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

IN RE DUCTILE IRON PIPE FITTINGS ("DIPF") INDIRECT PURCHASER ANTITRUST LITIGATION	Civil. No. 12-169 (AET) (LHG) **RETURN DATE: July 15, 2013** **ORAL ARGUMENT REQUESTED**
STATE OF INDIANA, by its Attorney General Greg Zoeller, Plaintiff, v. McWANE INC., SIGMA CORPORATION, and STAR PIPE PRODUCTS, LTD., Defendants.	Civil. No. 12-6667 (AET) (LHG)

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

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I. INTRODUCTION.

On March 18, 2013, the Court dismissed plaintiffs' amended class action complaint, concluding that "Indirect Purchaser Plaintiffs' pleadings regarding antitrust impact are insufficient as to each claim." (Mar. 18, 2013 Slip Op. at 10 (hereafter, "Slip Op.").) Although granting leave to amend, the Court "encouraged" plaintiffs "to anticipate those [other] arguments" raised by defendants, and "address any potential pleading deficiencies when amending the Amended Complaint." Ibid. For the most part, plaintiffs sidestepped that direction.

Defendants McWane, Inc. and SIGMA Corporation respectfully submit that the complaint should be dismissed in substantial part because:

- Three named plaintiffs -- City of Blair (Nebraska), City of Fargo (North Dakota), and Town of Fallsburg, Sullivan County (New York) -- fail to plead sufficient facts to support their claims that they were overcharged for ductile iron pipe fittings ("DIPF") and thus have not pled antitrust impact;
- Plaintiffs lack standing to bring claims under the laws of states where no named plaintiff resides or was injured;
- Plaintiffs fail to state a claim under the antitrust laws of their home states of Florida, Michigan, New York, and North Carolina, and the consumer protection laws of their home states of New Hampshire and North Carolina because those statutes require a showing of intrastate conduct and/or effects, or prohibit indirect purchasers from bringing claims;
- Plaintiffs fail to plead facts supporting antitrust impact for purchases of DIPF made as a part of

comprehensive contracts for waterworks (water systems) projects, and, in any event, no plaintiff with a viable cause of action alleges purchases of DIPF as a part of a waterworks contract;

- Plaintiffs fail to identify the state laws under which they are pursuing unjust enrichment claims; and

- Plaintiffs fail to state a claim for injunctive relief because they do not allege ongoing or threatened harm.

Defendants McWane and SIGMA respectfully submit that, for those reasons, the complaint should be dismissed in large part.[1]

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

A. The March 18, 2013 opinion and order.

On March 18, 2013, the Court dismissed plaintiffs' amended class action complaint in its entirety, concluding that "Indirect Purchaser Plaintiffs' pleadings fail to show, however, that any one of the Indirect Purchaser Plaintiffs was actually injured by Defendants' conduct as alleged under any single claim." (Slip Op. at 8.) It explained that plaintiffs had failed to plead with the "level of specificity" necessary to show that "they were directly injured in the claims" and thus the pleadings "regarding antitrust impact are insufficient as to each claim." (Id. at 8-10.) It reasoned that "[a]s such, it is

[1] Defendants McWane and SIGMA have not moved to dismiss the claims for alleged overcharges for "stand-alone" DIPF purchases under (i) Florida's unfair trade practices act (asserted by plaintiff City of Hallandale Beach), (ii) New Hampshire antitrust law (asserted by plaintiff Waterline Industries), and (iii) Kansas antitrust law (asserted by plaintiff Water District No. 1 of Johnson County).

unnecessary for the Court to address the other arguments raised by Defendants in favor of dismissal. Indirect Purchaser Plaintiffs are encouraged, however, to anticipate those arguments and address any additional potential pleading deficiencies when amending the Amended Complaint." (Id. at 10.)

B. Allegations in the second amended class action complaint.

On May 3, 2013, plaintiffs filed their second amended class action complaint ("complaint"). The underlying allegations largely remain unchanged. Where before there were eight (8) named plaintiffs from seven (7) different states, there are now ten (10) named plaintiffs from eight (8) different states. They are: Waterline Industries Corporation & Waterline Services, LLC (New Hampshire); Yates Construction Co., Inc. (North Carolina); City of Hallandale Beach (Florida); City of Blair (Nebraska); Wayne County (Michigan); South Huntington Water District, Village of Woodbridge and Town of Fallsburg (New York); City of Fargo (North Dakota); and Water District No. 1 of Johnson County (Kansas). (Compl. ¶¶ 15-43.)

All named plaintiffs and putative class members in this action remain "indirect" purchasers of DIPF. As indirect purchasers, plaintiffs have no Sherman Act damages claim as a matter of law. Illinois Brick v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). Therefore, their potential

recovery is limited to only damages under state law and injunctive relief under federal law. Hence, plaintiffs seek damages against all defendants under the antitrust statutes of 22 states and the District of Columbia, and the consumer protection statutes of 11 states (combined, the statutes of 29 jurisdictions are invoked), and injunctive relief against McWane and SIGMA for alleged violations of the Sherman Act. Once again, they assert an unjust enrichment claim but inexplicably fail to identify the state(s) applicable to that claim.

Plaintiffs' allegations now boil down to two allegedly anticompetitive courses of conduct. First, they allege that McWane, Star, and SIGMA "conspired to raise and stabilize the prices at which DIPF were sold in the United States from January 11, 2008 through May 2009." (Compl. ¶ 54; see also Slip Op. at 2-3.)

Second, they allege that McWane "was able to maintain its monopoly power in the Domestic DIPF Market through [the] unlawful acts" (Compl. ¶ 83), and that, as one of these "unlawful" acts, McWane and SIGMA entered into a Master Distribution Agreement ("MDA")[2] in September 2009 "with the specific intent to maintain artificially inflated prices in the

[2] SIGMA was only an importer and not a manufacturer of DIPF, and McWane was a manufacturer of domestic DIPF. The MDA allowed SIGMA to distribute domestically manufactured DIPF.

Domestic DIPF market by eliminating competition among themselves and excluding their rivals." (Compl. ¶ 96; see also Slip Op. at 3-4.)

Plaintiffs seek to certify three classes of indirect purchasers for purchases made in 28 states and the District of Columbia (collectively, the "29 states") during two class periods. Plaintiffs define the "Class Periods" as "February 17, 2009 to present (Class Period 1)" and "January 11, 2008 through May 2009 (Class Period 2)." (Compl. ¶¶ 131-32.) The putative classes are:

> (1) Injunction Class: All persons and entities that, during the period from February 17, 2009 to the present (Class Period 1), purchased Domestic DIPF indirectly from [d]efendants and/or their co-conspirators.
>
> (2) Stand-Alone Product Plaintiffs: All persons and entities who purchased DIPF as a stand-alone product indirectly from Defendants and/or their co-conspirators from January 11, 2008 through May 2009 (Class Period 2), or purchased Domestic DIPF as a stand-alone product indirectly from [d]efendant McWane or Sigma and/or their co-conspirators during Class Period 1 [in the 29 states].
>
> (3) Water Project Plaintiffs[3]: All persons and entities who, during Class Period 2, purchased DIPF as part of a water systems project contract indirectly from [d]efendants and/or their co-conspirators

[3] Elsewhere in the complaint, plaintiffs refer to "water systems projects" as "waterworks projects." (Compl. ¶ 52.)

> or, during Class Period 1 purchased Domestic DIPF as part of a water systems project contract indirectly from [d]efendant McWane or Sigma [in the 29 states].

(Compl. ¶¶ 131-32.)

C. The FTC proceedings.

The complaint remains duplicative of the complaints filed by the FTC. Every substantive allegation in the complaint either was contained in the FTC complaints or gleaned from public filings on the FTC's docket.

Star and SIGMA are no longer parties in any FTC proceedings; they signed consent decrees on March 20, 2012 and January 4, 2012, respectively.[4] The FTC found no liability on either Star's or SIGMA's part, and neither consent decree required any monetary payment. Star and SIGMA did not admit any wrongdoing. As the FTC explained in its press release, "[t]he issuance of a complaint is not a finding or ruling that the respondent has violated the law. A consent order is for settlement purposes only and does not constitute an admission of

[4] See In re SIGMA Corp., FTC File No. 101 0080, available at http://ftc.gov/os/caselist/1010080/index.shtm; In re McWane, Inc., and Star Pipe Products, Ltd., Docket No. 9351, available at http://ftc.gov/os/adjpro/d9351/index.shtm. The Court may consider the consent decrees contained in the FTC docket as public records. See Anspach v. City of Phila., 503 F.3d 256, 273 n.11 (3d Cir. 2007) ("Courts ruling on Rule 12(b)(6) motions may take judicial notice of public records."); see also Fed. R. Evid. 201.

a law violation[.]" (Press Release, Jan. 4, 2012, available at http://ftc.gov/opa/2012/01/mcwane.shtm.)

McWane and the FTC remain involved in administrative litigation under Section 5 of the FTC Act. On May 9, 2013, the administrative law judge (ALJ) issued an Initial Decision. See Initial Decision, Docket No. 9351, available at http://www.ftc.gov/os/adjpro/d9351/130509mcwanechappelldecision.pdf. The ALJ found that the FTC failed to prove that defendants conspired to fix prices, holding that the government's "unsupported speculation" was "weak at best" and its "daisy chain of assumptions fails to support or justify an evidentiary inference of any unlawful agreement involving McWane," and therefore dismissed Counts 1-3. The ALJ recommended a ruling in the FTC's favor on Counts 4-7. The FTC and McWane have appealed the Initial Decision to the Commission.

III. STANDARD OF REVIEW.

McWane and SIGMA move to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). To avoid dismissal under Rule 12(b)(1), plaintiffs bear the burden of establishing their standing to sue in federal court. See In re Flonase Antitrust Litig. ("Flonase I"), 610 F. Supp. 2d 409, 412 (E.D. Pa. 2009) (quoting Ballentine v. United States, 486 F.3d 806, 810 (3d Cir. 2007). The Court already has set forth the relevant standard of review for a 12(b)(6) motion, and it need not be repeated here.

(Slip Op. at 7.) Federal pleading standards apply to state law claims pressed in federal court. Ciemniecki v. Parker McCay P.A., No. 09-6450, 2010 U.S. Dist. LEXIS 55661, at *12 (D.N.J. June 7, 2010) ("federal pleading standards -- not New Jersey pleading standards -- govern the sufficiency of the Complaint") (citing Turk v. Salisbury Behavioral Health, Inc., No. 09-6181, 2010 U.S. Dist. LEXIS 41640, at *4 (E.D. Pa. Apr. 27, 2010) ("The federal pleading standards apply to state law claims asserted in federal court.") (additional citations omitted)).

In short, an antitrust complaint must be dismissed when the plaintiff fails to plead facts to support an essential element of its claim, such as standing, or its right to relief. See Brunson Commc'ns, Inc. v. Arbitron, Inc., 239 F. Supp. 2d 550, 570 (E.D. Pa. 2002) (dismissing antitrust claims under Sherman Act where complaint "provided no factual allegations" that would support core element of claim).

IV. ARGUMENT.

Plaintiffs' complaint is defective in four major respects:

First, three named plaintiffs fail to allege facts fundamental to their claims -- when and what they bought, and which, if any, defendant they purportedly bought from. That constitutes a now repeated failure to plead facts sufficient to

show antitrust impact; for that same reason, the Court earlier dismissed plaintiffs' prior complaint.

Second, core class action principles preclude plaintiffs from bringing state-specific claims as part of a putative class action unless they themselves can assert those claims. Yet, plaintiffs allege no facts to establish standing for any named plaintiff to assert claims under the laws of states in which no named plaintiff resides or was injured. Moreover, under the laws of four of the eight home states in which plaintiffs potentially may have standing -- Michigan, New Hampshire, North Carolina, and New York -- plaintiffs fail to meet the legal prerequisites for the claims they assert. Their unjust enrichment claim fails as well; it lacks specificity and suffers from the same ills that doom plaintiffs' statutory state claims.

Third, plaintiffs fail to plead facts sufficient to show antitrust impact to support claims based on purchases of DIPF made as part of a comprehensive contract for a waterworks project.

And, fourth, plaintiffs fail to plead any facts of ongoing anticompetitive acts as is required to maintain a claim for injunctive relief.[5]

A. Three plaintiffs' claims should be dismissed under the March 18 order.

Three of the plaintiffs fail to allege facts that support their allegations that they themselves were overcharged. That omission constitutes a repeated failure to allege the individualized injury necessary for their claims.

In its May 18 opinion, the Court set forth the legal principles applicable to determining whether plaintiffs may pursue this action. In addition to alleging a violation of the antitrust laws and damages, plaintiffs must allege facts showing "'individual injury[.]'" (Slip Op. at 7 (quoting In re Hydrogen

[5] After accounting for these deficiencies, plaintiffs are left with only claims for alleged overcharges for stand-alone DIPF under (i) the Florida deceptive and unfair trade practices act, Fla. Stat. §§ 501.201 et seq. (Compl. ¶¶ 192 and 240), for which only plaintiff City of Hallandale Beach has standing; (ii) New Hampshire antitrust law, N.H. Rev. Stat. §§ 356:1, et seq. (Compl. ¶¶ 172, 221, and 268), for which only plaintiff Waterline Industries has standing; and (iii) Kansas antitrust law, Kan. Stat. Ann. § 50-101, et seq. (Compl. ¶¶ 165 and 214), for which only plaintiff Water District No. 1 of Johnson County has standing. Because City of Hallandale is the only one of these plaintiffs that alleges it purchased during the alleged 2008-2009 conspiracy period, the price-fixing claims are limited to the Florida deceptive and unfair trade practices act claim. See Appendix I. Because Waterline Industries and Water District No. 1 are the only two of these plaintiffs that allege to have purchased during the alleged 2009-2010 McWane-SIGMA conspiracy, the monopolization claims against McWane and SIGMA are limited to New Hampshire and Kansas antitrust law.

Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008).) To allege individual injury, or "antitrust impact," plaintiffs must allege "'injury of the type the antitrust laws were intended to prevent . . . that flows from that which makes defendants' acts unlawful.'" (Ibid.) What is more, "in a class action lawsuit, a class representative for a particular claim must himself have a cause of action on that claim." (Id. at 8 (citing Zimmerman v. HBO Affiliate Grp., 834 F.2d 1163, 1169 (3d Cir. 1987), and Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987)).) "Therefore, for each antitrust claim asserted, there must be at least one Indirect Purchaser Plaintiff who has experienced antitrust impact that flows from the anticompetitive behavior that gives rise to the claim." (Ibid.)[6]

At a minimum, plaintiffs must allege they "actually purchased DIPF during the time periods relevant to those

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

claims." (Id. at 9.) Each plaintiff must therefore allege they either (i) purchased DIPF from McWane, SIGMA, or Star during the alleged 2008-2009 conspiracy period, (ii) purchased domestically manufactured DIPF from McWane after February 17, 2009, and (iii) purchased domestically manufactured DIPF from SIGMA after the execution of the MDA in September 2009.

As an aid, a chart summarizing each plaintiffs' purchase allegations is attached as Appendix 1. It shows, as explained below, that plaintiffs City of Blair (Nebraska), City of Fargo (North Dakota), and Town of Fallsburg (New York) each fails to allege any purchases that support antitrust impact:

- The City of Blair alleges only that it "indirectly purchased DIPF as part of water systems project contracts in 2011 and 2012." (Compl. ¶ 27.) That is not enough. To show antitrust impact between 2011 and 2012, it must have purchased domestically manufactured DIPF from either McWane or SIGMA. Because the City of Blair does not allege what type of DIPF it purchased or from which defendant it indirectly purchased, it has not alleged antitrust impact.

- The City of Fargo alleges that, "[b]etween 2008 and the present, Fargo indirectly purchased DIPF that was originally manufactured by one or more of the [d]efendants as part of many water systems project contracts." (Compl. ¶ 33.) But the City of Fargo does not allege that it in fact purchased

DIPF during the 2008-2009 conspiracy period, or that it purchased domestically manufactured DIPF from McWane or SIGMA. The City of Fargo fails to allege antitrust impact.

- The Town of Fallsburg alleges that, "[be]tween 2010 and 2011, Fallsburg indirectly purchased Star-branded Domestic DIPF as part of multiple water systems project contracts." (Compl. ¶ 42.) Its claim fails because Star is not alleged to have engaged in any anticompetitive acts related to the sale of "Star-branded Domestic DIPF" in 2010 or 2011.

These plaintiffs should be dismissed.[7] As explained below, without the Cities of Blair and Fargo as named plaintiffs, claims asserted under Nebraska and North Dakota law fail because no plaintiffs have standing to assert those claims.[8]

[7] Plaintiffs WaterLine Industries, Village of Woodridge, and Water District No. 1 did not allege relevant purchases of DIPF from one of the defendants during the alleged 2008-2009 price-fixing conspiracy. See Appendix I. They, therefore, are unable to claim impact from that conspiracy. Likewise, plaintiffs Yates Construction, City of Hallandale, South Huntington Water District, and Wayne County, do not allege purchases of domestically manufactured DIPF. See Appendix I. They, therefore, are unable to claim impact from any unlawful conduct related to those purchases.

[8] After the dismissal of Town of Fallsburg, there remain two named plaintiffs from New York. That said, as also noted below, the New York claims fail for other reasons. Further, even if the Cities of Fargo or Blair had alleged facts supporting antitrust standing, their claims would fail for those other reasons.

B. Plaintiffs cannot bring antitrust and consumer protection claims under the laws of states where no named plaintiff resides or was injured.

Plaintiffs assert causes of action under the statutory laws of 29 jurisdictions -- the antitrust statutes of 22 states and the District of Columbia, and the consumer protection statutes of 11 states (six of which overlap with the antitrust claim jurisdictions) -- and for unjust enrichment under unspecified law. Plaintiffs lack standing to sue under the laws of jurisdictions in which they do not personally allege any injury, and they fail to allege injury outside of their home states. Because they allege no facts showing they have standing to assert claims under any laws other than those of their home states, their claims under the laws of all other jurisdictions must be dismissed.

In dismissing the prior complaint, the Court recognized that a plaintiff cannot be a class representative unless it too has a personal claim. (Slip Op. at 8 ("[A] class representative for a particular claim must himself have a cause of action on that claim.").) The United States Court of Appeals for the Third Circuit rejected reliance on the standing of absent class members, explaining that "standing is not dispensed in gross." In re Schering Plough Corp., supra, 678 F.3d at 245 (quoting Lewis v. Casey, 518 U.S. 343, 358 n.6, 1116 S. Ct. 2174 n.6 (1996)).

Courts routinely dismiss indirect purchaser plaintiffs' blanket claims under the laws of states in which no named plaintiff resided or alleged any injury. For example, in In re Wellbutrin XL Antitrust Litigation, Judge McLaughlin reasoned that allowing plaintiffs to proceed under statutes for which they could not establish standing would "allow named plaintiffs in a proposed class action, with no injuries in relation to the law of certain states referenced in their complaint, to embark on lengthy class discovery with respect to injuries in potentially every state in the Union." 260 F.R.D. 143, 154-56 (E.D. Pa. 2009).[9]

[9] See also In re Refrigerant Compressors Antitrust Litig. ("Refrigerant Compressors I"), No. 2:09-md-020402, 2012 WL 2917365, at *5 (E.D. Mich. July 17, 2012) (relying on Wellbutrin XL and dismissing "for lack of Constitutional standing" claims in any state where plaintiff did not reside or purchase the product); In re Processed Egg Prods. Antitrust Litig., No. 08-md-02002, 2012 U.S. Dist. LEXIS 37265, at *24 n.11 (E.D. Pa. Mar. 20, 2012) ("There is long-standing precedent to the effect that when a 'class action' is introduced into the standing equation, the requirement that a named plaintiff must have standing to bring it is unaltered."); In re Flonase Antitrust Litig. ("Flonase II"), 692 F. Supp. 2d 524, 534 (E.D. Pa. 2010) ("Named plaintiffs must have case or controversy standing; the potential standing problem in this case is not created by class certification. Therefore class certification is not logically antecedent to the standing problem."); In re OSB Antitrust Litig., No. 06-826, 2007 WL 2253425, at *1 (E.D. Pa. Aug. 3, 2007) (stating that "lacking named representatives from Arizona, New Mexico, and South Dakota, [p]laintiffs do not have standing to maintain a class action in those states").

In re Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d 1365 (S.D. Fla. 2001), also is instructive. There, as here, indirect purchasers alleged that the defendant's anticompetitive conduct caused class members to "pay[] more" for certain types of drugs. Id. at 1370-71. The court dismissed all state claims for which no named plaintiff personally had alleged injury, concluding that "the named plaintiffs cannot rely on unidentified persons within those states to state a claim for relief." Id. at 1371. It explained that, even though indirect purchasers may have causes of action in various states, "[n]one of these statutes authorizes antitrust actions based on commerce in other states." Ibid.

Rejecting plaintiffs' attempts to invoke the laws of states to which plaintiffs have no connection, courts have recognized that "named plaintiffs lack standing to assert claims under the laws of the states in which they do not reside or in which they suffered no injury." In re Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 657 (E.D. Mich. 2011); Ulrich v. Walker, No. 92-1078, 1992 WL 212478, at *1-2 (E.D. Pa. Aug. 28, 1992) (stating that place of injury is where cause of action

accrues). The case law supporting this core proposition is overwhelming.[10]

This Court has previously dismissed indirect-purchaser claims under the laws of states for which the plaintiffs could not establish standing. See In re Magnesium Oxide Antitrust Litig., ("Magnesium Oxide I"), No. 10-5943 (DRD), 2011 WL 5008090 (D.N.J. Oct. 20, 2011). There, the plaintiffs alleged that anticompetitive conduct caused them to overpay for magnesium oxide. They, like plaintiffs here, brought claims under the laws of several states. The Court reasoned that, if

[10] See also In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1122, 1124-25 (N.D. Cal. 2008) (adopting In re Graphics Processing Units Antitrust Litig. and dismissing, by agreement, indirect purchaser plaintiffs' claims under state laws where no named plaintiff resided); In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1026-27 (N.D. Cal. 2007) (dismissing, with plaintiffs' agreement, claims under state laws where no named plaintiff resided); In re Dynamic Random Access Memory (DRAM) Antitrust Litig. ("DRAM I"), 516 F. Supp. 2d 1072, 1103 (N.D. Cal. 2007) (dismissing state law claims in states where no named plaintiff resided); Montgomery v. New Piper Aircraft, Inc., 209 F.R.D. 221, 227 (S.D. Fla. 2002) (holding that plaintiffs who did not allege injury in Florida could not bring claim under Florida law); Lyon v. Caterpillar, Inc., 194 F.R.D. 206, 218 n.16 (E.D. Pa. 2000) ("Several Eastern District of Pennsylvania courts have held that each class member would be subject to the consumer fraud statutes of his or her state of residence because that state would have the paramount interest in applying its laws to protect its consumers."); Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671, 683-84 (Tex. 2006) (dismissing antitrust claims brought in Texas under Texas law for alleged antitrust violations in other states).

plaintiffs were allowed to proceed under all state statutes, any antitrust plaintiff could

> bring a class action complaint under the laws of nearly every state in the Union without having to allege concrete, particularized injuries relating to those states, thereby dragging defendants into expensive nationwide class discovery, without a good-faith basis. In other words, the plaintiff would have to do no more than name the preserve on which he intends to hunt.

Id. at *10 (citation and internal quotation marks omitted).

When that principle is applied here, the result is compelling: the only states in which plaintiffs could potentially assert claims are their eight (8) home states of Florida, Kansas, Michigan, Nebraska, New Hampshire, New York, North Carolina, and North Dakota. In respect of the state antitrust law claims asserted in counts three, five, and seven, the only possibly surviving claims would be under the laws of Florida, Kansas, Michigan, Nebraska, New Hampshire, New York, and North Carolina.[11] In respect of the state consumer protection law claims in counts four and six, the only possibly

[11] The North Dakota claim fails because the City of Fargo lacks standing.

surviving claims would be under the laws of Florida, New Hampshire and North Carolina.[12]

C. Plaintiffs fail to state a claim under the Florida, Michigan, New York, and North Carolina antitrust laws, and the New Hampshire and North Carolina consumer protection acts.

All but three of the even potentially remaining statutory claims nonetheless should be dismissed because, regardless of plaintiffs' problems with antitrust impact and standing, they have failed to state a claim under the relevant state statutes for which relief can be granted.

Many state antitrust statutes specifically focus on intrastate or "predominantly local" conduct, or otherwise require a concrete connection to the state. Here, the antitrust statutes in Michigan, New York, and North Carolina require a concrete connection between the alleged conduct and the state.[13]

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[12] The Nebraska claim fails because the City of Blair lacks standing.

[13] **Michigan:** Aurora Cable Commc'ns, Inc. v. Jones Intercable, Inc., 720 F. Supp. 600, 603 (W.D. Mich. 1989) (holding that Michigan Antirust Reform Act "parallels the Sherman Antitrust Act as it applies to intrastate conduct"); Peoples Sav. Bank v. Stoddard, 102 N.W.2d 777, 796 (Mich. 1960) (permitting application of state antitrust law in cases where alleged monopoly is "predominantly local"); **New York:** Bowlus v. Alexander & Alexander Servs., Inc., 659 F. Supp. 914, 917 (S.D.N.Y. 1987) ("The language of the [antitrust] statute itself limits its application to conduct within the state.") (citing Baker v. Walter Reade Theatres, Inc., 237 N.Y.S.2d 795, 797 (Sup. Ct. 1962)); **North Carolina:** Lawrence v. UMLIC-Five Corp., No. 06-20643, 2007 WL 2570256, at *7 (N.C. Super. June 18, 2007) (dismissing claim by foreign plaintiff against resident

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Likewise, the consumer protections acts of New Hampshire and North Carolina require a substantial in-state effect. See N.H. Rev. Stat. § 358-A:1 (limited to unlawful "conduct of any trade or commerce within this state"); In re Refrigerant Compressors Antitrust Litig. ("Refrigerant Compressors II"), No. 2:09-md-02042, 2013 WL 1431756, at *17-19 (E.D. Mich. Apr. 9, 2013) (dismissing New Hampshire claim for a failure to allege "any unfair or deceptive act or practice took place in New Hampshire" and North Carolina claim for failure to allege facts showing "'substantial' in-state injury").[14] Lacking any allegation that defendants' challenged conduct occurred or had a substantial effect on commerce in any of these home states, the statutory claims of named plaintiffs Waterline Industries (New Hampshire),[15] Yates Construction Co. (North Carolina), Wayne

(...continued)
defendant because court was not persuaded "that the Defendants' alleged acts have had a substantial in-state effect on North Carolina trade or commerce"); Refrigerant Compressors II, supra, at *18 (citing cases and dismissing North Carolina claim where facts support "'substantial' in-state injury" as opposed to "merely an 'incidental' in-state injury").

[14] See also Mueller Co. v. U.S. Pipe & Foundry Co., No. Civ. 03-170-JD, 2003 WL 22272135, at *6 (D.N.H. Oct. 2, 2003) ("commercial conduct which affects the people of New Hampshire is actionable under section 358-A:2 only if it occurs within New Hampshire.")

[15] Plaintiffs' claim under the New Hampshire consumer protection act, N.H. Rev. Stat. § 358-A:1, et seq. (Compl. ¶¶ 196, 244), fails for the additional reason that, in order to state a claim under that act, the defendants must have their

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County (Michigan), South Huntington Water District (New York), Village of Woodbridge (New York), and Town of Fallsburg (New York) should be dismissed.

Plaintiffs' Florida antitrust law claim in count seven (Compl. ¶ 258) fails because Florida prohibits indirect purchaser plaintiffs from asserting state antitrust claims. See Mack v. Bristol Meyers Squibb Co., 673 So. 2d 100, 102 (Fla. Dist. Ct. App. 1996).

The only remaining plaintiffs with (i) standing and (ii) potentially viable claims under their home states' laws are the City of Hallandale Beach, Florida (deceptive and unfair trade practices act, counts four and six), Waterline Industries Corporation, New Hampshire (antitrust law, counts three, five, and seven), and Water District No. 1 of Johnson County, Kansas (antitrust law, counts three and five).

D. Plaintiffs' unjust enrichment claim fails.

Plaintiffs' vague claim for "unjust enrichment" is based on but one untethered, bald conclusion: that defendants "have been unjustly enriched by the receipt of unlawfully inflated prices and unlawful profits on sales of DIPF[.]" (Compl. ¶ 284.) That claim cannot survive. Plaintiffs do not

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principal place of business within the state. That, simply, is not the case here. See id. at § 358-A:10-a, I.

identify any state law under which the unjust enrichment claim pled in count eight arises. Courts consistently dismiss such deficiently pled unjust enrichment claims.

Because the common law theory of unjust enrichment varies in material respects from state to state, the sufficiency of plaintiffs' pleadings cannot be evaluated without reference to a particular state's body of case law. By way of example, unjust enrichment under the common law of some of the home states of the named plaintiffs requires that a plaintiff directly "confer a benefit" on defendants, which indirect purchasers cannot do by definition. See, e.g., Flonase II, supra, 692 F. Supp. 2d at 544 (dismissing unjust enrichment claims under Florida and North Carolina law as indirect purchasers cannot satisfy "direct benefit" requirement); Sheet Metal Workers Local 441 Health & Welfare Plan, et al. v. GlaxoSmithKline, PLC, 263 F.R.D. 205, 216 (E.D. Pa. 2009) (same under New York law); In re Relafen Antitrust Litig., 225 F.R.D. 14, 28 (D. Mass. 2004) (same); Apache Corp. v. MDU Res. Group, Inc., 603 N.W.2d 891, 895 (N.D. 1999) (requiring that, under North Dakota law, defendant have received direct benefit from plaintiff).

The variations in the common law of unjust enrichment of necessity would require the dismissal of some, if not all, of plaintiffs' state law claims. Thus, gauging the sufficiency of

the complaint's allegations of unjust enrichment without first defining which state's laws apply is utterly futile. Plaintiffs have failed to meet this basic pleading requirement, and their unjust enrichment claim should be dismissed as pled. See, e.g., Refrigerant Compressors II, supra, at *24 (recognizing that "state law requirements under unjust enrichment law vary widely," and dismissing unjust enrichment claims for failure to specify the "state or states' laws they are asserting an unjust enrichment claim under"); Wellbutrin XL., supra, 260 F.R.D. at 167 (dismissing unjust enrichment claim for failure to specify particular state law); Flonase I, supra, 610 F. Supp. 2d at 409 (same); In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 910 (N.D. Cal. 2008) (same); In re Ditropan XL, 529 F. Supp. 2d 1098, 1107 (N.D. Cal. 2007) (same); In re TFT-LCD, supra, 586 F. Supp. 2d at 1124-25 (same).

Moreover, plaintiffs cannot use an unjust enrichment claim as an end-run to pursue relief otherwise not available under state antitrust or consumer-protection laws. In re K-Dur, No. 01-1652, 2008 WL 2660780, at *5 (D.N.J. Feb. 28, 2008). That notion directly contravenes the legislative judgments expressed in the governing statutes, and violates the fundamental and long-standing principle that plaintiffs cannot use equity to expand statutorily defined rights. Hedges v. Dixon County, 150 U.S. 182, 192, 14 S. Ct. 71, 74, 37 L. Ed.

1044, 1048 (1893) (holding that, because "equity follows the law, or . . . wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation"). See also Flonase II, supra, 692 F. Supp. 2d at 542 ("[W]here an antitrust defendant's conduct cannot give rise to liability under state antitrust and consumer protection laws, [p]laintiffs should be prohibited from recovery under a claim for unjust enrichment.") In other words, an unjust enrichment claim cannot be used in derogation of the antitrust and consumer-protection policy decisions of a state legislature. Terazosin Hydrochloride, supra, 160 F. Supp. 2d at 1380.[16]

[16] Plaintiffs theoretically could bring claims for unjust enrichment under Florida law (City of Hallandale Beach) and under Kansas law (Water District No. 1 of Johnson County). That said, indirect purchasers by definition cannot assert a viable claim for unjust enrichment under either Florida or Kansas law because those states require that the plaintiff have conferred a direct benefit on the defendant. See In re Potash Antitrust Litig., 667 F. Supp. 2d 907, 948 (N.D. Ill. 2009) (indirect purchaser plaintiffs could not maintain unjust enrichment claim under laws of Michigan, Kansas or Florida because unjust enrichment in those states requires plaintiff establish that it conferred direct benefit on defendant) (citing Spires v. Hospital Corp. of America, 289 Fed. Appx. 269, 273 (10th Cir. 2008) (noting that Kansas law does not support "indirect unjust enrichment claim")); Flonase II, supra, 692 F. Supp. at 544 (stating, in dismissing claim for unjust enrichment under Florida law, that "Florida law is clear; it requires that a plaintiff confer a direct benefit upon a defendant in order to state a claim for unjust enrichment") (citing Nova Info. Sys., Inc. v. Greenwich Ins. Co., 365 F.3d 996, 1007 (11th Cir. 2004)). As these authorities make clear, the complaint cannot

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Dismissal of plaintiffs' unjust enrichment claim should be with prejudice. The Court already directed plaintiffs to amend their complaint to address all arguments raised by defendants in the prior briefing. Plaintiffs neglected to do so in respect of their unjust enrichment claim at their peril, despite both the Court's instruction and the settled case law. In like circumstances, courts have refused to allow a plaintiff yet another opportunity to save their unjust enrichment claims. See, e.g., Refrigerant Compressors II, supra, at *24-25; Wellbutrin XL, supra, 260 F.R.D. at 167 (dismissing unjust enrichment claim without leave to amend).

E. Plaintiffs fail to plead facts supporting antitrust impact in purchases of DIPF made as a part of comprehensive waterworks project contracts, and, regardless, no plaintiff with a viable claim purchased DIPF in this manner.

In addition to pursuing overcharge claims based on their purchases of DIPF as a "stand-alone" product (Compl. ¶¶ 16-17, 20-21, 24, 29, and 40), plaintiffs also seek to pursue claims for DIPF purchases made as a part of waterworks/water systems projects. (Compl. ¶¶ 27, 33-34, 36, and 38, 42.) Four plaintiffs allege that they made purchases as part of a project. (See Appx. 1.) Those claims fail for the three reasons

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be construed to allege unjust enrichment claims under either Florida or Kansas law.

discussed below. As a result, any remaining claims for alleged overcharges should be limited to stand-alone purchases of DIPF.

1. Plaintiffs fail to allege facts showing that the alleged antitrust violations would have more than a "minimal foreseeable effect" on the price of waterworks projects.

Plaintiffs do not allege facts to support their standing to bring claims based on alleged purchases of DIPF that were a component of a larger contract for a waterworks project. Specifically, plaintiffs fail to allege facts showing that the alleged antitrust violations would have more than a "minimal foreseeable effect" on the price of waterworks projects.

There are defined limits on the ability of purchasers to recover for antitrust violations. See Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982). In this Circuit, these limitations apply to indirect purchasers' federal and state law claims. Magnesium Oxide I, supra, at *6 ("In analyzing whether an antitrust injury proximately caused an alleged loss to an indirect purchaser, this Circuit has been guided by the Supreme Court's decision in [McCready]."); id. at *7 n.9 ("IP Plaintiffs also lack standing to assert their state antitrust claims because those claims are construed in accordance with federal antitrust principles.").

McCready explains that "an antitrust violation may be expected to cause ripples of harm to flow through the Nation's

economy; but ... [i]t is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action." Supra, 457 U.S. at 476-77, 102 S. Ct. at 2547, 73 L. Ed. 2d at 159. It sets out a two-part test for determining whether, for Article III standing purposes, a plaintiff has alleged that a defendant's alleged antitrust violation proximately caused an injury. It instructs that courts should "look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy...." Id., 457 U.S. at 478, 102 S. Ct. at 2547-48, 73 L. Ed. 2d at 160. The key consideration is "whether the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations ... would be likely to cause." Id., 457 U.S. at 479, 102 S. Ct. at 2548, 73 L. Ed. 2d at 161 (internal quotation marks and citations omitted).

Plaintiffs admit that "DIPF are a relatively small portion of the cost of materials of a typical waterworks project[.]" (Compl. ¶ 116.) Waterworks projects include, among other things, pipes, DIPF, valves and hydrants. (Compl. ¶¶ 51-

52.) Plaintiffs explain that "[w]aterworks projects can be separated into two categories – line or plant work." (Compl. ¶ 52.) Line work "relates to the waterworks projects related to underground pipes that move water to and from water supply facilities." (Compl. ¶ 52.) Plant work relates to "waterworks projects for water treatment plants, pumping stations, or wastewater treatment plants, which process water so that it is clean when it is dumped." (Compl. ¶ 52 (internal quotation marks and citation omitted).)

Yet, plaintiffs fail to allege facts to show the most telling and necessary aspect of this part of their case: that what they in fact paid for waterworks project was higher as a result of defendants' alleged conduct. Nothing in the complaint shows that the alleged injury -- overcharges for the waterworks project -- was "so integral an aspect of the conspiracy alleged." McCready, supra, 457 U.S. at 479, 102 S. Ct. at 2548, 73 L. Ed. 2d at 161. Simply said, they provide no detail as to what was involved in their waterworks projects or their cost.

In re Magnesium Oxide Antitrust Litigation ("Magnesium Oxide II"), No. 10-5943 (DRD), 2012 WL 1150123 (D.N.J. Apr. 5, 2012), supports dismissal. There, like here, the Court already had dismissed without prejudice the indirect purchaser plaintiffs' claims. The defendants moved to dismiss the amended complaint, arguing that "IP Plaintiffs lack Article III standing

to pursue their antitrust claims because they fail to show that the MgO conspiracy would have more than a minimal foreseeable effect on the price of products [e.g., CCM] containing MgO that they purchased." Id. at *9. The Court agreed because, although the plaintiffs alleged they had "purchased cattle feed rations and mineral packs containing up to 4% CCM[,] [t]his percentage of MgO is too small to provide a sufficient nexus between IP Plaintiffs' MgO products and the MgO conspiracy." Id. at *9. It explained: "While a small percentage of a price-fixed ingredient in a product may not be fatal to a product purchaser's standing to bring antitrust claims, there must be a showing that a price increase in that ingredient has a significant foreseeable effect on the price of the purchased product." Ibid.

Plaintiffs do not allege that DIPF accounted for even four percent of the price of waterworks projects. They candidly admit that DIPF only constituted a "small portion of the cost" of what they purchased. They have made no showing that the alleged price increase of DIPF had a "significant foreseeable effect" on the purchase price for waterworks projects.

2. Under Associated General Contractors, plaintiffs lack antitrust standing to assert claims as "end payors" of products containing DIPF.

Many of plaintiffs' state claims based on the alleged overcharges for DIPF bought as a part of waterworks projects

fail for an additional reason: most states require that an indirect purchaser satisfy the test for antitrust standing set forth in Associated General Contractors of California, Inc. v. California State Council of Carpenters ("AGC"), 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983). In AGC, the Supreme Court identified

> the following [five] factors that courts are to weigh to determine "whether the plaintiff is a proper party to bring a private antitrust action: 1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; 2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; 3) the directness or indirectness of the injury; 4) the potential for duplicative recovery or complex apportionment of damages; and 5) the existence of more direct victims of the alleged antitrust violation.

Refrigerant Compressors II, supra, at *11.[17]

Courts applying the AGC test to similar indirect purchaser claims –- where the allegedly price-fixed component was sold as a part of a larger product –- have held that plaintiffs may not bring claims under the antitrust statutes of 22 relevant jurisdictions, each of which is alleged by

[17] Appendix II contains a list of the relevant jurisdictions that apply the AGC factors and additional case law support for the application of those factors (and also notes the two relevant states that do not apply the AGC factors).

plaintiffs in this case.[18] Here, DIPF is purchased as a small, indivisible component of an overarching, comprehensive contract for a water works project, usually after a bidding process for the entire project as a completed whole.[19]

Applying the AGC factors to the claims for alleged overcharges related to purchases of DIPF as a part of a waterworks project demonstrates that plaintiffs do not have

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[18] See Refrigerant Compressors II, supra, at *8-10; Sahagian v. Genera Corp., No. CV 08-7613-GW(PJWx), 2009 U.S. LEXIS 132583, at *12, 19-20 (C.D. Cal. July 6, 2009); In re Dynamic Random Access Memory (DRAM) Antitrust Litig. ("DRAM II"), 536 F. Supp. 2d 1129, 1135 n.2 (N.D. Cal. 2008); DRAM I, supra, 516 F. Supp. 2d at 1085–96; In re Intel Corp. Microprocessor Antitrust Litig., 496 F. Supp. 2d 404, 408–09 (D. Del. 2007). See Appendix II for listing of states and additional authorities.

[19] See In re McWane, Inc. & Star Pipe Prods., Ltd., Dkt. No. 9351, available at http://ftc.gov/os/adjpro/d9351/index.shtm ("[Fittings] are a commodity product sold to end users through Distributors who package them with pipe and other products necessary to complete a waterworks project."); id. ¶ 1.a ("Because Fittings represent a small portion of a Distributor's overall bid for a waterworks project, the price of Fittings is not a major factor in determining whether a Distributor wins the bid."); id. ¶ 410("Other waterworks products include the following: high density polyethylene pressurized pipe; drainage pipe; concrete pipe; gate valves; fire hydrants; butterfly valves; service brass; marking tape; water meters; joint restraints; glands; and mechanical joint and flanged Fittings."); id. ¶ 426 ("Most waterworks projects are individual projects subject to a bidding process."). In citing to the FTC's brief, defendants do not concede its accuracy, but refer to it here to challenge the sufficiency of the pleadings as plaintiffs have cited it in their complaint and thus it is "integral to or explicitly relied upon in the complaint." Haines & Kibblehouse, Inc. v. Balfour Beatty Constr., Inc., 789 F. Supp. 2d 622, 628 n.6 (E.D. Pa. 2011) (citing Lum v. Bank of Am., 361 F.3d 217, 221 n.3 (3d Cir. 2004)).

standing to bring those claims. First, as noted above, plaintiffs fail to allege a causal link between the overcharge for DIPF and what they paid for their water works projects. Rather, they concede DIPF was only a small part of any bid for a contract for a waterworks project. Second, plaintiffs who purchased completed waterworks are not "consumers or competitors" in the market for DIPF; they do not purchase DIPF, but rather contract for the entire project, of which DIPF admittedly is but a small component. See id. at *12 ("Such a conclusion is consistent with other federal courts that have rejected a (component theory) of antitrust standing." (citing DRAM I, supra, 516 F. Supp. 2d at 1091, and In re Potash Antitrust Litig., 667 F. Supp. 2d 907, 939–40 (N.D. Ill. 2009))). Third, the injury is not direct, and the ultimate purchase price for waterworks projects reflected the price of numerous other components, "all of which collectively determine the final price paid by retail consumers or 'endpayors.'" Id. at *14. Fourth, there is a high potential for duplicative recovery or complex apportionment of damages. There are more direct victims of the alleged antitrust conspiracy -- distributors who directly purchased DIPF. (Compl. ¶ 51.) Finally, "there can be no dispute that there are more direct victims of the alleged antitrust conspiracy—individuals and

entities who directly purchased" DIPF. Refrigerant Compressors II, supra, at *14.

Under AGC, then, plaintiffs lack antitrust standing to assert state antitrust law claims in 22 jurisdictions based on alleged purchases of DIPF in contracts for waterworks projects.

3. No plaintiff with a viable cause of action purchased DIPF as a part of a waterworks project.

Only three plaintiffs -- the City of Hallandale Beach, Waterline Industries, and Water District No. 1 of Johnson County -- currently have potentially viable claims. Yet, none purchased DIPF as a part of a waterworks project. For that additional reason, they cannot assert overcharges for such purchases; those claims should be dismissed.

F. Plaintiffs' injunctive relief claims fail.

Plaintiffs' claim for injunctive relief also should be dismissed; once again, plaintiffs have not included any facts showing any ongoing or threatened harm.

Although they present the claim differently throughout the complaint, the thrust of plaintiffs' claims for injunctive relief relates to the purported consequences of the September 2009 distribution agreement between McWane and SIGMA. (Compl. ¶¶ 87, 143-44, 151-52.) Specifically, they seek to enjoin McWane and SIGMA from:

- "Entering into a distribution agreement that eliminated SIGMA as an entrant into the Domestic DIPF market";
- "Excluding actual and potential competitors through the adoption and enforcement of exclusive distribution policies";
- "Agreeing to charge prices at certain levels and otherwise to fix, increase, maintain or stabilize prices of DIPF sold in the United States";
- "Participating in conversations and communications regarding prices to be charged for DIPF"; and
- "Keeping the existence of the conspiracy unknown in order to foster the illegal anti-competitive conduct described herein."

(Compl. ¶ 144.)[20]

Injunctive relief, however, does not redress past wrongs absent a threat they will be repeated. City of Los Angeles v. Lyons, 461 U.S. 95, 102-03, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675, 684-85 (1983); see also Holiday Inns of Am., Inc. v. B & B Corp., 409 F.2d 614, 618 (3d Cir. 1969) ("The dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat[.]"). Here, the concern of past wrongs repeated is both factually unsupportable and, in any event, moot.

[20] Although they define the claims for the "Injunctive Class" as against all defendants beginning in February 2009, that is likely a drafting error. (Compl. ¶ 131.) Plaintiffs also seek an injunction "against Defendant McWane, preventing and restraining the violations alleged [in the complaint]," although they do not rely on additional allegations. (Compl. ¶ 154.)

There is no factual basis for plaintiffs' request for injunctive relief. They have not alleged that any of the claimed anticompetitive conduct is still occurring or may be repeated. The most recent allegation of anticompetitive conduct dates back to September 17, 2009, when McWane and SIGMA entered into the MDA through which SIGMA would sell domestic DIPF manufactured by McWane. (Compl. ¶¶ 66-67.) Plaintiffs do not even allege that the MDA is still in existence for a stark reason: it is not. Their vague and unsubstantiated allegation that the conduct is "continuing to the present" is woefully insufficient. Lacking any factual allegations showing an existing, actual threat, plaintiffs' claim must fail.[21]

Moreover, the injunctive relief claims are moot because they mimic the terms of SIGMA's consent decree with the FTC, thereby negating the irreparable-harm element of plaintiffs' claim. Addressing a similar circumstance, the

[21] See Dubois v. Abode, No. 02-4215, 2004 U.S. Dist. LEXIS 30596, at *4 (D.N.J. Mar. 15, 2004) (denying injunctive relief where plaintiff failed to show existing, actual threat) (internal citations omitted); In re Arthur Treacher's Franchisee Litig., 537 F. Supp. 311, 323 (E.D. Pa. 1982) (denying injunctive relief where plaintiff failed to show immediate and irreparable injury); see also 15 U.S.C. § 26 (requiring "threatened loss or damage by a violation of the antitrust laws" for injunctive relief); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129, 152 (1969) (requiring showing of "significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur").

United States Court of Appeals for the Sixth Circuit held it "reversible error in concluding that a risk of continuing irreparable harm had been shown" when plaintiffs sought an injunction that mirrored a consent decree. Ellis v. Gallatin Steel Co., 390 F.3d 461, 476 (6th Cir. 2004). In that case, the EPA and a factory entered into a consent decree prohibiting the factory from emitting a harmful dust. After the consent decree was signed, one of the factory's neighbors sought an injunction that "essentially mimicked" the consent decree. The district court granted the injunction, but the Sixth Circuit reversed, finding no risk of irreparable harm. Significantly, the court concluded that the plaintiffs "failed to explain why the . . . consent decrees do not adequately deal with these claims." Ibid.; see also Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 261, 92 S. Ct. 885, 890-91, 31 L. Ed. 2d 184, 192 (1972) ("The fact is that one injunction is as effective as 100[.]").

SIGMA and the FTC have signed a consent decree that, without any admission of liability, prohibits SIGMA from entering into any agreement to "raise, fix, maintain, or stabilize prices or price levels, or engage in any other pricing action." In re SIGMA Corp., FTC Docket No. C-4347, Decision and Order at 4 (Feb. 27, 2012), available at http://ftc.gov/os/caselist/1010080/120228sigmado.pdf. The consent decree also prohibits SIGMA from "Communicating Competitively Sensitive

Information to any other Competitor." Id. at 5. "Competitively Sensitive Information" includes "any information regarding the . . . price . . . for DIPF[.]" Id. at 6.

Plaintiffs do not allege -- nor could they in good faith allege -- that SIGMA is violating the decree. There is no allegation that the MDA is still in effect because plaintiffs undeniably know it is not. (Compl. ¶ 62-83.)

In sum, plaintiffs cannot show any risk of future harm or irreparable harm flowing from the denial of injunctive relief. See Howard Hess Dental Labs. Inc. v. Dentsply Intern., Inc., 602 F.3d 237, 250 (3d Cir. 2010) (holding that "plaintiff bears the obligation of presenting evidence demonstrating injury even where another injunction is already in place"); In re Nifedipine Antitrust Litig., 335 F. Supp. 2d 6, 17-18 (D.D.C. 2004) (dismissing injunctive relief claim where no factual basis provided to support claim that defendants continued to act unlawfully after entry of consent order); In re Plavix Indirect Purchaser Antitrust Litig., No. 06-cv-226, 2011 WL 335034, at *4 (S.D. Ohio Jan. 31, 2011) (granting motion to dismiss complaint requesting injunctive relief). And, "if a defendant is already enjoined from engaging in the illegal activities, it would be wasteful to require it to defend another suit seeking to enjoin the same activities once again[.]" Mid-West Paper Prods. Co. v. Cont'l Group, Inc., 596 F.2d 573, 594 n.83 (3d Cir. 1979).

G. Even if the Court were to permit the State of Indiana to pursue its claims separately, the Court should dismiss that action.

Plaintiff State of Indiana ("Indiana") filed its original complaint in this action on October 23, 2012, and its amended complaint on May 9, 2013. On November 5, 2012, the Court consolidated that action with the class actions. Indiana only claims to have purchased indirectly from defendants, so its action is necessarily consolidated with the IPP action. Because the actions are currently consolidated, defendants submit it is unnecessary to respond separately to the Indiana complaint.

If the Court were to consider the Indiana complaint separately, it should dismiss that complaint. First, Indiana has failed to allege facts to support its standing to assert the antitrust claims for damages set forth in counts three, four, and five of its amended complaint. Indiana does not provide any specificity in connection with its purchases of DIPF. Other than to baldly aver that certain of its subdivisions "indirectly purchased DIPF" from defendants, there are no facts surrounding those purchases; in particular, they fail to alleged whether the purchases of DIPF were "stand alone" or as a part of a waterworks project. (Amended Complaint ¶¶ 102-07.) As best as can be gleaned from the complaint, Indiana bases its damages claims entirely on purchases of DIPF it made for "water infrastructure projects." (Amended Complaint ¶¶ 73, 108.) Yet

Indiana, like IPPs, also admits that "DIPF are a relatively small portion of the cost of materials of a typical waterworks project." (Amended Complaint ¶ 39.) As with the IPPs' complaint, Indiana's amended complaint therefore includes no facts to show that the alleged conspiracies "would have more than a minimal foreseeable effect on the price" paid by Indiana, and counts three, four, and five fail for lack of standing, as explained above (see section IV.E.1.).

Second, Indiana, like the other members of the IPP class, failed to heed the Court's suggestions and asserts defective injunctive relief claims in counts one and two of the amended complaint. Those claims, therefore, also fail for reasons outlined above (see section IV.F.).

V. CONCLUSION.

Despite amending their complaint for now the second time, far too many pleading deficiencies remain. These deficiencies, when combined, require the dismissal of most of plaintiffs' complaint; the only claims remaining should be those for overcharges for stand-alone DIPF brought by the City of Hallandale Beach under Florida's deceptive and unfair trade practices act for the alleged price-fixing conspiracy, as alleged in paragraphs 192 and 240 of the complaint; brought by Waterline Industries under New Hampshire antitrust law for the alleged McWane-SIGMA conspiracy, as alleged in paragraphs 172,

221, and 268 of the complaint; and brought by plaintiff Water District No. 1 of Johnson County under Kansas law for the alleged McWane-SIGMA conspiracy, as alleged in paragraphs 165 and 214 of the complaint. For those reasons, defendants McWane and SIGMA respectfully request that the complaint be dismissed with prejudice as to all other claims and that all other named plaintiffs be dismissed from the case with prejudice.

Respectfully submitted,

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DATED: June 17, 2013

APPENDIX 1

Plaintiffs' Allegations in Support of Standing[22]

Plaintiff	Standing (2008-09 Conspiracy)	Standing (2009 Conspiracy)	Purchases (Stand-alone or Part of Water Systems Project)
Waterline Industries Corporation & Waterline Services, LLC (New Hampshire) Compl. ¶¶ 15-18.	No – Alleges purchases but not identity of defendant	Yes – Alleges Purchases from McWane in 12/09	Stand-alone
Yates Construction Co., Inc. (North Carolina) Compl. ¶¶ 19-22.	Yes – Alleges purchases from SIGMA in 2008	No – Alleges purchases of domestic DIPF from McWane but no dates	Stand-alone
City of Hallandale Beach (Florida) Compl. ¶¶ 24-25.	Yes – Alleges purchases from McWane in 2008	No – Does not allege purchases of domestic DIPF	Stand-alone
City of Blair (Nebraska) Compl. ¶¶ 26-27.	No – Does not allege purchases during conspiracy period	No – Does not allege purchases of domestic DIPF	Stand-alone

[22] Where it states "purchases from," the applicable allegations are that the purchases were made "indirectly from" one of the defendants.

South Huntington Water District (New York) Compl. ¶¶ 28-31.	Yes – Alleges purchases from SIGMA in 2008 and McWane in 2009	No – Does not allege purchases of domestic DIPF during relevant time period	Stand-alone
City of Fargo (North Dakota) Compl. ¶¶ 32-34.	No – Does not allege purchases from a defendant during conspiracy period	No – Does not allege purchases of domestic DIPF during relevant time period	Water systems project
Wayne County (Michigan) Compl. ¶¶ 35-36.	Yes – Alleges purchases from SIGMA in 2008	No – Does not allege purchases of domestic DIPF	Water systems project
Village of Woodbridge (New York) Compl. ¶¶ 37-38.	No – Does not allege purchases during conspiracy period	Unclear – Alleges purchases of domestic DIPF in "2010 and 2011" from SIGMA and Star	Water systems project
Water District No. 1 of Johnson County Kansas) Compl. ¶¶ 39-40.	No – Alleges purchases of domestic DIPF from McWane from 4/08 through 12/09	Yes – Alleges purchases of domestic DIPF from McWane from 4/08 through 12/09	Stand-alone
Town of Fallsburg (New York) Compl. ¶¶ 41-42.	No – Does not allege purchases during conspiracy period	No – Alleges purchases of domestic DIPF from Star only	Water systems project

*Note: Shaded rows are plaintiffs who have failed to allege facts showing antitrust impact.

APPENDIX II

Relevant States That Would Apply The AGC Factors

State	Authority
1) Arizona	In re Dynamic Random Access Memory (DRAM) Antitrust Litig. ("DRAM I"), 516 F. Supp. 2d 1072, 1095 (N.D. Cal. 2007) (citing Ariz. Rev. Stat. Ann. § 44-1412 ("in construing this article, the courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes")); In re Dynamic Random Access Memory (DRAM) Antitrust Litig. ("DRAM II"), 536 F. Supp. 2d 1129, 1135 n.2 (N.D. Cal. 2008); Sahagian v. Genera Corp., No. CV 08-7613-GW(PJWx), 2009 U.S. LEXIS 132583, at *12, 19-20 (C.D. Cal. July 6, 2009); In re Refrigerant Compressors Antitrust Litig., No. 2:09-md-02042, 2013 WL 1431756, at *9-10 (E.D. Mich. Apr. 9, 2013) (citing Luscher v. Bayer AG, No. 2004-01485, slip op. at 2-3 (Arizona Super. Ct. Sept. 14, 2005)).
2) California	DRAM I, 516 F. Supp. 2d at 1088-89 (citing Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979 (9th Cir. 2000)); DRAM II, 536 F. Supp. 2d at 1135 n.2; Sahagian, supra, at *12, 19-20; Refrigerant Compressors, supra, at *9-10 (citations omitted).
3) District of Columbia	Sahagian, supra, at *12, 19-20; Refrigerant Compressors, supra, at *9-10 (citing Peterson v. VISA U.S.A. Inc., No. Civ.A. 03-8080, 2005 WL 1403761, 2005 D.C. Super. LEXIS 17, at *12 (D.C. Super. Ct. Apr. 22, 2005)).
4) Indiana	Although the issue has not been specifically decided by the Indiana state courts, the AGC standard should apply here "[b]ecause Indiana antitrust law ... was substantially patterned after the federal Sherman Antitrust Act and references to decisional law under the Sherman Act may be made in construing Indiana antitrust

	provisions, the analysis of the plaintiff's claim under federal law is equally applicable to its state claim." Bi-Rite Oil Co. v. Indiana Farm Bureau Co-op. Ass'n, 720 F. Supp. 1363, 1378 (S.D. Ind. 1989), aff'd, 908 F.2d 200 (7th Cir. 1990).
5) Iowa	DRAM II, 536 F. Supp. 2d at 1135 n.2 (citing Southard v. VISA U.S.A. Inc., 734 N.W.2d 192, 198-99 (Iowa 2007)("We think the district court properly applied [the AGC] factors in deciding the plaintiffs had no standing under Iowa's competition law")); Sahagian, supra, at *12, 19-20; Refrigerant Compressors, supra, at *9 (citing Southard).
6) Kansas	DRAM I, 516 F. Supp. 2d at 1094 (citing Wrobel v. A Very Dennison Corp., No. 05-CV-1 296 (Kan. Dist. Ct., Feb. 1 2006) ("the Court finds that this AGC standing test may be applied to this action even though the [Kansas Restraint of Trade Act] specifically contemplates indirect purchaser suits"); Orr v. Beamon, 77 F. Supp. 2d 1208, 1212 (D. Kan. 1999)(federal district court in Kansas concluded "that standing under the Kansas antitrust statutes requires an antitrust injury similar to that required under the Sherman and Clayton Acts"));DRAM II, 536 F. Supp. 2d at 1135 n.2; Sahagian, supra, at *12, 19-20; Refrigerant Compressors, supra, at *9-10 (citing Wrobel and Orr).
7) Maine	DRAM I, 516 F. Supp. 2d at 1094 (citing Knowles v. VISA U.S.A. Inc., No. Civ.A. CV-03-707, 2004 Me. Super. LEXIS 227, 2004 WL 2475284, *5 (Me. Super. Ct. Oct. 20, 2004) ("It is probable that the Maine Law Court, if presented with this issue, would look to the [AGC] factors in determining standing under Maine's antitrust laws and would apply those factors except to the extent that those factors cannot be reconciled with the legislature's adoption of the Illinois Brick repealer")); DRAM II, 536 F. Supp. 2d at 1135 n.2; Sahagian, supra, at *12, 19-20 (C.D. Cal. July 6, 2009); Refrigerant Compressors,

	supra, at *9-10 (citing Knowles).
8) Michigan	DRAM I, 516 F. Supp. 2d at 1094 (citing Stark v. VISA U.S.A. Inc., No. 03-055030-CZ, 2004 WL 1879003, *2-3 (Mich. Cir. Ct. July 23, 2004) (applying AGC factors to determine antitrust standing under Michigan antitrust statute)); DRAM II, 536 F. Supp. 2d at 1135 n.2; Sahagian, supra, at *12, 19-20; Refrigerant Compressors, supra, at *9-10 (citing Stark).
9) Mississippi	DRAM I, 516 F. Supp. 2d at 1095 (citing Harrah's Vicksburg Corp. v. Pennebaker, 812 So. 2d 163 (Miss. 2002) (relying on federal interpretation of Noerr-Pennington doctrine to determine applicability of same under state antitrust statute)); DRAM II, 536 F. Supp. 2d at 1135 n.2; Sahagian, supra, at *12, 19-20.
10) Nebraska	DRAM I, 516 F. Supp. 2d at 1095 (citing Neb. Rev. Stat. § 59-829 ("the courts of this state in construing [Nebraska's antitrust statute] shall follow the construction given to the federal law by the federal courts")); DRAM II, 536 F. Supp. 2d at 1135 n.2; Sahagian, supra, at *12, 19-20; Refrigerant Compressors, supra, at *7 (citing Kanne v. VISA U.S.A. Inc., 272 Neb. 489, 723 N.W.2d 293 (Neb. 2006)).
11) Nevada	DRAM I, 516 F. Supp. 2d at 1095 (citing Nev. Rev. Stat. § 598A.050 ("The provisions of this chapter shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes")); DRAM II, 536 F. Supp. 2d at 1135 n.2; Sahagian, supra, at *12, 19-20.
12) New Hampshire	Refrigerant Compressors, supra, at *10 (citing N.H. Rev. Stat. Ann. § 356:14 (2010) ("In any action or prosecution under this chapter, the courts may be guided by interpretations of the United States' antitrust laws.") and Donovan v. Digital Equip. Corp., 883 F. Supp. 775, 786 (D.

	N.H. 1993) (applying federal antitrust standing requirements based on harmonization statute)).
13) New Mexico	DRAM I, 516 F. Supp. 2d at 1095 (citing N.M. Stat. Ann. § 57-1-15 ("the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws")); DRAM II, 536 F. Supp. 2d at 1135 n.2; Sahagian, supra, at *12, 19-20; Refrigerant Compressors, supra, at *10 (citing N.M. Stat. Ann. §57-1-15 (2010); Romero v. Phillip Morris, Inc., 2005 NMCA 35, 137 N.M. 229, 109 P.3d 768, 771 (N.M. Ct. App. 2005) ("We interpret the Antitrust Act in harmony with federal antitrust laws when, as here, we have no New Mexico authority on point to guide us."); Nass-Romero v. Visa U.S.A Inc., 2012 NMCA 58, 279 P.3d 772 (N.M. 2012) (applying the AGC test because of the New Mexico antitrust statute's harmonization provision)).
14) New York	Sahagian, supra, at *12, 19-20; Refrigerant Compressors, supra, at *9-10 (citing Ho v. Visa U.S.A., Inc., 787 N.Y.S.2d 677 (N.Y. Sup. Ct. 2004), aff'd 16 A.D.3d 256, 793 N.Y.S.2d 8 (N.Y. App. Div. 2005)).
15) North Dakota	DRAM I, 516 F. Supp. 2d at 1094 (citing Beckler v. VISA U.S.A. Inc., No. 09-04-C-00030, 2004 WL 2115144, *2-3 (N.D. Dist. Ct. Aug. 23, 2004) (finding indirect purchaser claims too remote and implying reliance on AGC factors in determining lack of standing)); Sahagian, supra, at *12, 19-20.
16) Oregon	Oregon Laborers-Employers Health & Welfare Trust Fund v. Phillip Morris Inc., 185 F.3d 957, 963 n.4, 964-67 (9th Cir. 1999)(affirming District of Oregon's order granting defendants' motion for judgment on the pleadings and applying AGC factors to plaintiffs' RICO and federal and

	state antitrust claims).
17) South Dakota	DRAM I, 516 F. Supp. 2d at 1094) (citing "Cornelison v. VISA U.S.A., Inc., No. CIV 03-1350 (S.D. Cir. Ct. 2004), Ex. A to Defendants' Motion for Judgment on the Pleadings re Second and Fourth Claims for Relief (hearing transcript noting state trial court's bench ruling employing AGC factors and granting dismissal based on lack of antitrust standing)"); DRAM II, 536 F. Supp. 2d at 1135 n.2; Sahagian, supra, at *12, 19-20.
18) Tennessee	Sahagian, supra, at *12, 19-20.
19) Utah	Sahagian, supra, at *12, 19-20.
20) Vermont	Fucile v. VISA U.S.A. Inc., No. S1560-03 CNC, 2004 Vt. Super. LEXIS 42, 2004 WL 3030037, at *3 (Vt. Super. Ct. Dec. 27, 2004)(granting motion to dismiss, applying AGC factors in holding plaintiff lacked standing, and predicting that the Vermont Supreme Court would draw upon the standing factors in AGC for guidance with respect to analyzing standing of indirect purchasers); Investors Corp. of Vermont v. Bayer AG, No. S1011-04-CnC (Vt. Super Ct., June 1, 2005) (applying AGC factors to determine whether antitrust defendant possessed standing).
21) West Virginia	DRAM I, 536 F. Supp. 2d at 1135 n.2 (citing W. Va. Code § 47-18-16 ("This article shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes")); Sahagian, supra, at *12, 19-20; Refrigerant Compressors, supra, at *10 (citing W. Va. Code § 47-18-16 (2010)(providing that the state antitrust act shall "be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes.")).

22) Wisconsin	DRAM I, 516 F. Supp. 2d at 1094 (citing Strang v. VISA U.S.A. Inc., No. 03 CV 011323, 2005 WL 1403769, *3 (Wis. Cir. Ct. Feb. 8, 2005)("our appellate courts would look to [the AGC] factors for guidance in assessing an indirect or remote purchaser's standing")); DRAM II, 536 F. Supp. 2d at 1135 n.2; Sahagian, supra, at *12, 19-20; Refrigerant Compressors, supra, at *9-10 (citing Strang)(see D.E. No. 162 at 15 and Appendix 2; D.E. No. 166 at 5; see also D.E. No. 325 at 2 and Ex. 1 to D.E. No. 325)).

Relevant States That Do Not Apply The AGC Factors

State	Authority
1) Minnesota	Lorix v. Crompton Corp., 736 N.W.2d 619, 632 (Minn. 2007).
2) North Carolina	Teague v. Bayer AG, 195 N.C. App. 18, 671 S.E.2d 550, 557 (N.C. Ct. App. 2009).

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2013, a copy of the foregoing defendants' consolidated notice of motion to dismiss the second amended class action complaint, and the memorandum in support thereof, were filed electronically, and are available for viewing and downloading through the Court's CM/ECF System. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to any parties that are unable to accept electronic filing as indicated on the Notice of Electronic Filing.

/s/ Jason A. Leckerman
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