UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

IN RE DUCTILE IRON PIPE FITTINGS ("DIPF") INDIRECT PURCHASER ANTITRUST LITIGATION	:	Civ. No. 12-169 (AET) (LHG) Oral Argument Requested

INDIRECT PURCHASER PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' SECOND AMENDED CLASS ACTION COMPLAINT

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I. INTRODUCTION

Indirect Purchaser Plaintiffs ("Plaintiffs"), in the Second Amended Class Action Complaint ("SACAC"), have alleged an antitrust conspiracy against Defendants spanning from January 2008 through the present. The sufficiency of Plaintiffs' substantive allegations is not in dispute – nor could it be given the Court's denial of Defendants' motion to dismiss substantially similar allegations by Direct Purchaser Plaintiffs in this multidistrict litigation.[1] Indeed, defendants McWane Inc. ("McWane") and Sigma Corp. ("Sigma") concede that three of the ten Plaintiffs have alleged sufficient claims regarding Defendants' anticompetitive conduct and should be permitted to obtain discovery.

The joint motion by McWane and Sigma to dismiss the SACAC and the motion to dismiss by Star Pipe Prods., Ltd. ("Star") (together, the "Motions to Dismiss"), focus on two issues: 1) the specificity of Plaintiffs' allegations regarding their purchases, and 2) Plaintiffs' standing to bring certain of the claims alleged. Defendants' attacks fail as to each of these points. In amending their complaint, Plaintiffs heeded the Court's words regarding the necessary specificity of each claim for relief. Plaintiffs have set forth specific information regarding each Plaintiffs' purchases such that, viewing the SACAC in the light most favorable to Plaintiffs, the Court should deny Defendants' renewed motions to dismiss in their entirety.

II. BACKGROUND

A. Procedural Background

On March 18, 2013, the Court granted Plaintiffs leave to amend their complaint in order to add specificity regarding the injuries suffered by the named plaintiffs. *See* March 18, 2013

[1] The Court's holding was reinforced by a ruling from the FTC's chief administrative law judge that McWane engaged in anticompetitive conduct in violation of the FTC Act. *See* Initial Decision, *In the Matter of McWane, Inc.*, Docket No. 9351, *available at* http://www.ftc.gov/os/adjpro/d9351/130509mcwanechappelldecision.pdf.

Slip Op. at 10 (Dkt. 105) ("Opinion"). In granting Defendants' motion to dismiss without prejudice, the Court explained that additional specificity was required in order to demonstrate that at least one Plaintiff had suffered an injury under each of the counts alleged in Plaintiffs' complaint. Opinion at 8-10.

Plaintiffs made the necessary amendments to their SACAC, which was filed on May 3, 2013. Defendants then moved to dismiss certain of Plaintiffs' claims in their Motions to Dismiss. However, Defendants McWane and Sigma do not challenge the sufficiency of Plaintiffs' claims under: 1) the Florida deceptive and unfair trade practices act, *Fla. Stat.* §§ 501.201 *et seq.*; 2) the New Hampshire antitrust law, N.H. Rev. Stat. §§ 356:1 *et seq.*; and 3) the Kansas antitrust law, *Kan. State. Ann.* § 50-101, *et seq*. *See* Memorandum in Support of McWane and Sigma Motion ("McWane Mem."), Dkt. No.117-1, at 10 n.5.

B. Factual Background

A lengthy recitation of the facts is unnecessary given the Defendants' concessions regarding the sufficiency of Plaintiffs' substantive allegations. Plaintiffs have alleged that, beginning in January 2008, Defendants commenced a conspiracy to fix the prices for Ductile Iron Pipe Fittings ("DIPF") sold in the United States. SACAC ¶ 3. Defendants communicated the terms of their price fixing through, *inter alia*, communications with their distributors located around the nation. *Id.* ¶¶ 56-57. From January 2008 through May 2009, the three Defendants, who controlled virtually all of the DIPF market, maintained their price fixing conspiracy with regard to all DIPF (domestic and imported) sold in this country. *Id*. ¶¶ 3, 56-57. Thus, in pleading valid claims attributable to this price fixing conspiracy, Plaintiffs have plausibly alleged injury on purchases of DIPF in 2008 and early 2009.

In February 2009, Congress passed the American Recovery and Reinvestment Act ("ARRA"). SACAC ¶ 5. The ARRA allocated billions of dollars towards water project construction, and imposed a "Buy American Provision" on all such projects. As a result, demand for American-made DIPF ("Domestic DIPF) skyrocketed. Defendant McWane, which possessed a monopoly in the Domestic DIPF market, stood to reap tremendous profits in the absence of additional competition. *Id*. Thus, McWane acted in violation of the antitrust laws in order to maintain its dominant position.

First, McWane conspired with Sigma in order to prevent Sigma from generating Domestic DIPF capacity. SACAC ¶ 7. McWane prevailed upon Sigma to forego developing Domestic DIPF capacity and, instead, engaged Sigma in an exclusive "Master Distribution Agreement." SACAC ¶ 87. The MDA represented a transfer by McWane of some of its Domestic DIPF sales and profits to Sigma in exchange for Sigma's commitment to abandon plans to enter the Domestic DIPF market as a competitor. *Id*. The MDA was, in McWane's words, an "insurance policy" against Sigma's independent entry as a competitor. SACAC ¶ 93. In the absence of the MDA, Sigma likely would have entered the domestic market and competed against McWane. Both McWane and Sigma entered into the MDA with the intent to maintain artificially inflated prices in the national Domestic DIPF market. SACAC ¶ 96.

McWane also acted to exclude Star from the Domestic DIPF market. SACAC ¶ 99. Upon becoming aware of Star's impending entry into the domestic market, McWane adopted restrictive and exclusionary distribution policies. *Id*. Among other things, McWane threatened waterworks distributors around the nation with diminished access to McWane's Domestic DIPF, as well as the loss of accrued rebates, in the event that distributors purchased Domestic DIPF from Star. *Id*. In addition, McWane modified its rebate structure for Domestic DIPF in order to re-

quire its customers to purchase almost exclusively from McWane. *Id*. McWane stated that it was acting to "make sure that [Star] don't reach any critical market mass that will allow them to continue to invest and receive a profitable return" and to "reduce Star's ability to grow share" in the Domestic DIPF market. SACAC ¶¶ 99, 102. A Sigma executive echoed that the McWane-Sigma MDA was "likely to have the intended effect of marginalizing Star." SACAC ¶ 103. McWane's exclusionary conduct enabled McWane to maintain its lock on the Domestic DIPF by substantially preventing Star from entering and competing in that market. SACAC ¶ 104.

In pleading valid claims attributable to McWane's monopolization of the Domestic DIPF market and Sigma's complicity therewith, Plaintiffs have plausibly alleged injury on purchases of Domestic DIPF commencing in February 2009.

C. Plaintiffs' Claims

The most significant amendments to Plaintiffs' SACAC concern the specific allegations of Plaintiffs' DIPF purchases and the harm incurred by Plaintiffs as a result of those purchases. Defendants seek to obscure the fact that Plaintiffs have pled amended allegations with sufficient specificity to ensure that all of Plaintiffs' claims may proceed. In the interest of clarity, Plaintiffs will briefly set out the claims brought by each of the ten Plaintiffs before addressing Defendants' scattershot arguments for dismissal.

1. Yates Construction Co., Inc.

Plaintiff Yates Construction Co., Inc. ("Yates") is a North Carolina corporation with its principal place of business in North Carolina. SACAC ¶ 19. Yates purchased Sigma-branded DIPF throughout 2008. SACAC ¶ 20. On multiple occasions from 2009 through at least 2011, Yates indirectly purchased McWane-branded Domestic DIPF. *Id.* ¶21.

Yates has sufficiently alleged claims under: the North Carolina state antitrust statute (N.C. Gen. Stat., §§ 75-1, *et seq*.); the North Carolina state consumer protection statute (N.C. Gen. Stat. §§ 75-1.1, *et seq*.); the North Carolina unjust enrichment law; Sections 1 and 2 of the Sherman Act (15 U.SC. §§ 1, 2); and Section 3 of the Clayton Act, 15 U.S.C. § 14.

By virtue of the injury incurred by Yates, and on account of the claims asserted by Yates, Plaintiff Yates has standing to bring claims on behalf of a class of indirect purchasers under the following Counts: Count 1 (Injunctive relief against McWane and Sigma pursuant to Sherman Act §1); Count 2 (Injunctive relief against McWane pursuant to Sherman Act §2); Count 3 (Violation of state antitrust statutes against all Defendants for their 2008-09 price fixing conspiracy); Count 4 (Violation of state consumer protection and unfair competition statutes against all Defendants for their 2008-09 price fixing conspiracy); Count 5 (Violation of state antitrust statutes against McWane and Sigma for their conspiracy to restrain trade in the Domestic DIPF market commencing in September 2009); Count 6 (Violation of state consumer protection and unfair competition statutes against McWane and Sigma for their conspiracy to restrain trade in the Domestic DIPF market commencing in September 2009); Count 7 (Violation of state antitrust, consumer protection and unfair competition statutes against McWane for its illegal maintenance of a monopoly in the Domestic DIPF market commencing in February 2009); and Count 8 (Unjust enrichment against Defendants for their anticompetitive conduct commencing in 2008).

2. City of Hallandale Beach

Plaintiff City of Hallandale Beach ("Hallandale Beach") is a city located in Florida. SACAC ¶ 23. Hallandale Beach purchased DIPF from 2008 through at least 2012, including purchases of McWane-branded DIPF in January, March, May and July 2008. *Id.* ¶ 24. As McWane and Sigma concede, Hallandale Beach has sufficiently alleged claims under the Florida

deceptive and unfair trade practices act, *Fla. Stat.* §§ 501.201 *et seq*. By virtue of the injury incurred by Hallandale Beach, and on account of the claims asserted by Hallandale Beach, Plaintiff Hallandale Beach has standing to bring claims on behalf of a class of indirect purchasers under Counts 4 and 8 of the CASAC.

3. Waterline Industries Corporation

Plaintiff Waterline Industries Corporation ("Waterline") is a business located in New Hampshire. SACAC ¶ 15. Waterline purchased DIPF in February, April, May, June, July, August and October 2008, and January, February, March and April 2009. *Id.* ¶ 16. Given that Defendants controlled virtually the entire DIPF market in 2008-09, *id.* at ¶ 3, Waterline has plausibly alleged purchases from a Defendant in that time period. Waterline also purchased McWane-branded Domestic DIPF in December 2009. *Id.* ¶ 17. As McWane and Sigma concede, Waterline has sufficiently alleged claims under the New Hampshire antitrust statute, N.H. Rev. Stat. §§ 356:1 *et seq*. Waterline has also sufficiently alleged claims under: the New Hampshire consumer protection statute, N.H. Rev. Stat. §§ 358-A:1 *et seq*.; New Hampshire unjust enrichment law; Sections 1 and 2 of the Sherman Act (15 U.SC. §§ 1, 2); and Section 3 of the Clayton Act, 15 U.S.C. § 14. By virtue of the harm incurred by Waterline, and on account of the claims asserted by Waterline, Plaintiff Waterline has standing to bring claims on behalf of a class of indirect purchasers under Counts 1 through 8 of the CASAC.

4. South Huntington Water District

Plaintiff South Huntington Water District ("SHWD") is a municipal corporation located in the State of New York. SACAC ¶ 28. SHWD purchased DIPF on numerous occasions from 2008 to the present, including an August 2008 purchase of Sigma-branded DIPF. *Id.* ¶ 29. In March and May 2009, SHWD indirectly purchased McWane-branded Domestic DIPF. *Id.* ¶ 30.

SHWD has sufficiently alleged claims under: New York's antitrust statute, the Donnelly Act (N.Y. Gen. Bus. Laws § 340 *et seq*.); New York unjust enrichment law; Sections 1 and 2 of the Sherman Act (15 U.SC. §§ 1, 2); and Section 3 of the Clayton Act, 15 U.S.C. § 14. By virtue of the harm incurred by SHWD, and on account of the claims asserted by SHWD, Plaintiff SHWD has standing to bring claims on behalf of a class of indirect purchasers under Counts 1, 2, 3, 5, 7 and 8 of the CASAC.

5. Wayne County

Plaintiff Wayne County ("Wayne") is a Michigan county. SACAC ¶ 35. Wayne indirectly purchased Sigma-branded DIPF in November 2008. *Id.* ¶ 36. Wayne has sufficiently alleged claims under the Michigan antitrust statute (Mich. Compiled Law Annotated, §§ 445.772, *et seq*.). By virtue of the injury incurred by Wayne, and on account of the claims asserted by Wayne, Plaintiff Wayne has standing to bring claims on behalf of a class of indirect purchasers under Counts 3 and 8 of the CASAC.

6. Village of Woodridge

Plaintiff Village of Woodridge ("Woodridge") is a New York municipal corporation. SACAC ¶ 37. Woodridge indirectly purchased Sigma- and Star-branded Domestic DIPF in 2010 and 2011. *Id.* ¶ 38. Woodridge has sufficiently alleged claims under: New York's antitrust statute, the Donnelly Act (N.Y. Gen. Bus. Laws § 340 *et seq*.); New York unjust enrichment law; Sections 1 and 2 of the Sherman Act (15 U.SC. §§ 1, 2); and Section 3 of the Clayton Act, 15 U.S.C. § 14. By virtue of the injury incurred by Woodridge, and on account of the claims asserted by Woodridge, Plaintiff Woodridge has standing to bring claims on behalf of a class of indirect purchasers under Counts 1, 2, 5, 7 and 8 of the CASAC.

7. City of Fargo

Plaintiff City of Fargo ("Fargo") is a city in North Dakota. SACAC ¶ 32. Fargo indirectly purchased DIPF manufactured by Defendants on numerous occasions between 2008 and the present. *Id.* ¶ 33. Plaintiffs have plausibly alleged that between February 2009 and the present, Fargo indirectly purchased McWane-branded Domestic DIPF. *Id.* ¶ 34. Fargo has sufficiently alleged claims under: the North Dakota antitrust statute, N.D. Century Code, §§ 51-08.1-01, *et seq*.; North Dakota unjust enrichment law; Sections 1 and 2 of the Sherman Act (15 U.SC. §§ 1, 2); and Section 3 of the Clayton Act, 15 U.S.C. § 14. By virtue of the harm incurred by Fargo, and on account of the claims asserted by Fargo, Plaintiff Fargo has standing to bring claims on behalf of a class of indirect purchasers under Counts 1, 2, 3, 5, 7 and 8 of the CASAC.

8. Water District No. 1 of Johnson County (Kansas)

Plaintiff Water District No. 1 of Johnson County (Kansas) ("WaterOne") is a quasi-municipal agency located in Kansas. SACAC ¶ 39. WaterOne purchased DIPF on numerous occasions from 2008 to through at least December 2009, including multiple purchases of McWane-branded Domestic DIPF. *Id.* ¶ 40. As McWane and Sigma concede, WaterOne has sufficiently alleged claims under the Kansas antitrust statute, *Kan. Stat. Ann.* § 50-101, *et seq*. WaterOne has also sufficiently alleged claims under: Kansas unjust enrichment law; Sections 1 and 2 of the Sherman Act (15 U.SC. §§ 1, 2); and Section 3 of the Clayton Act, 15 U.S.C. § 14. By virtue of the harm incurred by WaterOne, and on account of the claims asserted by KansasOne, Plaintiff KansasOne has standing to bring claims on behalf of a class of indirect purchasers under Counts 1, 2, 3, 5 and 8 of the CASAC.

9. Township of Fallsburg

Plaintiff Township of Fallsburg ("Fallsburg") is a New York Municipal Corporation. SACAC ¶ 41. Blair indirectly purchased Star-branded Domestic DIPF in 2010 and 2011. *Id.* ¶ 42. As detailed at §§ III.D, F, *infra*, Fallsburg has sufficiently alleged claims under: the Donnelly Act (N.Y. Gen. Bus. Laws § 340 *et seq.*); New York unjust enrichment law; Sections 1 and 2 of the Sherman Act (15 U.SC. §§ 1, 2); and Section 3 of the Clayton Act, 15 U.S.C. § 14. By virtue of the injury incurred by Fallsburg, and on account of the claims asserted by Fallsburg, Plaintiff Fallsburg has standing to bring claims on behalf of a class of indirect purchasers under Counts 1, 2, 5, 7 and 8 of the CASAC.

10. City of Blair

Plaintiff City of Blair ("Blair") is a Nebraska municipal corporation. SACAC ¶ 26. Blair indirectly purchased DIPF in 2011 and 2012. *Id.* ¶ 27.[2] Blair has sufficiently alleged claims under: the Nebraska antitrust statute (Nebraska Rev. Stat., §§ 59-801, *et seq.*); the Nebraska consumer protection statute (Nebraska Rev. Stat., §§ 59-1601, *et seq.*); Nebraska unjust enrichment law; Sections 1 and 2 of the Sherman Act (15 U.SC. §§ 1, 2); and Section 3 of the Clayton Act. By virtue of the injury incurred on account of the claims asserted, Plaintiff Blair has standing to bring claims on behalf of a class of indirect purchasers under Counts 1, 2, 5, 6 and 8.

III. ARGUMENT

A. Standard of Review

Defendants have moved to dismiss the SACAC under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Defendants' Rule 12(b)(1) jurisdictional motions challenge the Plaintiffs' standing.

[2] Plaintiffs have a reasonable good faith basis to believe that third-party discovery will reveal additional information regarding injuries to Blair and other municipal Plaintiffs as a result of their DIPF purchases. *Id.* ¶ 43.

These motions mount a facial attack on the SACAC because they contend that it lacks sufficient allegations to establish Plaintiffs' standing. When addressing a facial challenge, "the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elec. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000). In determining whether the SACAC adequately pleads the elements of standing, the standards are the same as that used when considering a motion to dismiss under Rule 12(b)(6). *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007).

A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of the complaint." *Sturm v. Clark*, 835 F.2d at 1009, 1101 (3d Cir. 1987). Its purpose is not to resolve disputed factual issues or to decide the merits of the case. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). Defendants' burden of proof to prevail is "high." *Sakhrani v. Escala*, Civ. A. No. 05-CV-4746, 2006 U.S. Dist. LEXIS 57294 (D.N.J. Aug. 16, 2006).

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a plaintiff to, *inter alia*, set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), a complaint satisfies Rule 8 when it sets forth sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Plaintiffs Have Sufficiently Alleged Antitrust and Consumer Protection Violations

As set forth at § II.C above, Plaintiffs have adequately alleged violations of state antitrust and consumer protection statutes as to those states in which Plaintiffs reside and made DIPF purchases, as well as those states in which no Plaintiff resides. Indeed, the distinction drawn by De-

fendants between the two groups of states is inappropriate at this stage of the proceedings. As detailed below, Plaintiffs have standing to bring claims under each count of the SACAC; the adequacy of Plaintiffs to represent a class that includes purchasers in additional states is an issue reserved for class certification.

1. Plaintiffs Have Sufficiently Alleged Violations of the Laws in Their Home States

Plaintiffs have set forth specific allegations with regard to the injuries that they incurred as a result of purchasing DIPF that was the subject of Defendants' anticompetitive conduct. Defendants, now unable to question the harm incurred by Plaintiffs as a result of their DIPF purchases, have instead sought to impose an inappropriately restrictive interpretation of the various state statutes invoked by Plaintiffs: Defendants assert that because their alleged anticompetitive conduct was national in scope – and not merely limited within the borders of any state – Plaintiffs should somehow be deprived the opportunity to recover for the damages that they incurred. Defendants' tortured interpretation of the various state antitrust and consumer protection statutes should be rejected, and Plaintiffs' claims should be left intact.

a. **Defendants Operated a Nationwide Conspiracy With Significant Impact in All States**

Plaintiffs have made explicit allegations regarding Defendants' conduct in each of the states as to which that Defendants allege a statutory violation, as well as the direct impact of Defendants' conduct on commerce in each such state. Defendants sell DIPF, in its finished form, directly to distributors in all 50 states. SACAC ¶¶ 44-46. Defendants and their co-conspirators carried out an unlawful conspiracy that had the "purpose and effect of raising and fixing prices in the market for ductile iron pipe fittings throughout the United States." SACAC ¶ 1. The conspiracy affected the DIPF market in the United States. *Id.* Defendants carried out their price fixing

conspiracy by, *inter alia*, exchanging messages among themselves in the form of letters mailed to distributors located in each such state. SACAC ¶ 128. Moreover, McWane executed its illegal attempt to monopolize the Domestic DIPF market by contacting its DIPF distributors in each state to demand their loyalty in exchange for continued rebates. SACAC ¶ 99. Thus, Defendants' claim that their alleged conduct did not have a sufficient adverse effect on the trade and commerce in certain states is plainly without merit.

Indeed, Defendants' attempt to read a restrictive "intrastate-only" conduct requirement into the various state antitrust and consumer protection statutes has regularly been rejected by courts evaluating indirect purchaser actions at the motion to dismiss stage. As the court in *In re Packaged Ice Antitrust Litigation* reasoned, any "'intrastate effects' requirement is met at the pleading stage by allegations, like those in the instant case, claiming that the anticompetitive conduct caused supra-competitive price effects nationwide." 779 F. Supp. 2d 642, 664 (E.D. Mich. 2011) (and cases cited therein).[3]

Similarly, in *In re Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 618 (E.D. Mich. 2000), defendants argued that indirect purchasers' Wisconsin and Tennessee state law antitrust claims had to be dismissed because the alleged anticompetitive conduct was *interstate*, rather than *intrastate*. The court rejected out of hand the suggestion that interstate conduct was insufficient to permit a state law antitrust claim. First, looking at the relevant Wisconsin law, the court concluded that plaintiffs "alleged conduct that significantly and adversely affected trade and commerce in that state and thus state a claim for relief under [the Wisconsin antitrust statute]." *Id*. at 666. Moving on to Tennessee, the court reached a similar conclusion, reasoning that:

[3] *See also In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 407-408 (S.D.N.Y. 2011); *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380, 406 (E.D. Pa. 2010); *Kaufman v. Sirius XM Radio, Inc.*, 2012 WL 1109397 (2d Cir. April 4, 2012).

> [t]he mere fact that there are allegations that Cardizem CD was sold in other states as well as Tennessee, or that the anticompetitive conspiracy was hatched and implemented in other states as well as Tennessee, does not mean that Tennessee Plaintiffs, who allege they purchased Cardizem CD in Tennessee at artificially inflated prices as a result of Defendants' anticompetitive conduct, are precluded from asserting a claim under Tennessee's antitrust and consumer protection laws.

Id. at 667-68.[4]

More generally, in *In re Chocolate Confectionary Antitrust Litigation*, 602 F. Supp. 2d 538 (M.D. Pa. 2009), plaintiffs alleged that producers conspired to fix the price of chocolate products in the United States. On a motion to dismiss, defendants alleged, *inter alia*, that indirect purchaser plaintiffs had failed to state claims under the state antitrust laws of Nevada, South Dakota, Tennessee, West Virginia and Wisconsin because they alleged effects on interstate rather than exclusively intrastate commerce. *Id*. at 580. The language of those state antitrust statutes with respect to "intrastate" commerce was similar to that of the statutes at issue here. The court rejected Defendants' interpretation, concluding that the particular plaintiffs, in alleging a nationwide price-fixing scheme that resulted in higher prices in each of the particular states, had necessarily stated a claim under the law of each of the states. *Id.* at 581-82[5]

Courts have rejected Defendants' overly narrow reading of the antitrust and consumer protection statutes for good reason. The states at issue are those which have permitted actions by indirect purchasers to recover for antitrust injuries. Given the federal prohibition on indirect

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[4] *See also, In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 613 (7th Cir. 1997) ("[i]f the [Alabama state antitrust] statute is limited today . . . to commerce that is not within the regulatory power of Congress under the commerce clause, it is a dead letter because there are virtually no sales, in Alabama or anywhere else in the United States, that are intrastate in that sense.").

[5] *See also Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline*, 737 F. Supp. 2d 380, 396, 403 (E.D. Pa. 2010) (characterizing defendants' intrastate commerce argument as "weak," and holding that "plaintiffs' allegations that [defendant's] conduct caused consumers in each named state, including Arizona, to pay more…are sufficient at the pleading stage to show effect in Arizona.")

purchaser antitrust recovery, the narrow statutory reading suggested by Defendants would leave consumers in those states at the mercy of out-of-state defendants who conspire to raise, fix, maintain or stabilize prices of goods sold in those states merely because defendants did not conduct all of their conspiratorial conduct in one state. Such a result should be rejected here, where Defendants intended to, and did, impact commerce in all of the indirect purchaser states.

b. State Antitrust Claims

Consistent with the preceding discussion, Plaintiffs have clearly alleged sufficient claims under the antitrust and consumer protection laws of their home states.

i. **Michigan**

Plaintiff Wayne has stated a claim under Michigan's antitrust law because it purchased Defendants' price-fixed DIPF in Michigan and was harmed there. SACAC ¶ 36. Defendants marketed and sold DIPF to distributors in Michigan throughout the class period at an artificially inflated price, and McWane enforced its Domestic DIPF monopoly by pressuring its Michigan-based distributors. Moreover, there is simply no Michigan case law requiring *all* of the acts underlying an antitrust claim to take place within the state.

Under the Michigan Antitrust Reform Act ("MARA"): "A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." MCLS § 445.772. The MARA contains no suggestion that it is limited to exclusively intrastate conduct. Defendants therefore attempt, with no success, to find a basis for such an interpretation in the case law.

Defendants first point to the Court's holding in *Peoples Savings Bank v. Stoddard*, 102 N.W.2d 777, 796 (Mich. 1960), that the Michigan Antitrust Reform Act ("MARA") parallels the Sherman Antitrust Act as it applies to intrastate conduct. Defendants wish to interpret this to

mean that MARA *only* applies to conduct that is *completely* intrastate. But this view ignores not only the plain-language of the opinion, but also the context of the court's ruling.

Stoddard involved a bank attempting to buy a two-thirds share of the capital stock of a rival in order to have that stock vote for dissolution. After plaintiffs brought suit under, *inter alia*, state antitrust law, the defendant bank argued that the Sherman and Clayton Acts pre-empted the state law. It is in *this* context that the court reasoned that MARA "parallels and augments the Clayton and Sherman acts, in no way does it conflict with them." Thus, the Court's holding was that MARA is not pre-empted by federal law; the court did not hold that a MARA claim is limited to or requires *all* of the facts underlying the claim to have transpired *exclusively* within the state.[6]

Defendants' reliance on *Aurora Cable Communications, Inc. v. Jones Intercable, Inc.*, 720 F. Supp. 600 (D. Mich. 1989) is similarly misplaced. In that case, the court held that the defendants were entitled to summary judgment on plaintiff's federal antitrust claims on *Noerr-Pennington* grounds. The court then held that summary judgment was similarly appropriate under MARA, noting that MARA "parallels" the Sherman Antitrust Act, *id*. at 603, and that activities not in violation of one are also not in violation of the other. Nothing in *Aurora Cable* suggests that MARA and the Sherman Act are mutually exclusive such that indirect purchasers are foreclosed from pursuing claims under Michigan law for interstate antitrust conduct.

Defendants have therefore pointed to nothing in the statute or the case law prohibiting Plaintiff Wayne County's antitrust claim under Michigan law. Plaintiff purchased the price-

[6] While all the parties were Michigan citizens or institutions created under Michigan law, that fact played no role in the Court's holding. *See Sheet Metal Workers*, 737 F. Supp. 2d at 396 ("*Peoples Savings Bank* simply observed that the monopolistic activities in question *in that case* were predominantly local. . . . The court did *not* rule that the MARA *only* applies to activities that are predominantly local").

fixed item in Michigan, suffered harm in Michigan, and Michigan clearly has an interest in its citizens redressing harms stemming from Defendants' anticompetitive conduct suffered within its borders.

ii. New York

Plaintiffs SHWD, Woodridge and Fallsburg have similarly stated a claim under New York's antitrust law because they were harmed in New York by price-fixed DIPF they purchased in New York. SACAC ¶¶ 29-31, 38, 42. Again, all Defendants sold their artificially-priced goods through NewYork-based distributors, and McWane maintained its monopoly by, *inter alia*, threatening to eliminate rebates to distributors in New York and other states. Moreover, Defendants again cite no case law which requires that *all* the actions underlying such a claim to have occurred within the state.

> New York's state antitrust law, the Donnelly Act, provides in pertinent part that:
>
> Every contract, agreement, arrangement or combination whereby
>
> A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
>
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained . . . is hereby declared to be against public policy, illegal and void.

NY CLS Gen Bus § 340. Thus, by the plain-language of the statute, Plaintiffs have stated a claim since they were injured by Defendants' anticompetitive conduct within the state: they bought DIPF products marketed and sold in New York.

Lacking a statutory basis for their position, Defendants again try to manufacture a rule – namely, that New York antitrust law only reaches claims whose underlying facts take place exclusively within the state – out of cases that do not support it.

In *Baker v. Walter Reade Theatres, Inc.*, 237 N.Y.S.2d 795 (Sup. Ct. 1962), plaintiff sued defendant under New York state antitrust law, claiming the latter had tried to monopolize movie distribution in parts of New Jersey. The court, finding that the purpose of the law was to promote free competition within the state, and not adjudicate the legality of contracts that had their impact *outside* the state, dismissed the suit. *Id*. at 797. Here, by contrast, the antitrust conduct whose impact was felt by Plaintiffs *within* the state. *Baker* is thus beside the point.

In *Bowlus v. Alexander & Alexander Services, Inc.*, 659 F. Supp. 914 (S.D.N.Y. 1987), plaintiff sued a former employer under state antitrust law and related grounds over the employer's attempted enforcement of several non-compete agreements in state court. After defendant removed the case to federal court, plaintiff moved to have it remanded. The question before the court was whether removal of that case had been proper; the court held that it was not. *Id*. at 921. Echoing *Peoples Savings Bank*, the court found that there was no pre-emption issue since federal law did not "preclude state courts from adjudicating claims arising under state antitrust law." *Id*. at 918. Removal and preemption were thus at issue – *not* the extraterritorial reach of the state's antitrust law. Thus, the comment of the *Bowlus* court that "the language of the [Donnelly Act] itself limits its application to conduct within the state," *id*. at 917, is of no moment. Plaintiffs have adequately alleged conduct by Defendants that occurred within the state:. The plain language of the Donnelly Act allows for Plaintiffs' antitrust claims, and none of the case law supports Defendants' stance that *all* of the acts underlying such a claim must have transpired in New York.

iii. North Carolina

Plaintiff Yates has likewise stated a claim under North Carolina's antitrust law, the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") because Plaintiff alleges it was

harmed in North Carolina by Defendants' anticompetitive conduct in marketing and distributing price-fixed DIPF within the state. SACAC ¶¶ 19-22. Defendants' claim that North Carolina's UDTPA deals solely with intrastate activities is without merit.

The UDTPA succinctly states that: "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1. "To state a claim under the UDTPA, Plaintiffs must allege '(1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce and (3) plaintiff was injured as a result.'" *Lawrence v. UMLIC-Five Corporation*, 06 CVS 20643, 2007 NCBC LEXIS 20, 13 (N.C. Super. June 18, 2007). Falling squarely within the purview of the statute, Plaintiffs allege that they suffered injury as a result of purchasing price-fixed DIPF in North Carolina – where Defendants' marketed and distributed the products.

Turning to the case law, Defendants point to *Lawrence* for the proposition that the UDTPA does not reach a claim in which some of the alleged facts transpired out of state. But the court's ruling in *Lawrence* had nothing to do with the interstate application of the UDTPA.

In *Lawrence*, the plaintiffs, who were Texas residents, had originally sued defendants, North Carolina corporations, for improperly foreclosing on their Texas home. Plaintiffs were successful at trial but were stymied by defendants when they tried to collect on the damages awarded by the jury. Plaintiffs then brought a second suit in North Carolina state court under the UDTPA. The court ruled that the UDTPA claim should be dismissed because, while foreign plaintiffs were permitted to sue under the UDTPA, the case had nothing to do with competition between the parties or goods or services affecting the public. *Id.* at 17. By contrast, plaintiff Yates is a North Carolina resident and has alleged that it suffered a loss based on Defendants' marketing and distribution of a price-fixed DIPF product. *Lawrence* is thus irrelevant.

Defendants' citation to *In re Refrigerant Compressors Antitrust Litigation ("Refrigerant Compressors II")*, Case No. 2:09-md-02042, 2013 U.S. Dist. LEXIS 50737 (E.D. Mich. April 9, 2013), is similarly unavailing. In *Refrigerant Compressors II*, the court employed the amorphous concept of substantial versus incidental in-state injury in determining that the inflated prices North Carolina plaintiffs paid for the hermetic compressors for their refrigeration units was merely an incidental injury and thus improperly brought under the UDTPA. Critical to the Court's finding was that defendants' connection with North Carolina was remote: defendants merely manufactured a part that was then sold to a company which, in turn, put it into their refrigeration units and sold these units around the world.

Here, however, the commercial nexus, and thus the locus of the harm to Yates, is obviously in North Carolina. Unlike *Refrigerant Compressors II*, this is not a situation involving a component part sold to another company, which put the component into a product that by chance ended up in North Carolina. Rather, Defendants intentionally marketed and distributed their price-fixed DIPF products within the state.[7]

iv. North Dakota

Plaintiff Fargo has stated a claim under North Dakota antitrust law because it has sufficiently alleged that it purchased Defendants' price-fixed products in the state and sustained its resulting economic injuries there.[8] SACAC ¶ 34.

[7] Defendants' challenge to Yates' North Carolina consumer protection claim fails for the same reason.

[8] Plaintiffs submitted the Miller affidavit attesting to Fargo's numerous DIPF purchases throughout the relevant period. The Miller affidavit provides more than sufficient support for Fargo's allegations, by documenting that: 1) Fargo had at least **100** waterworks projects that were completed in the relevant time period; 2) Fargo used **only two** waterworks distributors; 3) one Fargo distributor confirmed that the distributor "**only**" purchased its DIPF products from McWane and Star, while the other distributor confirmed that it "**primarily**" purchased DIPF products from one

Under North Dakota law: "[a] contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful. . . . 'Relevant market' means the geographical area of actual or potential competition in a line of commerce, all or any part of which is within this state." N.D. Cent. Code, § 51-08.1-01, 02. Defendants additionally cite, without argument, *In re Magnesium Oxide Antitrust Litigation*, a District of New Jersey case in which the court held that plaintiffs lacked standing to assert violations of North Dakota's antitrust law because they had failed to allege a causal connection between their injuries and the conduct prohibited by the law, which the court said required a showing that such conduct occurred, *or whose effects were felt*, in-state. Civ. No. 10-5943, 2011 U.S. Dist. LEXIS 121373, *26 n. 10 (D.N.J. Oct. 20, 2011).

Here, by contrast, Fargo has alleged, and attested to in a sworn affidavit, precisely such a causal connection: Plaintiff purchased Defendants' price-fixed DIPF products, and suffered resulting economic harm, *in-state*. Being a city located within the state of North Dakota, it is impossible that Plaintiff could have sustained injury anywhere else.

c. State Consumer Protection Claims

Defendants' arguments regarding the consumer protection laws of New Hampshire, North Carolina (addressed in the prior section) and Florida fare no better.

i. New Hampshire

Indirect purchaser claims are permitted under New Hampshire law. *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 374 (D.D.C. 2002). The New Hampshire Supreme Court allows indirect purchaser class actions under N.H. Rev. Stat. § 358-A:2(XIV). *LaChance*

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of the Defendants; and 4) the distributors have the pertinent information, but neither is voluntarily cooperating with Plaintiffs due to a fear of alienating the Defendants. SACAC, at Exhibit 1, Affidavit of Mike Miller, at ¶¶ 2, 4-6 and Exhibit A, pp. 1-17.

v. United States Smokeless Tobacco Co., 156 N.H. 88,93 1 A.2d 571 (N.H. 2007) (general anticompetition business practices amount to antitrust violations, effects in New Hampshire); *accord Chocolate Confectionary Antitrust Litig.*, 749 F. Supp. 2d 224, 234-35 (M.D. Pa. 2010). Defendants again rely on *In re Refrigerant Compressors Antitrust Litig*., No. 2:09-md-020402, 2013 U.S. Dist. LEXIS 50737 (E.D. Mich. Apr. 9, 2013), to argue that the New Hampshire claims should be dismissed. Def. Consol. Br. at 20. With respect to the claim under the New Hampshire antitrust statute, the allegations in the SACAC as to Waterline are materially different from those in *Refrigerant Compressors*. In that case the complaint merely alleged that the conspiracy resulted in the sale of a product containing the priced-fixed product to the New Hampshire plaintiff, not that he purchased the price-fixed product itself. *Refrigerant Compressors*, 2013 U.S. Dist. LEXIS 50737, at *13. Waterline, on the other hand, alleges that it purchased DIPF.

Further, the court in *In re New Motor Vehicles Canadian Export Litig.*, 350 F. Supp. 160 (D. Me. 2004), explained that the state courts in New Hampshire had not addressed whether just the trade or commerce or the unlawful act must occur in New Hampshire, although some Federal courts had concluded that the latter is required. *Id.* at 193. The court did not have to decide the issue because sales of vehicles in New Hampshire "are trade or commerce" within the state and plaintiffs alleged that the conspiracy involved New Hampshire automobile dealers. *Id.*

ii. Florida

Defendants McWane and Sigma rightly concede the sufficiency of Plaintiffs' allegations under Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). As the court in *In re Pool Products Distribution Market Antitrust Litigation* recently held:

> The FDUTPA prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or

> commerce." Fla. Stat. Ann. § 501.204. Section 501.204(2) provides that in determining what constitutes an "unfair method of competition" under subsection 501.204(1), "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1)." The FTC Act, in turn, encompasses violations of the antitrust laws. *See* Federal Trade Commission Act, § 5(a)(1), 15 U.S.C.A. § 45(a)(1); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454-55 (1986) (holding that antitrust violations are unfair methods of competition under the FTC Act). Thus, the acts proscribed by subsection 501.204(1) include the antitrust violations alleged by IPPs, specifically the attempted monopolization and anticompetitive vertical agreements that lie at the heart of all of plaintiffs' claims. Therefore, the FDUTPA claim based on unfair methods of competition survives the motion to dismiss.

2013 U.S. Dist. LEXIS 74192, 34-35 (E.D. La. May 24, 2013). Virtually the same analysis applies to Plaintiffs' claims in this litigation.

Nevertheless, Star argues that Plaintiffs' FDUTPA claims should be dismissed for failure to comply with Fed. R. Civ. P. 9(b). For the reasons set forth in the well-reasoned *Pool Products* opinion, Star's assertions regarding Rule 9(b) are beside the point. Plaintiffs have sufficiently alleged an "unfair method of competition" on the part of Defendants. Nothing more is required.

2. Plaintiffs Have Sufficiently Pled Violations of Antitrust and Consumer Protection Laws in the Remaining *Illinois Brick* Repealer States

Defendants invite the court to prematurely address their argument that Plaintiffs do not have "standing to sue under the laws of jurisdictions in which they do not personally allege any injury." Def. Consol. Br. at 14. However, as numerous courts have recognized, Defendants' argument, couched as an issue of standing, is really a matter for class certification.

In a class action, once it is determined that a plaintiff has individual standing to assert a claim against the defendants, then the relevant inquiry is plaintiff's ability to represent other class members. That question is governed by class certification requirements set forth in Rule 23, and thus should be addressed during the class certification stage of the litigation. This makes sense because the standing concern only exists when the named plaintiff seeks to represent class

members in various states. If consideration of the class action requirements results in denial of class certification, then any standing issue becomes moot. Waiting to consider the issue is not the legal equivalent of kicking the can down the road. Instead, it is the most logical and efficient way to address it.

a. The SACAC Sufficiently Alleges The Standing Elements

Defendants' facial attack on the SACAC's standing allegations fails because, as set forth above, the SACAC sufficiently sets forth the basis for the Plaintiffs' standing as to each of the counts asserted. The SACAC alleges that "Plaintiffs indirectly purchased DIPF during the Class Period. As a direct and proximate result of the unlawful conduct and conspiracy of Defendants alleged herein, Plaintiffs and other members of the Class have paid more during the Class Period for DIPF than they otherwise would have paid in a competitive market and have therefore been injured in their respective business and property." *Id.* ¶9. Paragraph 14 further alleges that, "[a]s a result of the activities described [in the SACAC], Defendants have: (a) Caused damage to the residents of every state, including the states identified herein; (b) Caused damage in every state, including each of the states identified herein, by acts or omissions committed outside each such state by regularly doing or soliciting business in each such state; (c) Engaged in persistent courses of conduct within every state and/or derived substantial revenue from the marketing of DIPF; and (d) Committed acts or omissions that they knew or should have known would cause damage (and did, in fact, cause such damage) in every state while regularly doing or soliciting business in each such state, engaging in other persistent courses of conduct in each such state, and/or deriving substantial revenue from the marketing of DIPF in each such state."

Each Plaintiff alleges the states where they have their principal place of business or are located, that they indirectly purchased DIPF, and that they were each "injured as a result of

Defendants' illegal conduct as alleged [in the SACAC]." SACAC ¶¶ 18, 22, 25, 27, 31, 33, 36, 38 and 40.

The SACAC further alleges the following effects from Defendants' anticompetitive conduct: "(a) Price competition has been restrained or eliminated with respect to DIPF; (b) the prices of DIPF have been fixed, raised, maintained, or stabilized at artificially inflated levels; and (c) Indirect purchasers of DIPF have been deprived of free and open competition. SACAC ¶¶ 118, 145; *see also* SACAC ¶¶ 107, 202, 207, 233, 249, 250 and 281.

The SACAC also alleges that "Plaintiffs and the members of the Classes have paid supra-competitive prices for DIPF" (SACAC ¶ 119); "[t]he inflated prices of DIPF resulting from Defendants' price-fixing conspiracy have been passed on to Plaintiffs and the other Class members (SACAC ¶ 120); and that "[b]y reason of the alleged violations of the antitrust laws, Plaintiffs and the members of the Classes – contractors, municipalities and regional water authorities – have sustained injury to their businesses or property, having paid higher prices for DIPF than they would have paid in the absence of Defendants' illegal contract, combination, or conspiracy . . . This is an antitrust injury of the type that the antitrust laws were meant to punish and prevent." SACAC ¶ 122.

Thus, the SACAC adequately alleges the elements of Plaintiffs' standing. It avers that: (1) Plaintiffs suffered an injury in fact; (2) caused by the Defendants' conduct; (3) that can be redressed by the relief they are seeking. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To establish Article III standing, Plaintiffs are not required to allege that they indirectly purchased or were harmed in a particular state. *Fond Du Lac Bumper Exchange, Inc.*, Case No. 09-CV-00852, 2012 U.S. Dist. LEXIS 125677 (E.D. Wis. Sept. 5, 2012). *In re Processed Egg Products Antitrust Litig.*, 851 F. Supp. 2d 867, 886-88 (E.D. Pa. 2012). In a class

action, "standing requires that the named plaintiffs' injury be typical of the class members he or she seeks to represent." *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp 2d 538, 579 (M.D. Pa. 2009) (citing Fed. R. Civ. P. 23(a)(3); *In re Wafarin Sodium Antitrust Litig.*, 212 F.R.D. 23 1,246 (D. Del. 2002)).

b. Any Standing Concern Should Be Considered In Connection With Class Certification Proceedings

Each Plaintiff has sufficiently pled Article III standing. Whether some or all Plaintiffs can represent class members from other states is a separate question, reserved for a different juncture in the litigation. Defendants' argument conflates standing and class certification, and therefore should be rejected.

Arrayed against Defendants' position are numerous cases from this Circuit and beyond. One is *Ramirez v. STi Prepaid LLC*, 644 F. Supp.2d 496, 504-06 (D.N.J. 2009). In *Ramirez*, the two named plaintiffs brought a class action alleging that defendants had violated the consumer protection laws of at least eleven states by selling prepaid phone cards with inadequate or non-existent disclosures about the cards' charges and fees. *Id.* at 499. Plaintiffs further alleged that they purchased the offending cards, and that had the charges and fees been adequately disclosed, they would not have purchased the cards or would not have paid full price for them. *Id.* Plaintiffs sought to represent the injured consumers in not only New Jersey and New York, the states where they resided, but also in nine other states with similar laws. *Id.* at 498-99.

The court rejected defendants' motion to dismiss on standing grounds, reasoning as follows: First, "in the class action context, named representatives need only establish that they individually have standing to bring their claims." *Id.* at 504. "'[W]hether or not other class members have standing" is not a relevant inquiry. *Id.* at 505 (quoting *Winer Family Trust v. Queen*, 503 F.3d 319, 325-26 (3d Cir. 2007)). Since the named plaintiffs had standing to assert their in-

dividual claims, defendants' argument fell flat. Second, "Defendants' [standing] argument . . . conflate[d] the issue of whether the named Plaintiffs have standing to bring their individual claims with the secondary issue of whether they can meet the requirements to certify a class under Rule 23." *Id.* at 505. But since "the named plaintiffs have standing to bring their individual claims... [t]hat is all that is required at this stage of the litigation." *Id.* at 506.

As long as the named plaintiffs have individual standing to sue defendants, the relevant question is "'whether [the named class representatives'] injuries are sufficiently similar to those of the purported class to justify the prosecution of a nationwide class action."' *Id.* at 506 (quoting *In re Grand Theft Auto Video Game Consumer Litig.* (No. II), 06 MD 1739, 2006 U.S. Dist. LEXIS 78064 (S.D.N.Y. Oct. 25, 2006) (citing *In re Buspirone*, 185 F. Supp. 2d 363,377 (S.D.N.Y. 2002)). The answer to this question is appropriately determined at the class certification stage. *Id.*

Recently, in *In re Automotive Parts Antitrust Litig.*, No. 12-md-02311, 2013 U.S. Dist. LEXIS 80338 (June 6, 2013), the court followed the better reasoned line of cases and concluded that "the better path is to defer this issue until the class certification stage."[9] *Accord Hoving v. Transnation Title Ins. Co.*, 545 F. Supp. 2d 662, 667-68 (E. D. Mich. 2008).

Likewise, the court in *In re Polyurethane Foam Antitrust Litigation* found that it was premature to dismiss the state-law claims in which the named indirect purchaser plaintiffs did not reside at this stage:

> This Court would similarly confuse Article III standing and Federal Civil Rule 23's requirements if it would, at this stage, dismiss all state-law claims but those of the jurisdictions in which the named

[9] In reaching its conclusion, the court rejected the reasoning set forth in *In re Refrigerant Compressors*, upon which Defendants rely. Def. Consol. Br. at 15 n.9.

> Indirect Purchaser Plaintiffs reside, or to which they are connected … since the supposed standing deficiencies ... arise because the Indirect Purchaser Plaintiffs invoke state antitrust and consumer protection statutes for each state from which putative class members are drawn, this Court will determine whether the Indirect Purchaser Plaintiffs may, as class representatives, advance their state-law claims at class certification.

In re Polyurethane Foam Antitrust Litig., 799 F.Supp.2d 777, 806 (N.D. Ohio 2011).

The court in *In re Chocolate Confectionary Antirust Litig.*, *supra*, also squarely addressed the standing issues raised there (and here) by defendants, and followed the better reasoned opinions in determining that such issues are more appropriately considered at the class certification stage of the proceedings. In *Chocolate*, the named indirect purchaser plaintiffs in an action alleging collusion by the major chocolate manufacturers claimed that the defendants' activities violated the antitrust and consumer protection statutes of twenty-four states and the District of Columbia. Defendants sought dismissal of the claims under the state statutes of the states where no class representative resided or did business, claiming that the plaintiffs had no standing to assert claims based on the laws of states where they were not injured. *Id.* at 578. The court decided that the appropriate time to consider the standing challenge was at the class certification stage. Relying on *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 204 (D.N.J. 2003), the court decided that *Ortiz v. Fibreboard Corp.* 527 U.S. 815, 831 (1999) and *Amchem Prods.Inc. v. Windsor*, 521 U.S. 591, 612 (1997), authorize district courts in class action cases to evaluate class issues before standing concerns if the latter are "logically antecedent" to the former. *Chocolate*, 602 F. Supp. 2d at 579. In *Chocolate*, because the plaintiffs' capacity to represent class members from other

states depended upon certification of a class including them, there was no standing question at the motion to dismiss stage except for that of the named plaintiffs. *Id.* at 579.[10]

C. Plaintiffs Who Purchased As Part of Water Projects Have Standing

Defendants also wrongly distinguish between Plaintiffs who purchased DIPF as a standalone product and those who purchased DIPF as part of a water project. Defendants claim that water project purchasers somehow lack standing to seek a recovery for the damages that they incurred as a result of Defendants' anticompetitive conduct. Defendants' argument lacks merit and should be rejected.

1. Water Project Purchasers Have Article III Standing

Plaintiffs' allegations are sufficient to establish Article III standing. Article III standing requires: "(1) an 'injury in fact'; (2) 'a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court'; and (3) a showing that it 'be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *N.J. Physicians, Inc. v. President of United States*, 653 F.3d 234, 238 (3d Cir. 2011) (quoting Lujan, 504 U.S. at 560-61). At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice to establish standing. *See Lujan* at 561.

Here, the SACAC alleges: (a) Defendants engaged in anticompetitive conduct, SACAC ¶¶ 54-110; (b) because of their conduct, DIPF prices were artificially inflated, *id.* at ¶¶ 107, 118-

[10] Defendants' position has been rejected in numerous other cases. *E.g.*, *K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 543-544 (D.N.J. 2004) (The court decided not to address defendants' claim that named plaintiffs who did not purchase K-Dur in certain states were not injured and thus had no standing to bring claims under the laws of those states prior to determining class certification); *Sheet Metal Workers National Health Fund v. Amgen Inc.*, 2008 WL 3833577 at *8-9 (D.N.J. Aug. 13, 2008); *In re Hypodermic Prods. Antitrust Litig.*, 2007 WL 1959225, at * 15 (D.N.J. June 29, 2007).

22; (c) the resulting overcharges were passed-through the distribution chain to end-users including named Plaintiffs and other entities that purchased DIPF as part of water projects, *id.* at ¶¶ 26-27, 33-36, 41-42, 51-52, 119-122; (d) named Plaintiffs personally paid the overcharges, *id*; (e) the injury can be redressed, if granted, by the relief sought, which includes, *inter alia*, monetary damages, *see id.* at Prayer for Relief ¶¶ C, D, F, G. Further, the FTC has stated in its parallel antitrust proceeding "[f]ittings end users," including "municipalities, regional water authorities, and the contractors they hire to construct waterworks projects," are the entities "that ultimately paid the supracompetitive prices that are at issue." SACAC ¶ 121. Such allegations are sufficient to establish constitutional standing. *See In re Processed Egg Prods. Antitrust Litig.*, 851 F. Supp. 2d 867, 883-91 (E.D. Pa. 2012) (finding Article III standing where indirect purchasers alleged they paid artificially inflated prices for eggs and/or products containing eggs because of conspiracy); *see also D.R. Ward Const. Co. v. Rohm and Haas Co.*, 470 F.Supp.2d 485, 492-93 (E.D. Pa. 2006).

In response, Defendants claim that Plaintiffs failed to allege injury because there are no allegations that the price increase for DIPF caused higher prices for waterworks projects. But, this argument is merely an improper attempt to require evidence of pass-through at the motion to dismiss stage. Indeed, a plaintiff need not provide "detailed" allegations of pass-through in order to plead injury-in-fact and causation for purposes of constitutional standing to survive a Rule 12(b)(6) motion. *See In re Auto. Parts Antitrust Litig.*, No. 12-md-02311, 2013 U.S. Dist. LEXIS 80338, at *45-46 (June 6, 2013) (stating that missing allegations such as "allegations addressing how OEMs price their vehicles and how the price of component parts affects the price of the finished vehicle" "do not provide for dismissal under Rule12(b)(6)"); *see also Hyland v. Homeservices of Am., Inc.*, No. 3:05-CV-612-R, 2008 U.S. Dist. LEXIS 65250, at *(W.D. Ky.

Aug. 25, 2008) (holding that allegations of injury sufficed to establish Article III standing at motion to dismiss stage, despite lack of "empirical data or studies" demonstrating pass-through mechanics).

In any event, the SACAC clearly alleges that the distributors passed-on Defendants' supra-competitive prices to Plaintiffs, causing them to pay more for waterworks projects containing DIPF than they would have otherwise. SACAC ¶¶ 119-22. Such "[a]n economic loss due to paying an illegally inflated price is sufficient to satisfy the injury requirement for Article III standing." *Hyland*, 2008 U.S. Dist. LEXIS 65250, at * 10. *See also Egg Prods.*, 851 F. Supp. at 883-91 (finding injury-in-fact sufficiently alleged where indirect purchasers described conduct and that they personally purchased priced-fixed product at "artificially inflated prices").[11]

Lastly, Defendants' reliance on *In re Magnesium Oxide Antitrust Litig.*, No. 10-5943, 2012 U.S. Dist. LEXIS 48427 (Apr. 5, 2012), is misplaced. There, the court dismissed the action because the indirect purchasers failed to allege sufficient nexus between increases in the prices of the products that they purchased, which contained the price-fixed chemicals, and the conspiracy. *Id*. at 27-28. By contrast, Plaintiffs have pled such a nexus here, *supra*.[12]

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[11] Further, economic authority underscores the plausibility that indirect purchasers are often the most harmed by illegal overcharges. *See, e.g.*, Robert G. Harris & Lawrence A. Sullivan, Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis, 128 U. Pa. L. Rev. 269, 276 (1979) (emphasis in original) ("[I]n a multiple-level chain of distribution, *passing on monopoly overcharges is not the exception: it is the rule*."); Antitrust Modernization Commission, Report and Recommendations, 256 (April 2007) *available at* http://www.amc.gov/report_recommendation/toc.htm ("when a price-fixing manufacturer overcharges for the goods it sells, the party who purchases the goods directly from that manufacturer pays the overcharge in the first instance. This 'direct purchaser' then may incorporate the price-fixed good into the products it sells and pass on to its distributors all or some portion of the manufacturer's overcharge. In turn, the distributors may be able to pass on all or a part of that overcharge to consumers.").

[12] Even if the price of DIPF were a small percentage of the water systems proejcts' cost, as Defendants argue, "Defendants may not shield themselves from liability by fixing prices on a

2. Water Project Purchasers Have Antitrust Standing

Defendants contend that Plaintiffs lack antitrust standing to bring state claims based on *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*").[13] Defendants are wrong. *AGC* is an interpretation of federal anti-trust law in a different context and does not address state indirect purchaser actions. Numerous courts addressing this issue have held that *AGC* does not apply to state indirect purchaser actions absent a clear directive from the states' legislatures or highest courts—even in the face of state harmonization provisions or reference to federal antitrust precedents.[14]

While Defendants concede that *AGC* would not apply to Minnesota and North Carolina, Defendants identify cases purportedly supporting the application of *AGC* to "21" or "22" other *Illinois Brick* repealer states. But, Defendants' arguments regarding *AGC*'s applicability to the relevant state statutes are incorrect or are factually inapposite.[15]

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relatively inexpensive item." *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 614-15 (N.D. Cal. 2009) (rejecting defendants' argument that because price increase on price-fixed component had *de minimis* effect on overall product, there was no injury).

[13] The *AGC* factors are: (1) the nature of plaintiffs' alleged injuries and whether plaintiffs were participants in the relevant markets; (2) the directness of the alleged injury; (3) the speculative nature of the alleged harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. 459 U.S. at 536-39.

[14] *See, e.g., D.R. Ward*, 470 F. Supp. at 496 (finding lower state-court decision insufficient); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp. 2d 1011, 1023-24 (N.D. Cal. 2010) (finding that *AGC* factors did not apply to Arizona, Kansas, Michigan, Minnesota, Mississippi, Nevada, New Mexico, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin); *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1153 (N.D. Cal. 2009) ("This Court, however, is reticent to adopt an across-the-board rule that a state's harmonization provision, whether created by statute or common law, is an appropriate means of predicting how a state's highest court would rule regarding the applicability of *AGC* to state law antitrust claims").

[15] For instance, in *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907 (N.D. Ill. 2009), the court declined to find *AGC* applicable to plaintiffs' Kansas and Michigan antitrust claims, and

Moreover, even assuming *arguendo* that *AGC* applied here, Plaintiffs have alleged facts sufficient to establish antitrust standing under *AGC*. First, Plaintiffs who purchased DIPF as part of water projects have allegedly suffered antitrust injury. SACAC ¶¶ 119-22. Plaintiffs' injuries are exactly the type of harm the state antitrust laws were intended to remedy. "It is difficult to imagine a more formidable demonstration of antitrust injury." *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 400 (3d Cir. 2000); *see also Lorix v. Crompton Corp.*, 736 N.W.2d 619, 631 (2007) ("The violation complained of – price fixing – is a *per se* violation of the law that strikes at the heart of antitrust law's purpose . . . . The injury alleged – overcharge – is exactly the sort that would be expected to flow from the violation.").

Second, Plaintiffs who purchased DIPF as part of water projects are market participants because they made their purchases in the very market where the anticompetitive conduct occurred. *See, e.g.*, *In re Napster, Inc. Copyright Litig.*, 354 F. Supp. 2d 1113, 1125 (N.D. Cal. 2005) ("[U]nder California law, an indirect purchaser of goods or services is deemed to participate as a customer in the relevant market and thus may suffer a cognizable antitrust injury"). Even if Defendants were correct in characterizing the anticompetitive conduct as only affecting the market for DIPF (they are not), numerous courts have rejected similar arguments. *See, e.g.*, *Flash Memory*, 643 F. Supp. at *1154 (holding that indirect purchasers of flash memory based-products are in the "same market" as direct purchasers of the flash memory component) (citations omitted); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 159 (3d Cir. 2002) (holding that plaintiffs that purchased corrugated sheets or boxes from defendants that fixed linerboard prices had standing, even though "linerboard was a mere ingredient").

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denied the motion to dismiss on that basis. Defendants' reliance on the *DRAM* cases is also misplaced, as several courts have refused to follow these cases, recognizing the impropriety of revising repealer state antitrust laws. *GPU*, 527 F. Supp. 2d at 1026, *In re TFT-LCD Antirust Litig.*, 586 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008); *Flash Memory*, 643 F. Supp. 2d at 1152-53.

Third, the injury is "direct" because DIPF: (1) constitutes an identifiable physical component that is severable from a water project; and (2) follows a traceable chain from Defendants to intermediaries to entities that contract for water projects. *See, e.g.*, *Auto. Parts*, 2013 U.S. Dist. LEXIS 80338, at *68 (directness requirement met based on allegations that cost of component traceable through production distribution chain) (citations omitted).

Fourth, duplicative recovery and apportionment of damages are not relevant here. It would be wrong to repudiate the laws of *Illinois Brick* repealer states, where those states permit monetary recovery. *See, e.g.*, *Auto Parts*, 2013 U.S. Dist. LEXIS 80338, at 71 (rejecting defendants' argument that recovery would be duplicative so as not to "undermine what the state legislatures have condoned"). Moreover, the cost of DIPF is traceable. Finally, Plaintiffs are direct victims because indirect purchasers often "suffer [] the greatest, if not the most direct, injury of the price-fixing conspiracy." *D.R. Ward*, 470 F. Supp. 2d at 503; *see also Lorix*, 736 N.W.2d at 631.

3. Plaintiffs Have a Viable Cause of Action for DIPF Purchased as Part of a Water Works Project

Defendants concede that Hallandale Beach, Waterline and WaterOne "currently have potentially viable claims." They argue, however, that because these entities purchased standalone DIPF, they cannot assert overcharges for purchasers of DIPF as part of water projects. As a preliminary matter, this "argument is better taken under the lens of typicality or adequacy of representation, rather than standing." *Forcellati v. Hyland's, Inc.*, 876 F. Supp. 2d 1155, 1161 (C.D. Cal. 2012).

In any event, Plaintiffs can seek such overcharges here because their claims are based on: (a) the same anticompetitive conduct that affected both stand-alone product purchasers and water project purchasers; and (b) involve the same price-fixed product (*i.e.*, DIPF) and the same De-

fendants. *See, e.g.*, *In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 447 (D. Kan. 2006) (finding that certain plaintiffs who purchased price-fixed product on stand-alone basis met typicality because claims "are all based on the same legal or remedial theory, which is that they suffered damages by virtue of the fact that they all purchased polyester polyols and related chemical systems at prices that were allegedly artificially inflated because of the price-fixing conspiracy among [Defendants] and their coconspirators") (citations omitted).

D. Umbrella Standing Prevents The Dismissal Of Certain Damages Claims

Damages claims by Plaintiffs Blair and Fallsburg survive the Motion to Dismiss pursuant to umbrella standing. Umbrella standing is based on the proposition that, "[i]n a cartelized market, the price charged by nonconspirators will be a function of the price charged by conspirators; [...] the prices charged by the nonconspirators are the result of the existence of the cartel." *In re Uranium Antitrust Litig.*, 552 F. Supp. 518, 525 (N.D. Ill. 1982). In other words, when a controlling share of the market has conspired to raise the price of a certain class of products, even nonconspirators who sell the product *benefit* by having the ability to increase their price to meet the supracompetitive price instituted by the conspirators, while purchasers of the product are *injured* because they paid a supracompetitive price whether the product was purchased from either the conspirators *or* the nonconspirators. Plaintiffs aver that this happened in the instant case. As to those purchases by Plaintiffs which were not expressly alleged to be from the Defendants during specific time periods, Plaintiffs have sufficiently pled that all Defendants conspired to raise and fix prices of DIPF in 2008-2009 and that Defendants controlled over 90% of the entire DIPF market – with McWane controlling more than 90% of the domestic market during the relevant time period. SAC ¶¶ 3, 54-76, 83. It naturally follows that the purchase of any DIPF during this time period would have been affected by the supracompetitive prices implemented by the con-

spirators, regardless of whether the DIPF was purchased from McWane, Sigma, Star or a nonconspirator. Similarly, McWane's illegal monopoly of the domestic market beginning in February 2009 allowed McWane to implement supracompetitive prices of domestic DIPF from February 2009 through the present, thereby benefiting Star and any other nonconspirator, and injuring any purchaser of domestic DIPF during that time period. For example, Fallsburg was injured by paying supracompetitive prices for DIPF manufactured by Star as a result of McWane/Sigma's illegal conduct.

E. Plaintiffs Have Sufficiently Alleged Unjust Enrichment Claims

Defendants seek dismissal of Plaintiffs' unjust enrichment claims, arguing that: (1) the claim cannot survive because the laws governing unjust enrichment vary materially from state to state; and (2) Plaintiffs cannot use an unjust enrichment claim to pursue relief otherwise unavailable under state antitrust or consumer-protection laws. Defendants' arguments are without merit.

Defendants' first argument fails because there are no material differences in the law of unjust enrichment from state to state. *See, e.g., In re Mercedes–Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 58 (D.N.J. 2009), *opinion clarified on other grounds*, 267 F.R.D. 113 (D.N.J. 2010), *opinion modified on reconsideration on other grounds*, MDL No. 1914, 2010 U.S. Dist. LEXIS 75911 (D.N.J. July 22, 2010) ("While there are minor variations in the elements of unjust enrichment under the laws of the various states, those differences are not material . . . .") (citing *Agostino v. Quest Diagnostics, Inc.*, 256 F.R.D. 437, 463–64 (D.N.J. 2009)); *Powers v. Lycoming Engines*, 245 F.R.D. 226, 231 (E.D. Pa. 2007), *rev'd on other grounds*, 328 Fed. App'x 121 (3d Cir. 2009) ("Although there are numerous permutations of the elements of the [unjust enrichment] cause of action in the various states, there are few real differences.").

Contrary to Defendants' assertions, unjust enrichment is a universally recognized cause of action that is essentially the same throughout the United States. Thus, Plaintiffs' pleading can be evaluated without reference to a particular body of case law at this stage of the litigation. *In re K-Dur Antitrust Litigation* is squarely on point. There, the court denied the defendant's motion to dismiss the indirect purchaser plaintiffs' fifty-state unjust enrichment claim, finding that the critical inquiry is whether the plaintiffs' detriment and the defendant's benefit are related to, and flow from, the challenged conduct. 338 F. Supp. 2d 517, 544, 546 (D.N.J. 2004).

Furthermore, again contrary to Defendants' assertions, Plaintiffs have identified the state laws under which they bring their unjust enrichment claims. Plaintiffs' unjust enrichment claim specifically "incorporate[s] by reference the allegations in the preceding paragraphs," *see* SACAC at ¶ 283, and is limited to Plaintiffs and members of the Damages Classes, *see id.* ¶¶ 285–86. The "Damages Classes" are defined in the SACAC as individuals who made relevant purchases in twenty-eight states (each of which is specifically named) and the District of Columbia, *id.* ¶ 132. Accordingly, Plaintiffs have adequately identified the state laws under which they bring their unjust enrichment claim.[16] *See* Fed. R. Civ. P. 10(c) ("A statement in a pleading may be adopted by reference elsewhere in the same pleading . . .).

Defendants further claim that some states have a "direct benefit" element in their unjust enrichment law, which they assert Plaintiffs cannot satisfy. *See* McWane Mem. at 22. This position misconstrues the relevant case law: there is no *per se* ban on indirect purchaser plaintiffs'

[16] Alternatively, if the court were to find in favor of Defendants on this issue, Plaintiffs respectfully request that the Court allow Plaintiffs to amend their complaint to more clearly state the laws under which they are bringing the unjust enrichment claims. *See, e.g., In re Skelaxin (Metaxalone) Antitrust Litig.*, 1:12-MD-2343, 2013 WL 2181185, at *25 (E.D. Tenn. May 20, 2013) (granting plaintiffs leave to amend because defendants were on notice as to which states' laws unjust enrichment claims were being brought under even though the states were not directly listed in the complaint); *In re Flonase*, 610 F.Supp.2d 409, 419 (E.D. Pa. 2009) (granting leave to amend). Dismissing with prejudice would be improper in this instance.

ability to claim unjust enrichment, even in states that do require a showing of some form of "direct benefit." *See, e.g.*, *In re DDAVP Indirect Purchaser Antitrust Litig.*, 903 F. Supp. 2d 198, 234 (S.D.N.Y. 2012) (denying a motion to dismiss state unjust enrichment claims under Florida and New York law because "despite not having direct dealings . . . with Defendants, Plaintiffs plausibly conferred some benefit on Defendants, albeit indirectly, by purchasing DDAVP at elevated prices, and Defendants profited . . . ."); *In re ConAgra Peanut Butter Prods. Liab. Litig,* No. 1:07–MD–1845-TWT, 2008 U.S. Dist. LEXIS 40753 (N.D. Ga. May 21, 2008) (finding that defendant manufacturer's direct marketing to consumers created enough of a direct benefit to allow for unjust enrichment claims by consumers that purchased the product through retailers). And, at least one court has held that determining whether Defendants received a direct benefit is a question of fact that should not be resolved at the motion to dismiss stage. *See In re Canon Cameras*, 2006 U.S. Dist. LEXIS 43223 (S.D.N.Y. June 23, 2006).

Defendants' second argument, that Plaintiffs cannot use an unjust enrichment claim to pursue relief otherwise unavailable under state antitrust or consumer-protection laws, must also fail.[17] Defendants' argument is moot because Plaintiffs only make unjust enrichment claims in twenty-eight states and the District of Columbia, all of which allow indirect purchasers to pursue claims under either state antitrust laws (Counts III, V, VII), state consumer protection and unfair

[17] Defendant Star makes a related argument stating that the laws of five states preclude an unjust enrichment claim when there is an adequate remedy at law. *See* Star Mem. at 9. Under Rule 8, a party may plead alternative theories of liability, but "may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds." Fed. R. Civ. P. 8(e)(2). Relying on this rule, the court in *D.R. Ward Construction Co. v. Rohm & Hass Co.*, 470 F. Supp. 2d 485 (E.D. Pa. 2006), reasoned that the viability of an unjust enrichment claim does not hinge upon the success of the state statutory antitrust claims "because the Federal Rules of Civil Procedure permit parties to plead claims in the alternative and because, in practice, equitable remedies for unjust enrichment claims are often awarded when state statutory claims prove unsuccessful." *Id.* at 506.

competition laws (Counts IV,VI, VII), or both. *See* SACAC ¶¶ 132, 285. Accordingly, the Court should not dismiss Plaintiffs' unjust enrichment claims on this basis either.

F. Plaintiffs Have Adequately Sought Injunctive Relief

All Plaintiffs have standing to assert claims for injunctive relief. In the Third Circuit, the requisite showing for an "entitlement to injunctive relief [is] the demonstration of: (1) threatened loss or injury cognizable in equity; (2) proximately resulting from the alleged antitrust injury." *In re Warfarin Sodium Antitrust Litigation*, 214 F.3d 395, 399-400 (3d Cir. 2000). In order to plead sufficient facts to support a claim for injunctive relief, then, Plaintiffs must plead that Defendants' conduct precluded competition which caused DIPF purchasers to pay inflated prices.

In *Warfarin*, the court analyzed the relationship of the indirect purchasers to the makers of the drug to determine if standing for injunctive relief should be recognized. The court found that the purchasers of Coumadin were "foreseeable and necessary victims" of the antitrust violations because they had no choice in which warfarin sodium they purchased; and that the excess amount paid by Coumadin users was "inextricably intertwined" with the injury the defendant sought to inflict and the overcharge was the aim of the defendant's preclusive effect.

In the case at bar, Plaintiffs have asserted two counts requesting injunctive relief: 1) Count One alleges a price-fixing conspiracy by Defendants that began in September 2009 and continuing to the present; and 2) Count Two alleges the maintenance of a monopoly by McWane that began in February 2009 and continuing to the present. SAC at ¶ 143 and 151. Like in *Warfarin*, Plaintiffs here are end users of products produced and distributed by Defendants and, therefore, are foreseeable and necessary victims of the antitrust violations due to the fact that the DIPF market is controlled by Defendants. Additionally, the price overcharges paid by purchasers of DIPF are inextricably intertwined with the aim of Defendants' conduct. Plaintiffs also suf-

ficiently pled that Defendants McWane and Sigma and their co-conspirators continued to conspire in restraint of trade and for the purposes of maintaining a monopoly in the domestic market after the original conspiracy period and continued to do so through the present. SAC ¶¶ 77-107. Finally, Plaintiffs have pled that Defendants maintain monopoly power by holding over a 90% share of the DIPF market, both imported and domestic. SAC ¶¶ 3, 8, 78.[18]

Defendants McWane and Sigma argue for dismissal of Plaintiffs' claims for injunctive relief because: (1) the SACAC purportedly lacks allegations of ongoing anticompetitive acts, and (2) the injunctive relief claims mimic the terms of SIGMA's consent decree with the FTC.

Defendants' first argument rests on incorrect assertions. The SACAC expressly includes adequate allegations of anticompetitive conduct "continuing to the present" in both the first and second claim that are sufficient to survive Defendants' motion to dismiss. SACAC ¶¶ 143–44, 151–52. Although Plaintiffs do not repeat all of the allegations that form a basis for Counts I and II within each section, they do incorporate by reference all of the preceding allegations in the SACAC, which is the basis for their claims for injunctive relief. SACAC ¶¶ 142, 146, 149, 150, 152, 154.

The SACAC, when read in the light most favorable to Plaintiffs, alleges not only that the anticompetitive conduct is "continuing into the present" and that members of the Injunctive Class have been injured, but also the factual basis underlying the allegations. SACAC ¶¶ 84–110, 143, 147, 151–52. When read together and taken as true, these allegations support a claim for injunctive relief. *See Ammond v. McGahn*, 532 F.2d 325, 329 (3d Cir. 1976) (characterizing the

[18] Even a plaintiff, such as Fallsburg, who purchased only from Star during 2010 and 2011, has an interest in an injunction because Defendants McWane's domination, with Sigma, of the Domestic DIPF market has driven up all prices for domestic DIPF. Likewise, Plaintiff Blair has also sufficiently pled that it purchased DIPF in 2011 and 2012, and, therefore, should not be dismissed at this stage.

requirement for injunctive relief as a "clear showing of immediate irreparable injury"). Past exposure to illegal conduct may be used as a basis for injunctive relief, if it is "accompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974); *Robinson v. Hornell Brewing Co.*, CIV. 11-2183 JBS-JS, 2012 U.S. Dist. LEXIS 33327 (D.N.J. Apr. 11, 2012).

Defendants also contend that the injunctive claims should be dismissed because they mimic the terms of SIGMA's consent decree with the FTC. Defendants rely principally on a case that is procedurally inapposite, *Ellis v. Gallatin Steel Co*., 390 F.3d 461, 476 (6th Cir. 2004). In *Ellis*, after reviewing the lower court's decision rendered after trial, the court ultimately denied the plaintiff's request for injunctive relief only after addressing the claim's merits. *Id*. at 476. The plaintiff was unsuccessful because of a failure to satisfy the traditional requirements necessary for obtaining an injunction, not because the pleadings could not survive a Rule 12(b)(6) motion. *Ellis* also did not, as Defendants imply, deny injunctive relief simply because a similar consent decree was in existence. Instead, the plaintiff in *Ellis* was given the opportunity to show why the consent decree did not adequately deal with the plaintiff's claims. *Id*. at 476.

IV. CONCLUSION

For the reasons set forth herein, Defendants' Motions to Dismiss should be denied in their entirety.

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Respectfully submitted,

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