UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: DIGITAL MUSIC ANTITRUST LITIGATION	)	MDL Docket No. 1780 (LAP)

DEFENDANTS' JOINT MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND TO STRIKE PORTIONS OF PLAINTIFFS' SECOND CONSOLIDATED AMENDED COMPLAINT

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All defendants submit this joint memorandum in support of their motion, pursuant to FED. R. CIV. P. 12(b)(6), to dismiss the Second Consolidated Amended Complaint for failure to state a claim and, alternatively, pursuant to FED. R. CIV. P. 12(f), to strike the last sentence of paragraph 38 and the entirety of paragraphs 87 and 106-112 of the complaint.[1]

INTRODUCTION

This complaint is only the latest in literally dozens of attempts by plaintiffs to allege a cognizable antitrust claim where none exists. Prompted by a press report of a New York State Antitrust Bureau investigation concerning the terms upon which recorded music was being made available for digital distribution, plaintiffs raced to file over thirty complaints around the country in which they made conclusory and often conflicting allegations of a purported conspiracy to fix the prices for "Internet Music"[2] and compact discs. After those actions were transferred to this Court by the Judicial Panel on Multidistrict Litigation, plaintiffs filed a clearly inadequate first consolidated amended complaint. As directed by the Court, defendants provided plaintiffs with a letter detailing the deficiencies in that complaint. In response, plaintiffs filed a Second Consolidated Amended Complaint on June 13, 2006. That complaint, for the following reasons,

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[1] This memorandum is submitted on behalf of all defendants: Bertelsmann, Inc.; SONY BMG Music Entertainment; Sony Corporation of America; Capitol Records dba EMI Music North America, Inc.; EMI Group North America, Inc.; Capitol-EMI Music, Inc.; Virgin Records America, Inc.; Time Warner Inc.; UMG Recordings, Inc.; and Warner Music Group Corp. (collectively, "defendants"). Time Warner, Bertelsmann and Sony Corporation of America are also submitting supplemental memoranda in support of defendants' motion to dismiss that address arguments unique to those entities.

[2] The complaint defines "Digital Music" as "music sold as digital files" and "Internet Music" as Digital Music delivered "online via the Internet." Compl. ¶ 2. Defendants do not accept those definitions as appropriate, but use the terms "Digital Music" and "Internet Music" for the purposes of this motion only.

still fails to allege facts sufficient to support a claim or to justify putting defendants through protracted proceedings while plaintiffs continue their search for a viable claim:

1. *The Complaint Does Not Satisfy The Requirements of Twombly.* The Supreme Court's recent decision clarifying the pleading requirements in antitrust suits requires dismissal of the complaint. Plaintiffs have failed to make allegations with enough "factual matter" to even "plausibly suggest" that parallel conduct among competitors was the product of "a preceding agreement." Instead, plaintiffs allege exactly what *Twombly* forecloses — conclusory allegations of "parallel conduct that could just as well be independent action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. __, 127 S.Ct. 1955, 1966 (2007). *See* Section I.

2. *Plaintiffs' Claims Through February 1, 2005 Have Already Been Settled and Released.* All members of the putative class that have purchased CDs have "fully, finally and forever released, relinquished and discharged" their claims through February 1, 2005 by the terms of a broad settlement agreement reached in a prior litigation. *See* Section II.

3. *Plaintiffs' Claims Involving the Sale of Compact Discs Cannot Survive.* Even if plaintiffs have stated an antitrust claim involving the sale of Internet Music, which they have not, and even if those claims have not been released, which they have, claims involving the sales of CDs cannot survive. Plaintiffs lack standing to bring these claims and have not sufficiently alleged antitrust injury with respect to such claims. *See* Section III.

4. *Plaintiffs Lack Standing to Assert Claims on Behalf of Residents of Other States.* Plaintiffs lack standing to bring claims under the laws of the fourteen jurisdictions in which no named class representative resides. *See* Section IV.

5. *Plaintiffs Simply Ignore the Specific Pleading Requirements for Many of the State Statutes Upon Which They Rely.* It is well-settled that indirect purchasers cannot recover

damages under federal antitrust laws. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1970). As a result, plaintiffs have attempted to piece together a patchwork complaint that relies upon state statutes that permit recovery by indirect purchasers (so-called *Illinois Brick*-repealer statutes). Plaintiffs, however, have failed to plead the elements necessary to state a claim under nearly all of these state laws. *See* Section V.

6. *Plaintiffs' Unjust Enrichment Claim Is Barred.* Plaintiffs' unjust enrichment claim is barred because an adequate remedy exists at law and because plaintiffs have failed to plead the requisite elements to state an unjust enrichment claim under state law. *See* Section VI.

7. *Plaintiffs' Extraneous Allegations Must Be Stricken.* Lacking any factual or substantive allegations in support of their antitrust claim, plaintiffs rely on a litany of extraneous, immaterial and inflammatory invective that must be stricken from the complaint. *See* Section VII.

BACKGROUND

The complaints in this multidistrict litigation began to appear within days of newspaper articles published on Christmas Eve, 2005. Warner Music had disclosed that the New York State Attorney General's Office was conducting an investigation into the pricing of recorded music sold by Apple on its "iTunes" website. According to these stories, Apple was charging 99 cents for every song it sells, but major music companies were advocating adoption of "variable pricing," by which the most popular recordings could sell for more and lesser-known music could sell for less. In the coming months, dozens of copycat cases were filed around the country and, by order of the Judicial Panel for Multidistrict Litigation entered on August 23, 2006, these complaints were consolidated before this Court pursuant to 28 U.S.C § 1407.

From the very first complaint filed in December 2005 through the Second Amended Consolidated Complaint filed in June 2007, this litigation has been a case in search of a theory.

The first complaint ("*Feferman*"), was brought on behalf of California residents who purchased Internet Music downloads. It alleged that each of the major music companies had "steadfastly charged California consumers a flat rate of $0.99 per single-track recording no matter what its actual consumer demand may be (or its per-song artist royalty expense) for songs downloadable from Apple Computer's iTunes Music [website]." Declaration of Helena Almeida, dated July 30, 2007 ("Almeida Decl.") Ex. A (*Feferman* Compl.) at ¶ 19.[3] Of course, only Apple — and certainly not the music companies — sets retail prices or sells anything on its iTunes website. And, the complaint never explained the glaring inconsistency between the allegation that the music companies were *fixing* a 99 cent price and the newspaper reports that these same companies were being investigated for *opposing* that 99 cent price.

The complaints that followed *Feferman* only compounded the inconsistencies. For example, in the *Bulcao* complaint, brought on behalf of consumers throughout the United States who purchase either Internet Music or CDs, the plaintiff alleged that the music companies had colluded to delay the development of delivery or music over the Internet and, rather than "steadfastly charg[ing]" 99 cents, as alleged in *Feferman*, had been collectively pressuring Apple to raise its price *above* the current 99 cents in order both to elevate prices for online music and to maintain higher prices for CDs. Almeida Decl. Ex. B (*Bulcao* Compl.) at ¶ 47.

In the midst of this, Lerach Coughlin, the same counsel that filed *Bulcao* and co-lead counsel for plaintiffs in this consolidated action, filed a conflicting complaint against Apple itself

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[3] The complaints that preceded the second amended consolidated complaint are illuminating and may properly be considered by this Court on this motion to dismiss. *See United States v. GAF Corp*., 928 F.2d 1253, 1259 (2d Cir. 1991) (superseded pleadings are admissible both in the case where originally filed and any subsequent litigation involving the party) (citations omitted); *Sulton v. Wright*, 265 F. Supp. 2d 292, 295 (S.D.N.Y. 2003) (concessions made in earlier complaints may be considered by the court on a motion to dismiss).

on behalf of consumers throughout the United States who purchased either an iPod made by Apple or Internet Music sold by Apple's iTunes (the "*Tucker*" action). *Tucker* alleges that Apple — not the music companies — has monopolized the market for Internet Music through iTunes to reap monopoly profits on its iPods.[4] Apple's objective, allegedly, is to leverage its monopoly over Internet Music — which, under the scenario portrayed by these allegations, it perpetuates by not charging more than competitive prices — in order to force consumers to buy *iPods* at inflated "supracompetitive prices." Almeida Decl. Ex. C (*Tucker v. Apple Computer, Inc.*, C-06-4457 (N.D. Cal.), *filed* July 21, 2006) at ¶ 12, 46, 54, 55.[5] Thus, in one breath plaintiffs' counsel alleges that the music companies are conspiring to raise the price of Internet Music, and in the next contends that Apple has a monopoly over Internet Music and is not raising the price of Internet Music. These wildly divergent portraits of the marketplace lay bare the "shoot first and learn the facts later" approach that has defined this litigation from the start.

In all, over thirty complaints have been filed on behalf of buyers of Internet Music in various states and throughout the United States charging multiple variations of the allegations described above. The history of these complaints goes a long way toward explaining why, as shown in the pages that follow, the complaint that has emerged from these pleadings asserts no plausible claims, makes no economic sense and must be dismissed.

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[4] The *Tucker* complaint alleges that Apple deliberately made iTunes incompatible with any players other than its iPods, and made iPods incompatible with any Internet Music store other than iTunes. Almeida Decl. Ex. C at ¶ 14, 15.

[5] The Court may take judicial notice of the complaint filed against Apple under FED. R. EVID. 201(b) on this motion. *See Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

THE SECOND CONSOLIDATED AMENDED COMPLAINT

In this latest complaint, plaintiffs purport to bring a putative class action on behalf of all persons or entities in twenty states plus the District of Columbia (defined in the complaint as the "End Purchaser States") that were indirect purchasers of Internet Music (through Apple or others) or CDs produced, manufactured, distributed and/or sold by defendants from December 4, 2001, through the conclusion of trial, for their own use and not for resale.[6] Compl. ¶¶ 44-45. These claims are asserted under the state laws of these twenty-one jurisdictions because *Illinois Brick* bars federal Sherman Act claims by indirect purchasers (Count II). Plaintiffs also assert a claim for unjust enrichment (Count III) and claims for violation of Section 1 of the Sherman Act on behalf of the few plaintiffs who by some means may have purchased Internet Music or CDs directly from defendants (Count I).

The purported bases for these claims are as follows: *First*, according to the complaint, defendants had the opportunity to conspire through a long-standing trade association and two joint ventures (which were reviewed by the Antitrust Division of the Department of Justice) and adopted "virtually" the same prices and terms of sale. This could not be a coincidence, the complaint contends, and therefore reflects the existence of a conspiracy. *Second*, each of the defendant music companies "could" have afforded to charge less for recorded music than it did because distributing recorded music through the Internet saves some of the costs associated with distributing the same recordings through CDs. The rest of the complaint is window dressing, designed to distract the Court's attention from how much is missing. Indeed, for all the verbiage in the 146-paragraph complaint, the conspiracy alleged is wholly implausible, the conspiracy

[6] Plaintiffs also seeks injunctive relief on behalf of all purchasers of "Digital Music" (which may be delivered either as Internet Music or CDs) produced, manufactured, licensed, distributed and/or sold by defendants in the United States. Compl. ¶ 43.

theory makes no economic sense, and there is nowhere near the degree of factual specificity required to state a viable antitrust claim. Even though defendants presented plaintiffs with each of the arguments as to why their complaint was inadequate, plaintiffs were unable to cure those defects through a Second Consolidated Amended Complaint. As a result, and for the reasons detailed below, plaintiffs' complaint should now be dismissed with prejudice.

ARGUMENT

I. *TWOMBLY* REQUIRES DISMISSAL OF THIS COMPLAINT

The Supreme Court recently addressed the pleading requirements in antitrust cases, affirming Judge Lynch's dismissal of the underlying antitrust complaint because the allegations failed to provide "plausible grounds to infer an agreement." *Twombly*, 127 S.Ct. at 1965. The Supreme Court emphasized that competitors responding in the same way to the same set of circumstances is not evidence of conspiracy and, therefore, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id*. at 1966. Indeed, *Twombly* announced that the days of alleging a "conceivable" antitrust conspiracy in order to survive a motion to dismiss are over. After *Twombly*, a complaint must allege sufficient "factual matter" (taken as true) to "plausibly suggest" that parallel conduct among competitors was the product of a "preceding agreement," and not "merely parallel conduct that could just as well be independent action." *Id.* at 1965-66. At the very least, *Twombly* requires allegations of the "specific time, place, [and] person involved in the alleged conspiracies" — *i.e.*, "*which* [defendants] supposedly agreed" and "*when* and *where* the illicit agreement took place." *Id.* at 1971 n.10 (emphases added).

The allegations in this complaint are neither plausible nor sufficiently specific to state a claim. At best, the complaint simply conjures up two "conceivable" theories of conspiracy, one based on the mere existence of joint ventures among the defendants and one based upon pure speculation about the distribution costs of Internet Music and how one might expect prices to

change given these assumed costs. Such allegations, however, ignore *Twombly's* clear imperative that plaintiffs must allege more than theories and instead must provide "factual matter" that "plausibly suggest[s]" that the defendants' conduct was the product of a "preceding agreement." *Id.* at 1965-66. Lacking even a single factual allegation that the conduct at issue was anything other than "mere[] parallel conduct that could just as well be independent action," the complaint demands to be dismissed. *Id.* at 1966.

A. The Allegation That Defendants' Joint Ventures Provided An Opportunity To Conspire

The complaint alleges that defendants had the opportunity to conspire through membership in a trade association and the formation of two joint ventures. At the same time they had this opportunity, defendants allegedly "adopted and adhered to" what are termed "virtually identical" pricing, terms and restrictions on the ability to make unlimited copies of copyrighted recordings without paying for them (known as digital rights management or "DRM" rules) and ultimately "adopted" identical terms of sale and "pricing schemes" for Internet Music. Compl. ¶¶ 127, 129. Assuming this were true, however, adopting such prices, terms and DRM rules would be entirely consistent with independent, though parallel, action. Plaintiffs never meet their burden of placing these allegations "in a context that raises a suggestion of a *preceding* agreement, not merely parallel conduct that could just as well be independent action." 127 S.Ct. at 1966 (emphasis added). Instead, the "*context*" in which these allegations arise points in exactly the opposite direction — *i.e.*, to "independent responses to common stimuli." *Id.* at 1966 n.4 (citation omitted).

1. Context

The complaint alleges that at "the outset" (presumably meaning at least as far back as 2001, when the allegations of the complaint begin), the music companies formed two joint

ventures, "MusicNet" (organized by Warner Music, Bertelsmann and EMI) and "pressplay" (organized by Sony and Universal Music) to begin selling digital music over the Internet. Compl. ¶ 67. It conspicuously ignores, however, that these joint ventures were formed to provide an alternative to widespread unauthorized downloading of music from the Internet. It further ignores the fact that MusicNet and pressplay were only two websites, and that defendants' recordings also became available on other websites in which defendants held no interest, including Apple's dominant iTunes.[7] It similarly ignores the fact that the Antitrust Division of the Department of Justice closed its inquiry into the formation of the joint ventures, finding that its "substantial investigation" had uncovered "*no evidence that the major record labels' joint ventures have harmed competition or consumers of digital music*." Almeida Decl. Ex. D (Dec. 23, 2003 DOJ Press Release) (emphasis added). The DOJ further explained that it had found "no impermissible coordination among the record labels as to the terms on which they would license their music to third parties" and found that the joint ventures did not "suppress the growth of the Internet . . . in order to protect their present positions in the distribution of CDs." *Id.* Plaintiffs now attempt to build an antitrust conspiracy around these joint ventures despite the fact that the DOJ, after a lengthy investigation, examined these same issues involving these same joint ventures *and found no improper conduct whatsoever*.

2. Opportunity To Conspire

Plaintiffs' complaint goes on to criticize MusicNet and pressplay for allegedly providing "forums" through which the music companies "*could* discuss their general desires to restrain trade in Internet Music and come to agreement on the specifics," for providing "*opportunities* and *forums* to meet and further conspire to cooperate to maintain the prices and terms for Internet

[7] Almeida Decl. Ex. A at ¶ 22; *id.* at Ex. B at ¶ 45.

Music" and for serving as "*vehicles* through which the Defendants effectively exchanged price information." Compl. ¶¶ 67, 87, 98 (emphases added). The complaint also asserts that a music industry trade association, the Recording Industry Association of America ("RIAA"), "provides [d]efendants with a forum to exchange competitive information, and fix prices and terms" and provided a "forum" through which defendants "*can* communicate" about pricing and terms. *Id.* ¶¶ 34, 88 (emphases added). Although defendants allegedly participated in an open discussion of variable pricing (*id.* ¶ 131), there is no allegation of any actual agreement or any adoption of variable pricing by any of the defendants.

Opportunities, forums and *vehicles* are neither meetings of the mind nor conspiracies. *See Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 545 (2d Cir. 1993) ("The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred.") Indeed, in *Twombly*, the plaintiffs similarly alleged that the defendants would "'communicate amongst themselves' through numerous industry associations," and had "numerous opportunities to meet with each other," but the Supreme Court held that this was not sufficient to raise the inference of a conspiracy. 127 S.Ct. at 1974, 1986. Significantly, the *dissent* in *Twombly* considered the position advanced by plaintiffs here — that "an allegation that competitors meet on a regular basis, like the allegations of parallel conduct, is consistent with . . . an unlawful agreement." *Id.* at 1986 n.10. But *seven Justices rejected this argument* and dismissed the complaint.

The same holds true here. Allowing a plaintiff to plead an antitrust conspiracy based simply on membership in a joint venture would transform all joint ventures into potential antitrust conspiracies due to the inherent opportunity to conspire. For this reason, *Twombly* requires plaintiffs to plead more than mere "opportunity to conspire" and instead compels

plaintiffs to allege specific facts that plausibly exclude independent action. *Id.* at 1966. Plaintiffs' conclusory allegations of "opportunity" and "forum" to conspire fail to meet this standard. In fact, in suggesting that one should infer an illegal conspiracy from the very same joint venture activities that the DOJ found presented "no evidence" of harm to competition, plaintiffs' allegations are simply implausible on their face.

3. No Overt Acts

The complaint also lacks the requisite degree of specificity regarding what the defendants supposedly did with their alleged "opportunities." The complaint avers that after their formation, MusicNet and pressplay "maintained prices at artificially high levels" and that, with respect to each venture, the venturers allegedly agreed to exchange "price information" (the nature of which is never specified), agreed upon the sharing of revenues and agreed that no one would get a better deal than the others ("Most Favored Nation" or "MFN" protection). Compl. ¶¶ 67, 68, 89. These allegations, even assuming their truth for purposes of this motion, fail to state an antitrust violation. Indeed, it is well-established that joint ventures are free to set the terms and requirements under which the joint venture will operate. *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006) ("[A] joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price.")[8]

[8] The same is true of plaintiffs' conclusory allegations that when MusicNet and pressplay began to license to third-party retail music websites, they still allegedly "agreed to fix the terms of sale," including DRM rules and prices, and "adopted and adhered to virtually identical and parallel methods of distribution . . . pricing . . . and modes of DRM." Compl. ¶¶ 69, 127. This is simply a matter of joint venturers agreeing on what the ***venture*** will charge and require. *Dagher*, 547 U.S. at 6 (although a joint venture's "pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense").

The closest the complaint comes to alleging such a conspiracy is the assertion that defendants "have agreed to a wholesale price floor whereby they sell Internet Music to retailers at or about 70 cents per song," which they allegedly "enforce" by "forcing Internet Music retailers to sign ["Most Favored Nation"] agreements that specify that the retailers must pay each of the Defendants the same amount." Compl. ¶ 99. It is not at all clear whether this allegation is intended to refer only to sales through MusicNet and pressplay (which were joint ventures, not conspiracies) or directly from an individual defendant to a third-party Internet retailer. But in either event, this claim is implausible and makes no economic sense. Evidence that prices are all "at or about" some figure would still allow each seller to try to undercut the other. Moreover, evidence that prices are all "at or about" the same level will almost always exist in competitive markets — indeed, perfectly competitive markets are characterized by all competitors charging identical prices. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If such evidence constituted evidence of conspiracy, nearly every market would be subject to antitrust allegations every day.

Even less plausible and less economically sensible is the allegation that forcing retailers to sign an MFN agreement would further a conspiracy to raise prices. To the contrary, a buyer-side MFN clause, by which a buyer promises to pay each seller as much as it pays any other seller, serves to assure that the buyer will never pay *any* seller a higher price, lest it have to pay *every* seller that higher price. This creates a *ceiling* on prices, not a floor. *Cf. Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (MFN clauses are "standard devices . . . . It is not price fixing.")

Furthermore, in alleging that defendants "agreed to a wholesale price floor" and forced retailers to sign an MFN agreement in furtherance of the conspiracy, plaintiffs again fail to

identify the "specific time, place, or person" related to these allegations, making such allegations wholly insufficient under *Twombly*. 127 S.Ct. at 1971 n.10. Plaintiffs must make allegations with "enough heft" to show entitlement to relief, *id.* at 1959, and "enough *facts* to state a claim to relief that is plausible *on its face*." *Id.* at 1974 (emphases added). Plaintiffs' conclusory allegations that defendants set prices "at or about" the same level and forced retailers to sign MFNs in furtherance of that conspiracy fall precipitously short of this standard. *Id.* at 1966.[9]

In sum, what the complaint really alleges is that in an environment of rampant unauthorized downloading, the music companies formed two joint ventures in an effort to facilitate the authorized sale of their copyrighted recordings through the Internet. According to plaintiffs, because the music companies had an "opportunity" to conspire by belonging to the RIAA or joint ventures, an inference of a conspiracy to fix prices may be drawn. Moreover, plaintiffs urge the Court to draw this inference of illegal coordination among the joint ventures despite the fact that the DOJ found that the joint venturers engaged in no "impermissible coordination" whatsoever. This "conjecture" is exactly the approach to pleading foreclosed by *Twombly*. No longer do the words "opportunity to conspire" plus "supracompetitive pricing" constitute a claim in the absence of "factual enhancement" as to a specific time, place, person, and the nature of the agreement. *Twombly*, 127 S.Ct. at 1966.

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[9] Plaintiffs also attempt to pepper the complaint with a "list" of overt acts but, upon examination each of these "facts" turns out to be an alleged *consequence* and not one of them actually is an *act*. Specifically, the purported overt *acts* alleged are that: (a) plaintiffs allegedly were "deprived of the benefits of . . . competition," (b) prices allegedly were "raised, fixed and maintained" at "artificially high" levels, (c) plaintiffs allegedly had to pay "artificially high" prices, and (d) price competition allegedly was "restrained, suppressed and eliminated." Compl. ¶ 132. Plaintiffs thus improperly seek to supplant the requirement that they allege specific overt acts by instead providing a vague "laundry list" of conclusory and unsupported allegations.

B. The Allegation That Defendants Could Have Charged Less

Defendants' May 14, 2007 letter detailed the deficiencies described above. The Second Consolidated Amended Complaint fails to correct those deficiencies, and attempts a new and equally unavailing tack: It alleges that the defendant music companies "charge more money" for recordings distributed through the Internet than they could afford to charge, and that defendants include DRM rules in order to prop up the prices of the same recordings that these defendants sell on CDs. Compl. ¶ 74. This purportedly evidences a conspiracy. The flaw in this hypothesis is that parallel decisions among competing music companies to achieve more remunerative pricing for each recording no matter how it is delivered, and to prevent unlimited and unauthorized copying (which would undermine the value of each recording), is no evidence of a conspiracy at all. Even assuming the truth of these allegations for purposes of this motion, such decisions undeniably would be in the individual interest of each of the music companies. It is well-settled that such independent self-interested conduct does not constitute evidence of conspiracy. *Twombly*, 127 S.Ct. at 1968 & n.7 ("[N]either parallel conduct nor conscious parallelism, taken alone, raise the necessary implication of conspiracy . . . .").

The complaint repeatedly asserts the similarities between CDs and Internet Music, alleging Internet Music and CDs "*are simply different delivery methods of identical subject matter.*" Compl. ¶ 41 (emphasis added). Yet, plaintiffs also allege that certain costs associated with the delivery of a recording are eliminated when an Internet download is substituted for a CD and, therefore, since the price charged for a recording delivered as an Internet download allegedly is not "dramatically less" (by some unidentified measure) than it supposedly should be in comparison with the price charged for a CD, there simply *must* be a conspiracy to fix prices. Compl. ¶ 74.

Conspicuously missing is *any* allegation as to how material such cost savings actually are (allegedly, the cost of stamping out discs and shipping them to retailers, etc.) in relation to common costs, such as the artists' and composers' royalties and the cost of promotion and advertising, or whether additional costs are incurred with Internet downloads that are not incurred with CDs. Instead, the complaint coyly asserts that delivering recorded music over the Internet has the "potential" for dramatic cost reduction (Compl. ¶ 70) and then leaps precipitously to the conclusion that the price of a recording delivered to retailers over the Internet should be "dramatically less" than the price of the same recording delivered on a CD, absent a conspiracy to fix prices. Compl. ¶ 74.

This argument necessarily assumes that: (a) the cost reduction is more than potential, (b) the cost reduction is material, and (c) each music company would charge a lower price if it were acting independently. There is no allegation as to (a) or (b) at all. The closest the complaint comes to (c) are the allegations that as a "general rule in competitive markets, dramatic cost reductions . . . are accompanied by dramatic price reductions and output expansion" (*id*.) and that "an innovation that lowers a company's variable costs . . . will result in a company lowering its prices . . . to increase its market share while increasing its profit margin because not all of the decreased cost is passed on" — which strategy allegedly would have been in all of the music companies' "individual interests." Compl. ¶ 78.

These are not factual allegations and are not even very convincing as theory or legal conclusions. As the Supreme Court explicitly pointed out in *Twombly*, there is no general rule that, absent conspiracy, it is in the individual interest of a company to ignite price wars every chance it gets. Thus, it is never enough to allege that companies *must* have been colluding or else they would have been competing harder and sooner. Indeed, to the contrary, "resisting

competition is routine market conduct" and "only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing." *Twombly*, 127 S.Ct. at 1971.

Accordingly, the allegation that each of the music companies could have, but did not, charge "dramatically less" for recordings delivered through the Internet than through CDs is evidence of nothing. And, the allegation that each of the music companies could have, but did not, abandon DRM rules and allow unlimited copying of recordings as a competitive strategy also shows nothing. *Twombly*, once again, dictates the result. Noting that "parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions," Judge Lynch held in *Twombly* that, at the pleading stage, while plaintiffs obviously need not "present evidence" tending to exclude independent self-interested conduct, plaintiffs must *make allegations* tending to exclude independent action. *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 179-80 (S.D.N.Y. 2003), *rev'd and remanded*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S.Ct. 1955. Thus, as the Supreme Court further elaborated, there needs to be allegations of "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." 127 S.Ct. at 1966 n.4 (quoting 6 Areeda & Hovenkamp ¶ 1425, at 167-185). What is alleged here plainly *would* result from "independent responses to common stimuli," namely, that in the face of unauthorized downloading, defendants insisted upon certain

technological specifications that were designed to keep unauthorized downloading at bay. Compl. ¶ 76. Consequently, plaintiffs do not come close to meeting the *Twombly* test.[10]

As one court recently observed in explaining *Twombly*: "[T]he mere metaphysical possibility that *some* plaintiff could provide *some* set of facts in support of the pleaded claims is insufficient. The complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering support for *these* claims." *Ridge at Red Hawk, L.L.C. v. Schneider*, No. 06-4162, 2007 WL 1969681, at *3 (10th Cir. July 9, 2007) (emphasis in original). The same applies here. This complaint, which relies solely on speculative assumptions rather than concrete facts plausibly suggesting a "preceding agreement," must be dismissed.

II. PLAINTIFFS' CLAIMS THROUGH FEBRUARY 1, 2005 HAVE BEEN RELEASED

Even if plaintiffs had met the pleading requirements of *Twombly*, which they have not, indirect purchaser claims of all plaintiffs who purchased CDS (except those residing in Nebraska) for the period before February 1, 2005, are barred by a binding and express release made in connection with a prior litigation.

In *Ottinger, et al. v. EMI Music Distribution, et al.*, Civil Action No. 24885-II (Tenn. Cir. Ct.) (the "*Ottinger* Cases"), a plaintiff class of all indirect purchasers of recorded music in jurisdictions with indirect purchaser statutes entered a Stipulation of Settlement with the music company defendants. The Stipulation of Settlement resolved a series of state court actions alleging price fixing. *See* Almeida Decl. Ex. E (*Ottinger* Stipulation of Settlement, Sept. 29,

[10] Likewise, there is nothing to plaintiffs' assertion that collusion among the defendants is demonstrated by the website "eMusic," which allegedly charges only 25 cents per song and places no restrictions on copying. By plaintiffs' own admission, eMusic allegedly offers the releases only of so-called "independent labels" (Compl. ¶ 103), and there is no allegation that the marketplace puts the same value on these recordings as it does on defendants' recordings.

2003) at § 1.19; *id.* Ex. F (*Ottinger* Order of Final Approval and Judgment, Jan. 22, 2004). Plaintiffs' operative complaint in the *Ottinger* Cases alleged an expansive antitrust conspiracy among the music companies with respect to music pricing and, in particular, with respect to the pricing of CDs. *See* Almeida Decl. Ex. G (*Ottinger* Fifth Amended Class Action Compl.) at ¶¶ 1-2.

The settlement of the *Ottinger* Cases contained a broad and all-encompassing release that ***"fully, finally and forever released, relinquished and discharged"*** (Almeida Decl. Ex. E at § 8.1) the music company defendants as well as "the labels distributed by Defendants, and each of their respective parents, subsidiaries, divisions, affiliates, assignors, assignees, predecessors, successors, officers, directors, employees, agents and attorneys" (*id.* at § 1.17) from:

> [A]ny and all manner of claims, actions, suits, liabilities, damages (whether compensatory, punitive, or otherwise), and rights and causes of action, known or unknown, whether in law or equity, that any Plaintiff or any Settlement Class Member now has or has ever had based upon the matters alleged (or which could have been alleged) in the Complaints in the Litigation or the Related State Actions …. Each Settlement Class Member hereby is deemed to covenant and agree that he/she shall not hereafter seek, and each is hereby enjoined from seeking, to establish liability against any Released Person based, in whole or in part, upon any of the Released Claims . . . .

Id. at § 1.16.

This broadly-worded agreement releases the very claims plaintiffs seek to assert here. *Krumme v. Westport Stevens, Inc.*, 238 F.3d 133, 144 (2d Cir. 2000) (an unambiguous release must be enforced according to its terms) (interpreting New York law); *Geron v. County of Nassau,* No. 95 Civ. 3994(LMM), 2004 WL 639615, at *8 (S.D.N.Y. Mar. 30, 2004) (emphasizing importance of enforcing releases because releases are a "jural act of high significance without which settlement of disputes would be rendered all but impossible") (citations and quotation marks omitted) (interpreting New York law). In fact, residents from every indirect purchaser state at issue in the instant litigation (except Nebraska) expressly

released their claims pursuant to the *Ottinger* Stipulation of Settlement. Almeida Decl. Ex. E at §§ 1.19, 1.20, 8.1. Further, as the *Ottinger* Stipulation of Settlement expressly provides, the release on behalf of indirect music purchasers includes not only the specific matters alleged in the *Ottinger* Cases but also ***all claims that could have been alleged***. *Id.* at § 1.16. Thus, CD purchaser plaintiffs' indirect purchaser claims with respect to CDs and Internet Music, some of which actually ***were alleged*** in the *Ottinger* Cases and all of which ***could have been alleged*** in those cases, are fully and finally discharged by the Stipulation of Settlement. *Id.* at § 8.1. In light of the above, all indirect purchaser claims for all CD purchasers in the putative class (except Nebraska residents) for the period before February 1, 2005 must be dismissed.[11]

Moreover, pursuant to section 8 of the Order of Final Approval and Judgment entered in the *Ottinger* Cases, class members who released their claims in the Stipulation of Settlement are enjoined from participating in any action based upon the released claims. "Any party violating the Court's injunction shall pay costs and attorneys' fees incurred by any Released Person as a result of a violation of the Court's injunction." Almeida Decl. Ex. F (*Ottinger* Order of Final

[11] The "Effective Date" of the release in the *Ottinger* Stipulation of Settlement was contingent upon the occurrence of a number of events including the dismissal with prejudice of a related federal action, *In re Compact Disc Antitrust Litigation*, MDL Docket No. 98 MDL 1216 (JSL) (C.D. Cal.) ("*In re Compact Disc*"). *See* Almeida Decl. Ex. E at §10.1(e). The Stipulation of Dismissal in *In re Compact Disc* was signed by Judge Letts and filed on February 1, 2005, making that date the Effective Date of the *Ottinger* settlement and the earliest possible date on which the claims in the Second Consolidated Amended Complaint have not been released. *See* Almeida Decl. Ex. H (*In re Compact Disc* Stipulation of Dismissal With Prejudice of Entire Action, filed Feb. 1, 2005). Moreover, despite plaintiffs' effort to seek recovery for the period "through the conclusion of the trial in this matter" (Compl. ¶ 44), "the general rule in private antitrust actions is that the plaintiff may not recover damages arising from acts committed after the filing of the complaint, even when those acts are alleged to be part of a continuing conspiracy or course of conduct." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 749 (9th Cir. 2006) (citations and quotation marks omitted).

Approval and Judgment, filed Jan. 22, 2004) at § 8). Thus, defendants are entitled to recover their costs and fees incurred in connection with this part of their motion.

III. PLAINTIFFS FAIL TO STATE A CLAIM REGARDING COMPACT DISC PURCHASES

Even if plaintiffs have stated allegations satisfying the requirements of *Twombly*, which they have not, such a claim (to the extent it has not been released) at most would apply only to Internet Music sales. Any speculative secondary effects that alleged restrictions on the sale of Internet Music might have on the price of CDs do not create claims for purchasers of CDs, especially absent any allegation that such CD purchasers would have purchased Internet Music in some "but-for" world. The law does not condone such an expansion of standing, particularly given the presence of more directly affected plaintiffs.

Plaintiffs propose separate classes for Internet Music purchasers and purchasers of CDs. Because allegations of anticompetitive conduct affecting one set of purchases do not create a cause of action for purchases of different items, the Court should examine the sufficiency of the specific allegations regarding CDs. Here, the allegations regarding defendants' anticompetitive conduct all concern Internet Music, not CDs. Plaintiffs summarize their complaint as alleging that defendants "conspired to restrict the output of and fix the prices and terms under which Internet Music would be sold." Compl. ¶ 3. Their allegations regarding the formation of joint ventures, MFN clauses and price-fixing expressly relate only to Internet Music. Compl. ¶¶ 67-69. There is no allegation that defendants fixed CD prices, excluded anyone from producing

and/or selling CDs, agreed to limit production or sales of CDs, or did anything else in the CD business even remotely resembling an antitrust theory of liability.[12]

Moreover, although the complaint alleges that the price difference between CDs and Internet Music should have been greater (*see* Section I.B.), no named plaintiff alleges that he or she would have purchased Internet Music instead of CDs absent the alleged conduct. Rather, each named plaintiff merely alleges that he or she has bought Internet Music and CDs. Compl. ¶¶ 5-19. None of them alleges that, had defendants behaved differently with respect to Internet Music, he or she would have stopped buying CDs. *Id*. The absence of such allegations is dispositive; there is no basis simply to assume that these plaintiffs would have switched their CD purchases to Internet Music.

Lacking any allegation that they would have switched their CD purchases to Internet Music, the named plaintiffs appear to proceed under a theory that restricting Internet Music somehow raised the price of CDs, without ever specifying how that happens. *See, e.g.*, Compl. ¶ 3. Even if the Court were to credit such allegations, the failure to allege the requirements of antitrust injury and antitrust standing independently warrant dismissal of the claims regarding CD purchases.

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[12] The only allegation even distantly related to anticompetitive conduct concerning the sale of CDs is the one-sentence allegation that some defendants were subject to "a number of government investigations and lawsuits" regarding the pricing of CDs. Compl. ¶ 110. Mere reference to unnamed lawsuits and unspecified investigations does not state a claim, especially where: (1) there is no allegation that the conduct at issue in the investigations and lawsuits occurred during the time period at issue in this case; (2) plaintiffs do not allege here any of the facts underlying the complaints at issue in the lawsuits (on the contrary, they allege only that defendants "were subject" to investigations and lawsuits); and (3) as described above, it is a matter of public record that releases were entered as part of the settlement of the *Ottinger* Cases.

Allegations of antitrust injury are an essential element of a claim under the antitrust laws. *See Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 344 (1990). Antitrust law does not extend to every loss that "might conceivably be traced" to defendants' conduct. *Reading Indus., Inc. v. Kennecott Copper Corp*., 631 F.2d 10, 12 (2d Cir. 1980) (citation omitted). Purchasers in one market lack standing to recover for competitive injury in another market:

> Antitrust injury requires the plaintiff to have suffered its injury ***in the market where competition is being restrained***. Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury.

American Ad Mgmt., Inc. v. General Tel. Co. of Cal., 190 F.3d 1051, 1057 (9th Cir. 1999) (emphasis added). *See also Ass'n of Washington Pub. Hosp. Dists. v. Philip Morris Inc.,* 241 F.3d 696, 705 (9th Cir. 2001) (hospitals lacked standing to sue tobacco companies for anticompetitive conduct that raised the cost of providing medical care, because hospitals were not purchasers of tobacco); *Vinci v. Waste Mgmt., Inc*., 80 F.3d 1372, 1376 (9th Cir. 1996) (injury must occur in the same line of commerce as the challenged restraint); *Eagle v. Star-Kist Foods, Inc*., 812 F.2d 538, 540 (9th Cir. 1987) (plaintiff must be "a participant" in the market where the restraint occurred). That is the situation hypothesized here — that secondary injury, if any, would occur in the CD business, not the on-line business, which is where the challenged restraints allegedly occurred. Purchases of CDs do not take place in the same line of commerce "where competition is being restrained." *American Ad Mgmt.,* 190 F.3d at 1057.

Several factors determine whether a plaintiff has standing. *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538-44 (1983) ("*AGC*"). The most critical here is "the existence of more direct victims of the alleged [antitrust violations]." *Id.* at 544. The presence of putative classes of Internet Music purchasers (both direct and indirect) counsels against finding standing for CD purchasers wishing to attack the exact same conduct as

the Internet Music purchasers. *Id.* Since *AGC*, courts have repeatedly emphasized that "[t]he existence of an identifiable class of persons whose self interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the [plaintiffs] to perform the office of a private attorney general." *Eagle*, 812 F.2d at 542 (quoting *AGC*, 459 U.S. at 542). *See also 2660 Woodley Road Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732, 741-42 (3d Cir. 2004); *Lucas v. Bechtel Corp.*, 800 F.2d 839, 844 (9th Cir. 1986).

The remaining *AGC* factors principally focus on the causal connection between the alleged antitrust violation and the harm to plaintiff and the directness between the alleged violation and the resulting injury. 459 U.S. at 537, 540. Plaintiffs make no allegations setting forth the causal mechanism that links higher CD prices to an alleged conspiracy to raise Internet Music prices. Indeed, their claim that CDs are costlier to produce and distribute than Internet Music, if correct, would suggest that CD prices would not decline in response to the sale of music over the Internet. *See Eagle*, 812 F.2d at 541 ("The chain of causation between the injury and the alleged restraint in the market should lead directly to the 'immediate victims'").[13]

Whatever the causal mechanism might be, it would require considerable speculation as to how restrictions on Internet Music affect CD prices. The speculation could require guesses about, among other things: (1) how much the price of Internet Music would have declined in

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[13] *See, e.g., Kloth v. Microsoft Corp.*, 444 F.3d 312, 324 (4th Cir. 2006) (claim would have required court to imagine an alternative reality where Microsoft had not become the dominant supplier of operating systems); *Allegheny Gen. Hosp. v. Phillip Morris, Inc.*, 228 F.3d 429, 441 (3d Cir. 2000) (claim would have required court to imagine an alternative reality in which cigarette companies offered less harmful products); *Sullivan v. Tagliabue*, 25 F.3d 43, 51-52 (1st Cir. 1994) (claim would have required court to assess the future value of a hypothetical "refinanced, renovated, debt-free stadium with a new lease"); *Province v. Cleveland Press Publ'g Co.*, 787 F.2d 1047, 1053 (6th Cir. 1986) (claim would have required speculation as to the effects of a hypothetical sale of a company).

some but-for world (which likely varies over time and from song to song), (2) how much demand for a given CD would drop as some purchasers switched to Internet Music for some of that CD's songs, and (3) how such a speculative drop in demand for CDs would affect the price of each CD in light of the various factors that influence the wholesale and retail price of CDs. Such speculation is not consistent with rules of standing.

Expanding antitrust standing doctrine to accommodate these CD purchasers also would, contrary to settled doctrine, vastly increase the range of persons beyond the immediate victims. For example, loyal purchasers of Apple computers perhaps could allege, and pay an economist to testify, that restrictions on Microsoft-based computers increase the demand for (and the price of) Apple computers. Yet, extending rules of standing to such Apple loyalists to allow them to attack conduct by Microsoft would revolutionize antitrust doctrine. The presence of more immediate victims, such as Microsoft customers in this example, sufficiently meets the goals of antitrust enforcement.

For all of these reasons, plaintiffs lack standing to bring claims on behalf of CD purchasers even if those claims were "plausible" under *Twombly* and had not been released.[14]

IV. PLAINTIFFS LACK STANDING TO ASSERT CLAIMS ON BEHALF OF RESIDENTS OF OTHER STATES

The named plaintiffs — residents of California, Florida, Hawaii, Massachusetts, Michigan, Minnesota, New Mexico, New York and Oregon[15] — purport to assert claims on

[14] Plaintiffs' failure to allege a viable theory under federal antitrust law is equally fatal to their claims under state law. With respect to issues of liability, state antitrust laws overwhelmingly follow federal law, and the failure to allege injury to CD purchasers would be equally fatal to their state antitrust claims. *See Cheminor Drugs, Ltd. v. Ethyl Corp.*, 993 F. Supp. 271, 281 n.23 (D.N.J. 1998)) ("[C]ourts have consistently found that the failure to state viable federal antitrust claims is fatal to state antitrust claims"), *aff'd*, 168 F.3d 119 (3d Cir. 1999).

behalf of persons or entities not only in their home states, but also on behalf of persons and entities in thirteen other states and the District of Columbia. Plaintiffs have no constitutional standing to assert claims under the laws of states where no named plaintiff resides.[16]

Under Article III of the Constitution, federal courts have jurisdiction only to adjudicate actual "cases" and "controversies." U.S. CONST., art. III, § 2; *see also Allen v. Wright*, 468 U.S. 737, 750 (1984). To demonstrate a case or controversy, plaintiffs "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 n.1 (1992) ("the injury must affect the plaintiff in a personal and individual way").

These named plaintiffs cannot demonstrate that an actual case or controversy exists under the laws of the Non-Resident States. The complaint does not contain a single factual allegation of any conduct occurring in any particular state. At best, the complaint can be read to allege that each named plaintiff suffered injury *only* in his or her state of residence. *See, e.g.*, Compl. ¶ 5 (alleging generally that each plaintiff suffered "injury in fact"). Thus, although each plaintiff may theoretically be able to demonstrate a case or controversy arising from alleged violations of the law of his or her home state (at least with respect to Internet Music), no plaintiff can demonstrate that a case or controversy exists under the laws of any *other* state. Rather, if a case or controversy exists at all under the laws of the Non-Resident States, it could arise only from

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[15] Although the named plaintiffs include a resident of Hawaii (Paul Hampsch) and a resident of Oregon (Kevin Starr), no claim under either state's laws has been asserted.

[16] Plaintiffs assert claims on behalf of all persons or entities in the following jurisdictions in which no named plaintiff resides: Arizona, District of Columbia, Iowa, Kansas, Maine, Nebraska, Nevada, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, West Virginia and Wisconsin (the "Non-Resident States"). Compl. ¶¶ 44-45.

absent class members' purchases of Digital Music in those other states, not the claims or alleged injuries of the named plaintiffs.

Plaintiffs, however, cannot acquire constitutional standing by virtue of the hypothetical claims of absent plaintiffs. It is neither necessary nor appropriate for the Court to consider the claims of absent class members: Indeed, *on this motion, the named plaintiffs are the only plaintiffs before the Court*. *See Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d. Cir. 2005) ("Moreover, the named class plaintiffs 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'") (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975)); *In re Terazosin Hydrochloride Antitrust Litig.*, 160 F. Supp. 2d 1365, 1371 (S.D. Fla. 2001) (dismissing claims of states without a designated named plaintiff: "the named plaintiffs cannot rely on unidentified persons within those [other] states to state a claim for relief. Class allegations that others suffered injuries giving rise to claims 'add … nothing to the question of standing.'"); *Blum v. Yaretsky*, 457 U.S. 991, 1001 n.13 (1982) (named plaintiffs cannot merely allege that "injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent") (internal quotation marks omitted).[17]

[17] While two district courts have held that class certification can be decided prior to ruling on this standing question (*In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363, 377 (S.D.N.Y. 2002); *In re Grand Theft Auto Video Game Consumer Litig. (No. II)*, No. 06 MD 1739(SWK)(MHD), 2006 WL 3039993 (S.D.N.Y. Oct. 25, 2006)), those decisions conflict directly with Supreme Court precedent and are unpersuasive. *See, e.g., Blum*, 457 U.S. at 1001 n.13. Because it is the named plaintiffs, not the unnamed class members, who lack standing to assert claims in the Non-Resident States, this Court should address the issue of standing prior to any determination of class certification. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000) (as a general rule, questions of jurisdiction must be considered before the merits "since if there is no jurisdiction there is no authority to sit in

Because the Court does not have jurisdiction over such claims, the complaint should be dismissed to the extent it purports to assert claims under the laws of Arizona, the District of Columbia, Iowa, Kansas, Maine, Nebraska, Nevada, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, West Virginia and Wisconsin.

V. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM UNDER THE LAWS OF EIGHTEEN STATES AND THE DISTRICT OF COLUMBIA

In addition to plaintiffs' lack of standing to assert claims under the laws of states in which they do not reside, many of the claims asserted in Count II of the Complaint under multiple state antitrust and consumer protection statutes fail for a separate and independent reason: Plaintiffs simply have not pleaded the requisite elements. Consideration of each of the antitrust and consumer protection statutes invoked by plaintiffs illustrates that multiple bases for dismissal often apply to each claim, any one of which would be sufficient in and of itself to justify dismissal.

A. Plaintiffs Allege A Substantial Effect On *Inter*state Commerce And Therefore Cannot State A Claim Under The Laws Of The District Of Columbia, Michigan, New York, North Carolina, South Dakota, Tennessee, West Virginia And Wisconsin

In their complaint, plaintiffs allege conduct that is interstate in its nature and effects. *See* Compl. ¶¶ 56-57 ("Defendants produce, license and distribute Digital Music . . . *throughout the United States [and] . . . through Internet sites. . .*") (emphasis added); *id.* ¶¶ 39 ("Defendants . . . produced, licensed, distributed and/or sold Digital Music in a continuous and uninterrupted

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judgment of anything else"); *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 108 (D.C. Cir. 2002) ("The question of constitutional standing [] is a prerequisite to Rule 23 class certification," and should be addressed by a court in a motion to dismiss and not be deferred until class certification "because it goes to the court's jurisdiction"); *Easter v. Am. West Fin.*, 381 F.3d 948, 962 (9th Cir. 2004) (district court should address "the issue of standing before it addresse[s] the issue of class certification").

flow of intrastate and *interstate commerce throughout the United States*.") (emphasis added); *see also id.* ¶ 127. Despite these allegations, plaintiffs seek to rely on various state laws that require plaintiffs to allege a specific impact upon or nexus with *intrastate* commerce. Plaintiffs' sweeping assertion that defendants' conduct was *interstate* cannot satisfy the individual state requirements of a nexus between the conduct and that particular state. Plaintiffs fail to make a single allegation with respect to the effects of defendants' conduct upon the individual states on whose laws plaintiffs seek to rely. As a consequence, plaintiffs have not pleaded claims under the antitrust statutes of the District of Columbia,[18] Michigan,[19] New York,[20] South Dakota,[21] Tennessee,[22] West Virginia[23] and Wisconsin[24] and the consumer protection laws of North Carolina.[25]

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[18] *See Sun Dun, Inc. of Wash. v. Coca Cola Co.*, 770 F. Supp. 285, 288 (D. Md. 1991) (dismissing D.C. antitrust claim because plaintiff failed to show that its purchase did not involve an interstate element); *Sun Dun, Inc. of Wash. v. Coca Cola Co.*, 740 F. Supp. 381, 397 (D. Md. 1990) ("the only claims … to which the D.C. [Antitrust Act] might possibly apply are those for direct and indirect purchases within the District of Columbia which do not involve an interstate link, and which thus do not fall within the scope of federal antitrust law.")

[19] *Aurora Cable Communc'ns, Inc. v. Jones Intercable, Inc.*, 720 F. Supp. 600, 603 (W.D. Mich. 1989) (the "MARA parallels the Sherman Antitrust Act as it applies to intrastate conduct").

[20] Under New York law, "[w]here the conduct complained of principally affects interstate commerce, with little or no impact on local or intrastate commerce, it is clear that federal antitrust laws operate to preempt the field and oust state courts of jurisdiction." *Two Queens, Inc. v. Scoza,* 296 A.D.2d 302, 304 (N.Y. App. Div. 2002); *see also In re Wiring Device Antitrust Litig.,* 498 F. Supp. 79, 82 (E.D.N.Y. 1980) (where interstate commerce is involved, federal antitrust laws preempt the Donnelly Act).

[21] South Dakota's antitrust statutes provide that "[a] contract, combination, or conspiracy between two or more persons in restraint of trade or commerce any part of which is within this state is unlawful." S.D. CODIFIED LAWS § 37-1-3.1 (2007). *See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F. Supp. 2d 150, 172 (D. Me. 2004).

[22] Tennessee's antitrust statute applies to conduct with a *wholly* intrastate effect. *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 42 (D.D.C. 1999) (dismissing antitrust claims on the grounds that Tennessee law applies to "violations having solely intrastate impact"). At a

B. Plaintiffs Assert Claims Under State Antitrust Laws That Are Presumed To Be Limited To Intrastate Activity

Plaintiffs also assert claims under six state antitrust laws whose application to interstate conduct has not yet been addressed: Arizona, Iowa, Minnesota, North Carolina, North Dakota and Vermont. Under the Commerce Clause, and absent judicial or legislative resolution, these statutes must be read as being limited to intrastate conduct or, at the very least, requiring a specific nexus between the alleged conduct and the particular state. Because plaintiffs fail to allege any nexus whatsoever specific to these six states, plaintiffs' claims must fail.

In *Raymond Motor Transportation v. Rice*, the Supreme Court articulated the test for determining whether a state statute or regulation violates the Commerce Clause: "Where the statute regulates evenhandedly to effectuate a legitimate *local* public interest, and *its effects on interstate commerce are only incidental*, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 434 U.S. 429, 441 (1978) (citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960)) (emphasis added). *See also Flood v. Kuhn*, 407 U.S. 258, 284 (1972) (upholding the lower courts' determinations that

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minimum, the Tennessee statute applies to alleged anticompetitive conduct that "more than incidentally" affects intrastate commerce. *See In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 667 (E.D. Mich. 2000); *Valley Prods. Co., Inc. v. Landmark*, 877 F. Supp. 1087, 1094-95 (W.D. Tenn. 1994).

[23] *State ex rel Palumbo v. Graley's Body Shop, Inc.*, 425 S.E.2d 177, 183 n.11 (W. Va. 1992); *see also Anziulewicz v. Bluefield Community Hosp., Inc.*, 531 F. Supp. 49, 53 (S.D. W. Va. 1981).

[24] *Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 158 (Wis. 2005) (under Wisconsin's antitrust statute, plaintiff must allege actionable conduct occurred within the state or the conduct complained of "substantially affects" the people of Wisconsin and has impacts in this state).

[25] The North Carolina Unfair Trade and Deceptive Trade Practices Act requires allegations of "substantial effects on . . . in-state business operations." *Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1463 (M.D.N.C. 1996); *see also The In Porters S.A. v. Hanes Printables Inc.*, 663 F. Supp. 494, 502 (M.D.N.C. 1987).

Commerce Clause precluded the application of state antitrust law where the state antitrust regulation would conflict with federal policy and "the burden on interstate commerce outweighs the states' interests in regulating [the industry]"); *Olstad*, 700 N.W.2d at 158 ("[T]he legislative history reveals that Congress did not intend to preempt state laws [by enacting the Sherman Act] . . . . Rather, in accord with the dominating theory of the era, Congress intended the federal law to apply only to interstate cases while the state laws continued to apply to intrastate cases.").

Accordingly, the Court should interpret the territorial application of the antitrust laws of Arizona, Iowa, Minnesota, North Carolina, North Dakota and Vermont — which have not ruled that their antitrust statutes have interstate reach — as limited to intrastate activity. In light of the absence of any allegations of intrastate conduct and impact, these antitrust claims should be dismissed.

C. The Kansas, New Mexico, New York and North Carolina Consumer Protection Acts Focus On Fraudulent, Deceptive Or Misleading Conduct And, Based On The Allegations In The Complaint, Must Be Dismissed

In Count II, plaintiffs allege claims under the consumer protection statutes of California, the District of Columbia, Florida, Kansas, Maine, Massachusetts, Nebraska, New Mexico, New York and North Carolina. Compl. ¶ 136.

Simply *labeling* their claims as ones for consumer fraud will not suffice. Many state consumer protection statutes require plaintiffs to demonstrate facts supporting fraud or deceit. *See Tylka v. Gerber Prods.*, 178 F.R.D. 493, 498 (N.D. Ill. 1998) ("[A] brief review of the [consumer protection] statute reveals not only nuances, but differing standards of proof, procedure, substance, and remedies."). Such conduct is not at issue here.[26] Entering into

[26] The complaint concerns defendants' alleged conspiracy to affect the price, availability and use of Digital Music. Compl. ¶ 66. Plaintiffs purport to identify aspects of this alleged conspiracy (*id.* ¶¶ 67-69), but none of these allegations involves fraud or misrepresentation and,

purportedly anticompetitive agreements absent some element of fraud or deceit simply does not provide a basis for relief under many of these states' consumer protection statutes. *See, e.g.*, *Sickles v. Cabot Corp.*, 877 A.2d 267, 277 (N.J. Super. 2005) (conduct that seeks to limit competition does not "mislead" consumers). Plaintiffs make no claim that they bought anything other than what they expected at the quoted retail price. Because they allege no deception, no misstatements and no representations in connection with their purchases, plaintiffs fail to allege any facts that would transform their antitrust claim into violations of Kansas,[27] New Mexico,[28] New York[29] or North Carolina[30] state consumer protection statutes.

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therefore, the claims must be dismissed. Plaintiffs allege only two specific instances of conduct involving misrepresentations. Compl. ¶¶ 90-91 (concerning the Department of Justice investigations); *id.* ¶¶ 111-12 (concerning the "payola" allegations). But neither speaks to fraud *perpetrated on plaintiffs*. Further, both of these assertions are inappropriate and should be stricken from the Complaint, as discussed in Section VII.

[27] The Kansas Consumer Protection Act ("KCPA") prohibits "deceptive" or "unconscionable" acts or practices "in connection with a consumer transaction." KAN. STAT. ANN. §§ 50-626, 50-627 (2006). Thus, absent "deceptive or oppressive practices[,] overreaching, intentional misstatements, or concealment of facts, there is no claim under the KCPA." *Gonzales v. Assocs. Fin. Serv. Co. of Kan., Inc.*, 967 P.2d 312, 328 (Kan. 1998) (citations and internal quotations omitted); *see also Heller v. Martin*, 782 P.2d 1241, 1244 (Kan. Ct. App. 1989) (citing similar requirements under § 50-626(b)(3)).

[28] *See* N.M. STAT. § 57-12-2(D) (2007) (party must "knowingly" make a "false or misleading" statement "which may, tends to or does deceive or mislead").

[29] Under New York General Business Law § 349(a), a plaintiff must allege "that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof" and that defendant's acts are directed to consumers. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 744 (N.Y. 1995); *see also Conboy v. AT&T Corp.*, 241 F.3d 242, 258 (2d Cir. 2001) (failure to identify false or deceptive statement bars claims).

[30] In North Carolina, "[a] practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Dalton v. Camp*, 548 S.E.2d 704, 711 (N.C. 2001). *See also Marshall v. Miller*, 276 S.E.2d 397, 403 (N.C. 1981) ("A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."). "In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or

D. Plaintiffs May Not Bring A Class Action For Damages Under The California Unfair Competition Law

Plaintiffs assert a claim under California's Unfair Competition Law seeking "compensatory, and where available punitive and special damages." Compl. ¶ 137. However, "California law is clear that §§ 17200 *et seq. do not authorize a suit by a private party for damages*." *Cacique, Inc. v. Robert Reiser & Co., Inc.*, 169 F.3d 619, 624 (9th Cir. 1999) (emphasis added); *see also Bank of the West v. Superior Court*, 833 P.2d 545, 557 (Cal. 1992); *Chatton v. Nat'l Union Fire Ins. Co.*, 13 Cal. Rptr. 2d 318, 330 (1992). Plaintiffs' California consumer protection act claim should be dismissed.

E. Plaintiffs May Not Pursue Class Action Claims Under The Antitrust Laws Of New York

New York does not permit antitrust class actions. *Asher v. Abbott Labs.*, 290 A.D.2d 208, 208 (N.Y. App. Div. 2002); *Cox v. Microsoft Corp.*, 290 A.D.2d 206, 206 (N.Y. App. Div. 2002) ("Private persons are *precluded* from bringing a class action under the [Donnelly] Act.") (emphasis added). Although plaintiffs claim not to seek treble damages, special damages or penalties under General Business Law § 349, New York courts have held that such penalties may not be waived. *See Asher*, 290 A.D.2d at 208. Under the *Erie* doctrine, a federal court must follow this substantive limitation on New York's antitrust laws. *United States v. Dentsply Int'l, Inc.*, No. CIV. A. 99-005-SLR, CIV.A. 99-255-SLR, CIV. A. 99-854-SLR, 2001 WL 624807, at *16 (D. Del. Mar. 30, 2001); *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 727 (D. Md. 2001). Accordingly, plaintiffs' New York Donnelly Act claim must fail.

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deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton*, 548 S.E.2d at 711 (quoting *Spartan Leasing Inc. v. Pollard*, 400 S.E.2d 476, 482 (1991)).

Count II should be dismissed for the reasons set forth in Sections I-III above. In addition, for the reasons set forth in Section IV, the following claims in Count II should be dismissed under the specific statutes relied upon:

STATE	CLAIMS TO BE DISMISSED		BASIS FOR DISMISSAL				
	Antitrust Claim (AT)	**Consumer Protection Claim (CP)**	**No Named Plaintiff**	**Only Intrastate Commerce**	**No Fraud/ Deceit**	**No Private Party Damages**	**No Class Action**
Arizona	•	No claim made	AT	AT			
California		•				CP	
District of Columbia	•	•	AT & CP	AT			
Florida	No claim made						
Iowa	•	No claim made	AT	AT			
Kansas	•	•	AT & CP		CP		
Maine	•	•	AT & CP				
Massachusetts	No claim made						
Michigan	•	No claim made		AT			
Minnesota	•	No claim made		AT			
Nebraska	No claim made	•	CP				
Nevada	•	No claim made	AT				
New Mexico		•			CP		
New York	•	•		AT	CP		AT
North Carolina	•	•	AT & CP	AT & CP	CP		

STATE	CLAIMS TO BE DISMISSED		BASIS FOR DISMISSAL				
	Antitrust Claim (AT)	Consumer Protection Claim (CP)	No Named Plaintiff	Only Intrastate Commerce	No Fraud/ Deceit	No Private Party Damages	No Class Action
North Dakota	•	No claim made	AT	AT			
South Dakota	•	No claim made	AT	AT			
Tennessee	•	No claim made	AT	AT			
Vermont	•	No claim made	AT	AT			
West Virginia	•	No claim made	AT	AT			
Wisconsin	•	No claim made	AT	AT			

Thus, the only claims in Count II that could possibly satisfy the specific requirements of each state's statutory scheme are the California and New Mexico antitrust claims and the Florida and Massachusetts consumer protection act claims. As to those four claims, each is subject to dismissal for the reasons set forth in Sections I-III above.

VI. PLAINTIFFS UNJUST ENRICHMENT CLAIMS MUST BE DISMISSED

A. Plaintiffs' Exclusive Remedy Should Lie In The Antitrust Laws

Count III of the complaint pleads a common law claim for restitution, disgorgement and constructive trust for unjust enrichment under the common law of each "End Purchaser State" excluding residents of Florida, North Carolina and North Dakota. Asserting the equitable claim of unjust enrichment here violates "the basic tenet of equity jurisprudence: if an adequate remedy at law exists, equitable relief will not be granted." *See Goadby v. Philadelphia Elec.*

Co., 639 F.2d 117, 122 (3d Cir. 1981); *Reingold v. Swiftships Inc.*, 210 F.3d 320, 321 (5th Cir. 2000) (applying doctrine to unjust enrichment).[31]

As the court in *FTC v. Mylan Laboratories* observed, plaintiffs' exclusive remedy should lie in the state antitrust laws, *not* in some undefined and unsupported claim for unjust enrichment. 62 F. Supp. 2d at 44-53. Indeed, courts routinely hold that when state law provides an express remedy, parties are limited to that remedy. *Fascione v. CNA Ins. Cos.*, 754 N.E.2d 662, 666 (Mass. 2001) ("[W]here a statute creates a new right and prescribes the remedy for its enforcement, the remedy prescribed is exclusive.") (internal quotation marks omitted); *see also Lubner v. City of Los Angeles*, 53 Cal. Rptr. 2d 24, 28 (Cal. Ct. App. 1997); *Trade 'N Post, L.L.C. v. World Free Duty Ams., Inc.*, 628 N.W. 2d 707, 713 (N.D. 2001); *Wyman v. Terry Schulte Chevrolet, Inc.*, 584 N.W. 2d 103, 107 (S.D. 1998); *Monroe Beverage Co. v. Stroh Brewery Co.*, 559 N.W. 2d 297, 298-99 (Mich. 1997).

In Count III, the indirect purchaser plaintiffs are pursuing the very remedies provided for in the *Illinois Brick*-repealer statutes, and the very remedies they are also seeking under the End Purchaser States' consumer protection acts. Plaintiffs' Count III is therefore either disallowed by state law or duplicative of Count II. *Wrench LLC v. Taco Bell Corp.*, 36 F. Supp. 2d 787, 790 (W.D. Mich. 1998) (barring unjust enrichment claim where claim same as federal statutory claim). In either case, it should be dismissed in its entirety.[32]

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[31] Despite the many labels plaintiffs employ in Count III — restitution, disgorgement, and constructive trust — this claim to recover "overcharges" as a result of "supracompetitive" prices is plainly a claim for damages, not restitution. Compl. ¶¶ 139, 143. *See, e.g.*, DAN B. DOBBS, DOBBS, LAW OF REMEDIES § 4.1(1) (2d ed. 1993); *Kloth*, 444 F.3d at 322-23; *Mylan*, 62 F. Supp. 2d at 36-37; *In re Microsoft Corp. Antitrust Litig.*, 241 F. Supp. 2d at 565.

[32] While plaintiffs have tried to carve out some states from their unjust enrichment claim, presumably to not run afoul of *Illinois Brick*, they have done a poor job of it. Indirect purchasers can only recover damages if an individual state has passed specific legislation allowing such

B. Plaintiffs' Unjust Enrichment Claims Also Fail Under The Requirements Of State Law

Unjust enrichment claims require a showing that the plaintiff conferred a valuable benefit to the defendant and that the defendant failed to pay for the benefit under circumstances that would make it inequitable not to compensate plaintiff. *See generally Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000); *Haz-Mat Response, Inc. v. Certified Waste Serv. Ltd.*, 910 P.2d 839, 847 (Kan. 1996); *City & County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1144 (N.D. Cal. 1997).

Indeed, an unjust enrichment claim requires that the defendant received a benefit directly from the plaintiff. *See Kaye*, 202 F.3d at 616 (plaintiff failed to establish "specific and direct benefit" necessary to support unjust enrichment claim); *Allegheny Gen. Hosp.*, 228 F.3d at 447 ("distance" between hospital and tobacco manufacturers who benefited from provision of free health care to smokers bars claim for unjust enrichment). Thus, a plaintiff cannot assert a claim of unjust enrichment against a third party on whom it did not *directly* confer a benefit. *See* RESTATEMENT (THIRD) RESTITUTION § 110 (1937) (incidental beneficiary is not liable to repay any benefits it received from someone else's contractual obligations).[33]

Here, the indirect purchaser plaintiffs do not adequately allege that they provided defendants with a direct benefit to permit a claim for unjust enrichment. Indeed, by definition,

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claims under state law. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1970). Massachusetts, however, has passed no such legislation, and thus plaintiffs' claim for unjust enrichment on behalf of Massachusetts residents is improper.

[33] *See also Parker v. W. Dakota Insurers*, 605 N.W.2d 181, 187 (S.D. 2000) (dismissing plaintiff's claim of unjust enrichment against defendant that had paid a third-party for a benefit that had been conferred upon it by the plaintiff through the third-party); *In re Motel 6 Sec. Litig.*, Nos. 93-2183 (JFK), 93-2866 (JFK), 1997 WL 154011, at *7 (S.D.N.Y. Apr. 2, 1997) (an unjust enrichment claim requires "some type of direct dealing or actual, substantive relationship with a defendant.")

and their own allegations, the indirect purchasers only dealt with defendants *indirectly* — and thus have not alleged that they actually provided a benefit to defendants. The allegation that plaintiffs "have conferred upon [d]efendants an economic benefit, in the nature of profits resulting from unlawful overcharges," Compl. ¶ 140, ignores the reality of the indirect purchasers' relationship (or lack thereof) with defendants.[34]

Plaintiffs' unjust enrichment claim also fails because plaintiffs have not alleged that defendants received a benefit while plaintiffs received nothing in return. *See Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487, 495 (D.C. Cir. 1998) ("non-payment" for benefit); *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 155 (Tenn. 1966) (recovery barred if defendant "has given any consideration to any person"); *Ramsey v. Ellis*, 484 N.W.2d 331, 333 (Wis. 1992) ("[R]ecovery for unjust enrichment is based upon the inequity of allowing the defendant to retain a benefit *without paying for it* . . . .") (emphasis added). If plaintiffs received some benefit from the transaction, there is no unjust enrichment. *Tooltrend, Inc. v. CMT Utensili SRL*, 198 F.3d 802, 807 (11th Cir. 1999). Here, there is no question that plaintiffs received some benefit from the transaction — Digital Music — and therefore there is no unjust enrichment.[35]

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[34] In fact, under Kansas law, plaintiffs must have privity with defendants to allege an unjust enrichment claim unless certain "special circumstances" are present — none of which are alleged in the generic allegations of the complaint. *Haz-Mat Response*, 910 P.2d at 847.

[35] Moreover, Tennessee law imposes the additional burden that before a plaintiff can recover on an unjust enrichment claim, he "must have exhausted his remedies against the person with whom he had contracted, and still has not received the reasonable value of his services." *Paschall's, Inc*, 407 S.W.2d at 155. *See also Freeman Indus. LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 526 (Tenn. 2005) (Even if pursuit of remedies would be futile, plaintiff must allege a factual basis establishing why.) Plaintiffs have failed to do so.

VII. PLAINTIFFS' ALLEGATIONS OF EXTRANEOUS, IMMATERIAL AND INFLAMMATORY MATTERS SHOULD BE STRICKEN

Because they cannot set forth the relevant facts to allege an antitrust conspiracy in the on-line and CD markets, plaintiffs fill their complaint with extraneous, immaterial and inflammatory allegations in an attempt to make it appear that defendants have engaged in anticompetitive conduct. Many of the purported "facts" set forth in plaintiffs' complaint, however, have no bearing on the allegations and, as such, should be stricken.

Rule 12(f) of the Federal Rules of Civil Procedure permits a court to strike certain objectionable material in a pleading. FED. R. CIV. P. 12(f) ("the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter"). As detailed below, plaintiffs include references to previous litigations and investigations involving defendants in an attempt to show that "[d]efendants are no strangers to lawsuits and government investigations for anticompetitive behavior . . . ." Compl. ¶ 109. References to previous lawsuits and investigations to show that a defendant acted in conformity therewith are relevant only if those matters reached a decision on the merits. *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893-94 (2d Cir. 1976). Despite this fact, plaintiffs' complaint is peppered with references to litigations that have settled and to ongoing government investigations that have not reached a final decision on the merits.

Under Rule 12(f), references in a complaint to matters where a court or an administrative agency did not reach a decision on the merits are not true adjudications, and thus should be stricken as immaterial. *Id.* at 894 (striking references to a consent judgment between a federal agency and a private corporation because the decree was "the result of private bargaining, and there was no hearing or rulings or any form of decision on the merits by the district court"); *see also In re Merrill Lynch & Co. Inc. Research Reports Sec. Litig.*, 218 F.R.D. 76, 78-79

(S.D.N.Y. 2003) (striking allegations in complaint referring to administrative agency complaint and allegations relating to complaints in similar securities and antitrust civil proceedings).[36]

Allegations regarding the following should be stricken on this ground:

- **General Familiarity With Investigations:** Plaintiffs allege that the "Defendants are no strangers to lawsuits and government investigations" regarding Digital Music. Compl. ¶ 109. That sort of sweeping allegation has no place in a complaint.

- **Payola Investigations:** Plaintiffs make allegations regarding federal and state investigations into alleged "payola" schemes in which defendants were "paying radio stations for playing certain songs." Compl. ¶¶ 111-12. That allegation has no relationship or relevance to the allegations here. Indeed, plaintiffs do not even allege that these matters have anything to do with the advent of Internet Music or Digital Music generally. To the contrary, these allegations, as well as the allegations regarding "illegal payments" and "fictitious contest winners," are all designed to evoke inflammatory images rather than substantively relevant facts.

- **CD State Investigations:** Plaintiffs allege that "Defendants were subject to a number of government investigations and lawsuits concerning the pricing of CDs." Compl. ¶ 110. Plaintiffs do not here allege the facts underlying those investigations and lawsuits and what, if any, connection those facts have to the present matter. Nor do they allege that the investigations

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[36] *See also Shahzad v. H.J. Meyers & Co., Inc*., No. 95 Civ. 6196 (DAB), 1997 WL 47817, at *14 (S.D.N.Y. Feb. 6, 1997) (striking references to various consent orders between defendant and state and federal agencies because a "consent judgment between a federal agency and a private corporation which is not the result of an actual adjudication on the merits cannot be used as evidence in subsequent litigation between that corporation and another party") (internal quotation omitted); *Ledford v. Rapid-Am. Corp.*, No. 86 Civ. 9117 (FJK), 1988 WL 3428, at *1 (S.D.N.Y. Jan. 8, 1988) (striking portion of complaint discussing probable cause determination by state agency that was a non-adjudicative step in the administrative process because "references in a complaint to proceedings which do not adjudicate underlying issues may be stricken").

and lawsuits were meritorious. It is a matter of public record (*see* Section I.A.1) that the investigations were closed and those suits were settled and thus, did not reach a conclusion on the merits. As such, any references to the CD investigations should be stricken.

- **On-line Music Investigation:** Plaintiffs also include allegations regarding the ongoing federal and state investigations of defendants regarding the price of Internet Music. Compl. ¶¶ 106-08. They allege that the New York Attorney General's Office and the Department of Justice have begun investigations and issued, or plan to issue, discovery demands. These investigations are at a preliminary stage and no determination on the merits has been reached. As such, any references to the federal or state investigations of price fixing of Internet Music are prejudicial and should be stricken.

- **Napster Litigation:** Plaintiffs quote from the Napster litigation regarding the Court's characterization of the MusicNet and pressplay joint ventures on the Court's admitted "undeveloped record." Compl. ¶ 87. In the decision plaintiffs cite, *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087 (N.D. Cal. 2002), the Court held that "neither side has sufficiently developed the factual and legal bases for their arguments." 191 F. Supp. 2d at 1109. Thus, the Court granted Napster's motion under Rule 56(f) of the Federal Rules of Civil Procedure to allow for further factual development. *Id.* at 1110. The Court did not reach the legality of the joint ventures.

- **Lexecon Allegations:** Though not involving a previous investigation or litigation, the last sentence of paragraph 38 of the complaint, in which plaintiffs purport to reserve their right to have this case remanded after pretrial procedures, should be also stricken as immaterial because it states neither the grounds for jurisdiction nor the basis of a claim. *See In re Merrill*

Lynch, 218 F.R.D. at 78 (Rule 12(f) "is designed to reinforce the requirement in Rule 8(e) that pleadings be simple, concise, and direct".)

Moreover, plaintiffs have incorrectly stated the law because, by filing both the first and second consolidated amended complaints, plaintiffs did, in fact, waive any right to return to the districts from which they were transferred at the conclusion of pretrial proceedings. *See In re African-American Slave Descendants Litig.*, 471 F.3d 754, 756 (7th Cir. 2006) (holding that by filing an amended complaint that acknowledges proper venue and jurisdiction, a plaintiff authorizes an MDL transferee district court to determine the merits of a suit); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 211 n.32 (D. Me. 2003) ("[T]he two consolidated amended complaints filed in this District voluntarily . . . amount to a consent to transfer. After all, it would be hard to know where to "send back" the consolidated complaints".)

CONCLUSION

For the foregoing reasons, the Court should dismiss with prejudice plaintiffs' complaint pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim and, in the alternative, strike the last sentence of paragraph 38 and the entirety of paragraphs 87 and 106-112 of the complaint pursuant to FED. R. CIV. P. 12(f).

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Respectfully submitted,

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