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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

\_\_\_\_\_ )  
 In re WESTERN STATES WHOLESALE )  
 NATURAL GAS ANTITRUST )  
 LITIGATION )  
 \_\_\_\_\_ )  
 REORGANIZED FLI, INC. et al., )  
 Plaintiffs, )  
 vs. )  
 WILLIAMS COMPANIES. et al., )  
 Defendants. )  
 \_\_\_\_\_ )  
 LEARJET, INC. et al., )  
 Plaintiffs, )  
 vs. )  
 ONEOK, INC. et al., )  
 Defendants. )  
 \_\_\_\_\_ )

2:03-cv-01431-RCJ-PAL  
 MDL No. 1566  
**ORDER**

2:05-cv-01331-RCJ-PAL

2:06-cv-00233-RCJ-PAL

1 SINCLAIR OIL CORP., )

2 Plaintiff, )

3 vs. )

4 E PRIME INC. et al., )

5 Defendants. )

2:06-cv-00267-RCJ-PAL

6  
7 SINCLAIR OIL CORP., )

8 Plaintiff, )

9 vs. )

10 ONEOK ENERGY SERVICES CO., L.P., )

11 Defendant. )

2:06-cv-00282-RCJ-PAL

12 BRECKENRIDGE BREWERY OF )  
13 COLORADO, LLC et al., )

14 Plaintiffs, )

15 vs. )

16 ONEOK INC. et al., )

17 Defendants. )

2:06-cv-01351-RCJ-PAL

18 HEARTLAND REGIONAL MEDICAL )  
19 CENTER et al., )

20 Plaintiffs, )

21 vs. )

22 ONEOK, INC. et al., )

23 Defendants. )

2:07-cv-00987-RCJ-PAL

1 ARANDELL CORP. et al., )

2 Plaintiffs, )

3 vs. )

2:07-cv-01019-RCJ-PAL

4 XCEL ENERGY INC. et al., )

5 Defendants. )

6 NEWPAGE WISCONSIN SYSTEM INC., )

7 Plaintiff, )

8 vs. )

2:09-cv-00915-RCJ-PAL

9 CMS ENERGY RESOURCE )  
10 MANAGEMENT CO. et al., )

11 Defendants. )

12 )  
13 These consolidated cases arise out of the energy crisis of 2000–2002. Plaintiffs (retail  
14 buyers of natural gas) allege that Defendants (natural gas traders) manipulated the price of  
15 natural gas by reporting false information to price indices published by trade publications and by  
16 engaging in “wash sales.” Approximately forty motions are pending before the Court, including  
17 the final group of dispositive motions before remand to the transferor districts for trial.

18 **I. PROCEDURAL HISTORY**

19 In 2003, the Judicial Panel on Multidistrict Litigation (“JPML”) transferred seven class  
20 action cases from various districts in California to this District under 28 U.S.C. § 1407 as  
21 Multidistrict Litigation (“MDL”) Case No. 1566, assigning Judge Pro to preside. Since then, the  
22 JPML has transferred in several more actions from various districts throughout the United States.  
23 Between 2003 and 2015, Judge Pro ruled on many motions to remand, to dismiss, and for  
24 summary judgment. He also approved several class settlements. Several parties settled on their

1 own. One or more of the cases have been to the Court of Appeals twice and to the Supreme  
2 Court once. In 2007, the Court of Appeals reversed several dismissals under the filed rate  
3 doctrine and remanded for further proceedings. In 2013, the Court of Appeals reversed several  
4 summary judgment orders, ruling that the Natural Gas Act did not preempt state law anti-trust  
5 claims and that certain Wisconsin- and Missouri-based Defendants should not have been  
6 dismissed for lack of personal jurisdiction. The Supreme Court granted certiorari as to  
7 preemption under the Natural Gas Act and affirmed. The case was soon thereafter reassigned to  
8 this Court when Judge Pro retired. The Court has issued several dispositive orders and has  
9 denied class certification in applicable cases. Eight of the eighteen consolidated cases remain  
10 open, the others having been variously settled, dismissed, or remanded to state courts.

## 11 **II. MOTIONS TO RECONSIDER**

12 Plaintiff Sinclair Oil Corp. asks the Court to correct an alleged clerical error in the  
13 Court's March 30, 2017 order. In the introduction to its ruling on cross-motions for summary  
14 judgment on the issue of release, the Court wrote that material issues of fact remained as to  
15 whether Sinclair Oil had received sufficient notice of the settlements in the NYMEX case. But  
16 the Court thereafter closely analyzed the issue, finding that the release indeed precluded the  
17 present claims and that there had been sufficient notice of the settlements. Defendant ONEOK  
18 Energy Services Co., L.P. ("OESC") has responded that it has no objection to a clarification to  
19 the effect that the Court misspoke in its introductory remarks but intended to grant its motion  
20 (and the joinder thereto filed by Defendants e prime, inc. and Xcel Energy Inc.<sup>1</sup>), as indicated in  
21 both the analysis following the introduction and the "conclusion" section of the order.

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24 <sup>1</sup> These two Defendants have filed a separate motion under Rule 60(a) to this effect.

1 Defendants are correct. The Court will amend the previous order under Rule 60(a) to remove the  
2 final sentence of the first paragraph of Part III.B.

### 3 III. SUMMARY JUDGMENT MOTIONS

4 A court must grant summary judgment when “the movant shows that there is no genuine  
5 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.  
6 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson*  
7 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if  
8 there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See*  
9 *id.* A principal purpose of summary judgment is “to isolate and dispose of factually unsupported  
10 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

11 In determining summary judgment, a court uses a burden-shifting scheme. The moving  
12 party must first satisfy its initial burden. “When the party moving for summary judgment would  
13 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a  
14 directed verdict if the evidence went uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v.*  
15 *Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citation and internal quotation marks  
16 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or  
17 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate  
18 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving  
19 party failed to make a showing sufficient to establish an element essential to that party’s case on  
20 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24.

21 If the moving party fails to meet its initial burden, summary judgment must be denied and  
22 the court needn’t consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398  
23 U.S. 144 (1970). If the moving party meets its initial burden, the burden then shifts to the  
24 nonmoving party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v.*

1 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,  
2 the nonmoving party need not establish a material issue of fact conclusively in its favor. It is  
3 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the  
4 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*  
5 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid  
6 summary judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor*  
7 *v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the  
8 assertions and allegations of the pleadings and set forth specific facts by producing competent  
9 evidence that shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S.  
10 at 324.

11 At the summary judgment stage, a court’s function is not to weigh the evidence and  
12 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477  
13 U.S. at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are  
14 to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely  
15 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.  
16 Notably, facts are only viewed in the light most favorable to the nonmoving party where there is  
17 a genuine dispute about those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). That is, even  
18 where the underlying claim contains a reasonableness test, where a party’s evidence is so clearly  
19 contradicted by the record as a whole that no reasonable jury could believe it, “a court should not  
20 adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.*

21 **A. Motions Nos. 2745, 2764**

22 Responses to these motions are due two weeks after completion of depositions of certain  
23 expert witnesses. (*See Orders*, ECF Nos. 2786, 2797). Those depositions were expected to have  
24 been completed by March 10, 2017. (*See Order No.* 2786). No responses to Motions Nos. 2745

1 or 2764 appear to have been filed, however. The Court will therefore deny those motions  
2 without prejudice at this time.

3 **B. Motion No. 2740**

4 Defendants in the '233 Case have moved for summary judgment against the "full  
5 consideration" remedy under Kansas law. Defendants note that the Kansas Restraint of Trade  
6 Act ("KRTA") was amended in 2013 to replace the "full consideration" measure of damages  
7 with a triple damages remedy. *Compare* Kan. Stat. Ann. § 50-115 (repealed), *with id.* § 50-  
8 161(b) (2013). The question is whether the amendment applies retroactively to claims arising  
9 before the amendment. Defendants are correct that under Kansas law, changes to substantive  
10 rights apply only prospectively, but changes to remedies alone apply retroactively:

11 It is the law of this state that a statute which merely changes a remedy is not  
12 invalid, as there are no vested rights in any particular remedy. While generally  
13 statutes will not be construed to give them retroactive application unless it appears  
14 that such was the legislative intent, nevertheless when a change of law merely  
15 affects the remedy or law of procedure, all rights of action will be enforced under  
16 the new procedure without regard to whether they accrued before or after such  
17 change of law and without regard to whether or not the suit has been instituted,  
18 unless there is a saving clause as to existing litigation.

19 *Jones v. Garrett*, 386 P.2d 194, 199 (Kan. 1963); *accord Nitchals v. Williams*, 590 P.2d 582, 587  
20 (Kan. 1979). Defendants note that two courts to address the retroactivity of the repeal of the  
21 "full consideration" remedy have found that the repeal is retroactive under Kansas law. *See In re*  
22 *Polyurethane Foam Antitrust Litig.*, 998 F. Supp. 2d 625, 640 (N.D. Ohio 2014); *Assoc.*  
23 *Wholesale Grocers, Inc. v. United Egg Producers*, No. 10-cv-2171, at 4 (Kan. Dist. Ct.,  
24 Wyandotte Cnty. Oct. 3, 2013).

Plaintiffs respond that the amendment to KTRA disclaimed any retroactive effect, i.e.,  
that it contains a saving clause of the type mentioned by the *Jones* Court. The Court disagrees.  
The saving clause applies only to causes of action themselves, not to remedies:

1 K.S.A. 50-163 and the amendments to K.S.A. 50-101 and 50-112 by this  
2 act shall be applied retroactively to any choses in action or defenses premised on  
3 any provision of the Kansas restraint of trade act amended or repealed by this act,  
4 and any such choses in action or defenses that have accrued as of the effective date  
5 of this act shall be abated, *but causes of action that were pending in any court before  
6 the effective date of this act, shall not be abated.* All other non-remedial provisions  
7 of this section shall be applied prospectively.

8 Kan. Stat. Ann. § 50-164 (2013) (emphasis added).

9 The now-repealed “full consideration” remedy was formerly found at section 50-115.  
10 Section 50-164 does not mention section 50-115. Section 50-164 provides that certain new  
11 substantive standards for antitrust claims found in section 50-163, as well as the amended  
12 substantive standards found in sections 50-101 and 50-112, apply retroactively (against the  
13 default rule of prospective-only application of changes to substantive rights), but that any other  
14 *non-remedial* changes shall be applied only prospectively (in accordance with the default rule).  
15 Normally, no saving clause is required under Kansas law to rescue causes of action against  
16 retroactive effect. In the case of the 2013 KRTA amendments, however, one was needed,  
17 because the amendments were made retroactive to causes of action accrued but not yet pending.  
18 But the saving clause under section 50-164 does not indicate that amendments to remedies (such  
19 as the repeal of section 50-115) are to be applied only prospectively. That is enough to find the  
20 repeal of section 50-115 to apply to pre-amendment claims under Kansas law. And the final  
21 sentence of section 50-164 goes further, to avoid any confusion. In clarifying that all other “non-  
22 remedial” provisions of § 6 of KRTA are prospective, the amendment strongly implies that any  
23 amendments to remedial provisions are to be applied retroactively in accordance with the default  
24 rule under Kansas law.

25 Plaintiffs also argue that the language “causes of action that were pending in any court  
26 before the effective date of this act, shall not be abated” means that the repeal of the “full  
27 consideration remedy” does not apply to this case. *See id.* The Court disagrees. The non-

1 abatement clause of section 50-164 concerns the retroactivity of claims, not remedies. It  
2 provides that claims that were substantively viable only under the previous versions of the  
3 relevant statutes *and which were pending before the 2013 amendments* remain viable, whereas  
4 claims that were substantively viable only under the previous versions of the relevant statutes  
5 and which accrued before the 2013 amendments, *but which were not pending at the time of the*  
6 *2013 amendments*, are retroactively nonviable. Section 50-164 discusses only the retroactivity of  
7 changes to substantive standards governing antitrust claims under KRTA. It does not discuss the  
8 retroactivity of remedies under the 2013 KRTA amendments. Its silence on the retroactivity of  
9 remedies plus the default rule under *Jones* is enough to decide the issue, and as noted, section  
10 50-164 provides a further (unnecessary) implication that amendments to remedial provisions are  
11 to be applied retroactively by qualifying the catch-all provision with the term “non-remedial.”

12 Plaintiffs also argue that however this Court may interpret the effects of the amendments,  
13 the Kansas Court of Appeals has held that the repeal of section 50-115 was not retroactive. The  
14 Court disagrees. The first opinion cited is unpublished and is therefore not precedential under  
15 Kansas law. It is still potentially persuasive, but the opinion turned on whether a Kansas district  
16 court had properly decertified a class and only briefly mentioned section 50-115, not addressing  
17 the issues the Court has addressed directly, *supra*. See generally *O'Brien v. Leegin Creative*  
18 *Leather Prods., Inc.*, No. 188,908, 2014 WL 1362657 (Kan. Ct. App. Apr. 4, 2014). The next  
19 case is published, but that case does not address the retroactivity of the repeal of the “full  
20 consideration” remedy. See generally *Smith v. Philip Morris Cos., Inc.*, 335 P.3d 644 (Kan. Ct.  
21 App. 2014). Although the *Smith* court briefly addressed the amendments and noted that the pre-  
22 2013 KRTA applied to that case because it had been pending before the amendments, those facts  
23 are only briefly mentioned, and the issue is not discussed, i.e., the relevant issues do not appear  
24 to have been litigated. See *id.* 652–63.

1           There being no binding authority addressing the issue directly, the Court finds that the  
2 best interpretation of Kansas law is that the 2013 repeal of the “full consideration” remedy under  
3 KRTA is retroactive to all cases. A contrary conclusion would require the Court to read words  
4 into section 50-164 and ignore other words therein, or to countermand the law distinguishing the  
5 retroactivity of rights versus remedies as clearly stated by the Kansas Supreme Court.

6 Accordingly, the Court grants the motion for summary judgment on this issue.

7           **C.     Motion No. 2741**

8           The remaining Defendants in the ‘1019 and ‘915 Cases move for summary judgment  
9 based on res judicata and/or release against Arandell Corp. and NewPage Wisconsin System, Inc.  
10 (collectively, “Hedged Plaintiffs”) based on release under a settlement agreement reached in a  
11 consolidated class action brought in the Southern District of New York (“the NYMEX Case”).  
12 The Amended Consolidated Class Action Complaint (“ACCAC”) in the NYMEX Case alleged  
13 that the defendants had manipulated the prices of natural gas futures and options on the New  
14 York Mercantile Exchange (“NYMEX”) between January 1, 2000 and December 31, 2002 by  
15 reporting inaccurate, misleading, and false trading information, including artificial volume and  
16 price information, to trade publications that compile and publish such information. The  
17 Complaints here make the same allegations within the NYMEX relevant time period. (*Compare*  
18 *Second Am. Compl. ¶¶ 1–9, ECF No. 190 in Case No. 2:07-cv-1019, and Compl. ¶¶ 1–9, ECF*  
19 *No. 39-3, at 13 in Case No. 2:09-cv-915, with Am. Consol. Class Action Compl. ¶¶ 5, 60–70,*  
20 *ECF No. 2300-1). Several movants were also defendants under the ACCAC.<sup>2</sup> The plaintiff*

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24           <sup>2</sup> A comparison of the remaining Defendants to the defendants in the NYMEX action indicates  
that Williams Merchant Services Co., LLC; Dynege Illinois, Inc.; DMT GP, LLC; Dynege GP,  
Inc.; El Paso Corp.; Northern States Power Co.; and Xcel Energy Inc. were not defendants in the  
NYMEX Case. (*Compare Mot. Summ. J. 2 n.1, ECF No. 2741, with Ex. A to Am. Consol. Class*  
*Action Compl., ECF No. 2300-1). These Defendants are therefore not entitled to summary*

1 class in the NYMEX Case was defined as persons who had bought or sold natural gas futures or  
2 options on NYMEX during the relevant times. Hedged Plaintiffs were part of the NYMEX class  
3 because they directed their agent Kaztex to purchase NYMEX natural gas contracts during the  
4 relevant time period. (See Treis Dep. 144–45, 148, 167 & Exs. 112, 115, ECF No. 2741-8  
5 (showing NYMEX natural gas contracts purchases by Arandell for each month between  
6 November 2001 and December 2002, except April 2002); Krolikowski Dep 53–54, ECF No.  
7 2743 (testifying that NewPage Wisconsin System bought NYMEX natural gas contracts  
8 purchases through Stora Enso Financial Services during the relevant time period)).

9 On May 24, 2006, the court in the NYMEX Case entered a Final Judgment and Order of  
10 Dismissal (“the First Settlement Order”) with an expanded plaintiff class definition reaching  
11 back to June 1, 1999. The first group of settling class members was to receive a total of nearly  
12 \$73 million. On June 15, 2007, the court in the NYMEX Case entered a Final Judgment and  
13 Order of Dismissal (“the Second Settlement Order”) with a similarly defined plaintiff class. The  
14 second group of settling class members was to receive a total of nearly \$28 million. Paragraph 6  
15 of the First Settlement Order and Paragraph 5 of the Second Settlement Order provided for  
16 releases of the parties from further litigation:

17 The Released Parties are finally and forever released and discharged from  
18 any manner of claims . . . and causes of action in law, admiralty, or equity, whether  
19 class, individual, or otherwise in nature . . . whether known or unknown, suspected  
20 or unsuspected, whether concealed or hidden, or in law, admiralty, or equity, that  
21 the Representative Plaintiffs and other members of the Class who have not timely  
22 opted out of the settlement and excluded themselves from the Class (“Settling  
23 Plaintiffs”), or any of them, individually, or as a class (whether or not they make a  
24 claim upon or participate in the Settlement Funds), ever had, now have or hereafter  
can, shall or may have, against the Released Parties arising from or relating in any  
way to trading in NYMEX Natural Gas Contracts (including purchasing, selling, or

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23 judgment under the res judicata or release theories of the present motion. These Defendants may  
24 move to reconsider if they have evidence of relationships to released NYMEX defendants, e.g.,  
via succession or merger.

1 holding any NYMEX Natural Gas Contract, or taking or making delivery of  
2 physical natural gas pursuant to any NYMEX Natural Gas Contract, or any  
3 combination thereof, whether as a hedger or speculator), whether or not asserted in  
4 the Action, including without limitation, claims which (a) arise from *or relate in*  
5 *any way to any conduct complained of in any complaint filed in the Action*, (b) have  
6 been asserted or could have been asserted in any state or federal court or any other  
7 judicial or arbitral forum against the Released Parties or any one of them, (c) arise  
8 under *or relate to any federal or state commodity price manipulation law, any state*  
9 *or federal unfair or deceptive business or trade practices law, or other law or*  
10 *regulation, or common law, including, without limitation, the Commodity*  
11 *Exchange Act, 7 U.S.C. § 1 et seq., the federal antitrust laws (as that term is defined*  
12 *in 15 U.S.C. § 12), or state antitrust laws and/or (d) the claims brought in this*  
13 *Action. The Settling Plaintiffs, and each of them, are hereby enjoined from*  
14 *asserting any such claims against the Released Parties.*

15 (First Settlement Order ¶ 6(a), at 4–6, ECF No. 2300-5 (emphases added; footnote omitted)).

16 The omitted footnote defines “Released Parties” as, *inter alia*, the settling defendants and their  
17 predecessors and successors. (*See id.* 4 n.3, at 4–5). The release language of the Second  
18 Settlement Order is the same in relevant respects. (*See* Second Settlement Order ¶ 5(a), at 4–5,  
19 ECF No. 2300-7).

20 As the Court has ruled previously, these releases bar the present claims against those  
21 movants who were defendants in the NYMEX Case as against any Plaintiffs who were members  
22 of the settlement class, received sufficient notice, and did not opt out. The NYMEX court found  
23 that notice to the class had been sufficient and that the settlements were fair and reasonable, and  
24 movants provide evidence that the NYMEX Case claims administrator mailed notices to Hedged  
Plaintiffs’ NYMEX broker, Kaztex. (*See* Glenn Aff. & Exs. 1, 5, ECF No. 2741-11). There is no  
evidence that Hedged Plaintiffs opted out of the class.

Hedged Plaintiffs argue that they cannot have received sufficient notice via “pass  
through” notice to Kaztex. Unlike Sinclair Oil Co. previously argued, Hedged Plaintiffs do not  
appear to deny that they had a relationship with Kaztex when the notice was given to Kaztex.  
The question is whether notice to Kaztex was a constitutionally reasonable attempt at notice. A

1 broker has a fiduciary duty to notify parties like Hedged Defendants of such matters. Hedged  
2 Plaintiffs argue that movants have adduced no evidence that they made any attempt in the  
3 NYMEX litigation to identify the customers behind Kaztex's trades, and that their failure to do  
4 so but merely to rely on notice to the broker itself was constitutionally unreasonable. But the  
5 NYMEX court explicitly found that Rule 23 and due process had been satisfied with respect to  
6 class member notification. "Normally we will satisfy ourselves that the party received the  
7 requisite notice, opportunity to be heard, and adequate representation by referencing the state  
8 court's findings." *Hesse v. Sprint Corp.*, 598 F.3d 581, 588 (9th Cir. 2010) (citing *Epstein v.*  
9 *MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999) (noting that certifying courts' determinations on  
10 such issues are not subject to collateral review) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S.  
11 797, 809 (1985))). Hedged Plaintiffs' remedy is to move to intervene in the NYMEX action for  
12 the purpose of filing a Rule 60(b) motion as to the notice issue. Only if such a motion were  
13 granted could this Court reexamine the notice issue in the present context.

14 The Court has rejected the argument that the NYMEX Case concerned harm to natural  
15 gas futures traders via Defendants' acts, i.e., the artificial inflation of futures prices via reporting  
16 false prices and engaging in wash trades, whereas the present case concerns harm to natural gas  
17 consumers due to those acts. The release language of the Settlements is broad enough to  
18 preclude the present claims. The release clause releases OESC and other settling defendants  
19 from "any manner of claims . . . and causes of action" by settling plaintiffs:

20 *relating in any way to trading in NYMEX Natural Gas Contracts . . . including*  
21 *without limitation, claims which . . . relate in any way to any conduct complained*  
22 *of in any complaint filed in the Action [or which] arise under or relate to any federal*  
23 *or state commodity price manipulation law, any state or federal unfair or deceptive*  
24 *business or trade practices law, or other law or regulation, or common law,*  
*including, without limitation . . . state antitrust laws.*

1 (First Settlement Order ¶ 6(a), at 4–6 (emphases added; footnote omitted)). The language of the  
2 release is of course broader than the natural release as a matter of law that would have resulted  
3 from the settlement under ordinary principles of claim preclusion, otherwise the release would  
4 serve no purpose. And the language of the release here is extremely broad. It releases  
5 Defendants from the present claims, because they arise out of alleged conduct relating to conduct  
6 complained of in the NYMEX Case. The Court now rejects Hedged Plaintiffs’ similar argument  
7 that they did not purchase NYMEX natural gas contracts because they simply participated in a  
8 Kaztex hedging program under which Kaztex did so. The release is broad enough to cover  
9 Hedged Plaintiffs’ claims, and the evidence noted, *supra*, shows that Kaztex purchased natural  
10 gas contracts on behalf of Hedged Plaintiffs. Plaintiffs’ argument is further undermined by their  
11 own argument in opposition to Motion No. 2744 that they were direct purchasers of natural gas  
12 or natural gas contracts for the purposes of Wisconsin’s “full consideration” statute despite using  
13 Kaztex or others as middlemen.

14 **D. Motions Nos. 2744, 2754**

15 The Williams Cos., Inc.; Williams Merchant Services Co, LLC; and Williams Gas  
16 Marketing, Inc. move for summary judgment in the ‘1019 and ‘915 Cases because they sold no  
17 natural gas (or natural gas contracts) directly to any Plaintiffs during the relevant time period.  
18 Movants note that the Court of Appeals upheld Judge Pro’s ruling in this case that Wisconsin law  
19 permits a “full consideration” remedy only where a plaintiff directly purchased the commodity.  
20 *See In re W. States Wholesale Natural Gas Litig.*, 715 F.3d 716, 745–47 & n.28 (9th Cir. 2013)  
21 (citing Wis. Stat. § 133.14 and finding the result too clear to certify to the Wisconsin Supreme  
22 Court) (“We agree with the district court’s conclusion that the statutory text at issue is  
23 unambiguous. . . . There is no provision authorizing recovery by indirect purchasers or other  
24 non-parties to the voided contract.”). But even assuming movants have satisfied their initial

1 burden, Plaintiffs have adduced evidence of movants' sales of natural gas to Plaintiffs through  
2 their purchasing agents such as Kaztex. It is largely the same evidence, such as the Krolikowski  
3 deposition, that movants adduced in support of their summary judgment motion based on res  
4 judicata and release to show that Plaintiffs *had* in fact purchased natural gas from them, in order  
5 to show that Plaintiffs were member of the NYMEX class.

6 In reply, movants argue that Plaintiffs do not deny that movants did not sell natural gas to  
7 any Plaintiff during the relevant time period, but only to purchasing agents such as Kaztex. But  
8 that does not appear to be Plaintiffs' argument. Plaintiffs argue (contrary to their argument in  
9 opposition to Motion No. 2741) that the sales to Kaztex and WPS were not *to* those brokers but  
10 *through* them to Plaintiffs. The evidence is unclear enough to be interpreted that way by a  
11 reasonable jury. Assuming that a jury believed that the nature of the transactions between  
12 movants and Plaintiffs were sales directly between them that were simply facilitated by an agent  
13 such as Kaztex or WPS—the Court cannot rule this out based on the evidence—the Court of  
14 Appeals' ruling requiring a direct sale does not preclude the full consideration remedy under  
15 Wisconsin law.

16 **E. Motion No. 2746**

17 Defendants in the '233, '987, '1019, '915, and '1351 Cases move for summary judgment  
18 for failure to establish an antitrust conspiracy. An antitrust conspiracy under the Clayton Act  
19 requires an agreement. But an agreement need not be explicit. The Supreme Court has noted  
20 that coincidental changes in price structures at the same time by multiple competitors with no  
21 legitimate explanation may be enough to imply an agreement in restraint of trade under the  
22 Clayton Act. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007). Although "lawful  
23 parallel conduct fails to bespeak unlawful agreement," *id.* at 556, and parallel conduct may just  
24 as easily indicate competitive behavior as anticompetitive behavior, *see In re Musical*

1 *Instruments & Equip. Antitrust Litig.*, 789 F.3d 1186, 1193 (9th Cir. 2015), parallel conduct is  
2 not irrelevant to showing a conspiracy. An antitrust plaintiff may show a conspiracy via parallel  
3 conduct combined with “plus factors” under the totality of the circumstances. *Id.* at 1194 (citing  
4 *In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir. 1999)) (“Whereas parallel conduct is as  
5 consistent with independent action as with conspiracy, plus factors are economic actions and  
6 outcomes that are largely inconsistent with unilateral conduct but largely consistent with  
7 explicitly coordinated action.”). Examples of economic activity that tends to imply an agreement  
8 include extreme action against self-interests, decisions made closely enough in time that  
9 agreement is more likely than coincidence or market-based reaction, or agency reports finding  
10 the relevant type of agreement. *See id.* at 1194–98.

11         The Court first rejects Plaintiffs’ argument that Defendants’ behavior, i.e., wash trading  
12 and churning, was “inherently conspiratorial.” It may have been inherently wrongful under the  
13 antitrust laws as to each individual Defendant, but only an actual agreement to do something  
14 unlawful with another party is inherently conspiratorial. Defendant companies cannot have  
15 individually “conspired” with themselves. Only an agreement between the companies  
16 constitutes a conspiracy. But the evidence of wash trades *between Defendants*—which  
17 Defendants do not appear to dispute—implies an antitrust conspiracy. That is more than isolated  
18 parallel conduct. Plaintiffs correctly note that all that is required is a “conscious commitment to  
19 a common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv.*  
20 *Corp.*, 465 U.S. 752, 764 (1984). The concept of “wash trades” or “churning,” i.e., artificial  
21 price manipulation by a seller, is totally contrary to the goal of market competition. Unlike  
22 parallel *lawful* activity, at best, the present case involved parallel *unlawful* activity. Parallel  
23 unlawful activity strongly implies a “conscious commitment to a common scheme designed to  
24 achieve an unlawful objective.” *See id.* In such a case, each competitor benefits from both his

1 own and his competitors' anticompetitive behavior. Indeed, in wash trades between competitors,  
2 they do so via a series of collusive trades. Plaintiffs have produced a summary diagram on page  
3 61 of their opposition that neatly illustrates the "web of conspiracy" between Defendants based  
4 on wash trades. The Court will not grant summary judgment for failure to adduce evidence of  
5 any explicit agreement. It is virtually impossible that industry members such as Defendants did  
6 not realize the anticompetitive effects of the wash trades they were engaging in with one another.

7 **F. Motion No. 2748**

8 Defendants in the '233, '987, '1019, '915, and '1351 Cases move for summary judgment  
9 based on lack of "antitrust standing," i.e., proximate cause under § 4 of the Clayton Act.  
10 Movants argue that damages must be limited to those arising out of direct purchases of natural  
11 gas from movants, not any purchases from third-party suppliers. The Court disagrees that the  
12 doctrine of proximate cause under the Clayton Act is so stringent. The Supreme Court has ruled  
13 that although the text of 15 U.S.C. § 15 could be read so broadly as to permit actions for  
14 damages no matter how remotely connected to an antitrust violation, the purpose of the Clayton  
15 Act was to protect consumers from paying excessive prices due to monopolistic behavior in  
16 accordance with common law principles, and a court must therefore "evaluate the plaintiff's  
17 harm, the alleged wrongdoing by the defendants, and the relationship between them" in light of  
18 those principles, particularly the principle of "proximate cause." *Associated Gen. Contractors of*  
19 *Cal., Inc. v. Cal. State Council of Carpenters ("AGC")*, 459 U.S. 519, 529–36 (1983).  
20 Accordingly, there is no "black-letter rule that will dictate the result in every case," *id.* at 536;  
21 rather, a court must bear in mind that "the Sherman Act was enacted to assure customers the  
22 benefits of price competition, and our prior cases have emphasized the central interest in  
23 protecting the economic freedom of participants in the relevant market," *id.* at 538.

1 In *AGC*, the plaintiff “was neither a consumer nor a competitor in the market in which  
2 trade was restrained,” and it was “not clear whether the [plaintiff’s] interests would be served or  
3 disserved by enhanced competition in the market.” *Id.* at 539. Here, by contrast, it is  
4 indisputable that Plaintiffs were consumers in the market that Defendants allegedly manipulated,  
5 and that Plaintiffs’ interests would have been better served by enhanced competition in that  
6 market, i.e., without Defendants’ alleged manipulative practices that artificially increased prices.

7 Also, the “chain of causation” here is not attenuated, as it was in *AGC*. *Id.* at 540. There,  
8 a labor union claimed harm to its “vaguely defined . . . business activities” based on the  
9 defendant’s coercion of landowners to divert business to nonunion contractors. *Id.* at 540–41.  
10 The loss of potential union dues due to contractors’ disincentive to unionize (or employees’  
11 disincentive to join union shops) due to the coercion against the landowners was held to be too  
12 remote. *Id.* at 541 & n.46. Only the coerced landowners themselves potentially had any harm  
13 direct enough to implicate antitrust standing. *Id.* at 541. Here, by contrast, even if Plaintiffs did  
14 not purchase directly from Defendants—a genuinely disputed issue—they purchased natural gas  
15 at a price that had been inflated by Defendants’ alleged anticompetitive practices. That kind of  
16 harm is not so attenuated so as to break the chain of proximate cause required under § 4. *See,*  
17 *e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979) (“The essence of the antitrust laws is to  
18 ensure fair price competition in an open market. Here, where petitioner alleges a wrongful  
19 deprivation of her money because the price of the hearing aid she bought was artificially inflated  
20 by reason of respondents’ anticompetitive conduct, she has alleged an injury . . . under § 4 [of the  
21 Clayton Act].”). The Court denies the motion.

22 **G. Motions Nos. 2761 and 2762**

23 All remaining Defendants in the ‘987 and ‘233 Cases have moved for summary judgment  
24 under the respective statutes of limitations. Defendants argue Plaintiffs brought their claims

1 more than four and three years, respectively, after the alleged misconduct. *See* Mo. Rev. Stat.  
2 § 416.131(2); Kan. Stat. § 60-512(2). Defendants note that the original complaint in the '987  
3 Case was filed on March 22, 2007, but that Plaintiffs have never alleged that the injury occurred  
4 any later than October 2002, and they currently allege the latest date of injury as February 2002.  
5 Absent equitable tolling, therefore, the claims are time-barred under Missouri law. Defendants  
6 note that the original complaint in the '233 Case was filed on September 26, 2005, but that  
7 Plaintiffs allege the latest date of injury as February 2002. Absent equitable tolling, therefore,  
8 the claims are time-barred under Kansas law.

9       Because the statute of limitations is an affirmative defense, Defendants have the burden  
10 of proving it, so in the context of summary judgment they must produce evidence that would  
11 entitle them to a directed verdict if unrebutted at trial. They adduce approximately 100 pre-  
12 March 22, 2003 and pre-September 26, 2002 newspaper articles, press releases, and other  
13 publicly available materials indicating the controversy over manipulative, Enron-style "wash  
14 trading" and other practices, including a Federal Energy Regulatory Commission ("FERC")  
15 order from February 2002 indicating the opening of an investigation into the manipulation of  
16 electricity and natural gas prices by Enron or any other company. The other newspaper articles  
17 indicate that many other companies, including many of the Defendants in this case, were being  
18 investigated by the SEC for this kind of behavior.

19       Plaintiffs respond that they filed their respective lawsuits within four and three years of  
20 when the offending conduct could have been reasonably discovered, because FERC's report  
21 concerning the alleged antitrust violations was not published until March 26, 2003. The Court  
22 finds that Plaintiffs have satisfied their shifted burden (even assuming the burden has shifted to  
23 them) to create a genuine issue of material fact as to when they should reasonably have known of  
24 the underlying conduct in this case. The March 26, 2003 FERC report was the first indication

1 that Defendants had in fact conspired to make false reports of trades to manipulate prices.  
2 Moreover, Defendants had withheld information and given misleading responses during the  
3 investigation to hide their activities, in some cases being fined for it by FERC. Prior to that,  
4 Plaintiffs might have only been guessing based on newspaper articles. A reasonable jury could  
5 decide the issue in Plaintiffs' favor, and the Court therefore denies the motions.

6 **IV. MOTION FOR HEARING AND MOTION TO SEVER**

7 Reliant Energy, Inc. and Reliant Energy Services, Inc. (collectively, "Debtors") have  
8 filed a notice of bankruptcy. Debtors are Defendants in four of the remaining eight cases (Nos.  
9 2:06-cv-233, 2:07-cv-987, 2:07-cv-1019, and 2:09-cv-915). In each of those four cases,  
10 additional Defendants remain. Those remaining Defendants have asked the Court for a hearing  
11 to determine how those four cases should proceed. No separate hearing is necessary to resolve  
12 this issue. The automatic stay under 11 U.S.C. § 362 presumably prevents any continued  
13 litigation by or against Debtors until further action by the Bankruptcy Court, but it does not  
14 prevent continuing litigation by or against other Defendants. Nor is there any utility in formally  
15 severing the claims against Debtors.

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1 **CONCLUSION**

2 IT IS HEREBY ORDERED that the Motions to File Supplemental Briefs (ECF Nos.  
3 2798, 2824, 2828) and the Motions to Strike (ECF Nos. 2710, 2818) are DENIED as moot.

4 IT IS FURTHER ORDERED that the Motion for Order Limiting Defendants' Seriatim  
5 Filing of Dispositive Motions (ECF No. 2689), the Motion to Defer State Specific Rulings and  
6 Remand Cases to Transferor Courts (ECF No. 2843), the Motions to Strike (ECF Nos. 2901,  
7 2909), the Motion for Hearing (ECF No. 2921), and the Motion to Sever (ECF No. 2915) are  
8 DENIED.

9 IT IS FURTHER ORDERED that the Motions to File Surreply (ECF No. 2836, 2866,  
10 2900), the Motion for Leave to File Excess Pages (ECF No. 2849), and the Motion to Extend  
11 Time and Exceed Page Limits (ECF No. 2879) are GRANTED.

12 IT IS FURTHER ORDERED that the Motions to Seal (ECF Nos. 2738, 2742, 2749,  
13 2750, 2854, 2857, 2860, 2864, 2889) are GRANTED.

14 IT IS FURTHER ORDERED that the Motions to Reconsider (ECF Nos. 2839, 2840,  
15 2841) are DENIED, and the Motion to Reconsider (ECF No. 2852) is GRANTED. The Order  
16 (ECF No. 2832) is AMENDED under Rule 60(a) to remove the final sentence of the first  
17 paragraph of Part III.B.

18 IT IS FURTHER ORDERED that the Motion for Summary Judgment (ECF No. 2740) is  
19 GRANTED.

20 IT IS FURTHER ORDERED that the Motion for Summary Judgment (ECF No. 2741) is  
21 GRANTED IN PART and DENIED IN PART. The motion is granted, except as to Williams  
22 Merchant Services Co., LLC; Dynegy Illinois, Inc.; DMT GP, LLC; Dynegy GP, Inc.; El Paso  
23 Corp.; Northern States Power Co.; and Xcel Energy Inc.

1 IT IS FURTHER ORDERED that the Motions for Summary Judgment (ECF Nos. 2744,  
2 2746, 2748, 2754, 2761, 2762) are DENIED.

3 IT IS FURTHER ORDERED that the Motions for Summary Judgment (ECF Nos. 2745,  
4 2764) are DENIED without prejudice.

5 IT IS FURTHER ORDERED that the parties shall file a joint status report within  
6 fourteen (14) days addressing: (1) the refiling, mootness, waiver, etc. of Motions Nos. 2745 and  
7 2764; and (2) any matters (apart from motions to reconsider anything in the present order) that  
8 remain to be addressed in this Court before remand to the transferor courts.

9 IT IS SO ORDERED.

10 Dated this ~~27th~~ day of ~~July~~, 2017.

11 *August*

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14 ROBERT C. JONES  
15 United States District Judge  
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