here are most akin to those in *Klay v. Humana, Inc.*, where plaintiffs alleged that defendant HMOs systemically underpaid doctors by uniformly misrepresenting to them that the HMOs were "honestly pay[ing] physicians the amounts to which they were entitled." 382 F.3d 1241, 1258 (11th Cir. 2004), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008). There, the Eleventh Circuit upheld certification of the physician class on the basis that the doctors' RICO claims were "not simply individual allegations of underpayments lumped together," but rather focused on a centralized corporate conspiracy to defraud, which could be proven through generalized evidence—and which, absent certification, would have to be reproven in each case. *Id.* at 1257-58. Similarly here, the thrust of the RICO claim is USF's scheme to create and employ the VASPs to inflate the invoices so as to overbill each class member in the *exact same manner.*

USF contends that the customer invoices cannot be deemed to misrepresent cost without reference to the

parties' underlying contractual arrangement, defeating any resort to generalized proof. But even assuming *arguendo* that this is correct, the district court specifically found after reviewing the evidence that USF's cost-plus contracts are substantially similar in all material respects. *In re U.S. Foodservice*, 2011 WL 6013551, at *14. This finding is supported, moreover, by Deloitte, Ahold's auditor, which reviewed the contracts to determine USF's potential legal exposure and concluded that the key term of "invoice cost" is "consistently defined." J.A. at 900-01. In short, because the question whether the invoices materially misrepresented the amounts due USF is common to all plaintiffs, the class will "prevail or fail in unison" on this point—rendering certification appropriate. *Amgen*, 133 S.Ct. at 1191.

*b) Causation*

USF next contends that reliance is "a necessary part of the causation theory advanced by the plaintiffs," *Eli Lilly*, 620 F.3d at 133, and that individualized issues will predominate as to reliance because "the key issue in this case is customer knowledge of the alleged pricing practice at issue," Appellant's Br. at 25. USF argues that the district court simply "assumed" that USF's customers were "ignorant of USF's influence or control over the landed cost and [promotional allowances]" and that it failed to analyze or even acknowledge evidence to the contrary. Customer reliance on its supposedly inflated invoices, USF maintains, "can be determined only by adducing evidence from the 75,000 customers," and not by generalized proof. Appellant's Br. at 26-27. We disagree.

As we have noted, "proof of misrepresentation—even widespread and uniform misrepresentation—

only satisfies half of the equation" in cases such as this because plaintiffs must also demonstrate reliance on a defendant's common misrepresentation to establish causation under RICO.[6] *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008). Certification is inappropriate where "reliance is too individualized to admit of common proof." *Id.* at 224–25 (concluding that certification was improper where many factors other than defendants' alleged misrepresentations about health consequences of light cigarettes may have led individuals to purchase them). The fact that class members will show causation by establishing reliance on a defendant's misrepresentations, however, does not place fraud-based claims entirely beyond the reach of Rule 23, provided that individualized issues will not predominate. *See id.*

Such is the case here. First, payment, as we have said, "may constitute circumstantial proof of reliance upon a financial representation." *Id.* at 225 n. 7. As in *Klay*, the defendant here is alleged to have sent the plaintiffs false billing information (albeit in this case misrepresenting the amount of money due rather than, as in *Klay*, that the proper amount had been paid). *Klay*, 382 F.3d at 1259. In cases involving fraudulent overbilling, payment may constitute circumstantial proof of reliance based on the reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so

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[6] While the Supreme Court has clarified that first-party reliance is not an element of a RICO claim predicated on mail fraud, *see Bridge*, 553 U.S. at 649, 128 S.Ct. 2131, it may be, as it is here, "a necessary part of the causation theory advanced by the plaintiffs." *Eli Lilly*, 620 F.3d at 133.

absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed. Fraud claims of this type may thus be appropriate candidates for class certification because "while each plaintiff must prove reliance, he or she may do so through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue)." *Id.*

USF therefore errs in suggesting that "there is no common evidence of individual customer knowledge" as to its allegedly fraudulent billing scheme. Provided the plaintiffs are successful in proving that USF inflated their invoices and misrepresented the amount due, proof of payment constitutes circumstantial evidence that the plaintiffs lacked knowledge of the scheme. Moreover, and as found by the district court, the record also contains generalized proof of USF's *concealment* of its billing practices, including the Ekelschot memo in which the head of Ahold's audit committee observed that USF used the VASPs to earn promotional allowance rebates on private label products and "*to hide [these rebates] from clients' auditors.*" J.A. at 795 (emphasis added). As the district court found, "there is evidence that USF actually took steps to conceal the VASP system from its customers" and "the record lacks evidence that any of USF's customers had knowledge of USF fraudulently inflating the cost component of its products through the operation of the VASPs." *In re U.S. Foodservice*, 2011 WL 6013551, at *9, 11. Upon a review of the record, we conclude that these findings are not in error.

USF claims that this case is not like *Klay*, but like *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.*, 319 F.3d 205 (5th Cir. 2003), in which the Fifth Circuit held that a class action

premised on the fraudulent overcharge of insurance premiums, supposedly in excess of regulatory rates, had been improperly certified. In *Sandwich Chef,* however, as the Fifth Circuit concluded, the district court "did not adequately account for individual issues of reliance that will be components of defendants' *defense* against RICO fraud." *Id.* at 220 (emphasis added). There, the defendants had produced evidence that class members had individually negotiated premiums, demonstrating awareness that "the amounts being charged varied from rates filed with regulators," and that policyholders had nonetheless "agreed to pay such premiums." *Id.* Such evidence, reflecting individualized arrangements on the part of putative class members wholly aware of the truth regarding the alleged misrepresentations on which the class was said to have relied, "preclude[d] a finding of predominance of common issues of law or fact." *Id.* at 221. Critically, however, the record here contains *no such individualized proof* indicating knowledge or awareness of the fraud by any plaintiffs.

USF contends, to the contrary, that the district court "failed to rigorously analyze or resolve [an] overwhelming evidentiary record" demonstrating that many class members were not deceived as to the nature of its billing practices. Appellant's Br. at 27. We are not persuaded. Much of the evidence contained in the "ten tranches of evidence" on which USF relies is of marginal relevance, at best, to the question whether USF's customers had knowledge of the disputed billing practices. For example, USF relies heavily on a 2006 email from an employee at Premier, Inc. ("Premier"), a purchasing agent for some of USF's cost-plus customers, alerting clients that USF had been sued "for pricing practices" and noting the employee's belief that USF had been "transparent and ethical" in its

relationship with Premier. As the district court noted, Premier was not a cost-plus customer, but a "Group Purchasing Organization" that helped members like Catholic Healthcare West manage and reduce supply costs. And suffice it to say that this single-paragraph email sheds little light on the question whether any USF customer was aware of USF's billing practices during the relevant period.

Upon a review of the record, we conclude that the district court did not err in finding that "there is no evidence that the plaintiffs were aware of the VASP system or its purpose." *In re U.S. Foodservice*, 2011 WL 6013551, at *9. But even if this were not the case, most of the remaining proof to which USF points hardly draws into question plaintiffs' Rule 23 showing, and for a simple reason: such proof, far from demonstrating that factual questions regarding the knowledge of individual class members will pre-dominate over questions common to the class, is in fact *generalized* proof concerning common arrangements in the food distribution industry. Thus, USF cites the testimony of its expert, Frank Dell, that pursuant to "well-known and common industry practice," USF's customers would have understood that USF had influence over the invoice cost used in the cost-plus formula and that it received promotional allowances. USF relies on survey evidence suggesting, *inter alia*, that USF customers purchasing on a cost-plus basis understand both "that foodservice distributors, such as USF, ha[ve] an internal profit or inside margin in the cost component of their private label sold on a cost

plus basis" and that such distributors use middleman vendors.[7]

We agree with the district court that such evidence "does not raise the concern of issues of individual knowledge predominating." *See In re U.S. Foodservice*, 2011 WL 6013551, at *11. As the district court recognized, the parties "dispute the legitimacy and purpose of the VASPs," with USF contending that the VASPs provided service to USF, particularly regarding its private label products; that USF, as is common in the food service industry, legitimately influenced and even set the "cost" component in its cost-plus pricing based on the service provided; and that the monies supposedly funneled back to USF were in fact proper promotional allowances. *Id.* at *2. USF points to generalized proof supporting this defense—proof wholly consistent with class action treatment—but the record does not contain a single piece of evidence suggesting "actual individual knowledge" on the part of a specific customer "of the VASPs' existence and USF's pricing practices." *Id.* at *11; *see Katz v. China Century Dragon Media, Inc.*, 287 F.R.D. 575, 588-89 (C.D. Cal. 2012) (finding predominance requirement satisfied in securities fraud class action where there was no evidence indicating "the likely need for individualized assessments of class members with respect to the[ir] knowledge" of alleged misrepresentations); *Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 118-19 (S.D.N.Y. 2011) ("Sheer conjecture that class members 'must have' discovered [the misrepresentations] is

[7] USF additionally points to the testimony of plaintiffs' expert, Thomas Maronick, to the effect that pursuant to industry practice, USF would have a "say" in determining the price of their private label products.

insufficient to defeat Plaintiff's showing of predominance when there is no admissible evidence to support Defendants' assertions."). In such circumstances, conjectural "individualized questions of reliance," which are "far more imaginative than real[,] . . . do not undermine class cohesion and thus cannot be said to predominate for purposes of Rule 23(b)(3)." *Amgen*, 133 S.Ct. at 1197 (internal quotation marks omitted). For if bald speculation that some class members might have knowledge of a misrepresentation were enough to forestall certification, then no fraud allegations of this sort (no matter how uniform the misrepresentation, purposeful the concealment, or evident plaintiffs' common reliance) could proceed on a class basis—a conclusion that this Court has already declined to reach. *See McLaughlin*, 522 F.3d at 224-25.

Whether, as plaintiffs claim, the VASPs were created for the purpose of misrepresenting cost and were then kept secret so as to deceive customers about overbilling or whether, instead, they provided legitimate service to USF for which it appropriately billed its customers, is a question subject to generalized proof—and a question that, barring class action treatment, will have to be endlessly relitigated in individual actions. We conclude that the class will "prevail or fail in unison" on this point—so that, in either case, questions of fact common to class members will predominate over questions regarding individual customers' reliance. The district court acted well within its discretion in rejecting USF's claim to the contrary. *See Amgen*, 133 S.Ct. at 1191.

*c) Injury*

USF next contends that the district court abused its discretion in certifying a RICO class because RICO damages cannot be reliably ascertained on a class-

wide basis. According to USF, the proper measure of RICO damages here is the difference between the price paid by each plaintiff for the goods it purchased and the market price available when the goods were bought, so that regardless whether USF deceived customers in purporting to carry out its obligations under its cost-plus contracts, plaintiffs were harmed by USF's fraud *only* if they purchased goods from USF that they could have obtained more cheaply elsewhere. Because such a calculation "would require the consideration of the prices for thousands of products, on a daily, weekly and monthly basis, over a period of years, in hundreds of different markets, for tens of thousands of customers," class-wide issues as to damages, USF contends, do not predominate, and certification was inappropriate. Appellant's Br. at 45.

USF again misses the mark. Our case law is clear that "damages as compensation under RICO § 1964(c) for injury to property must, under the familiar rule of law, place [the injured parties] in the same position they would have been in but for the illegal conduct." *Commercial Union Assurance Co., plc v. Milken*, 17 F.3d 608, 612 (2d Cir. 1994). Granted, we have said that because RICO "compensates only for injury to 'business or property,'" a victim who is induced to part with his property by the misrepresentations of a fraudster is generally not entitled to "benefit of the bargain" damages—meaning recovery of what the fraudster promised, as opposed to the property the victim lost. *McLaughlin*, 522 F.3d at 228 (quoting 18 U.S.C. § 1964(c)); see also *Fleischhauer v. Feltner*, 879 F.2d 1290, 1300 (6th Cir. 1989); *Heinold v. Perlstein*, 651 F.Supp. 1410, 1412 (E.D.Pa. 1987) ("Where, as here, the only property to which a plaintiff alleges injury is an expectation interest that would not have existed but for the alleged RICO violation, it would

defy logic to conclude that the requisite causation exists."). This case, however, is not about such inducement, but concerns a fraud that occurred after plaintiffs already had a protectable interest in their cost-plus contracts with USF. *See Heinold*, 651 F.Supp. at 1411 (distinguishing between RICO violations that induce the formation of a contract and RICO violations that "interfere[ ] with a contract extant at the time of that conduct"); *see also Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987) (holding RICO victim entitled to recover benefits due under contract where defendants engaged in fraud after the formation of contract in order to deprive victim of benefits of its bargain).

USF, having entered into contracts that entitled its customers to "cost-plus" pricing, is alleged to have systematically deceived them into believing they were being afforded such pricing when, in fact, they were being overcharged. The key inquiry in such a circumstance is not what price customers could have procured elsewhere at the point of purchase, but rather the amount of overcharge—the amount customers paid USF as a result of its deception. The measure of damages as compensation for *this* injury is straightforward: customers are entitled to the difference between the amount they paid on fraudulently inflated cost-plus invoices and the amount they should have been billed (or, stated differently, the price increase due to the use of VASPs).[8] We accordingly conclude

[8] Plaintiffs' proposed measure for damages is thus directly linked with their underlying theory of classwide liability (that the misrepresentations on the invoices caused overpayments) and is therefore in accord with the Supreme Court's recent decision in *Comcast v. Behrend*, —— U.S. ——, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013), which reversed a Rule 23(b)(3) class certification on the ground that plaintiffs' theory of damages was flawed. *Id.* at

that USF's contention that the district court abused its discretion in certifying the RICO class because RICO damages cannot be shown on a class-wide basis is without merit.

*ii) The Contract Claims*

Certifying plaintiffs' breach of contract claims raises additional concerns because the contracts here are not uniform and they implicate the laws of many jurisdictions. USF argues common questions will not predominate as to these claims for three reasons: (1) the contracts vary materially from each other and individualized extrinsic evidence will predominate in the interpretation of key terms; (2) some of the contracts require customers to satisfy minimum purchase requirements before they are entitled to cost-plus pricing, a matter that is not subject to common proof; and, finally, (3) the contracts are governed by the laws of 48 states, as well as tribal law. For the following reasons, we disagree.

*a) Contract Variations and Extrinsic Evidence*

USF argues, first, that the contracts here have materially different terms and that the variations among them defeat plaintiffs' attempt to establish

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1432–33. In *Comcast*, the Supreme Court held that courts should examine the proposed damages methodology at the certification stage to ensure that it is consistent with the classwide theory of liability and capable of measurement on a classwide basis. *Id.* at 1433–35 (finding that plaintiffs' damages "model failed to measure damages from the particular antitrust injury on which petitioners' liability in this action is premised"). As discussed in Part B, *infra*, the district court carefully examined plaintiffs' damages model, finding it appropriate and feasible to redress the common harms alleged, and therefore did not abuse its discretion in determining that common issues predominate.

predominance as to the contract claims. Moreover, determining the issue of breach pursuant to the "numerous different definitions of the terms 'vendor' and [promotional allowance] in the numerous and varying contracts," USF maintains, will require "reference to individualized extrinsic evidence." Appellant's Br. at 49. USF asserts that resolution of the issue of breach can therefore not be attained through generalized proof and that the district court abused its discretion in ruling that Rule 23(b)(3)'s predominance requirement is satisfied as to the contract claims. We are not persuaded.

To be clear, courts properly refuse to certify breach of contract class actions where the claims require examination of individual contract language. *See, e.g.*, *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998); *Spencer v. Hartford Fin. Servs. Grp., Inc.*, 256 F.R.D. 284, 304 (D. Conn. 2009) (declining to certify class for breach of contract claims where contracts defined cost and value differently such that the language of each contract "would need to be carefully considered to determine whether defendants breached each contract at issue"); *cf. Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 398 (6th Cir. 1998) (decertifying class of early retirees in ERISA case where "side deals" contained myriad variations as to what each retiree was promised). In such cases, however, courts have determined that the language variations were material to the issue of breach. Here, USF's own expert testified that the contracts "essentially all [say] the same thing" and that in the food service industry, "[i]t [is] well understood . . . what a cost plus contract is," J.A. at 2938. Similarly, USF's own auditor found that USF's contracts are consistent in how they define invoice cost, J.A. at 900–01. The district court's conclusion

that USF's cost-plus contracts are substantially similar in all material respects, *see In re U.S. Foodservice*, 2011 WL 6013551, at *14, is amply supported by the record.

USF contends that resolving the contract claims will require introduction of evidence of contract negotiations and course of performance evidence to determine whether individual customers knew about USF's use of VASPs and "acquiesce[d] in it without objection." U.C.C. § 1–303(a)(2). To be sure, extrinsic evidence can illuminate the meaning of ambiguous contract terms, and the terms of the contracts here, each of which is governed by the Uniform Commercial Code ("UCC"), may in theory "be explained or supplemented" by extrinsic evidence of the parties' "course of performance, course of dealing, or usage of trade." *Id.* § 2–202; *see also id.* § 1–303(d)–(e) (noting that course of performance, course of dealing, and trade usage are "relevant in ascertaining the meaning of the parties' agreement, . . . and may supplement or qualify the terms of the agreement"); *accord Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003), *aff'd on other grounds by* 545 U.S. 546, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005).[9] USF's argument as to the

[9] The UCC defines "course of performance" as the parties' conduct in the transaction in question provided that "(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection." U.C.C. § 1–303(a). In contrast, "course of dealing" focuses on the parties' conduct in previous transactions that can "fairly be regarded as establishing a common basis of conduct for interpreting their expressions and other conduct" in the transaction in question. *Id.* § 1–303(b). Finally, "usage of trade" does not involve any inquiry into the

importance of individualized extrinsic evidence as to the contract claims, however, simply mimics its claim that the issue of individual customer knowledge defeats certification of the RICO class, and it fails for the same reason. Just as the record contains no evidence regarding individualized customer knowledge, it likewise includes no evidence of any USF customer's contract negotiations or individualized conduct in performing pursuant to the contract that tends to show either that the customer understood his contract to authorize the VASP arrangements or that he otherwise acquiesced in them. USF proffers expert testimony regarding accepted industry practice (namely, that it is common knowledge that food distributors employ VASP-like arrangements), but this is generalized trade usage evidence appropriately considered on a class-wide basis.

The fact that each of these contracts is governed by the UCC, moreover, further supports the district court's conclusion that common issues will predominate in the adjudication of these contract claims. Plaintiffs allege, *inter alia*, that USF breached its cost-plus contracts because the use of VASPs to inflate costs was dishonest, commercially unreasonable, and a breach of USF's implied duty of good faith. *See* Cmplt. ¶¶ 152-53; *see also* U.C.C. § 1–203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). The UCC's implied duty of good faith, in turn, requires not only "honesty in fact" between contracting parties but also "the observance of reasonable commercial

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conduct of the individual parties, but rather covers "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." *Id.* § 1–303(c).

standards of fair dealing in the trade." U.C.C. § 2–103(1)(b) (defining "good faith" for merchants); *see id.* § 1–201(b)(20) (defining "good faith" for non-merchants). *See also* U.C.C. § 1–203 cmt. (explaining that the duty of good faith is implemented by the provisions on course of dealing and trade usage, and "directs a court toward interpreting contracts within the commercial context in which they are created, performed, and enforced."); 1B Larry Lawrence, *Lawrence's Anderson on the Uniform Commercial Code* § 1–304:42 (3d ed. 2012) ("U.C.C. § 1–201(b)(20) establishes an objective test for good faith: whether the party acted in observance of reasonable commercial standards of fair dealing. The commercial reasonableness of the party's behavior relates solely to the fairness of the behavior.").

We agree with the district court that the question of breach with regard to plaintiffs' contract claims will focus predominantly on common evidence to determine whether, in fact, USF used controlled middlemen to inflate invoice prices and whether such a practice departs from prevailing commercial standards of fair dealing so as to constitute a breach. *See* U.C.C. § 2–103(1)(b). In this regard, we find the Eleventh Circuit's decision in *Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248, instructive. There, plaintiffs alleged that Exxon breached its contracts with its dealers by overcharging them on fuel purchases. *Id.* at 1252. Though the contracts were not identical, the Eleventh Circuit affirmed the class certification because the dealer agreements were materially uniform insofar as they imposed the same duty of good faith on Exxon. Thus, the question of whether Exxon had violated its duty was common to all class members. *Id.* at 1261. The same holds true here.

Like the district court, we anticipate that adjudication of the breach of contract claims will largely parallel adjudication of the RICO claims. The common issues will include USF's creation and control of the VASPs, the actual services, if any, the VASPs provided, USF's efforts to hide the true nature of the VASPs from its customers (which in the breach of contract setting is circumstantial proof that customers did not know of and never acquiesced in USF's course of performance), and trade usage concerning controlled middlemen like the VASPs. Since the record does not indicate the existence of material differences in contract language or other significant individualized evidence, we conclude that the district court did not abuse its discretion in concluding that common issues will predominate over any individual issues, and that USF's claim to the contrary should be rejected.

*b) Minimum Purchase Requirements*

USF next contends that many of the contracts impose minimum purchase requirements on customers as a precondition to their entitlement to cost-plus pricing. Compliance with this "condition precedent" to USF's obligation to provide cost-plus pricing, USF contends, raises individualized issues not subject to generalized proof, defeating predominance as to the contract claims. The district court concluded, to the contrary, that these minimum purchase obligations are not material, and do not draw into question the predominance of common issues as to the contract claims. We agree with the district court.

The minimum purchase requirements at issue here stipulate that to be entitled to the benefits of the contract, including cost-plus pricing, customers must purchase a minimum percentage of their food supplies from USF. For instance, the Thomas & King contract

provides that the specified margins are contingent on Thomas & King "purchasing 85% of [its] total purchases in each specified product category from [USF]," J.A. at 1544. We agree with USF that if the minimum purchase requirements in many of its contracts had ever been enforced, individualized questions could potentially predominate regarding these contracts, as each plaintiff might be required to introduce evidence showing that it had complied with the requirements set forth in its contract to establish USF's breach.

But that is not this case. Here, the district court found that the minimum purchase requirements in the contracts were not enforced by USF and thus are not material to the question whether USF breached its agreements. The factual finding of non-enforcement is entitled to deference unless clearly erroneous. *See Parker*, 331 F.3d at 18. Given the absence of any evidence showing that USF ever enforced these requirements, as well as testimony from USF's own expert describing such requirements as "dream figure[s]" that food distributors do not even monitor for customer compliance, we cannot say that the district court's determination was clearly erroneous. In light of this factual finding, the district court did not abuse its discretion in determining that the provisions are not material to the question of breach, and thus that they create no need for individualized evidence of compliance.

*c) Variations in State Contract Law*

USF next argues that certification was improper because this multi-state class action implicates the laws of many jurisdictions. We agree that putative class actions involving the laws of multiple states are often not properly certified pursuant to Rule 23(b)(3)

because variation in the legal issues to be addressed overwhelms the issues common to the class. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1183 (11th Cir. 2010). However, these concerns are lessened where the states' laws do not vary materially. *See Klay*, 382 F.3d at 1262 ("[I]f the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate."). Thus, the crucial inquiry is not whether the laws of multiple jurisdictions are implicated, but whether those laws differ in a material manner that precludes the predominance of common issues. *See Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) ("[N]ationwide class action movants must creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'" (quoting *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986))).

Here, they do not. As courts have noted, state contract law defines breach consistently such that the question will usually be the same in all jurisdictions. *See Klay*, 382 F.3d at 1263 ("A breach is a breach is a breach, whether you are on the sunny shores of California or enjoying a sweet autumn breeze in New Jersey."); *see also Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 n. 8, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995) ("[C]ontract law is not at its core diverse, nonuniform, and confusing" (internal quotation marks omitted)). The uniformity is even more pronounced in this matter,

moreover, as all the jurisdictions implicated have adopted the UCC. USF's principal contention to the contrary is that despite such adoption, state and tribal laws differ as to the admissibility of extrinsic evidence. But plaintiffs' papers in support of their motion for class certification demonstrate that all the relevant jurisdictions have adopted U.C.C. § 1–303, governing the introduction of such evidence. *See* J.A. at 2648-50. In the absence of any showing by USF disputing this, we conclude that the district court did not abuse its discretion in determining that variations in state contract law do not preclude certification.

*iii) Fraudulent Concealment and Tolling*

In yet another effort to refute the district court's conclusion that plaintiffs have established predominance for the purpose of Rule 23(b)(3), USF argues: (1) that plaintiffs must rely on USF's alleged fraudulent concealment to toll the various statutes of limitations implicated in this action, in order to render timely their RICO and contract claims; (2) that different jurisdictions employ various legal standards for tolling statutes of limitations; and (3) that, as a result, common issues of law or fact do not predominate, and the district court abused its discretion in concluding otherwise. For the following reasons, we disagree.[10]

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[10] Both parties presented the district court with an analysis of the relevant statute of limitations principles in all 50 states, though plaintiffs argue, *inter alia*, that upon proper application of choice of law principles, the law of only one to three states will be germane. Like the district court, we do not reach this choice of law issue in light of our conclusion that even assuming the laws of multiple jurisdictions apply, common issues predominate.

With regard to variations in the statutes of limitations themselves, the district court found that such variations did not pose an insuperable obstacle to class certification because only

At the start, we agree with the district court that fraudulent concealment can be demonstrated via class-wide, generalized evidence. Granted, some jurisdictions whose law may apply to plaintiffs' contract claims require that a "plaintiff asserting fraudulent concealment prove it exercised some degree of diligence" to discover the claims. *See In re U.S. Foodservice*, 2011 WL 6013551, at *19. Similarly, a plaintiff seeking to toll the statute of limitations for a civil RICO claim must demonstrate that he was "reasonably diligent in trying to discover his cause of action." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 182, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997). The district court found, however, that plaintiffs "produced common evidence showing that USF intended to conceal the VASPs and, therefore, it cannot reasonably be expected that the plaintiffs could have discovered the injury until they became more fully aware of VASPs[']  existence and purpose." *In re U.S. Foodservice*, 2011 WL 6013551, at *17. And while some contracts provided customers audit rights, common evidence indicates that USF purposefully designed the VASP system to be invisible to customer audits, and USF's own expert testified that an audit could not have uncovered the VASP arrangements. In the absence of any individualized evidence that plaintiffs were not deceived by USF's attempts to conceal the truth about the VASPs or that plaintiffs had the necessary tools to uncover the fraud prior to public disclosure of the VASP system in 2003,

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one state imposes a statute of limitations less than four years and subclasses may be created as needed to manage statute of limitations issues. *See In re U.S. Foodservice*, 2011 WL 6013551, at *17. USF does not dispute the propriety of this ruling on appeal.

the district court did not abuse its discretion in determining that common evidence of this concealment will predominate in resolving whether the relevant statutes of limitations were tolled. *Cf. McLaughlin*, 522 F.3d at 233–34 (decertifying class in part because defendants introduced evidence indicating that plaintiffs knew truth about light cigarettes and were not deceived by false advertising).

The other variations among potentially applicable tolling standards identified by USF do not change this analysis. First, surveys of state law conducted by both parties reveal that all but three states apply the doctrine of fraudulent concealment or the related doctrine of equitable estoppel to toll the statute of limitations for contract claims. USF points out that 14 of these states provide that a statute of limitations is tolled for fraudulent concealment only if the plaintiff relied on a misrepresentation by the defendant, and that five states require that plaintiffs demonstrate fraudulent concealment by clear and convincing evidence.[11] *See* J.A. at 3201–33. But just as payment of inflated invoices constitutes circumstantial evidence that can be used to establish, for RICO purposes, that plaintiffs relied on the invoices' misrepresentation as to the cost component of USF's

[11] USF also highlights variations in state law as to (1) whether an affirmative act of concealment by defendants is required as opposed to simple silence; (2) whether intent / knowledge on behalf of the defendant is required; and (3) whether the statute of limitations begins to run on actual discovery or constructive discovery. We find no error, however, in the district court's conclusion that these differences are immaterial. Plaintiffs allege an affirmative act by defendants who acted with an intent to deceive, and "the point at which plaintiffs should have discovered the breach is the same point at which they did discover the breach." *In re U.S. Foodservice*, 2011 WL 6013551, at *19.

pricing, so too may such evidence be used to establish reliance for fraudulent concealment purposes. And the mere fact that five states impose a heightened standard of proof for fraudulent concealment does not draw into question the district court's conclusion as to predominance, but instead suggests simply the possibility that the district court, in a case in which generalized proof will resolve many issues, may choose to handle other less numerous and less substantial issues through the creation of a limited number of homogeneous subclasses. *See* Fed. R. Civ. P. 23(c)(5) (authorizing creation of subclasses); *Marisol A. v. Giuliani*, 126 F.3d 372, 379 (2d Cir. 1997) ("Rule 23 gives the district court flexibility to certify subclasses as the case progresses and as the nature of the proof to be developed at trial becomes clear."). In sum, fraudulent concealment issues may sometimes preclude certification under Rule 23(b)(3), but they do not do so here.

*B. Expert Testimony*

USF also challenges the district court's reliance on the plaintiffs' damages expert John Damico, who testified that individual damages could be calculated on a class-wide basis with a simple formula using data extracted from USF's databases, and plaintiff's industry expert Stacy Moore, who testified that the VASP system "was not common industry practice and [USF's] customers would not—and by USF's design, could not—have known that USF was engaging in such conduct," J.A. at 2986. USF argues that the district court erred by considering this testimony without first conducting a *Daubert* hearing to determine

the evidence's admissibility.[12] The record establishes, however, that the district court performed its gate-keeping function and that it resolved the disputes regarding expert testimony in plaintiffs' favor.

The Supreme Court has not definitively ruled on the extent to which a district court must undertake a *Daubert* analysis at the class certification stage.[13] In *Wal–Mart Stores, Inc. v. Betty Dukes*, the Court offered limited dicta suggesting that a *Daubert* analysis may be required at least in some circumstances. *See* —— U.S. ——, 131 S.Ct. 2541, 2553–54, 180 L.Ed.2d 374 (2011) ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so. . . ." (internal citation omitted)). In *In re IPO*, we disavowed our earlier statement that "an expert's testimony may establish a component of a Rule 23 requirement

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[12] Under *Daubert v. Merrell Dow Pharmaceuticals Inc.*, expert testimony is admissible if the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact or issue. 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93, 113 S.Ct. 2786; *see also* Fed.R.Evid. 702; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (extending *Daubert* to non-scientific testimony).

[13] The Supreme Court certified this precise question in *Comcast Corp.*, *see* —— U.S. ——, 133 S.Ct. 24, 183 L.Ed.2d 673 (2012) (mem.) (certifying question "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis"), but did not reach it because the defendant had not objected to consideration of the expert testimony below, *see* 133 S.Ct. at 1435-36 (Ginsburg, *J.*, dissenting).

simply by not being fatally flawed," 471 F.3d at 41, without deciding whether or when a *Daubert* analysis forms a necessary component of a district court's rigorous analysis. *But see id.* at 41 (noting that a district judge must be afforded "considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements").

We need not reach that question here either, as the record indicates that even though the district court did not conduct a *Daubert* hearing, it considered the admissibility of the expert testimony on the papers after USF had indicated that it was "happy to rely on the papers." S.A. at 608, 719; *see United States v. Williams*, 506 F.3d 151, 161 (2d Cir. 2007) (noting that the "formality of a separate hearing" is not always required for a district court to "effectively fulfill[ ] its gatekeeping function under *Daubert*"). As its opinion makes clear, the district court did make the requisite findings, concluding with respect to Damico's proposed damages model that it is appropriately "based on USF's alleged fraudulent pricing," "provides for a universal calculation of damages" because USF "almost always used an invoice to calculate prices," and that "the only feasibility-related issue is the potential need for manual input of certain customers." *In re U.S. Foodservice*, 2011 WL 6013551, at *15-16. Similarly the court concluded that industry practice can be used to establish whether "USF customer[s] had any reason to know of" USF's VASP pricing. *Id.* at *11.[14] We therefore see no reason to disturb the district

[14] USF's argument that the district court erred in relying on Moore's testimony is actually a red herring. The district court cited Moore only once in its opinion—referring to her only as a "purported expert"—and its analysis regarding the predominance of industry standards over questions of individual customer

court's considered conclusions on the issue of expert testimony. *See United States v. Farhane*, 634 F.3d 127, 158 (2d Cir. 2011) (noting that *Daubert* inquiry is flexible, that "district courts enjoy considerable discretion in deciding on the admissibility of expert testimony," and that "[w]e will not disturb a ruling respecting expert testimony absent a showing of manifest error").

*C. Superiority*

USF asserts, finally, that even if common issues predominate in this class action, so that the district court did not err in reaching this conclusion, certification was still improper because a class action is not a superior method of adjudicating these claims. USF does not address any of the Rule 23(b)(3) factors,[15] however, and argues only that no economies would be achieved over individual litigation because absent this action individual customers would not bring suit. We do not find this reasoning persuasive.

As the Supreme Court has said, Rule 23(b)(3) class actions can be superior precisely because they

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knowledge was not dependent on her declaration. *See In re U.S. Foodservice*, 2011 WL 6013551, at *11.

[15] Rule 23 instructs that matters pertinent to a finding of superiority include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

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

facilitate the redress of claims where the costs of bringing individual actions outweigh the expected recovery. *See Amchem Prods., Inc.*, 521 U.S. at 617, 117 S.Ct. 2231. Here, substituting a single class action for numerous trials in a matter involving substantial common legal issues and factual issues susceptible to generalized proof will achieve significant economies of "time, effort and expense, and promote uniformity of decision." Fed. R. Civ. P. 23 advisory committee's notes. USF raises no significant argument to the contrary.

## CONCLUSION

Despite the size and geographic scope of this class, close inspection of this case reveals that any class heterogeneity is minimal and is dwarfed by common considerations susceptible to generalized proof. The claims of each class member will be governed by the same substantive law, either RICO or the UCC. Moreover, the uniform nature of USF's alleged fraud and USF's concerted effort to shield its scheme from scrutiny place each customer in the same position as to these issues and ensure the cohesiveness of the class. USF itself, moreover, relies heavily on common proof—namely, trade usage evidence—in articulating its defense and has identified no individualized evidence or legal issues drawing into question the district court's conclusion that common issues will predominate. We discern no abuse of discretion in the district court's determination that certification was appropriate. Accordingly, for the foregoing reasons, we affirm the district court's order certifying the class.

**APPENDIX 2**

UNITED STATES DISTRICT COURT
D. CONNECTICUT

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Nos. 3:07–md–1894 (CFD), 3:06–cv–1657 (CFD),
3:08–cv–4 (CFD), 3:08–cv–5 (CFD).

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IN RE: US FOODSERVICE INC PRICING LITIGATION

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WATERBURY HOSPITAL, ET AL.,
*Plaintiffs,*
v.
US FOODSERVICE INC.,
*Defendant.*

CATHOLIC HEALTHCARE WEST,
*Plaintiff,*
v.
KONINKLIJKE AHOLD N.V., ET AL.,
*Defendants.*

THOMAS & KING, INC.,
*Plaintiffs,*
v.
KONINKLIJKE AHOLD N.V., ET AL.,
*Defendants.*

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November 29, 2011

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RULING ON MOTION FOR CLASS CERTIFICATION

CHRISTOPHER F. DRONEY, District Judge.

I. Introduction

The plaintiffs, Waterbury Hospital, Frankie's Franchise Systems, Inc. ("Frankie's"), Thomas & King, Inc. ("T & K"), and Catholic Healthcare West ("CHW"),

have brought a motion asking the Court to certify a proposed class under Federal Rule of Civil Procedure 23. For the reasons that follow, the plaintiffs' motion is granted.

## II. Procedural Background

The plaintiffs filed a Consolidated and Amended Class Action Complaint in this multidistrict litigation ("MDL") proceeding. The MDL involves three previously filed cases: *Catholic Healthcare West v. Koninklijke Ahold N.V.*, et al., filed in the Northern District of California; *Thomas & King, Inc. v. Koninklijke Ahold N.V.*, *et al.*, filed in the Southern District of Illinois; and Waterbury Hospital et al. v. U.S. Foodservice, Inc., filed in the District of Connecticut. The United States Judicial Panel on Multidistrict Litigation previously found that the "three actions involve common questions of fact, and that centralization under [28 U.S.C. § 1407] in the District of Connecticut will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation." *In re: U.S. Foodservice, Inc., Pricing Litig.*, 528 F.Supp.2d 1370, 1371 (J.P.M.L. 2007).

In their Amended Complaint, the plaintiffs allege claims pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., as well as breach of contract against the defendant, U.S. Foodservice ("USF").[1] The plaintiffs

[1] In a December 15, 2009 ruling, the Court dismissed the plaintiffs' claims against defendant Koninklijke Ahold N.V., as well as the plaintiffs' claim against USF in Count Four of the Amended Complaint for a violation of California's Unfair Competition Law ("UCL"). *See generally In re Foodservice Inc. Pricing Litig., Nos*. 3:07 MD 1894(CFD), 3:06 CV 1657(CFD), 3:08 CV 4(CFD), 3:08 CV 5(CFD), 2009 WL 5064468 (D.Conn. Dec. 15,

have filed a motion seeking to certify the following class[2]:

> Any person in the United States who purchased products from USF pursuant to an arrangement that defined a sale price in terms of a cost component plus a markup ("cost-plus contract"), and for which USF used a VASP transaction to calculate the cost component.

## III. Factual Background[3]

USF is the second largest food distributor in the United States, providing food products and services to over 75,000 customers. Each of the plaintiffs is a customer of USF that purchased food products and other goods from USF under cost-plus contracts. Waterbury Hospital is a public hospital located in Waterbury, Connecticut, that offers meals and other

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2009). Defendant Gordon Redgate is still nominally a defendant. On September 17, 2008, the Court granted a joint motion to stay claims against Redgate pending the Court's approval of the parties' settlement of those claims. The Court has not yet approved any settlement with Defendant Redgate and therefore the stay remains in place. The plaintiffs' motion for class certification does not address Defendant Redgate, and this ruling only governs the plaintiffs' remaining claims against USF.

[2] Prior to the Court dismissing the plaintiffs' UCL claim in its December 15, 2009 ruling, CHW also sought certification of a California subclass for that claim.

[3] The following facts are taken from the plaintiffs' Amended Complaint, as well as from the Court's analysis of the evidentiary record, including affidavits and declarations. *See Lewis Tree Servs., Inc. v. Lucent Techs*., 211 F.R.D. 228, 231 (S.D.N.Y. 2002) ("In deciding whether the requirements of Rule 23 have been met, the Court may examine not only the pleadings but also the evidentiary record, including any affidavits and results of discovery." (citing *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 571 (2d Cir. 1982))).

food services to its patients, employees, and visitors.[4] Frankie's is a corporation located in Waterbury, Connecticut, that operates a chain of franchised restaurants in Connecticut.[5] T & K is a corporation with its principal place of business in Kentucky that owns and operates eighty-eight "Applebee's Neighborhood Grill & Bar" restaurants and seven "Carino's Italian Grill" restaurants in several states.[6] CHW is a non-profit corporation comprised of dozens of hospitals and medical centers in California, Arizona, and Nevada, with its principal place of business in California.[7]

A. Cost-Plus Contracts

As part of its food distribution service, USF enters into cost-plus contracts with its customers. Generally, cost-plus pricing arrangements involve three parties: (1) a supplier; (2) a distributor; and (3) a customer. Pursuant to a cost-plus contract, the customer agrees to purchase food from the distributor (USF) at "cost-

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[4] Waterbury Hospital is party to a cost-plus arrangement originally entered into with Alliant Exchange ("Alliant"), which USF acquired in 2001. Following USF's acquisition of Alliant, Waterbury Hospital continued to purchase products from USF pursuant to its cost-plus arrangement.

[5] Frankie's is party to a cost-plus arrangement with USF, pursuant to which Frankie's and its franchisees have purchased products from USF.

[6] T & K purchased products from USF pursuant to a cost-plus arrangement it entered into with Alliant effective July 1, 2001.

[7] In 1999, CHW and its hospitals and medical centers became members of Premier, Inc., a "Group Purchasing Organization" engaged in contracting services for its members to help them manage and reduce supply costs. CHW has purchased products from USF pursuant to a cost-plus arrangement between Premier and USF's predecessor, Alliant.

plus," where the "cost-plus" price is derived by (1) a cost component based on the prices charged to USF by USF's suppliers ("cost"), (2) plus an agreed upon mark-up of either a fixed percentage or a set dollar amount ("plus"). The cost component of "cost-plus" is often referred to as "landed cost," and is typically based on factors such as national or regional published price lists, or invoice cost plus freight.[8]

The cost-plus contracts between USF and its customers typically provide that USF is entitled to receive the benefit of "promotional allowances." Promotional allowances are rebates, discounts, credits, or other incentives that USF receives from its suppliers, which reduce USF's net cost in acquiring goods from the suppliers.[9] Although the promotional allowances reduce the prices charged to USF by its suppliers, thereby reducing USF's actual "cost," USF's cost-plus contracts permitted USF to receive the

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[8] For example, in a 2001 cost-plus agreement between T & K and Alliant, "landed cost" is determined "based on various national or regional published price lists, plus inbound freight (where applicable)" or "invoice cost plus freight (where applicable)." Kurtz Decl. Ex. 2 at 4. As evidenced in an agreement between Novation, LLC, and USF, "Landed Cost" may also be defined as

> the manufacturer's (supplier, packer or any other vendor) delivered cost or f.o.b. unit price plus standard freight . . . to Approved Distributor's distribution center, less off-invoice discounts on off-invoice allowances (such off-invoice discounts or off-invoice allowances to mean manufacturer generated discounts or allowances on particular items for set periods of time and which are specifically reflected on the invoice).

Kurtz Decl. Ex. 3.

[9] Suppliers provide these promotional allowances to USF and other distributors to promote the sale of their goods.

benefit of the allowances without any adverse effect on the cost component USF used to calculate the price charged to its cost-plus customers.[10]

B. VASP System

Beginning around 1998, six companies known as "Value Added Service Providers" ("VASPs") were formed. Four of the VASPs were owned by Brady Schofield and had their principal place of business in Rhode Island or Massachusetts. These VASPs were: (1) Seafood Marketing Specialities, Inc.; (2) Specialty Supply & Marketing, Inc.; (3) Produce Solutions, Inc.; and (4) Frozen Farms, Inc. The other two VASPs, Commodity Management Systems, Inc.[11] and Private Label Distribution, Inc., were owned by Gordon Redgate and had their principal place of business in New Jersey.

USF entered into Product Procurement Agreements with each VASP. Based on these agreements, USF would purchase certain food products from the VASPs to distribute to its customers. According to the plaintiffs, USF would instruct the VASPs to purchase certain products from USF's suppliers (at a price

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[10] For example, a "Promotional Allowance" provision in USF's cost-plus contract with Frankie's provides in relevant part: "PROMOTIONAL ALLOWANCES—All programs/allowances will be negotiated jointly. Only promotional allowances exclusively negotiated by you on your behalf will be passed through to you. USF shall be entitled to cash discounts and other supplier incentives." Kurtz Decl. Ex. 1.

[11] There is a dispute as to whether Commodity Management Systems, Inc. was a VASP; however, this dispute is not material to the Court's determination of whether class certification is appropriate and, despite the Court's characterization of it as a VASP for purposes of this ruling, such a characterization is not intended to hold any precedential value.

allegedly dictated by USF). USF would then buy those products from the VASPs at a markup (the size of the markup was also allegedly dictated by USF) and resell the products at "cost-plus" to its customers. After USF paid the VASPs for the products, the VASPs would remit back to USF the difference between the VASPs' actual cost (the cost of purchasing the products from the supplier) and the price the VASPs charged to USF. This difference was referred to as the "bucket." In compensation for purchasing and reselling the food products to USF, USF would pay the VASPs a nominal transaction fee.[12] Thus, USF used the VASPs to increase the cost component of its products that it sold to its cost-plus customers; however, USF's actual "cost" was less than that reflected on its cost-plus customers' invoices.

Essentially, through the use of the VASPs, USF interjected a "middle-man" between itself and its suppliers-a fourth party to the typical three-party cost-plus transaction. The plaintiffs claim that USF funded and controlled the VASPs to increase USF's profit margin on its cost-plus contracts by falsely

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[12] The alleged VASP "scheme" was outlined in an accounting analysis performed by Pricewaterhouse Coopers:

- The VASPs order goods and get charged (say) $18 by the [supplier]. The VASP in turn charges USF $20, which becomes USF's cost. USF charges its cost-plus customers based on the $20 cost.
- Later (calculated monthly), the VASP passes back the $2 markup, which is recorded by USF as a promotional allowance. . . .
- USF is charged a transaction fee by the VASP (on a "per invoice" or volume basis), which . . . is calibrated to allow the VASP to break even.

*See* Pls'. Ex. 1. at 1.

inflating the cost basis of the products that USF sold to its cost-plus customers.

The parties dispute the legitimacy and purpose of the VASPs. The plaintiffs allege and there is evidence that the VASPs were created solely as shell companies, intended to artificially inflate the cost component to be used in USF's cost-plus pricing agreements and, consequently, increase USF's bottom line. For instance, USF allegedly directly negotiated the supply contracts with the suppliers (instead of the VASPs) and USF allegedly dictated both the prices at which the VASPs purchased the products from the suppliers and the prices at which the VASPs sold those products to USF. Also, there is evidence that USF, instead of the VASPs, often placed purchase orders with various suppliers for "delivery" to the VASPs. In some instances, the VASPs allegedly would never take possession of the products they purchased from the suppliers; rather, the products would be shipped directly to USF.[13] The plaintiffs have also presented evidence that USF intentionally concealed the VASPs from its cost-plus customers.

In addition to controlling and concealing the VASPs' operations, there is also evidence that USF controlled the VASPs' finances. For instance, each of the VASPs was required to grant USF a security interest in the VASP's common stock; the VASPs had to obtain consent from USF for any change in their ownership; USF controlled to whom and when the VASPs made

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[13] In previous testimony, Gordon Redgate, owner of two of the VASPs, stated in regard to Private Brands, one of the VASPs he owned, "[a]ll we did was take paper in and paper out. . . . Our accounting department made the payments with the instructions that we were given by U.S. Foodservice."

payments;[14] and USF guaranteed the VASPs' obligations. Finally, there is evidence that USF funded many of the VASPs through short-term interest free loans and that USF accounted for most of the VASPs' business.

Despite the evidence regarding USF's control and use of the VASPs, there is also evidence in the record regarding the many legitimate business functions that the VASPs served, including: (1) quality control services; (2) purchasing; (3) brand and product development; (4) merchandising services; (5) marketing support; and (6) customer service. Additionally, Brady Schofield, owner of four of the VASPs, has testified to the legitimacy of the VASPs—namely that the VASPs are legitimate business organizations with office space, warehouse space, and many employees.

The effect of the VASP system was substantial; for example, one VASP passed back over $58 million to USF in one year (based on approximately $500 million in sales), while another VASP passed back approximately $28 million (based on around $130 million in sales). Pricewaterhouse Coopers found that the "[t]otal VASP pass-back receipts over the period from April 2000 to December 2002 were $388 million."

The plaintiffs argue that USF deceived its cost-plus customers into believing that USF's cost component was calculated based on transactions with "legitimate suppliers." Based on this contention, the plaintiffs have filed RICO claims and breach of contract claims against USF, alleging that USF's use of the VASP

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[14] The product procurement agreements between USF and the VASPs required the VASPs to keep all funds received from USF in an escrow or trust account for the purpose of paying the suppliers' bills for the products USF ordered.

system was fraudulent, and seek certification of the proposed class.

IV. Discussion

Federal Rule of Civil Procedure 23 governs class certification. To certify a class under Rule 23, the plaintiffs must satisfy both Rule 23(a) and at least one of the requirements listed in Rule 23(b). *See* Fed.R.Civ.P. 23(a) & 23(b).

The district court must determine through "rigorous analysis" that all Rule 23 requirements are met to certify the class. *See In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006). That a Rule 23 requirement overlaps with a merits issue does not prevent the court from making a determination as to whether the requirement has been met. *See id.* at 41. However, in assessing whether the Rule 23 requirements have been met, the court should not assess any aspects of the merits unrelated to a Rule 23 requirement. *See id.* (noting that the class certification proceeding should not turn "into a protracted mini-trial of substantial portions of the underlying litigation"); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551-52 & n. 6 (2011) ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. [T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." (internal quotations and citations omitted)).

"[T]he preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008).

A. Rule 23(a)

To satisfy Rule 23(a), the plaintiffs must demonstrate that:

> (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). Rule 23(a)'s four requirements or prerequisites are commonly referred to as numerosity, commonality, typicality, and adequacy of representation, respectively. *See In re Initial Pub. Offering Sec.*, 471 F.3d at 32. Although USF does not appear to strongly dispute that the plaintiffs' proposed class meets most of the 23(a) requirements,[15] the Court

will address each of them, and then turn to the disputed issue of predominance in Rule 23(b).

*1. Numerosity*

Numerosity exists where the proposed class "is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The U.S. Court of Appeals for the Second Circuit has held that the numerosity requirement is generally satisfied when the proposed

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[15] USF appears to only claim that the plaintiffs' claims are not typical of other class members' claims pursuant to Rule 23(a)(3) and that the plaintiffs are not adequate class representatives pursuant to Rule 23(a)(4).

class is comprised of forty or more members. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). The plaintiffs easily satisfy this requirement. Approximately 75,000 customers have bought food products from USF. Although it is not clear from the record whether all 75,000 customers purchased food products from USF pursuant to a cost-plus contract involving a VASP transaction, there is evidence of at least 200 cost-plus contracts between USF and its customers. *Cf. Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) ("Courts have not required evidence of exact class size or identity of class members to satisfy the numerosity requirement."). Accordingly, the Court finds that the proposed class meets the numerosity requirement.

*2. Commonality*

"Under Rule 23(a)(2), a class action is maintainable if there are common questions of law or fact." *Collins v. Olin Corp.*, 248 F.R.D. 95, 101 (D. Conn. 2008); *see Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) ("The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact."). To satisfy commonality, these common questions do not have to overshadow potential individual issues; common questions must simply exist. *See Collins*, 248 F.R.D. at 101.

> Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' This does not mean merely that they have all suffered a violation of the same provision of law. . . . Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is

> capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

*Wal-Mart Stores, Inc.*, 131 S.Ct. at 2551 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)).

The plaintiffs contend that USF employed a fraudulent scheme that was uniform in nature. The plaintiffs allege that USF systematically controlled the VASPs in such a manner to conceal the VASPs' existence while fraudulently inflating the price of USF's cost-plus products. Allegedly, USF placed orders for certain food products through the VASPs and uniformly charged its customers the cost-plus price based on the cost component derived through the VASPs, not USF's "actual" net cost. Despite any individual factual variations that may exist such as differences in USF's cost-plus contracts or differences in customers' knowledge of the VASP system, the plaintiffs have adequately shown a common course of conduct based on USF's alleged fraudulent pricing scheme, which is "at the core of the cause of action alleged." *See Reese v. Arrow Fin. Servs.*, LLC, 202 F.R.D. 83, 91 (D. Conn. 2001) ("[Commonality] does not require that all questions of law or fact raised be common. Although the claims of individual class members do not have to match precisely, the critical inquiry is whether the common questions are at the core of the cause of action alleged." (internal citations and quotations omitted)).

Based on the plaintiffs' allegations and the supporting evidence in the record, the Court determines that the plaintiffs have established that at least one common question of law and fact exists: whether the defendant's use of the VASPs to calculate the cost

component of the cost-plus markup price violated RICO or constituted a breach of contract.[16] *See Spencer v. Hartford Fin. Servs. Grp., Inc.*, 256 F.R.D. 284, 290 (D. Conn. 2009) ("Where the question of law involves 'standardized conduct of the defendant towards members of the proposed class . . . the commonality requirement of Rule 23(a)(2) is usually met." (quoting *Franklin v. City of Chi.*, 102 F.R.D. 944, 949 (N.D. Ill. 1984))). Accordingly, the Court finds that the plaintiffs have satisfied the commonality requirement of Rule 23(a)(2).

*3. Typicality*

"Typicality requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001) (internal quotations omitted); *see* Fed. R. Civ. P. 23(a)(3).

Here, there is no question that the plaintiffs' claims arise from the same set of events as the other members of the class—namely, USF's use of the VASPs to calculate the cost component of the price charged to its customers, including the plaintiffs and other putative

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[16] The U.S. Supreme Court recently denied class certification in Wal-Mart Stores, Inc. v. Duke because there was "nothing to unite all of the plaintiffs' claims." *Wal-Mart Stores, Inc.*, 131 S.Ct. 2541, 2557 n. 10. Unlike the plaintiffs in Wal-Mart Stores, plaintiffs here are all affected by the same practice of the defendant, namely its use of the VASPs to calculate the cost component of the cost-plus markup price.

class members, under cost-plus contracts.[17] Although USF claims that individual contractual terms may need to be examined in this case due to the large number of proposed class members and the uniqueness of each class member's contract, the plaintiffs still satisfy the typicality requirement because they have sufficiently alleged "that their injuries derive from a unitary course of conduct by a single system." *See Marisol A*, 126 F.3d at 377. Consequently, despite potential minor variations in the underlying facts of class members' claims, the class representatives' claims are typical of the claims of the class.

USF argues that the plaintiffs cannot show typicality because, even after learning of the alleged fraud involving the VASPs, the plaintiffs have continued to purchase food products from USF. *See Newman v. RCN Telecom Servs., Inc.*, 238 F.R.D. 57, 78 (S.D.N.Y. 2006) (finding the typicality requirement not met because the atypical plaintiff was subject to an affirmative defense based on the voluntary payment doctrine). USF's argument, however, is misplaced. First, it is undisputed that USF's VASP system ended around 2004. Thus, the voluntary payment doctrine does not affect the plaintiffs' current purchases of food products from USF which are not subject to the VASP system. Second, USF argues that the plaintiffs' alleged knowledge of the VASP system subjects them to unique defenses, which precludes a finding of typicality. *See Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990) ("[C]lass certification is inappropriate where a putative class representative is subject to

[17] Based on the description of the proposed class, every class member necessarily must have purchased food products from USF under a cost-plus contract that was subject to VASP pricing.

unique defenses which threaten to become the focus of the litigation."). While the voluntary payment doctrine may be a "unique defense," it does not bar a finding of typicality in this case. The voluntary payment doctrine is a bar to the recovery of damages for "payments voluntarily made with full knowledge of the facts." *Id.* While the plaintiffs' alleged knowledge of the VASP system is a strongly contested factual dispute between the parties in this case, even assuming that the plaintiffs' had *some* knowledge of the VASP system while it was ongoing, the voluntary payment doctrine would not apply as USF has not shown, at this time, that the plaintiffs' had *full* knowledge of the facts.[18] Accordingly, the voluntary payment doctrine does not prevent the Court from finding that the plaintiffs have satisfied Rule 23(a)'s typicality requirement.[19]

*4. Adequacy of Representation*

The final Rule 23(a) requirement is adequacy of representation, which requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To determine whether the representation is adequate, the court

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[18] Although the Court must develop a sufficient evidentiary record from which to conclude whether the party moving for class certification has satisfied Rule 23, *see Sirota*, 673 F.2d at 571-72, the Court "should . . . refrain from deciding any material factual disputed between the parties concerning the merits of the claims." *Lewis Tree Servs., Inc.*, 211 F.R.D. at 231.

[19] In addition to the issue of the plaintiffs' knowledge, the voluntary payment doctrine is a New York state law doctrine. Given that none of the plaintiffs is a New York company, it does not appear that the plaintiffs would be subject to this alleged "unique defense" and there is no indication that the doctrine, even if applicable, would "threaten to become the focus of the litigation."

typically inquires whether the "1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) (internal quotations omitted). This inquiry serves to identify any conflicts of interests between the named plaintiffs and the remainder of the potential class. *See Collins*, 248 F.R.D. at 102.

USF does not allege that the plaintiffs' attorneys are insufficient advocates or that any conflict of interests exist. Instead, USF reasserts its argument that because the plaintiffs have continued to purchase from USF after learning of the VASP system, they clearly do not credit their own allegations of fraud and, therefore, are not adequate representatives. However, as discussed in the foregoing analysis regarding typicality, the plaintiffs' current purchasing preferences, including purchasing food products from USF, are not relevant to the claims in this case and do not implicate the voluntary payment doctrine. Further, the class representatives' interests are not antagonistic to the claims of the rest of the class; every member of the putative class, including the class representatives, share a collective interest in recouping the funds that they allegedly overpaid for cost-plus food products from USF. Given the evidence of USF's systematic approach to pricing cost-plus products through use of the VASPs, any alleged conflicts of interest between the named parties and the class that the plaintiffs seek to represent are not "fundamental." *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001) ("The conflict that will prevent a plaintiff from meeting the Rule 23(a)(4) prerequisite must be fundamental. . . ."). Thus, the Court finds that

the plaintiffs have demonstrated that they are adequate representatives of the putative class in accordance with Rule 23(a)(4).

The Court finds that the plaintiffs have satisfied all four Rule 23(a) requirements for class certification.

B. Rule 23(b)(3)

In addition to satisfying Rule 23(a), the proposed class must also satisfy at least one of the requirements listed in Federal Rule of Civil Procedure 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). The plaintiffs seek certification under Rule 23(b)(3), which provides that a class may be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The predominance requirement, which is highly disputed here, "is a more demanding criterion than the commonality inquiry under Rule 23(a)." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002). It "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* (internal quotations omitted); *see Amchem Prods.*, 521 U.S. at 615 (noting that the requirements of Rule 23(b)(3) ensures that the class will be certified only when it would "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results" (internal quotations and citations omitted)). "Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class

member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject to only individualized proof." *Moore*, 306 F.3d at 1252.

The plaintiffs contend that common issues of law and fact predominate both their RICO claims and their breach of contract claim. The plaintiffs argue that the VASP scheme was common as to all class members and that each class member suffered the same injury—overpaying for certain food products based on invoices that USF sent to them which allegedly included artificially inflated cost-plus prices. The plaintiffs further contend that no class member had knowledge of the VASP system and that USF concealed the VASPs from all class members.

In contrast, USF argues that Rule 23(b)(3)'s predominance requirement is not met because individual factual and legal issues predominate with respect to the plaintiffs' RICO claims, breach of contract claim, and damages. USF also argues that this case is not manageable as a class action. USF claims that communications between itself and the class members regarding USF's pricing practices varied from customer to customer, thereby raising individual questions of knowledge. USF also contends that its cost-plus contracts were not uniform and therefore common issues of law and fact do not predominate. Finally, USF argues that variations in state law with respect to breach of contract claims and the admissibility of extrinsic evidence render the plaintiffs' claims not suitable for class treatment. The RICO and breach of contract issues, as well as damages, will be examined separately.

*1. RICO*

The plaintiffs bring a cause of action under 18 U.S.C. § 1962(c) which states that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."[20] A private citizen may bring a civil RICO action if the person is "injured in his business or property by reason of a violation of [RICO's substantive provisions]." 18 U.S.C. § 1964(c); *see also DeFalco v. Bernas*, 244 F.3d 286, 305 (2d Cir. 2001) ("To establish a RICO claim, a plaintiff must show: (1) a violation of the RICO statute, 18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962." (internal quotations omitted)).

To establish a civil RICO claim pursuant to 18 U.S.C. § 1962(c), the plaintiffs must prove "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 472 U.S. 479, 496 (1985); *see also First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 173 (2d Cir. 2004).

*a. Conduct, Enterprise, and Pattern*

The plaintiffs have produced evidence showing that common issues predominate over individual issues with respect to conduct, enterprise, and pattern. First, common evidence would be used to show that USF

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[20] The plaintiffs also allege a violation of 18 U.S.C. § 1962(d), which states that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

managed and controlled the VASPs. *See DeFalco*, 244 F.3d at 309 ("The Supreme Court has interpreted the phrase 'to participate . . . in the conduct of [the] enterprise's affairs' to mean participation in the operation or management of the enterprise." (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993))). Additionally, common evidence will predominate in establishing that the VASPs constituted an "enterprise." *See DeFalco*, 244 F.3d at 306 ("A RICO enterprise 'includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.'" (quoting 18 U.S.C. § 1961(4))). Finally, common evidence, including evidence of the thousands of VASP transactions that occurred involving USF and USF's cost-plus customers will predominate in satisfying the RICO pattern element. *See DeFalco*, 244 F.3d at 306 ("A 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." (quoting 18 U.S.C. § 1961(5))). USF does not appear to contest the finding of predominance with respect to these elements.

*b. Racketeering Activity & Injury*

As to the final element of a civil RICO claim—racketeering activity—the plaintiffs claim that USF engaged in a "pattern of racketeering activity" by committing mail fraud, wire fraud, and money laundering. *See* 18 U.S.C. § 1961(1); *see also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 220 (2d Cir. 2008). "The essential elements of a mail or wire fraud violation are (1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the

mails or wires to further the scheme." *United States v. Shellef*, 507 F.3d 82, 107 (2d Cir. 2007) (internal quotations and citation omitted).

The U.S. Court of Appeals for the Second Circuit has held that to certify a class based on a RICO mail and wire fraud claim, the fraud claim must be based on uniform misrepresentations made to all members of the class. *See Moore*, 306 F.3d at 1253. Material variations in the nature of the alleged misrepresentations will render class certification improper. *See id.* USF claims that the plaintiffs' RICO fraud claim is not based on any uniform communication because the contracts of the individual plaintiffs differ markedly. However, the alleged overriding uniform misrepresentations that USF made to all members of the proposed class are the invoices that USF sent to its cost-plus customers containing cost-plus prices that were inflated through the use of the VASP enterprise. Although the invoices of each class member are not uniform—class members purchased different products or quantities based on their individual needs—the invoices each contained a "common misrepresentation," the cost-plus price derived from the VASP system. *Cf. Klay v. Humana, Inc.*, 382 F.3d 1241, 1258 (11th Cir. 2004) ("In this case, however, the plaintiffs allege that while the defendants engaged in a variety of specific communications with physicians, they all conveyed essentially the same message—that the defendants would honestly pay physicians the amounts to which they were entitled.). Thus, while USF asserts that the difference in its customers' contracts precludes a finding of uniform misrepresentations, the focus here is on the alleged fraudulent misrepresentations in the invoices, not the contracts.

USF contends that, even if the invoices represent the uniform misrepresentation, the plaintiffs cannot simply rely on the blanket allegation that the invoices contained fraudulent prices; rather, USF argues that the plaintiffs must demonstrate common evidence of fraud. *See Allstate Ins. Co. v. Adv. Health of Prof'ls P.C.*, 256 F.R.D. 49, 61 (D. Conn. 2008) ("Because a fraud is [a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment, a conclusion that a representation is fraudulent requires both that the representation be false—which in turn requires the existence of a fact with which the representation is inconsistent—and the intent that such representation, known by the speaker to be false, to be taken as true by the person to whom the representation is made."). Despite USF's assertion that there are differences in its customers' contracts that preclude a finding of predominance with respect to a uniform misrepresentation, for the purposes of the plaintiffs' fraud claim, the contracts appear to be sufficiently similar for purposes of demonstrating common evidence of fraud. First, there is no evidence that the plaintiffs were aware of the VASP system or its purpose. In fact, there is evidence that USF actually took steps to conceal the VASP system from its customers, which is a common misrepresentation. Additionally, although the definition of "cost" varied slightly from contract to contract, there is common evidence with respect to cost-plus pricing, including benchmark data showing the amounts actually billed by the suppliers, the amount the VASPs charged USF, and the cost used to generate customer invoices. *See* Pls.' Ex. 63 (memorandum from Deloitte & Touche stating that for those individuals whose contracts state that sales price is defined as "invoice cost plus a stipulated margin," "invoice cost"

is "consistently defined"). *Cf. Allstate Ins. Co.*, 256 F.R.D. at 62 (noting how the plaintiffs failed to allege "any external facts or benchmarks by which to judge the accuracy, fraudulence, misleading nature, or truthfulness of Defendants' submissions" to the plaintiffs).

The U.S. Supreme Court recently held that a plaintiff does not need to demonstrate "first-person" reliance in a RICO claim based on mail fraud, *see Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 649 (2008); however, the Supreme Court noted that "none of this is to say that a RICO plaintiff who alleges injury by reason of a pattern of mail fraud can prevail without showing that someone relied on the defendant's misrepresentations." *Id.* at 658 (emphasis in original). In the absence of reliance by anyone, it would be difficult, if not impossible for the plaintiff to establish "but for" and proximate causation. *See id.* The Supreme Court concluded that although a RICO plaintiff alleging a pattern of mail fraud must establish at least third-party reliance to prove causation, reliance is not automatically transformed into an element of the claim. *See id.* Therefore, while reliance is not a necessary element, the plaintiffs must still prove "but for" and "proximate causation." *See also McLaughlin*, 522 F.3d 215, 222 (2d Cir. 2008) (noting that for a RICO injury to occur "by reason of" a defendant's violation, the plaintiff must show both "but for" causation (also referred to as "transaction causation" or "reliance") and "proximate" causation (also referred to as "loss causation")).

Here, although reliance is not necessary, the plaintiffs principally rely on the proposed class members' reliance on USF's invoices to establish causation and

injury.[21] The plaintiffs claim that reliance can be demonstrated by their payment of the allegedly fraudulent invoices. *See McLaughlin*, 522 F.3d at 225 n. 7 ("[P]ayment may constitute circumstantial proof of reliance upon a financial representation."); *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 238 (C.D. Cal. 2003) (finding that, in a fraud case, the plaintiffs could demonstrate reliance by showing that they paid the "Debit Memos"); *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 561 (E.D. Va. 2000) (noting that plaintiffs who paid deficiency judgments "clearly made payments in reliance upon the assurance that the process of repossession, sale and all subsequent steps were taken in conformity with the law" and noting that to "conclude otherwise would . . . run counter to the traditional presumption in favor or factors operating under rational economic choice"); *cf. Klay*, 382 F.3d at 1259 ("It does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon the defendants' representations and assumed they would be paid the amounts they were due.").

USF argues that proof of each class member's reliance on the alleged misrepresentations (the invoices) requires highly individualized proof, therefore precluding a finding of predominance. *See Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319

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[21] The only injury that the plaintiffs allege is overpayment, based on USF's allegedly fraudulent inflation of the cost-component of its cost-plus products. Therefore, it is unclear how the plaintiffs could demonstrate causation in this case if they do not prove reliance on the misrepresentations. *See Dungan v. Academy at Ivy Ridge*, No. 06–CV–0908, 2008 WL 2827713, at *2 (N.D.N.Y. July 21, 2008) ("While first-person reliance may not be an essential element of the RICO claims, it remains a central focus of the allegations and claims in this case.").

F.3d 205, 220 (5th Cir. 2003). In Sandwich, the plaintiffs advanced a similar "invoice theory," claiming that they could demonstrate reliance by paying the invoices that contained material misrepresentations (inflated premiums). The U.S. Court of Appeals for the Fifth Circuit held that the "invoice theory" ignored the defendants' defense that the plaintiffs were aware that the premiums were being calculated in a different way (the defendants maintained that potential class members *negotiated* premiums that varied from the filed rates, and introduced evidence to that effect.) The Fifth Circuit found that "[k]nowledge that the invoices charged unlawful rates, but did so according to a prior agreement between the insurer and the policyholder, would eliminate reliance and break the chain of causation." *Id.* The court reasoned that although common evidence might permit a reasonable jury to find for some policyholders, the court would still need to admit proof demonstrating a lack of reliance by individual plaintiffs. *See id.* at 221. Therefore, the "invoice theory" did not demonstrate a common manner of proving reliance.

Here, USF claims that, as part of its defense, it will show that many of its customers, including potential class members, had knowledge of the alleged fraudulent conduct. Despite USF's assertions, the record lacks evidence that any of USF's customers had knowledge of USF fraudulently inflating the cost component of its products through the operation of the VASPs. For instance, the deposition testimony that USF claims shows its customers' knowledge of its pricing practices does not speak to individualized conceptions of knowledge as in Sandwich. Rather, most of the deposition testimony that USF relies on contains broad generalizations made by USF's customers about the customers' general understanding of industry

pricing practices. *See, e.g.*, Def's. Ex. 12 at 230-33; Def's. Ex. 13 at 91-92; Def's. Ex. 14 at 134-35; Def's. Ex. 1529 at 82-83.[22] Additionally, USF's purported expert, Frank Dell, concluded that "USF's business with the VASPs was consistent with well-known and common industry practice, [so] all or most of USF's cost-plus customers would have understood that USF had control or influence over the invoice cost used in the cost-plus formula under their contracts."[23] Dell Decl. at ¶¶ 5, 21. Such evidence does not raise the concern of issues of individual knowledge predominating. *Cf. In re Monster Worldwide, Inc. Secs. Litig.*, 251 F.R.D. 132, 137 (S.D.N.Y. 2008) (finding "evidence" of individual knowledge to be speculation). Instead, the evidence, including Dell's conclusion, is limited to information about what the industry practice was and, therefore, what USF believes USF's customers should have understood. Moreover, there is no evidence of separate agreements or understandings between USF and its customers regarding its cost-plus

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[22] USF has only shown that some class members had knowledge that pricing and USF's profits varied between its private brands and national brands. There is no evidence that USF's customers knew of the existence of the VASP system, the purpose of the VASPs, or the VASP's effect on the customers.

[23] Similarly, Charnette Norton, another purported expert, opines in an affidavit that USF customers who purchased products on a cost-plus basis understood that food service distributors such as USF control or influence the cost component of such goods by using a middle man and include promotional allowances for themselves. *See* Norton Aff. at ¶ 3. Again, like Dell's declaration, Norton's affidavit only contains generalizations about what customers are "generally aware" of. Thus, even if Norton's statements are found to be true, that does not affect a finding of predominance.

pricing practices.[24] In fact, the plaintiffs' purported expert, Stacy Moore, stated that based on her experience and knowledge of the industry, USF's alleged fraudulent pricing practice was not common and no USF customer had any reason to know of it. *See* Pls.' Reply Ex. 2 at ¶ 42. And although it was the industry standard to include promotional allowances for the distributor, this acknowledgment does not bear on individualized proof, but rather generalized standards. Also, with respect to promotional allowances, the evidence appears to distinguish USF's use of the VASPs from industry-standard promotional allowances.[25] Finally, there is also other evidence showing that the plaintiffs could prove USF's concealment of the VASPs through generalized proof. *See, e.g.*, Pls.' Ex. 53 (internal audit memo stating: "The company does not pass PA [promotional allowances] to its clients of whom many have a cost plus contract. The Company uses brokers for its private label programs in order to shelter and earn similar 'rebates' on its private label brands and *to hide PA's from clients' auditors*." (emphasis added)).

Therefore, in the absence of evidence of actual individual knowledge of the VASPs' existence and USF's pricing practices, USF's "knowledge defense"

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[24] Also, reliance on cost-plus pricing is more quantifiable, and thus more appropriate for class treatment than reliance on a product's quality based on marketing materials. *See McLaughlin*, 522 F.3d at 225 n. 7 (distinguishing reliance upon financial representations from reliance upon inferences drawn from marketing and branding).

[25] Even if the VASP passbacks or "buckets" are found to constitute promotional allowances, promotional allowances are common to all class members and do not require individual examination.

does not require individualized examination into the intent and understanding of each customer. Consequently, the Court finds that common questions of law and fact with respect to the plaintiffs' RICO claims will predominate over any individual issues of knowledge that may exist. *Cf. Klay*, 382 F.3d at 1260 ("[E]ven if many plaintiffs' claims require . . . individualized consideration, such inquiries are outweighed by the predominating fact that the defendants allegedly conspired to commit, and proceeded to engage in, a pattern of racketeering activities to further their Managed Care Enterprise. It is ridiculous to expect 600,000 doctors across the nation to repeatedly prove these complicated and overwhelming facts.").

*2. Breach of Contract*

In addition to their RICO causes of action, the plaintiffs also claim that USF breached the terms of its cost-plus contracts by using invoice costs from the VASPs to calculate the cost component of the price it billed its cost-plus customers. The plaintiffs claim that they are injured because they paid prices higher than they otherwise would have for cost-plus products, absent USF's alleged breach of their cost-plus contracts.

As with their RICO claim, the plaintiffs assert that, through common evidence, they can prove that USF funded, operated, and controlled the VASPs in order to artificially inflate the cost component of its food products, and in so doing breached its contracts with its various cost-plus customers. USF argues that individualized factual and legal issues will predominate the plaintiffs' breach of contract action. In particular, USF claims that, given the wide geographical scope of USF's cost-plus customers, the Court will need to apply the contract law of all fifty states to the individual customers' breach of contracts

claims. In addition, USF contends that there are too many factual variations among its cost-plus customers' contracts to render class treatment appropriate in a breach of contract action.

Courts have held that "breach of contract claims can be appropriate for class treatment, but only where they are subject to generalized proof." *Jim Ball Pontiac–Buick–GMC, Inc. v. DHL Exp. (USA), Inc.*, No. 08–CV–761C, 2011 WL 815209, at *6 (W.D.N.Y. Mar. 2, 2011) (citing *McCracken v. Best Buy Stores, L.P.*, 248 F.R.D. 162, 168 (S.D.N.Y. 2008)). "In a multi-state class action, variations in state law may swamp any common issues and defeat predominance." *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996). However, "if a claim is based on a principle of law that is uniform among the states, class certification is a realistic possibility." *Klay*, 382 F.3d at 1262. Whether a contract has been breached is a question of contract interpretation that does not vary from state to state. *See id*.

In support of their assertion that common legal issues predominate, the plaintiffs argue that the class members' cost-plus contracts with USF are subject to and governed by the Uniform Commercial Code ("UCC"). The plaintiffs claim that their claims fall under UCC §§ 1-201, 1-303, 1-304, and 2-103.[26] While USF contends that even with the general uniformity of the UCC, there are still differences in each state's implementation and application of the UCC, the evidence shows that all fifty states have adopted

[26] UCC Section 1-201 deals with General Definitions, 1-303 deals with "course of performance, course of dealing, and usage of trade," 1-304 deals with the obligation of good faith, and 2-103 deals with definitions.

nearly all of these provisions.[27] *See* Pls.' Exs. 75, 87. While USF argues that although these sections of the UCC might be "textually" uniform, they may be interpreted differently, *see, e.g., Feinstein v. Firestone Tire & Rubber Co.*, 535 F.Supp. 595, 605 (S.D.N.Y. 1982) (noting that "even within the U.C.C . . . . state law may differ"), none of the decisions that USF relies on directly addresses a breach of contract claim, but rather breach of warranty claims. Absent any evidence of significant variation in states' breach of contract law and states' adoption of the relevant UCC provision, the Court finds that common legal issues are likely to predominate the plaintiffs' breach of contract claim.[28]

While common legal issues are likely to predominate the plaintiffs' breach of contract action, the plaintiffs must still show that common facts and evidence are also likely to predominate. Central to the plaintiffs' breach of contract claim is the need to show that the VASPs were prohibited in USF's cost-plus contracts (*i.e.*, whether the VASPs constituted "vendors"), and whether the "buckets" were promotional allowances. The plaintiffs assert that the evidence presented regarding these questions will be common to all members of the proposed class.

As to the first issue, whether the VASPs were "vendors," the plaintiffs claim that the terms "vendor" and "supplier" are unambiguous in the contracts and, therefore, do not require any individualized proof.

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[27] Louisiana has not adopted Article 2.

[28] If the Court subsequently finds that variations in state law are substantive and problematic, "the Court may employ sub-classes or decertify those state law subclasses whose adjudication becomes unmanageable." *Cassese v. Wash. Mut., Inc.*, 255 F.R.D. 89, 97–98 (E.D.N.Y. 2008).

Additionally, even if the terms are ambiguous, the plaintiffs contend that the terms could be proven through "trade usage evidence." USF argues that by allowing extrinsic evidence of what the term "vendor" means, the evidence becomes more individualized. However, section 1-303(d) of the UCC provides uniformity to any issue that may arise over the meaning of "vendor" in USF's cost-plus contracts. UCC § l-303(d) states that "[a] course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement." Additionally, the plaintiffs assert that they would be able to rely on evidence of the VASPs' conduct and USF's internal documents to provide generalized proof that the VASPs were not vendors. *See, e.g.*, Pls.' Ex. 27 (e-mail noting that one of the VASPs was "not just any 'vendor,' but we do not want to publicize this fact").

Extrinsic evidence, however, is a double-edged sword in this context. While such evidence may help to provide uniformity to the meaning of the term "vendor" in USF's cost-plus contracts, courts have found that the need to rely on extrinsic evidence in a breach of contract claim weighs against class certification. *See Sacred Heart Health Sys., Inc. v. Humana*, 601 F.3d 1159, 1176-77 (11th Cir. 2010) ("Even the most common of contractual questions—those arising, for example, from the alleged breach of a form contract—do not guarantee predominance if individualized extrinsic evidence bears heavily on the interpretation of the class members' agreements."); *see also Elliot Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d

1091, 1107 n. 10 (10th Cir. 2005) (noting that pleading a breach of contract claim on behalf of approximately 10,000 individuals would have presumably made certification less likely, particularly when issues of individual conduct come into play); *Coca–Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 95 F.R.D. 168, 178 (D. Del. 1982) (declining to certify a class even where the "contracts to be construed [were] identical in their material parts" because "myriad . . . contract issues lurk[ed] in th[e] lawsuit, . . . [i]n particular, [the fact that] each unamended bottler's course of dealing with [Coca-Cola] would be relevant to construing the contract language, inasmuch as it could indicate knowledge of or acquiescence in [Coca-Cola's] pricing policies"). Additionally, the application of multiple states' laws with respect to the use of extrinsic evidence in a breach of contract case weighs against certification. *See, e.g.*, *Bowers v. Jefferson Pilot Fin. Ins. Co.*, 219 F.R.D. 578, 583-84 (E.D. Mich. 2004) (finding class certification not appropriate in a breach of contract action where there was significant variation in the laws of the relevant states with respect to the use of extrinsic evidence); *Jim Ball Pontiac–Buick–GMC*, 2011 WL 815209, at *7 ("[C]ourts have found class certification improper due to significant variations in the states' laws with regard to the use of extrinsic evidence."). While it is unclear to what extent extrinsic evidence will be necessary in the plaintiffs' breach of contract claim, there is at least a concern that such evidence could predominate.

USF also claims that individual factual issues with regards to whether its customers complied with the "substantial majority" rule in the customers' cost-plus contracts are likely to predominate. According to Jonathan Kass's Declaration, many of USF's cost-plus contracts have a "minimum purchase provision,"

which states that the buyer must make USF its "prime vendor" and must purchase a set percentage (usually eighty percent or eighty-five percent) of its food supplies from USF. *See* Def's. Ex. 2, Kass Decl. at ¶¶ 1819. Kass asserts that some of USF's cost-plus contracts required compliance with these provisions in order for the customer to receive the "pricing terms" or "markup schedule."[29] USF argues that non-compliance with these provisions is material as to whether the plaintiffs and other proposed class members would be entitled to the cost-plus pricing under their contract and, accordingly, whether their breach of contract claim could succeed on the merits.[30] However, it appears that these minimum purchase provisions were not material. For example, Waterbury Hospital's contract with USF provides that if the eighty percent threshold is not met, then a plan shall be initiated to "improve purchasing levels." In fact, even the defendant's expert stated that the eighty-percent threshold is a "dream figure" that does not appear to be monitored unless non-compliance is "really grievous." *See* Pls.' Ex. 81, Dell Dep. at 294-95. Thus, while the issues of various affirmative defenses in a breach of contract class action may weigh against certification, the Court finds that such a concern is not material here. *Cf. Weiss v. La Suisse*, 226 F.R.D. 446, 454 (S.D.N.Y. 2005) (declining to certify a class in a breach of contract where affirmative defenses could

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[29] Former Executive Vice President and General Counsel of USF David Eberhardt has asserted that the reasons for these differences between contracts are that the distribution agreements are all negotiated separately by USF with hundreds of different purchasers. Eberhardt Aff. ¶ 3.

[30] For example, according to the Declaration of Amy Waterfield, plaintiff Waterbury Hospital never reached the eighty-percent requirement mandated under its contract.

include issues of non-compliance with contract provisions by various plaintiffs in various ways); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 303-04 (S.D.N.Y. 2003).

Finally, USF also claims that its cost-plus contracts include fundamental differences that would require individualized examination. For example, differences between contracts including how "cost" is defined, the manner in and extent to which "plus factors" are imposed, the application of certain surcharges, and the ability of a customer to choose the vendors from whom goods are obtained, would require individualized examination. Some contracts include provisions limiting the forum in which any contractual disputes may be resolved, as well. However, based upon the Court's review of the contracts and the principal issues to be decided in the plaintiffs' breach of contract claim, the Court finds that the alleged differences between the various contracts are immaterial, and therefore do not affect the certification of a class. *See, e.g.*, Pls.' Ex. 98, Dell Dep. at 307 (stating that review of all of USF's contracts was not necessary because "they all essentially said the same thing" and because it "was well understood in the industry what a cost plus contract is"); *cf. Sacred Heart Health Sys.*, 601 F.3d at 1176 (finding that differences in material terms of the agreements created an "unnecessarily high risk" of abridgment of defendant's rights by utilizing the class action form). For instance, the defendant's contention that differing language regarding whether USF could retain promotional allowances could predominate appears to be immaterial because the plaintiffs' theory is that the VASP "passbacks" were not promotional allowances. Instead, the principal issue is whether any cost-plus contract permitted USF to use a VASP invoice to calculate its cost-plus prices, which does not

appear to require individualized proof. Accordingly, the Court finds that the plaintiffs have shown that both common legal and factual issues are likely to predominate their breach of contract claim.

*3. Damages*

At the class certification stage, the Court's inquiry is limited to determining whether, if individual damages will vary, "there is nevertheless a possible and reasonable means of computing damages on a class-wide basis, for example, by using a formula or statistical analysis." *Spencer*, 256 F.R.D. at 305. "Only where the individualized [damages] inquiry will be fact-specific and require extensive judicial resources have courts determined that a damages issue should preclude class certification, at least as to the issue of damages." *Id.*; *see also McLaughlin*, 522 F.3d at 231 ("[I]ndividual damages . . . is nonetheless a factor that we must consider in deciding whether issues susceptible to generalized proof 'outweigh' individual issues.").

The plaintiffs claim that although there may be individual questions regarding damages, these questions are insufficient to defeat certification because the plaintiffs can prove all of the class members' damages through common evidence. Conversely, USF argues that the plaintiffs' damages model is inconsistent with existing law and is "faulty."

First, USF claims that the plaintiffs' damages model is inconsistent with existing law because it calculates damages on the benefit of the bargain theory, rather than "out of pocket loss." The general rule of damages for RICO is that the plaintiffs may recover for out-of-pocket losses caused by the fraud. *See McLaughlin*,

522 F.3d at 227. That is to say, the fraudulent defendant is only liable for the losses the plaintiffs actually suffered. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F .3d 763, 768 (2d Cir.1994). USF claims that the plaintiffs did not suffer any "out-of-pocket losses" because USF provided the best prices and services for comparable goods at the time of each order. *See In re Zyprexa Prods. Liability Litig.*, 253 F.R.D. 69, 188 (E.D.N.Y. 2008) (finding that damages were the "difference between what was paid for Zyprexa and the actual value of the product"). However, the plaintiffs do not allege that they were defrauded as to the actual value of the product. Instead, the plaintiffs' damages are based on USF's alleged fraudulent pricing.

The plaintiffs' damages model is based on USF's data and provides for a universal calculation of damages. The plaintiffs' damages expert, John Damico, asserts that his damages model connects an item "sold" by a VASP to USF to a corresponding item sold to a cost-plus customer to determine the amount the customer was overcharged. *See* Damico Dec. at ¶ 22. According to Damico, damages are calculated by "computing the difference between the cost derived from the USF purchase order identified by our model and the cost of the product to the VASP found in the CASP sales, and . . . by calculating the additional amount of overbilling resulting from application of the relevant plus percentage to the inflated cost component." *Id.* at ¶ 27.

USF claims that the plaintiffs' method of calculating damages is unreliable because it is based on pricing assumptions that are not uniform across USF's three

computer pricing systems.[31] For example, LeeAnn Manning claims that the "P-system" does not break-down "cost" and "plus" into component parts like the "A-System." Therefore, any analysis of these components for customers in the "P-System" (such as Frankie's) would require manual calculation. *See* Manning Decl. at ¶ 23. In response to this criticism, Damico "refined" his methodology to be applicable to the "P-System," utilizing the "DWA_COST_CALC"[32] as the basis for cost. Damico claims that, according to the data and deposition testimony he reviewed, this cost basis is the best and most reliable manner of calculating cost for "P-System" customers.[33] *Id.* at ¶ 16.

USF also argues that it was entitled to set costs based on various measures such as "price lists" and, therefore, to determine whether an individual plaintiff was overcharged, each possible method of charging the plaintiffs must be calculated. Similarly, USF stresses that each customer's contract was different, and that certain products or certain locations may have been

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[31] According to LeeAnn Manning's Declaration, the three different systems (A, P, and I) encompass separate divisions: those that were formerly part of Alliant (A), those that were part of PYA Monarch (P), and those acquired over time (I). *See* Manning Decl. at ¶ 14.

[32] According to the Declaration of Robert Stewart, "DWA" stands for "District Weighted Average."

[33] USF disputes this assertion and claims that the error rate in Damico's analysis is still too high. For example, Damico apparently made 759 "matched" transactions where the matching was "unreasonable," allegedly resulting in overstated damages. *See* Manning Decl. at ¶¶ 3138. Nonetheless, at the class certification stage, the plaintiffs do not need to demonstrate that their analysis captures all of the correct variables, but rather that it is possible to use a single formula to estimate class-wide damages. *See In re EPDM*, 256 F.R.D. 82, 101 (D. Conn. 2009).

excluded from the "cost-plus" pricing arrangement. However, while USF may have been entitled to use other methods of pricing, it appears to have almost always used an invoice to calculate prices. *Cf.* Pls.' Ex. 78, Lesley Dep. at 108-11 (noting that cost, regardless of whether it was landed or TMC, was based off the invoices received from vendors); Pls.' Ex. 79, Stewart Dep. at 44-45 (noting that "product cost" was based on the "invoice cost" whether it was with LICSU pricing or market cost). *But see* Def's. Ex. 16 at 58, 119-20, 182.

It is a rare case where computation of each individual's damages is so complex, fact-specific, and difficult that the burden on the court is intolerable. *See Klay*, 382 F.3d at 1260. At the class certification stage, USF should be focused on disputing the use of the methodology itself, not the results of the methodology. *In re EPDM*, 256 F.R.D at 96. "In other words, if the defendants' experts are merely disputing the results of the plaintiffs' experts' analysis rather than the feasibility of using a single formula methodology, that would be a merits issue, not a class certification issue." *Id.* Here, the only feasibility-related issue is the potential need for manual input of certain customers and the time necessary to complete this analysis for thousands of potential plaintiffs. *See Rodney v. Northwest Airlines, Inc.*, 146 F. App'x 783, 791 (6th Cir. 2006) (holding that the variables that would be needed to be plugged into the formula are too specific to the individuals); *see also LaBauve v. Olin Corp.*, 231 F.R.D. 632, 677-78 (S.D. Ala. 2005) (individualized questions about damages predominated when had to examine the particular types of property, the extent of the contamination, genesis of duration of contamination, etc.). Despite the parties' disagreement about

how damages should be calculated, there is no indication that the damages calculation would require individualized proof. Thus, even though some "individualized damages issues" exist, the Court finds that, given the common issues with respect to RICO liability, common issues still predominate. *See In re Visa Check*, 280 F.3d at 139–40.

*4. Superiority*

In addition to finding that common factual and legal issues predominate, Rule 23(b)(3) also requires the Court to determine whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Four factors are "pertinent" to this inquiry:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The only issue with respect to superiority that USF disputes is the manageability of a class action. While managing upwards of 75,000 class members and witnesses is no easy task, it is certainly preferable and superior to litigating 75,000 lawsuits. *See Spencer*, 256 F.R.D. at 306 ("Rule 23 provides for a comparative inquiry—not whether a class action suit is a good method of adjudicating the claims, but whether it is "superior to other available methods.").

*5. Statute of Limitations*

Finally, USF claims that the statute of limitations weighs against certifying a class for the plaintiffs' RICO and contract claims. There is a four-year statute of limitations for civil RICO claims, which starts to run "when the plaintiff discovers—or should reasonably have discovered—the alleged injury." *Spencer*, 256 F.R.D. at 307–08 (internal quotations omitted).

The plaintiffs claim that the statute of limitations should be tolled based on USF's alleged fraudulent concealment of the VASP pricing scheme.[34] The Supreme Court has recognized that fraudulent concealment tolls the statute of limitations in civil RICO claims as long as plaintiffs performed due diligence. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 195-96 (1997). Thus the law on the issue is uniform for all plaintiffs. "Courts have overwhelmingly held that, even when the issue of fraudulent concealment involves both common and individual questions, the common question of whether USF successfully concealed the existence of the alleged conspiracy predominates over any individual questions regarding the knowledge or diligence of individual plaintiffs." *In re NASDAQ Market-Makers Antitrust Lit.*, 169 F.R.D. 493, 520 (S.D.N.Y. 1996) (finding the active misrepresentations to the market to be susceptible to common

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[34] The plaintiffs argue that the earliest any of the proposed class members could have reasonably found out about the VASPs was October 16, 2003, which was when the VASPs' existence was publicly disclosed in an SEC filing. Accordingly, the plaintiffs argue that their RICO claim is at least tolled until that point. However, USF claims that because the plaintiffs have asserted a toll for that period, individual factual inquiries must be performed. *See Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 323-33 (4th Cir. 2006).

proof); *see also Abramovitz v. Ahern*, 96 F.R.D. 208, 218 (D. Conn. 1982) ("The issue of fraudulent concealment is common to all class members."). Here, the plaintiffs have produced common evidence showing that USF intended to conceal the VASPs and, therefore, it cannot reasonably be expected that the plaintiffs could have discovered the injury until they became more fully aware of VASPs existence and purpose. Therefore, common issues regarding fraudulent concealment exist and the statute of limitations does not bar certification of the RICO class.[35]

As to the contract claims, USF argues that plaintiffs have not identified the applicable limitations period, rendering the class definition inadequate. Plaintiffs in response have demonstrated that all but eight states follow UCC § 2-275(1), which applies a four-year statute of limitations to breach of contract for sale claims. Of those eight states, only one (Colorado) applies a limitations period of less than four years. Plaintiffs suggest that if Colorado's shorter period becomes an issue, then a subclass of Colorado purchasers can be created. *Cf. Clausnitzer v. Fed. Express Corp.*, 248 F.R.D. 647, 655 (S.D. Fla. 2008) (denying class certification in part because the applicable limitations periods ranged from three to twenty years and because plaintiffs had not laid forth a proposed subclass scheme).

The point of accrual of the claim is not an individualized question either. The statute of limitations for breach of contract can also be tolled when a defendant

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[35] The Court's determination at the class certification stage regarding the statute of limitations does not foreclose USF from presenting evidence and argument at trial or on summary judgment that some class members' claims are barred by the applicable statue of limitations. *See Spencer*, 256 F.R.D. at 308.

fraudulently conceals from a plaintiff the source of the breach. *See, e.g.*, *Four Seasons Solar Products Corp v. Southwall Technologies, Inc.*, 100 Fed. Appx. 12, 13 (2d Cir. 2004) (applying New York law). Unlike plaintiffs' RICO claims, which are based on a federal statute, their breach of contract claims and relevant defenses are based in state statutory and common law; further, the U.S. Court of Appeals for the Second Circuit has not addressed the question of whether fraudulent concealment in a breach of contract case can be treated on a class-wide basis. Therefore, the Court asked the parties to provide supplemental briefing as to the uniformity of the law surrounding fraudulent concealment and its effect of tolling the statute of limitations in breach of contract actions. Both parties conducted a thorough review of the law in all fifty states, and their supplemental memoranda revealed that some variation exists in the law, but this variation can be addressed in a class-wide manner.

As the briefs revealed, the statute of limitations for Article 2 breach of contract cases is tolled either by fraudulent concealment or the related doctrine of equitable estoppel in all states except Florida, Ohio, and Nevada.[36] This list is not markedly more expansive than the list compiled by the court in *Allapattah*

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[36] Florida has not adopted the statute of limitations of the U.C.C. and instead imposes a five year limitations period. Fla. Stat. Ann. § 95.1 l(2)(b) (West 2011). Although at one point fraudulent concealment was recognized in Florida, the U.S. District Court for the Middle District of Florida held that, given recent case law, the Florida Supreme Court would "find the doctrine of fraudulent concealment no longer available to toll" the relevant statute of limitations. *Pacific Harbor Capital, Inc. v. Barnett Bank N.A.*, No. 2:97–cv–416–FTM–24D, 2000 WL 33992234, at *7 (M.D. Fla. Mar. 31, 2000). Ohio's statute of limitations for contracts for sale does not provide for tolling for the plaintiff's

*Services, Inc. v. Exxon Corp.*, 188 F.R.D. 667 (S.D. Fla. 1999). In that case, the district court held that class-wide treatment of fraudulent concealment for the purpose of tolling the statute of limitations was appropriate in spite of the fact that two of the jurisdictions relevant in that dispute, Florida and Ohio, do not apply fraudulent concealment doctrine. *Id.* at 673.

Given that almost every state allows the statute of limitations in this case to be tolled if the plaintiffs can demonstrate fraudulent concealment, the factual issues related to fraudulent concealment can be treated on a class-wide basis. The common issue of fact in those jurisdictions that recognize fraudulent concealment doctrine is whether the VASP invoices misrepresented USF's costs so that the alleged breach of contract was concealed. Any steps that USF took to conceal its scheme would be common to all plaintiffs.

USF also points to certain differences in the law of the states that do apply fraudulent concealment doctrine in this context to argue that those differences will make class-wide treatment unmanageable. This Court disagrees. According to the parties' supplemental briefs, in fourteen of the tolling jurisdictions,

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lack of knowledge. Ohio Rev.Code Ann. § 1302.98. Nevada allows tolling in certain specific circumstances by statute, none of which appear to apply here. See Nev.Rev.Stat. Ann. § 11.207 (West 2010). The parties have not presented, and the Court has not found, any decisions discussing a common law fraudulent concealment rule in Nevada. USF argues that Missouri does not allow tolling of its statute of limitations for contracts for sale. However, the provision that they point to appears to have been repealed; the applicable provisions, Mo. Ann. Stat. §§ 400.2-725 and 516.280, allow for tolling in this case.

reliance is required as an additional element of fraudulent concealment (Alabama, Alaska, California, Colorado, Illinois, Iowa, Maine, Maryland, New Mexico, North Carolina, Pennsylvania, Rhode Island, Texas, Wisconsin).[37] Defendant also demonstrates that five jurisdictions (Connecticut, Iowa, Maryland, Pennsylvania, Virginia) require clear and convincing evidence to demonstrate fraudulent concealment.[38]

Both of these issues were present in the *Allapatah* case, and the court found those differences to be "not insurmountable so as to require decertification." 188 F.R.D. at 675; *see also Simon v. Philip Morris Inc.*, 2000 WL 1745265, at *29 (E.D.N.Y. Nov. 16, 2000) (noting that plaintiffs demonstrated the "relative uniformity among fraudulent concealment laws"). Further, plaintiffs are prepared to show that all of USF's customers involved in the case relied upon USF's misrepresentations. If necessary, the Court at a later time can create a subclass of plaintiffs in those jurisdictions that require either reliance as an

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[37] Kentucky's common law recognizes both deliberate fraudulent concealment and equitable estoppel. Deliberate concealment does not require reliance, but equitable estoppel does. *Golden Oak Mining Co. v. Lucas*, No.2008–CA–002148–MR, 2011 WL 2416600, at *8 (Ky. Ct. App. June 17, 2011) (equitable estoppel); *Lashlee v. Sumner*, 570 F.2d 107, 110 (6th Cir. 1978) (deliberate concealment). Plaintiffs also cite Virginia as requiring reliance, but reliance does not appear to be an element of fraudulent concealment in Virginia. *See Schmidt v. Household Finance Corp., II*, 661 S.E.2d 834, 840 (Va. 2008).

[38] This list of states with heightened burdens of proof varies from the list created by the Allapattah court, which included Connecticut, Maryland, Pennylvania, Vermont, Virginia, and Washington. This Court believes, based on its own research, that the list provided by USF in this case is correct.

element or clear and convincing evidence of fraudulent concealment.

Defendant argues that there are additional differences in the states' laws which preclude certification. First, they argue that some states require an affirmative act whereas others require only a failure to act as an element of fraudulent concealment. However, plaintiffs are prepared to demonstrate an affirmative act, namely the creation of false invoices, on the part of the defendant; their case does not depend on the defendant's mere failure to act. Similarly, even though some states require intent or knowledge on the part of the defendant, plaintiffs are arguing that USF intentionally acted to deceive all the plaintiffs. Thus any intent or scienter elements could be commonly proved.

USF also contends that a substantial number of jurisdictions—fifteen, according to the defendant's supplemental brief—require the plaintiff asserting fraudulent concealment to prove that it exercised some degree of diligence. However, courts in other contexts have held that the predominating question in fraudulent concealment is the fact of concealment on the part of the defendant, not the diligence on the part of the plaintiff. *See, e.g.*, *Weil v. Long Island Savings Bank, FSB*, 200 F.R.D. 164, 175 (E.D.N.Y. 2001) ("[T]he crucial question here is whether the defendants have concealed the nature of this scheme. This question is common to all members of the class."). Thus even in those jurisdictions where a showing of diligence is required, common factual issues related to the fraudulent concealment predominate.

Finally, Defendant points out that some states toll the statute of limitations until the point of actual

discovery, whereas others toll up to the point of constructive discovery. This difference does not matter in this case because point at which plaintiffs should have discovered the breach is the same as the point at which they did discover the breach; even if these points differ, the questions of constructive discovery and actual discovery are both common to all of the plaintiffs.

Thus while the law does vary and could require the Court to create subclasses of plaintiffs in the future, common questions still predominate and both the legal and factual issues related to the tolling of the statute of limitations for the breach of contract claim can be treated on a class-wide basis.

V. Conclusion

Accordingly, the plaintiffs' motion for class certification [Dkt. # 216] is GRANTED.

SO ORDERED.

**APPENDIX 3**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 12-1311-cv

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IN RE U.S. FOODSERVICE INC. PRICING LITIGATION

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CATHOLIC HEATHCARE WEST, THOMAS & KING, INC., WATERBURY HOSPITAL O/B/O THEMSELVES & OTHERS SIMILARLY SITUATED; CASON INC., O/B/O THEMSELVES & OTHERS SIMILARLY SITUATED; FRANKIE'S FRANCHISE SYSTEMS INC. O/B/O THEMSELVES & OTHERS SIMILARLY SITUATED,

*Plaintiffs-Appellees*,

v.

US FOODSERVICE INC.,

*Defendant-Appellant*,

KONINKIJKE AHOLD N.V., GORDON REDGATE, BRADY SCHOEFIELD,

*Defendants.*

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October 22, 2013

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Appeals from the United States District Court
for the District of Connecticut

Hon. Christopher F. Droney, *U.S. District Judge*

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Appellant US Foodservice Inc., filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe