IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON VICINAGE

IN RE DUCTILE IRON PIPE FITTINGS ("DIPF") INDIRECT PURCHASER ANTITRUST LITIGATION	Civ. No. 12-169 (AET) (LHG) **RETURN DATE: TBD** **ORAL ARGUMENT REQUESTED**

REPLY MEMORANDUM OF DEFENDANTS McWANE, INC. AND SIGMA CORPORATION IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED CLASS ACTION COMPLAINT

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I. INTRODUCTION.

The failure to allege facts that, if true, entitle plaintiffs to relief is not some minor inconvenience, but a fundamental pleading deficiency. Plaintiffs cannot side-step this deficiency and the other problems with their complaint by simply restating allegations cribbed from the FTC docket in its administrative complaint against the defendants. Fundamentally, whether the FTC's allegations are sufficient to state a claim under the FTC Act in an administrative proceeding brought by the FTC is not the question before this Court. Rather, the question is whether plaintiffs have adequately pled factual allegations -- as opposed to merely cut-and-pasting from the FTC complaint -- suggesting that they -- personally -- are entitled to relief under the various state statutes and laws they invoke. Their failure to do so requires dismissal before the parties embark on prolonged and costly litigation.[1]

II. ARGUMENT.

A. Plaintiffs have not alleged facts that, if proven true, would entitle them to relief.

What plaintiffs glibly dismiss as unnecessary "minutia" and "quibbl[ing]" (Opp.Br. at 9, 10), the Federal

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[1] Plaintiffs' opposition brief substantially exceeds the page limits of L. Civ. R. 7.2(b) and (d), and they have not sought the required "special permission . . . prior to submission of the brief" or, for that matter, at any time.

Rules and the Supreme Court consider to be essential pleading requirements. According to plaintiffs, the question boils down to whether defendants "have sufficient notice of the claims against them." (Opp.Br. at 9 n.3.) But, try as they may, plaintiffs cannot avoid Rule 8's requirement that they "state a claim for relief" supported by allegations "showing that [they are] entitled to relief." Fed. R. Civ. P. 8(a).[2] Although they claim they incurred overcharges on purchases of DIPF, they abjectly have failed to include any factual allegations in their complaint that, if proven, show they made purchases of DIPF for which they were overcharged.[3] This motion is that straightforward.

Plaintiffs' opposition brief proves this very point. They claim that "[d]efendants' antitrust violations had three

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[2] As underscored in McWane and Sigma's principal memorandum, Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 1940, 173 L. Ed.2d 868 (2009), plainly requires that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1960, 167 L. Ed. 2d 929 (2007)).

[3] This brief does not repeat the arguments made by defendants in their opening and reply memoranda in support of their motion to dismiss the direct purchaser plaintiffs' complaint. Those arguments focus on the common deficiencies in direct and indirect purchaser plaintiffs' complaints -- principally, the failure to allege a conspiracy and monopolization. Therefore, as a reply to plaintiffs' arguments (Opp. Br. at 13-19), defendants incorporate their reply contemporaneously filed in the direct purchaser action (Civil Action No. 12-711).

principal elements" (Opp.Br. at 1), as a result of which they "were injured . . . due to overcharges." (Opp.Br. at 10.) First, they argue that "from January 2008 until early 2009 [i.e., January 2009], all [d]efendants conspired to fix the prices of DIPF sold in the United States." (Opp.Br. at 1; Compl. ¶ 32.) But nowhere in their complaint do plaintiffs include allegations that any of the plaintiffs personally were injured by this alleged year-long conspiracy. They do not even claim to have purchased any DIPF during this period, let alone that they purchased DIPF at inflated prices. Although they allege that direct purchasers passed on some undefined "higher prices," they never allege what prices they paid during this period, assuming, of course, they made any purchases at all. (Opp.Br. at 11.) This critical factual support, if in fact true, would be uniquely in the possession of plaintiffs.

Second, they argue that "McWane and Star conspired to fix DIPF prices (both domestically produced and foreign DIPF) beginning in April 2009, and implemented identical price lists for DIPF, which remained in effect until at least July 2010." (Opp.Br. at 2.)[4] Again, they never allege having made any

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[4] Contrary to Plaintiffs' contention (Opp.Br. at 9, n.3), "domestically-produced" and "foreign" are not types of DIPF, but rather a place of manufacture (and not a specific one at that). There are thousands of types of DIPF, varying by material grade, diameter and length, degree bend, pressure rating

(continued...)

purchases of DIPF -- either domestic or foreign -- during this time period or that their purchases were at the list prices they now assert were "fixed."

Third, and finally, plaintiffs argue that, "beginning in September 2009, McWane and SIGMA reached an illegal distribution agreement that effectively eliminated Star from competing with McWane in the domestically produced DIPF market." (Opp.Br. at 2.) Once more, they do not allege having made any purchases of DIPF during this time period, let alone any domestically manufactured DIPF, from McWane or SIGMA. The necessary factual support, if true, surely is in plaintiffs' possession, and they are required to plead it under the basic pleading requirements of Rule 8.

In sum, all of plaintiffs' claims suffer from the same fatal flaw: aside from a few conclusory allegations, plaintiffs ask the Court to infer that they purchased DIPF from the proper defendant (McWane, Star, or SIGMA), during the particular time period (January 2008 to January 2009, April 2009 to July 2009, or "after" July 2009), and that the DIPF purchased from that "inferred" defendant during that "inferred" time period was of

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(...continued)
specifications, coating, and lining. Plaintiffs nowhere allege what type of DIPF they purchased. See Brief in Support of Motion to Dismiss Direct Purchaser Complaint at 8-9; Direct Purchaser Compl. ¶ 42.)

the particular type (imported or domestic) that is implicated by the alleged antitrust violation. None of plaintiffs' leaps of faith are reasonable inferences to make. This is an overcharge case; hence, plaintiffs must allege facts plausibly showing that they paid a price that would have been lower but for the specific antitrust violation.[5] This is especially true where, as here, two of the alleged conspiracies implicate some but not all of the three defendants.

Absent these critical facts, plaintiffs cannot plead or prove injury for any of the alleged antitrust violations and, therefore, cannot prove standing or state a claim for relief.[6]

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[5] See In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 247 (3d Cir. 2012) (affirming, in off-label marketing case, dismissal of claim that did not allege sufficient facts showing economic harm based on own purchases and rejecting attempt to rely on injury to other putative class members); In re Iowa Ready-Mix Concrete Antitrust Litig., 768 F. Supp. 2d 961, 978-79 (N.D. Iowa 2011)(dismissing complaint for failure to plead an antitrust conspiracy claim and expressing "considerable doubt . . . that the plaintiffs have sufficiently pled standing, where, for example, they have not specifically alleged that any particular plaintiff purchased ready-mix concrete from any particular defendant during the class period, thus pleading a factual basis for their own antitrust injury").

[6] See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008) ("Importantly, individual injury (also known as antitrust impact) is an element of the cause of action."); In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 152 (E.D. Pa. 2009) ("A named plaintiff whose injuries have no causal relation to, or cannot be redressed by, the legal basis for a claim does not have standing to assert that claim.").

The fundamental pleading defects in the complaint require dismissal of the complaint as a whole.

B. Plaintiffs do not have standing to assert claims under the laws of states where they do not reside.

The named plaintiffs allege they are residents of seven states. (Compl. ¶¶ 16-21.) They concede that they do not allege a personal injury in any of their home states, arguing instead that their injury "can be inferred." (Opp.Br. at 24.) Tellingly, they do not argue that they allege injury, nor that injury can be inferred, in respect of the remaining 21 jurisdictions under whose laws they also expansively claim damages. Without pleading injury for each of those claims, plaintiffs have no standing.

Plaintiffs' response is wholly unpersuasive. They first contend that, as long as they have standing to assert claims under their home state's laws, they have standing to assert claims under the laws of every state that permits indirect purchasers to sue. (Opp.Br. at 32.) That theory categorically has been rejected in this Circuit, most recently in In re Schering Plough Corp., supra, where the court rejected a similar argument made by the named plaintiffs in a putative class action, explaining that "'standing is not dispensed in

gross.'" 678 F.3d at 244 (quoting Lewis v. Casey, 518 U.S. 343, 358 n.6, 116 S. Ct. 2174, 2193 n.6, 135 L. Ed. 2d 606 (1996)).[7]

Nor should the Court accept plaintiffs' invitation to defer the inquiry into plaintiffs' standing until class certification. As set forth in detail both in our earlier memorandum (at 24-27) and below, the overwhelming majority of courts that have addressed this issue consistently have held that standing is a threshold issue that cannot be deferred.

Instead, plaintiffs rely on In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 579 (M.D. Pa. 2009), interpreting Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 2307, 144 L. Ed. 2d 715 (1999), and Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 612, 117 S. Ct. 2231, 2244, 138 L. Ed. 2d 689 (1997). According to plaintiffs, Ortiz and Amchem "authorize" district courts "to evaluate class issues before standing concerns if the latter are 'logically antecedent' to the former." (Opp.Br. at 37.) That argument is

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[7] In re Schering Plough Corp. also holds that "a plaintiff who raises multiple causes of action 'must demonstrate standing for each claim he seeks to press'" (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct. 1854, 1858, 164 L. Ed. 2d 589 (2006)); and further holds that plaintiff cannot "defend[] its standing to sue . . . on the basis of . . . purchases made by the other [p]laintiffs[.]" Id. at 244, 245, 247.

simply wrong. As explained by courts both within[8] and without this Circuit,[9] neither Ortiz nor Amchem authorizes a court to defer standing issues until it considers class certification. Those authorities reason that at the heart of the "logically antecedent" language in Ortiz and Amchem lies the requirement that a court simultaneously facing class certification and Article III standing issues should consider the Rule 23 issues before standing but only when the Rule 23 issues are dispositive in favor of the same party asserting the constitutional issues. The underlying rationale, as explained in Third Circuit opinion later affirmed by the Supreme Court, is that "a court need not

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[8] See, e.g., In re Wellbutrin XL Antitrust Litig., supra, 260 F.R.D. at 157; In re Flonase Antitrust Litig., 610 F. Supp. 2d 409, 418-19 (E.D. Pa. 2009).

[9] See, e.g., In re Packaged Ice Antitrust Litig., No. 08-md-01952, 2011 WL 891169, at *11 (E.D. Mich. Mar. 11, 2011) (collecting cases granting dismissal because "named plaintiffs lack standing to assert claims under the laws of the states in which they do not reside or in which they suffered no injury"); In re Refrigerant Compressors Antitrust Litig., No. 2:09-md-02042, 2012 U.S. Dis. LEXIS, at *27 (E.D. Mich. July 17, 2012) (granting motion to dismiss claims under laws of 11 states where no named plaintiff plausibly alleged injury); In re Checking Account Overdraft Antitrust Litig., 694 F. Supp. 2d 1302, 1324-25 (S.D. Fla. 2010) (dismissing state law claims where no representative plaintiff resides); In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1164 (N.D. Cal. 2009) ("Where ... a representative plaintiff is lacking for a particular state, all claims based on that state's laws are subject to dismissal."); In re Potash Antitrust Litig., 667 F. Supp. 2d 907, 923 (N.D. Ill. 2009) (same); Temple v. Circuit City Stores, Inc., No. 06 CV 5303 (JG), 2007 WL 2790154, at *8-9 (E.D.N.Y. Sept. 25, 2007) (same).

reach difficult questions of jurisdiction when the case can be resolved on some other ground in favor of the same party." Georgine v. Amchem Products, Inc., 83 F.3d 610, 623 (3d Cir. 1996), aff'd, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

Those issues -- sufficiency of the complaint vs. class certification -- are not presented simultaneously here. In our circumstances, the rule of decision is clear: "An analysis into the legal viability of asserted claims is properly considered through a motion to dismiss under Rule 12(b). . . , not as part of a Rule 23 certification process." Sullivan v. DB Investments, Inc., 667 F.3d 273, 305 (3d Cir. 2011).[10]

Further, Ramirez v. Sti Prepaid LLC, 644 F. Supp. 2d 496 (D.N.J. 2009), In re Grand Theft Auto Video Game Consumer Litig. (No. II), No. 06 MD 1739, 2006 WL 3039993 (S.D.N.Y. Oct.

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[10] The logic underlying that point is made patent in In re Wellbutrin XL Antitrust Litig., supra, 260 F.R.D. at 155: "Courts do not wait for potentially dispositive issues to arise at later stages of litigation solely in an effort to postpone and avoid constitutional adjudication." It underscores that the weight of authority supports the proposition that "allegations [that] present no facts that would connect injuries specific to the plaintiffs, as opposed to injuries against competitors and purchasers nationwide, to any cause arising in states where no named plaintiff is located and where no . . . named plaintiff purchased" the product at issue in the class action cannot "implicate the laws of those states" due to the plaintiffs' lack of standing." Id. at 157; see also ante n.8 (citing cases). Hence, such claims are properly dismissed on standing grounds on a Rule 12(b) motion. Id. at 157-58.

25, 2006), and In re Chocolate Confectionary Antitrust Litig., supra, relied on by plaintiffs (Opp.Br. at 35-38), are directly contrary to this Circuit's clear precedent[11] holding that standing must be established for each claim at the pleadings stage.[12] Further, postponing challenges to standing needlessly imposes lengthy and expensive class certification discovery on antitrust defendants, one of the inefficiencies that the Supreme Court specifically instructed must be avoided at the pleading stage. Twombly, supra, 550 U.S. at 558, 127 S. Ct. at 1966-67, 167 L. Ed. 2d 929.

In short, standing is a threshold issue to be decided at this stage, rather than years down the road. See In re Wellbutrin XL Antitrust Litig., supra, 260 F.R.D. at 155.

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[11] See In re Schering Plough Corp., supra, and cases cited ante n.4.

[12] Plaintiffs also cite a string of cases. (Opp.Br. at 38 n.14.) However, when confronted by the same arguments plaintiffs advance here, those very cases have been found unpersuasive. For example, In re Packaged Ice Antitrust Litig., 779 F.Supp. 2d 642, 645 (E.D. Mich. 2011), concluded that "neither Ortiz nor Amchem requires that Article III standing issues be deferred until a class has been certified." Instead, it followed Easter v. American West Financial, 381 F.3d 948 (9th Cir. 1999), and In re Wellbutrin XL Antitrust Litig., supra, as the "better-reasoned opinions on this issue which recognize and refuse to abandon the fundamental prudential standing requirements of Article III." Id. at 656.

C. Plaintiffs' unjust enrichment claim should be dismissed.

Plaintiffs concede defendants' essential point: plaintiffs have failed to identify any State under whose laws their unjust enrichment claims arise. For that reason alone, their claims should be dismissed outright. In re Wellbutrin XL Antitrust Litig., supra, 260 F.R.D. at 167 (dismissing unjust enrichment claim for failure to specify particular state law).

Instead, they gamely try to excuse that failure, arguing that, because unjust enrichment is "essentially the same throughout the United States," their unjust enrichment claims "can be evaluated without reference to a particular body of case law." (Opp.Br. at 20.) In other words, plaintiffs advance the unsupported notion that a common law claim -- unjust enrichment -- can be evaluated without reference to state law. That proposition is wholly without merit.

Plaintiffs' assertion that there are no material differences in claims for unjust enrichment among different jurisdictions is plainly wrong: the principal authority on which plaintiffs rely, In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 544 (E.D. Pa. 2010), completely undermines that argument. Inexplicably, plaintiffs ignore that, by that point, the Flonase court already had dismissed the unjust enrichment claims because, like here, those plaintiffs had failed to

identify the state or states under which they were making the claim. In re Flonase Antitrust Litig., 610 F. Supp. 2d 409, 419 (E.D. Pa. 2009). Even after plaintiffs amended their complaint and specified that they were bringing unjust enrichment claims under seven states' common laws, the court remained unsatisfied. It specifically held that "[t]he elements necessary to allege unjust enrichment vary state by state[,]" id. at 544, thus dismissing unjust enrichment claims under Florida and North Carolina law because those jurisdictions require that the plaintiff confer a "direct benefit" on the defendant, something that plaintiffs -- as indirect purchasers -- by definition cannot do. Id. at 544, 545-46.[13]

Undaunted, plaintiffs misconstrue defendants' argument that plaintiffs are using their unjust enrichment claim as an end-run to pursue relief otherwise not available under state antitrust or consumer protection laws. As In re Flonase Antitrust Litig., supra, makes clear, "[c]ertain states have

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[13] As noted in defendants' opening brief, courts consistently have recognized the "material" differences in the various state laws of unjust enrichment. (Def. Mem. at 33-34.) See, e.g., Mazza v. Am. Honda Motor Co., 666 F.3d 581, 591 (9th Cir. 2012); Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortgage Ass'n, 624 F.3d 185, 195-96 (5th Cir. 2010); Yarger v. ING Bank, FSB, No. 11-154-LPS, 2012 WL 3776012, at *15 (D. Del. Aug. 27, 2012); In re Aqua Dots Prods. Liab. Litig., 270 F.R.D. 377, 386 (N.D. Ill. 2010); In re Conagra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689, 697 (N.D. Ga. 2008); Lilly v. Ford Motor Co., 2002 WL 507126, at *2 (N.D. Ill. Apr. 3, 2002).

adopted Illinois Brick and deny indirect purchaser plaintiffs recovery under their state antitrust statutes[.] Allowing indirect purchasers to recover and recoup a benefit from the defendant under an unjust enrichment theory would circumvent the policy choice of Illinois Brick." 692 F. Supp. 2d at 542. It follows, then, that "where an antitrust defendant's conduct cannot give rise to liability under state antitrust and consumer protection laws, [p]laintiffs should be prohibited from recovery under a claim for unjust enrichment." Ibid. At a minimum, once identified, any unjust enrichment claim must be dismissed if the statutory claims likewise do not lie.[14]

D. Plaintiffs have not alleged facts supporting their claim for injunctive relief.

Plaintiffs' injunctive relief claims fare no better. In response to defendants' argument that plaintiffs have not included any allegations that plausibly establish an actual and

[14] The cases cited by plaintiffs, In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517 (D.N.J. 2004), and D.R. Ward Construction Co. v. Rohm & Haas Co., 470 F. Supp. 485, 506 (E.D. Pa. 2006), are not to the contrary. In K-Dur, although the court initially declined to address the unjust enrichment argument at that specific point in the lawsuit, it later held that "where the applicable state law bars antitrust actions for damages by indirect purchasers . . . a plaintiff cannot circumvent the statutory framework by recasting an antitrust claim as one for unjust enrichment." In re K-Dur Antitrust Litig., No. 01-1652, 2008 WL 2660780, at *5 (D.N.J. Feb. 28, 2008). In D. R. Ward, the analysis of the unjust enrichment claims relied entirely on judging the compatibility of particular states' statutory antitrust law with those specific states' unjust enrichment law. Supra, 470 F. Supp. at 506.

imminent threat, as required by City of Los Angeles v. Lyons, 461 U.S. 95, 103, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983), plaintiffs point only to their unsupported and unsupportable allegations that the conduct is "continuing into the present" and that "members of the Injunctive Class have been injured." (Opp.Br. at 22 (citing Compl. ¶¶ 62-83, 115, 119, and 123-124).) Yet, none of plaintiffs' purported facts show that any conduct in fact is continuing. There is a simple reason for that failure of pleading: it is not. By describing the allegedly anticompetitive conduct in the past tense (see, e.g., Compl. ¶¶ 65, 116, 119), plaintiffs admit as much. Without stubborn but necessary facts -- dates and particular acts -- showing the likelihood of future harm, plaintiffs cannot state a claim for injunctive relief.[15]

Common sense explains plaintiffs' abject failure to plead facts showing an actual and imminent threat. Two of the three alleged wrongdoers -- SIGMA and Star -- have entered into

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[15] See In re Plavix Indirect Purchaser Antitrust Litig., No. 06-cv-226, 2011 WL 335034, at *4 (S.D. Ohio Jan. 31, 2011) ("[T]he Court is not required to accept [p]laintiffs' conclusions and inferences if they are unsupported by facts. Indeed, [p]laintiffs provide no factual basis for their claims that there is any kind of threatened violation on the part of defendants."); In re Nifedipine Antitrust Litig., 335 F. Supp. 2d 6, 17-18 (D.D.C. 2004) (dismissing injunctive relief claim where no factual basis was provided to support claim that defendants continued to act unlawfully after entry of consent order).

thirty-year consent decrees barring them from engaging in broadly defined pricing action and unlawful communications, conspiracies, agreements, or understandings with competitors. (Compl. ¶¶ 82-83.) And, it is axiomatic that, "if a defendant is already enjoined from engaging in the illegal activities, it would be wasteful to require it to defend another suit seeking to enjoin the same activities once again[.]" Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 594 n.83 (3d Cir. 1979)[16]

III. CONCLUSION.

For the foregoing authorities, arguments and reasons, together with those set forth in defendants' opening brief and the briefing filed in support of their parallel motion to dismiss the direct purchasers' complaint, defendants McWane and SIGMA respectfully request that the indirect purchasers' consolidated class action complaint be dismissed.

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[16] That McWane has not entered into a consent decree (Opp.Br. at 22) is of no moment. Because SIGMA has entered into a consent decree with the FTC -- as has co-defendant Star -- plaintiffs cannot show an imminent threat of McWane colluding with SIGMA (or, for that matter, Star) in the future.

Respectfully submitted,

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DATED: December 4, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing reply memorandum of defendants McWane, Inc. and SIGMA Corporation in further support of their motion to dismiss the amended class action complaint to be filed via the CM/ECF system established for the United States District Court for the District of New Jersey.

I hereby further certify that, via the CM/ECF system, I have caused true and correct copies of the foregoing to be served electronically on:

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