

I. Background

In this antitrust litigation, plaintiffs—direct purchasers of PPPs²—claim that defendants—manufacturers of PPPs—conspired to “fix, raise, maintain, and stabilize the prices at which [PPPs] were sold, and to allocate customers and markets for [PPPs], throughout the world, including at least in the United States and Europe, from at least as early as 1994 and continuing through at least December 31, 2004.”³ Plaintiffs further allege that defendants tried to conceal their anticompetitive behavior by giving deliberately false and pretextual explanations for price increases of PPPs, attributing such pricing to competitive market forces rather than conspiratorial conduct.

In November 2004 and thereafter, a series of class actions was initiated against manufacturers of PPPs on behalf of a class of purchasers of PPPs in the United States. The Judicial Panel on Multidistrict Litigation consolidated those actions for pretrial purposes in this district. On July 29, 2008, U.S. District Judge John W. Lungstrum certified a class of PPPs purchasers. Thereafter, plaintiffs timely opted out of the class action and filed two separate suits against defendants.⁴

On April 27, 2009, defendants served their first set of requests for production of

²PPPs are primarily used to make foams for insulation, furniture, mattresses, packaging, automobile seats, appliances, and other goods.

³Doc. 1123 at 4; Doc. 1124 at 3.

⁴*See Carpenter Co., et al. v. BASF SE, et al.*, No. 08-2617-JWL; *Woodbridge Foam Corp., et al. v. BASF SE, et al.*, No. 09-2026-JWL.

documents on plaintiffs.⁵ To the extent that the requests sought downstream data regarding plaintiffs' use, manufacture, sale, marketing, or distribution of products made from PPPs, plaintiffs objected on the grounds that such discovery was not relevant and was unduly burdensome. Attempting to resolve this dispute without court intervention, defendants then limited their requests to the following six categories of documents:

1. Plaintiffs' price increase announcements with respect to their products that contain Polyether Polyol Products;
2. Plaintiffs' financial results, both with respect to the company as a whole and the divisions or business units that use Polyether Polyol Products;
3. Regular reports for the business units that use Polyether Polyol Products, such as might be prepared for senior management or the board of directors;
4. Evaluations or analyses of the sales and financial results of the businesses that used Polyether Polyol Products, whether done on a regular basis or otherwise;
5. Evaluations or analyses of the market for products containing Polyether Polyol Products, including the current and forecasted demand for such products;
6. Strategic planning documents pertaining to the businesses that use Polyether Polyol Products.⁶

Defendants contend this information is relevant to their defense that the prices they charged for PPPs were the result of market conditions, not collusive behavior. According to defendants, "[p]laintiffs' pricing of their own products, and the conditions in the market in which they competed, bear directly on the market prices of [PPPs] and the success or failure of any [d]efendant's attempt to increase prices," as well as undermine plaintiffs' allegations

⁵See docs. 921 & 922.

⁶Ex. 8 to doc. 1116 at 4.

that defendants' explanations of price increases were pretextual.⁷ Defendants assert that the burden of producing the documents should be minimal because they are willing to "accept production of high level, summary-type documents."⁸

Despite defendants' narrowing of their requests, plaintiffs continue to refuse production of downstream information pertaining to plaintiffs' markets and prices on the bases that the discovery sought is irrelevant and burdensome. In the instant motion, defendants seek an order compelling plaintiffs to produce documents falling under the six categories described above.

II. Legal Standards

The overarching issue before the court is whether information regarding the markets and prices of plaintiffs' products that are made with PPPs, or downstream data, is relevant to a claim or defense in this action.

Under Fed. R. Civ. P. 26(b)(1), discovery may be obtained "regarding any non-privileged matter that is relevant to any party's claim or defense." Relevancy is broadly construed for pretrial discovery purposes. "A party does not have to prove a prima facie case to justify a request which appears reasonably calculated to lead to the discovery of admissible evidence."⁹ At least as a general proposition, then, information is deemed

⁷Doc. 1114 at 3.

⁸*Id.* at 4.

⁹*Mackey v. IBM*, 167 F.R.D. 186, 193 (D. Kan. 1996).

relevant “unless it is clear that [it] can have no possible bearing on the claim or defense of a party.”¹⁰ A court, however, must limit the extent of discovery if it determines “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”¹¹ Accordingly, to determine whether plaintiffs’ downstream data is discoverable, the court must first determine if the requested information is relevant to a claim or defense in this action, and if it is deemed relevant, must then weigh the benefits of the information to defendants against the production burdens to plaintiffs.¹²

Despite the broad construction of relevancy, some courts have limited the discovery of downstream data in the antitrust context. The genesis of this limit is the Supreme Court’s decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,¹³ which prohibited the use of downstream data to support a “pass-on defense”; that is, except under limited circumstances, defendants to a charge of price-fixing cannot assert as a defense that direct-

¹⁰*Sheldon v. Vermonty*, 204 F.R.D. 679, 689–90 (D. Kan. 2001) (internal quotations and citations omitted).

¹¹Fed. R. Civ. P. 26(b)(2)(C)(iii).

¹²*See In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732-LDD, 2008 WL 2275528, at *3 (E.D. Pa. April 8, 2008).

¹³392 U.S. 481 (1968).

purchaser plaintiffs passed on overcharges to their customers.¹⁴ Courts interpreting *Hanover Shoe* have extended its holding to prohibit discovery of downstream data even in cases where no pass-on defense is asserted.¹⁵ Many courts have explicitly stated that discovery of downstream data is disfavored.¹⁶

¹⁴*Ill. Brick Co. v. Illinois*, 431 U.S. 720, 724–25 (1977); *Hanover Shoe*, 392 U.S. at 494. See also *Sports Racing Servs., Inc. v. Sports Car Club of Am.*, 131 F.3d 874, 885 (10th Cir. 1997) (“*Hanover Shoe* precludes the argument that [plaintiff] did not suffer cognizable antitrust injury merely because it passed overcharges on to its customers or otherwise was shielded from competition by the defendants’ anticompetitive behavior.”).

¹⁵*In re K-Dur Antitrust Litig.*, No. 01-1652, 2007 WL 5302308, at *10–15 (D. N.J. Jan. 2, 2007) (holding downstream data irrelevant to the issues of class certification and that downstream data could not be used to explore whether direct purchasers used cost-plus contracts with their customers); *In re Automotive Refinishing Paint Antitrust Litig.*, No. MDL 1426, 2006 WL 1479819, at *7–8 (E.D. Pa. May 26, 2006) (holding downstream data irrelevant to the determination of damages and to the issue of whether a price-fixing scheme existed); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 226 F.R.D. 492, 497–98 (M.D. Pa. 2005) (holding downstream data irrelevant to determine whether a conflict of interest existed among named and unnamed class members and that downstream data could not be used to explore whether direct purchasers used cost-plus contracts with their customers); *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 298–301 (D. D.C. 2000) (holding downstream data not necessary to support defendants’ argument that demand for defendants’ products was a factor in setting the prices that plaintiffs would have been charged “but for” the conspiracy, and thus, that downstream data was not relevant to determining damages); *In re Folding Cartons Antitrust Litig.*, No. MDL 250, 1978 U.S. Dist. Lexis 20409, at *4–9 (N.D. Ill. May 5, 1978) (holding plaintiff’s financial data irrelevant to the issue of whether defendants conspired to fix prices).

¹⁶*In re Aspartame*, 2008 WL 2275528, at *4 (“Though ‘downstream discovery’ is not prohibited in federal price-fixing class actions, courts have consistently noted that this type of discovery is not favored.”); *Automotive Refinishing Paint*, 2006 WL 1479819, at *7 (“Discovery of the information sought by Defendants is generally disfavored.”); *Pressure Sensitive Labelstock*, 226 F.R.D. at 497 (“[C]ourts generally disallow discovery of downstream sales data in cases such as this one.”); *In re Plastics Additives Antitrust Litig.*, No. Civ. A. 03-2038, 2004 WL 2743591, at *16 (E.D. Pa. Nov. 29, 2004) (“[T]he caselaw brought to the Court’s attention holds that downstream data is irrelevant to determining whether defendants are liable for price-fixing under the Sherman Act. . . . As such, courts

On the other hand, a growing number of courts have recognized that *Hanover Shoe* does not stand as a *per se* barrier to discovery of downstream data.¹⁷ As Magistrate Judge David J. Waxse stated in an earlier opinion in this litigation, “neither *Hanover Shoe* nor *Illinois Brick* holds that downstream data is irrelevant or non-discoverable.”¹⁸ Thus, Judge Waxse followed the lead of the Eleventh Circuit in *Valley Drug Co. v. Geneva Pharm., Inc.* and ordered the production of downstream information that “directly bear[ed] on class certification issues.”¹⁹ Specifically, Judge Waxse ordered the plaintiffs in the underlying class-action to produce information related to their sales and the market of end-products containing PPPs, finding such downstream data was relevant to whether plaintiffs’ claims are typical, the predominance of common questions, and whether named plaintiffs would be adequate class representatives.²⁰

have refused to require production of downstream data in antitrust price-fixing cases.”); *In re Vitamins*, 198 F.R.D. at 301 (“[T]he fact remains that no court has ever allowed production of individualized downstream data . . .”).

¹⁷*See, e.g., In re Urethane Antitrust Litig.*, 237 F.R.D. 454, 462–63 (D. Kan. 2006); *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1192 (11th Cir. 2003); *In re Vitamins*, 198 F.R.D. at 299.

¹⁸*In re Urethane*, 237 F.R.D. at 462 (noting that “[t]he general rule gleaned from *Hanover Shoe* and its progeny is that downstream data cannot be used to support a pass-on defense”).

¹⁹*Id.* at 464 (citing *Valley Drug Co.*, 350 F.3d at 1191). *See also In re Aspartame*, 2008 WL 2275528, at *5 (“[T]hough information about Plaintiffs’ sales of products containing aspartame may be of some marginal value in determining demand elasticity, this marginal value is outweighed by the burden on plaintiffs of this type of downstream discovery.”).

²⁰*In re Urethane*, 237 F.R.D. at 462–64.

In another case revealed by the court’s research, the production of downstream pricing information was ordered as relevant to damages where the antitrust plaintiffs (defendants who asserted antitrust counterclaims) sought to recover lost profits and injury to business, not merely alleged overcharges. In *Air Tech Equipment, LTD. v. Humidity Ventilation Systems, Inc.*, the court found that while downstream data was not relevant to “liability on, or defenses to” the antitrust claims asserted therein, evidence of the antitrust plaintiffs’ pricing practices was relevant to the issue of whether their “purported loss of business was attributable to factors other than [the antitrust defendants’] alleged anticompetitive conduct.”²¹

Finally, in *J.B.D.L. Corp. v. Wyeth-Ayerst Laboratories, Inc.*, a case heavily relied upon by defendants, the court determined that downstream data was relevant to the issue of antitrust liability.²² There, the defendant argued that the price it charged for the drug Premarin was “the result and not the cause of” market manipulation by the plaintiffs.²³ The court held that discovery of downstream information was relevant to the question of “whether or not the price increases were anti-competitive” and was not precluded by

²¹No. 05-cv-77, 2006 WL 3193720, at *2 (E.D. N.Y. Nov. 2, 2006); *see also In re Folding Cartons*, 1978 U.S. Dist. Lexis 20409, at *11–12 (noting that if the direct-action plaintiffs were to “seek to recover lost profits or for injury to business, defendants would be entitled to discover their financial data”).

²²No. C-1-01-704, slip op. at 5 (S.D. Ohio June 7, 2004).

²³*Id.* at 2, 5, 7. Defendant accused plaintiffs of “‘speculative purchasing,’ a practice whereby wholesalers stockpile products in anticipation of price increases by manufacturers and then make money by raising retail prices when manufacturers implement price increases.” *Id.* at 2.

Hanover Shoe.²⁴ Although the court recognized the defendant was in “possession of the facts which allowed it to set its price for Premarin,” it nonetheless found that “corroboration of those facts from [the defendant’s direct customers was] a legitimate end to be pursued via discovery.”²⁵ Moving to the burden analysis, the court found the burden of responding to defendant’s request for downstream data “would be considerable.”²⁶ The court therefore exempted absent class members from responding, but found no reason not to compel direct action plaintiffs to respond.²⁷

III. Relevancy Analysis

After considerable study of *Hanover Shoe* and its progeny, the court finds the downstream data sought by defendants in this case relevant to the claims and defenses asserted herein and not prohibited as a matter of law.

A. Relevance to How Defendants Set Their Prices

Plaintiffs claim that defendants conspired to fix the prices at which defendants sold PPPs.²⁸ Defendants deny this allegation and state that they “plan to establish at trial that prices for [PPPs] were the result of normal market forces and prevailing market

²⁴*Id.* at 5.

²⁵*Id.* at 5–6.

²⁶*Id.* at 6.

²⁷*Id.* at 7. Plaintiffs are clearly mistaken when they state, “Outside of the class certification context, every court to have considered this issue over the last 30-plus years has denied the relief that Defendants seek.” Doc. 1153 at 1.

²⁸*See, e.g.,* Second Amended *Woodbridge* Complaint, doc. 1124, at 3, 21, 27.

conditions.”²⁹ To do this, defendants will attempt to show that the prices they set for PPPs were significantly influenced by, among other things, (1) the demand for the products that plaintiffs made from PPPs (which, in turn, affected the demand for PPPs sold by defendants), (2) the willingness and ability of plaintiffs to raise the prices of the products that plaintiffs made from PPPs,³⁰ and (3) forces in plaintiffs’ markets that led plaintiffs to seek pricing concessions from defendants that would enable plaintiffs to compete in the market of products made from PPPs.³¹

There can be little doubt that downstream data of plaintiffs’ markets have some possible bearing on defendants’ three asserted price influences. Thus, the information is relevant to determining whether a non-collusive explanation exists for defendants’ conduct. Nothing in the caselaw precludes the production of this relevant information. Defendants are not seeking the information for the purpose of asserting a pass-on defense as prohibited by *Hanover Shoe*.

The court finds this case most analogous to *J.B.D.L. Corp.* in which the defendant disputed liability by attempting to show that the price it charged for its product was the result

²⁹Doc. 1114 at 2.

³⁰Specifically, defendants assert that “some price increases initiated by one or more of the Defendants or Bayer succeeded only because the Direct Action Plaintiffs and their competitors succeeded in raising their own prices and therefore were willing to accept some increases in the prices of their supplies of [PPPs]. Conversely, some attempted price increases by one or more of the Defendants failed when the Direct Action Plaintiffs and other significant purchasers would not, or could not, raise their own prices and therefore refused to accept price increases from the Defendants.” Doc. 1115 at 9.

³¹Doc. 1114 at 2.

of manipulations by the plaintiffs in their resale market.³² The court found downstream data “relevant to the liability issue and not precluded by *Hanover*, which was a decision on the merits and not a decision clarifying the requirements of setting limitations on discovery permitted by Rule 26(b)(1).”³³ The court reasoned that “[t]he fact finders need to know how and why [defendant] determined its allegedly noncompetitive price.”³⁴ Like plaintiffs here, the plaintiffs in *J.B.D.L. Corp.* argued that if the defendant set its prices by considering the downstream market or in response to pressure exerted by the plaintiffs, then the defendant must necessarily possess all the information it needed to demonstrate how its prices were set.³⁵ The court stated that this argument “makes sense to us, as recognized in *In re Vitamins Antitrust Litigation*,” but nonetheless held that “corroboration of those facts . . . is a legitimate end to be pursued via discovery.”³⁶

Plaintiffs assert that *Automotive Refinishing Paint* and *In re Vitamins* counsel against permitting the requested discovery. The court declines to follow those cases.

In *Automotive Refinishing Paint*, the defendants, manufacturers of automotive

³²No. C-1-01-704, slip op. at 5.

³³*Id.* at 6.

³⁴*Id.* at 5.

³⁵*Id.* at 3–4.

³⁶*Id.* at 5–6. Although recognizing the considerable burden of complying with the requested discovery, the court ordered the direct-action plaintiffs to respond. However, the court exempted absent class members from responding, noting that, as a general rule, discovery from absent class members should be sharply limited. *Id.* at 6.

refinishing paint, sought the discovery of downstream information relating to the market conditions for the plaintiffs' indirect paint sales.³⁷ The defendants asserted that "the requested information will demonstrate the highly competitive nature of the paint industry and, in turn, prove the nonexistence of a price-fixing scheme."³⁸ The court rejected this argument, ruling that the underlying charge must be proved or disproved "by evidence of Defendants' activities, not Plaintiffs'."³⁹ The court stated that it would not "depart from the long-held practice of proscribing discovery of downstream data and financial information."⁴⁰

The court declines to follow *Automotive Refinishing Paint* for two reasons. First, the *Automotive Refinishing Paint* court was urged by the defendants in that case to follow the holding in *J.B.D.L. Corp.* The court refused, stating, "The decision to compel discovery in [*J.B.D.L. Corp.*] was based on the defendant's allegation that its price increases were 'the result and not the cause of downstream speculative purchasing.' No such allegation is made by Defendants here."⁴¹ In the instant case, defendants *have* asserted allegations that certain actions by plaintiffs influenced defendants' price increases. Thus, this case appears to line up closer with *J.B.D.L. Corp.* than *Automotive Refinishing Paint*. Second, it appears that the *Automotive Refinishing Paint* court was influenced by what it termed "the long-held practice

³⁷2006 WL 1479819, at *7.

³⁸*Id.* at *8.

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.* at *8 n.11.

of proscribing discovery of downstream data.” As discussed in detail above, however, it can no longer be said there exists a practice of proscribing discovery of downstream data. Multiple courts have recognized that if downstream data is relevant to a permissible claim or defense asserted in the case, it may be discovered.

Likewise, the court will not follow *In re Vitamins*. In that case, direct purchasers of vitamins sued vitamin manufacturers. The defendants sought discovery of documents regarding the plaintiffs’ sales and marketing of vitamins and vitamin-containing products as probative to the issue of damages.⁴² Specifically, the defendants stated the information sought would show demand for the defendants’ products, which is “a factor in determining the prices plaintiffs would have been charged ‘but for’ the conspiracy.”⁴³ In evaluating the relevance of the requested information, the court considered the reports of four experts. Three of the experts opined the “but for” prices determinative of damages could be calculated from industry-wide public data; the fourth expert gave no reason why they could not be.⁴⁴ Thus, the court held plaintiffs’ individual data was only marginally relevant, if relevant at all.

The court does not find *In re Vitamins* applicable to the instant case. Here, defendants seek downstream data to defend against liability, not to establish damages.⁴⁵ Moreover, no

⁴²198 F.R.D. at 298.

⁴³*Id.*

⁴⁴*Id.* at 299–300.

⁴⁵*See* discussion at Section III.C.

evidence has been presented showing that the information to be gleaned from the data (i.e., demand for the products sold by plaintiffs, the willingness and ability of plaintiffs to raise the prices of their products, and pricing concessions plaintiffs obtained from defendants) can be determined from evidence in the public sphere.

Accordingly, the court finds downstream data relevant to the issue of liability in this case.

B. Relevance to Whether Defendants Gave Pretextual Reasons for Price Increases

Defendants also seek to dispute plaintiffs' allegations that in furtherance of the conspiracy, defendants gave "false and pretextual reasons for the price increases of [PPPs] . . . and falsely attribut[ed] such pricing as being the result of competitive market forces and natural forces rather than conspiratorial conduct."⁴⁶ Defendants assert that the downstream data they seek could show that plaintiffs "offered some of the same real-world, normal market forces as justifications for increasing their own products' prices."⁴⁷

The court finds the downstream data sought for this purpose appears reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs do not deny the reasons they gave their customers for increasing product costs included market forces, such as increases in raw material costs; they simply argue they likely repeated defendants' misrepresentations. This is clearly an open issue that defendants could learn more about if they had access to plaintiffs' pricing and market analyses. Indeed, defendants need such

⁴⁶Second Amended *Woodbridge* Complaint, doc. 1124, at 31; *see also id.* at 7, 32–37.

⁴⁷Doc. 1114 at 2.

access in order to test plaintiffs' argument—in other words, in order to determine whether plaintiffs did simply repeat defendants' explanations or whether plaintiffs had independent knowledge that corroborated defendants' descriptions of market conditions.⁴⁸

Plaintiffs also assert that the reasons for defendants' price increases—whether based on the costs of raw materials or not—is in defendants' possession. This is likely true. As the *J.B.D.L. Corp.* court recognized, however, “corroboration of those facts . . . is a legitimate end to be pursued via discovery.”⁴⁹ The court finds corroboration by documents in plaintiffs' possession particularly appropriate in this case where plaintiffs have alleged that defendants intentionally misstated the truth. As noted by defendants, such documents may qualify as party admissions by plaintiffs. Thus, because the court cannot say the downstream data sought could have no possible bearing on plaintiffs' allegation of pretext, the information is relevant to this issue.⁵⁰

C. Relevance to Fact of Injury and Damages

In addition to seeking downstream data as relevant to questions of liability and fraudulent concealment, defendants make passing reference in their initial motion papers to the theory that the information sought may be important to issues of “fact of injury, and

⁴⁸Defendants have submitted as exhibits documents drafted by plaintiffs that indicate plaintiffs were independently monitoring the raw material costs that defendants would incur to produce PPPs. *See* Exs. 6–8 to doc. 1193.

⁴⁹No. C-1-01-704, slip op. at 5–6.

⁵⁰*See Sheldon*, 204 F.R.D. at 689–90.

amount of damages.”⁵¹ Defendants do not develop this argument or provide legal authority to support it. Moreover, in their reply brief, defendants expressly state they are not seeking downstream data for the purposes of calculating plaintiffs’ damages.⁵² Therefore, the court does not consider at this time whether downstream data is discoverable as relevant to the issues of fact of injury or damages.⁵³

IV. Burden Analysis

Having found the downstream data requested by defendants relevant, the court must now consider whether discovery should nonetheless be limited because the burden and expense of production that would be born by plaintiffs outweighs the likely benefit of the information to defendants.⁵⁴ Although the parties have briefed this issue, they espouse such fundamentally different conceptions of the number and types of documents falling under defendants’ discovery requests that their discussions of burden are impossible to compare.

Plaintiffs characterize the discovery requests as encompassing

all documents relating to sales of all of Plaintiffs’ PPP-containing products, including documents that incorporate such sales into a larger picture. These requests encompass many different types of documents concerning the sales of thousands of different products, dispersed far and wide in different offices

⁵¹Doc. 1114 at 3; doc. 1115 at 11.

⁵²Doc. 1193 at 10.

⁵³For this reason, plaintiffs’ arguments regarding damages and the declaration of Charles L. Miller opining on whether the discovery sought would “be useful in the calculation of damages in this case,” *see* doc. 1153 at 8–11 and doc. 1157 at 3, are not relevant to the court’s disposition of the instant motion.

⁵⁴Fed. R. Civ. P. 26(b)(2)(C)(iii).

and located in the files of many custodians. For some, this would require a search of nearly all documents ever created relating to the businesses of those Plaintiffs.⁵⁵

Based on this perception of what is requested, plaintiffs submit declarations predicting that production of the documents would be very difficult, take a tremendous amount of time,⁵⁶ and consume enormous resources. For example, plaintiff Flexible Foam Products, Inc. has submitted a declaration stating that complying with the requests would require it to search facilities in nine cities, as well as three warehouses containing more than 1,000 un-indexed boxes, some of which have been exposed to water and rodents.⁵⁷ Flexible Foam estimates that the search would cost at least \$150,000.⁵⁸ Similarly, plaintiffs Hickory Springs Manufacturing Company and Hickory Springs of California, Inc. have submitted a declaration stating that they would be required to search at least thirty-six locations at an expense of 1,000 hours and 50 employees.⁵⁹

In reply, defendants contend that plaintiffs have exaggerated and misconstrued what defendants have asked them to produce. Defendants state, “Defendants have offered to accept production of *very high level, summary-type documents* that most likely had limited

⁵⁵Doc. 1153 at 12.

⁵⁶Plaintiffs assert that the collective amount of time for plaintiffs to produce downstream documents “would easily exceed 15,000 hours.” Doc. 1153 at 13.

⁵⁷Ex. G to doc. 1153 at 2–3.

⁵⁸*Id.* at 4.

⁵⁹Ex. H to doc 1153 at 3–4.

distribution among the Direct Action Plaintiffs' upper-level custodians and management."⁶⁰ With regard to pricing of products made from PPPs, defendants state that they are only seeking exemplars of plaintiffs' price increase announcements. Defendants argue that because plaintiffs' burden analyses are based on "misstatements of what they have been asked to produce," they "are of no evidentiary value."⁶¹ Defendants further note that most plaintiffs do not discuss what documents could be located electronically or in connection with their obligation to satisfy other, unopposed, discovery requests.

It is apparent to the court that, in disregard of D. Kan. R. 37.2, the parties have not engaged in meaningful discussion about the particular types of documents defendants seek.⁶² The letters exchanged between counsel prior to the filing of the instant motion indicate that the parties discussed generally whether downstream data is relevant and discoverable. To the extent they addressed burden of production, defendants simply stated, "We suspect that you could easily identify the Plaintiffs' custodians who would have received such documents and readily locate them among the appropriate custodians' files. So production of these responsive documents would not seem to be very burdensome."⁶³ Counsel's failure to communicate has led to the current uncertainty about the documents sought and the

⁶⁰Doc. 1193 at 13 (emphasis in original).

⁶¹*Id.* at 15.

⁶²D. Kan. Rule 37.2 explicitly requires that the parties (or their counsel) "in good faith converse, confer, compare views, consult and deliberate, or in good faith attempt to do so."

⁶³Ex. 8 to doc. 1116 at 4; Ex. 9 to doc. 1116 at 3.

corresponding burden—whether heavy or light—of production.

Given the state of things and defendants’ express representations that they seek only limited, high-level, downstream documents, the court will order plaintiffs to produce such documents that are responsive to the six categories set out in defendants’ amended document requests.⁶⁴ The court expects the parties to engage in a reasoned and detailed discussion about the practical realities of the documents sought. In the highly unlikely event that either side later believes that the other is seeking or withholding documents inconsistent with the letter or spirit of this order, that party is given leave to file an appropriate motion.

In consideration of the foregoing,

IT IS HEREBY ORDERED:

Defendants’ motion to compel (doc. 1114) is granted. Plaintiffs shall produce the requested documents by **February 19, 2010**.

Dated January 20, 2010, at Kansas City, Kansas.

s/James P. O’Hara
James P. O’Hara
U.S. Magistrate Judge

⁶⁴See *supra* discussion p. 3.