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Defendant Star Pipe Products, Ltd. (“Star”), in response to Indirect Purchaser Plaintiffs’ Opposition to Defendants’ Motions to Dismiss Plaintiffs’ Second Amended Class Action Complaint (“Opposition”), files this Reply in support of its Motion to Dismiss Counts 3, 4, and 8 of the Second Amended Class Action Complaint (the only counts for which Star is a defendant). Also on this day, McWane and Sigma (“Other Defendants”) have filed a Reply in support of their Motion to Dismiss (“Other Defendants’ Reply”). Star joins in the Other Defendants’ Reply as to arguments addressing only Counts 3, 4, and 8 of the Second Amended Class Action Complaint.

ARGUMENT & AUTHORITIES

I. The Indirect Purchaser Plaintiffs failed to respond to the grounds for dismissal for a large portion of their state claims, and those claims should be dismissed.

In its Motion to Dismiss and the attached appendices, Star sought dismissal of all state antitrust, consumer protection, and unjust enrichment claims asserted against Star by the Indirect Purchaser Plaintiffs. The Indirect Purchaser Plaintiffs in their Opposition failed to respond to at least one ground for dismissal of the following claims: (1) antitrust claims for the states of Kansas, Maine, New Mexico, New York, and Utah; (2) consumer protection claims for the states of Arkansas, California, Hawaii, Massachusetts, Nebraska, New Hampshire, New Mexico, North Carolina, Rhode Island, and South Carolina; and (3) unjust

enrichment claims for the states of South Carolina and Tennessee. *See* Appendix 1 (chart of state antitrust claims and grounds for dismissal with responses noted); Appendix 2 (chart of state consumer protection claims and grounds for dismissal with responses noted); Appendix 3 (chart of unjust enrichment claim and grounds for dismissal with responses noted). Therefore, those claims should be dismissed outright.

II. There is no basis for standing against Star for named plaintiffs City of Blair (Nebraska), Village of Woodridge (New York), Town of Fallsburg (New York), Water District No. 1 of Johnson County (Kansas), City of Fargo (North Dakota), and Waterline Industries Corporation (New Hampshire).

Star is a defendant for the Indirect Purchaser Plaintiffs' and Direct Purchaser Plaintiffs' claims based upon conduct only in the time period of January 2008 to May 2009 and further relating only to imported DIPF. Therefore, for purposes of stating a claim against Star, Plaintiffs must allege that they purchased non-domestic DIPF that originated from at least one Defendant during the January 2008 to May 2009 time period. As set forth in the Motion to Dismiss, six of the named plaintiffs have not done so, and the Indirect Purchaser Plaintiffs have failed to identify any allegations that cure this fatal deficiency:

- The City of Blair (Nebraska) alleges no purchases at all in 2008 or 2009.

SAC at ¶ 27.

- The Village of Woodridge (New York) alleges no purchases at all in 2008 or 2009. SAC at ¶ 38.
- The Town of Fallsburg (New York) alleges no purchases at all in 2008 or 2009 or of imported DIPF. SAC at ¶ 42.
- Water District No. 1 of Johnson County (Kansas) alleges no purchases of imported DIPF. SAC at ¶ 40.
- The City of Fargo (North Dakota) does not allege that it in fact purchased DIPF during the alleged 2008-2009 conspiracy period. SAC at ¶ 33.
- Waterline Industries Corporation (New Hampshire) fails to allege that it purchased DIPF that originated from any Defendant. SAC at ¶ 16.

The Indirect Purchaser Plaintiffs attempt to argue that all plaintiffs should be presumed to have purchased DIPF from one of the Defendants because Defendants had a large percentage of the DIPF market during the relevant time period—a proposition they fail to support with any authority. That argument, however, fails to meet the requirement for pleading standing under *Twombly* and the numerous other cases cited by Star.

The Indirect Purchaser Plaintiffs also argue that they have “umbrella standing.” This dubious doctrine has been explicitly rejected by courts in numerous jurisdictions, including the Third Circuit. *E.g., Mid-West Paper Prods. Co. v. Continental Group Co.*, 596 F.2d 573, 584-85 (3d Cir. 1979); *In re*

Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 691 F.2d 1335, 1341 (9th Cir. 1982); *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 38-39 (D.D.C. 1999). Under the binding authority of the Third Circuit, “umbrella standing” cannot provide standing for any of the Indirect Purchaser Plaintiffs.

Therefore, all claims against Star by City of Blair (Nebraska), Village of Woodridge (New York), Town of Fallsburg (New York), Water District No. 1 of Johnson County (Kansas), City of Fargo (North Dakota), and Waterline Industries Corporation (New Hampshire) should be dismissed.

III. The Indirect Purchaser Plaintiffs do not have standing for any state in which no named plaintiff resides.¹

The named plaintiffs allege that they are the residents of only eight states. SAC at ¶¶ 15-43. There are no allegations in the Second Amended Complaint of injury to the named plaintiffs in any other states for which claims are asserted. Their claims for any states other than their home states fail for this reason.

Plaintiffs are incorrect that standing under their home states provides them standing to assert claims for any other state that allows indirect purchaser standing. The Third Circuit has held, explicitly and recently, that “standing is not dispensed in gross,” “a plaintiff who raises multiple causes of action ‘must demonstrate standing for each claim he seeks to press,’” and a plaintiff cannot “defend[] its

¹ Star also specifically incorporates by reference the arguments and authorities in the Other Defendants’ Reply at Section II.D.

standing to sue...on the basis of...purchases made by the other [absent] [p]laintiffs[.]” *In re Schering Plough Corp.*, 678 F.3d 235, 244, 245, 247 (3d Cir. 2012) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). For this reason, it is appropriate to consider this issue at the motion to dismiss stage, and not defer the inquiry of plaintiffs’ standing until class certification, as Indirect Purchaser Plaintiffs suggest. *Id.*

Therefore, all claims for states other than the named plaintiffs’ home states of Kansas, Florida, Michigan, Nebraska, New Hampshire, New York, North Carolina, and North Dakota should be dismissed.

Further, because the only named plaintiff for the following states failed to adequately allege standing against Star, there is no named plaintiff for Counts 3, 4, or 8 against Star in the following additional states: Kansas, Nebraska, New Hampshire, and North Dakota.

IV. The Indirect Purchaser Plaintiffs did not allege separate purchases of DIPF and therefore have no standing.²

The Indirect Purchaser Plaintiffs’ admissions that they purchased DIPF only as a portion of a waterworks project and that DIPF was only a small portion of the cost of materials for such a project result in a failure to meet the standing

² Star also specifically incorporates by reference the arguments and authorities in the Other Defendants’ Reply at Section II.E.

requirements of *AGC*, which applies in most of the states for which they seek to assert claims. SAC at ¶ 16; *see* Appendix 1, column 2. Indirect Purchaser Plaintiffs assert that *AGC* should not apply in most states, but fail to directly respond to the large amount of authority presented in Star's and the Other Defendants' Motions to Dismiss.

V. There are no valid unjust enrichment claims stated against Star.

Indirect Purchaser Plaintiffs' vague references to general allegations of DIPF purchases throughout the two alleged class periods fail to identify any basis for standing against Star for an unjust enrichment claim. For purposes of stating an unjust enrichment claim against Star, Plaintiffs must allege that they purchased non-domestic DIPF that originated *from Star* during the January 2008 to May 2009 time period. Otherwise, there is no allegation that Star was unjustly enriched from any sales to that plaintiff. As shown in Appendix 3, no plaintiff has made the required allegations against Star. Because no plaintiff has pled an unjust enrichment claim against Star, that claim should be dismissed as to Star.

Further, the unjust enrichment claim is not adequately pled. Indirect Purchaser Plaintiffs failed to identify any specific state laws, despite their claims to have "incorporated by reference" the laws of various states. Response at 36. A plain reading of Count 8 shows no such incorporation by reference or indeed any reference to any state unjust enrichment laws. SAC at ¶¶ 283-86. Indirect

Purchaser Plaintiffs also respond that there are no differences between state laws on unjust enrichment. This is not correct, as recognized by numerous courts. *See, e.g., In re Flonase Antitrust Litig.*, 610 F. Supp. 2d 409, 419 (E.D. Pa. 2009) (recognizing that “states analyze unjust enrichment claims differently,” so that plaintiffs should specify the laws under which they bring such claims, and dismissing the complaint in its entirety); *Sergeants Benevolent Ass’n Health and Welfare Fund v. Sanofi-Aventis U.S. LLP*, No. 08-CV-0179, 2012 WL 4336218, at *7-8 (E.D.N.Y. Sept. 17, 2012) (criticizing plaintiffs’ “fus[ing] the...applicable state standards...without attention to the nuances of the [] jurisdictions’ respective unjust enrichment regimes”—where there were only three states’ laws at issue—and recognizing the “significant variance” in those states’ laws).

The cases to which Indirect Purchaser Plaintiffs cited do not hold differently; *Powers* specifically recognized that “there are numerous differences in unjust enrichment laws among many states” and that the “legal elements required to establish a claim for unjust enrichment vary from state to state.” *Powers v. Lycoming Engines*, 245 F.R.D. 226, 231 (E.D. Pa. 2007).

Even had Indirect Purchaser Plaintiffs properly specified the state laws, many of the possible states require plaintiffs to assert a direct benefit conferred as one of the elements of such a claim. *See* Appendix 3, column 4. Indirect Purchaser Plaintiffs have no allegations supporting a direct benefit conferred from

Star to any plaintiff, and for this reason the claims for many states fails. *See Peoples Nat'l Bank of Commerce v. First Union Nat'l Bank of Florida*, 667 So. 2d 876, 879 (Fla. Dist. Ct. App. 3d Dist. 1996) (affirming dismissal of unjust enrichment claims where plaintiff did not allege it had directly conferred a benefit on defendants); *Suture Express, Inc. v. Cardinal Health 200, LLC*, No. 12-2760-RDR, 2013 U.S. Dist. LEXIS 109235, at *41-42 (D. Kan. Aug. 1, 2013) (plaintiff's allegations were insufficient to state an unjust enrichment claim and claim was dismissed where plaintiff did not allege plaintiff conferred a benefit on defendant, citing *J.W. Thompson Co. v. Welles Prods. Corp.*, 758 P.2d 738, 745 (Kan. 1988)); *A&M Supply Co. v. Microsoft Corp.*, No. 274164, 2008 WL 540883, at *2 (Mich. Ct. App. Feb. 28, 2008) (amending complaint to include an unjust enrichment claim was futile and dismissal was affirmed where plaintiff could not allege it conferred a direct benefit); *Mandarin Trading Ltd. v. Wildenstein*, 944 N.E.2d 1104, 1110-11 (N.Y. 2011) (affirming dismissal of unjust enrichment claim where complaint lacked allegations supporting some relationship between the parties that was not too attenuated); *Carolina Orthopaedic Specialists v. Smith*, No. COA10-657, 2010 N.C. App. LEXIS 2317, at *4 (N.C. App. Dec. 7, 2010) ("To state a claim for unjust enrichment, the plaintiff's allegations must set forth that a benefit was conferred on the defendant...") (citing *Booe v. Shadrick*, 322 N.C. 567, 570 (1988)); *see generally* Appendix 3, column 4.

Indirect Purchaser Plaintiffs cite cases for the proposition that whether a direct benefit is conferred is a question of fact and that direct marketing to plaintiffs could establish a direct benefit. These cases are irrelevant. Not only is there no allegation of any direct benefit or of direct marketing to indirect purchasers, but Plaintiffs fail to explain how, even if there were such an allegation, a defendant's marketing to a plaintiff establishes a direct benefit conferred on that defendant.

Indirect Purchaser Plaintiffs' unjust enrichment claim should be dismissed in its entirety.

VI. Intrastate conduct or effect requirements are appropriate for determination at the pleading stage and bar antitrust or consumer protection claims for many states.

Star argues in its Motion to Dismiss that the state antitrust claims must be dismissed as to many of the states because those states' statutes require allegations of either substantial effects on intrastate commerce or in-state conduct. Plaintiffs misconstrue this argument entirely and respond instead to an argument Star did not make—that dismissal is appropriate because the matter involves interstate conduct rather than exclusively intrastate conduct.

Notably, Plaintiffs cite *In re Cardizem CD Antitrust Litigation* in support of their superfluous argument, but that case actually supports Star's position. There, even the plaintiffs agreed that the Tennessee statutes "allow Tennessee to regulate

anticompetitive conduct occurring outside the state but having *more than an incidental effect* on Tennessee’s intrastate conduct.” 105 F. Supp. 2d 618, 667 (E.D. Mich. 2000) (emphasis added).

In expending so much effort on the wrong argument, Plaintiffs fail to sufficiently address the actual argument—that many of the states’ statutes require a substantial effect on intrastate commerce or in-state conduct. Plaintiffs point to several allegations in the SAC, including that Defendants sold DIPF to distributors in all 50 states (SAC ¶¶ 44-46). But alleging that some DIPF was sold in each state is not the same as alleging the challenged conduct had a substantial effect on each state’s commerce. Plaintiffs also attempt to bolster the argument by pointing to allegations in paragraphs 99 and 128 of the SAC. Plaintiffs disingenuously state that these paragraphs support that conduct occurred “in each state.” Response at 12. In reality, those paragraphs contain absolutely no allegations regarding the location of the conduct.

Finally, although Plaintiffs argue that Star has raised the intrastate issue prematurely, Response at 12, the issue is routinely argued and decided at the dismissal stage. Star cited to ample authority in its Motion to Dismiss wherein courts in numerous jurisdictions, including in states whose laws are at issue, have

granted motions to dismiss based on the intrastate requirement in state antitrust statutes.³ Plaintiffs do not address any of that authority.

Plaintiffs fail to satisfy the central question raised by the Motion to Dismiss. Plaintiffs have failed to plead the prerequisite facts for invoking the state statutes directed to challengeable conduct within the various states.

CONCLUSION

For the reasons stated above and in the Other Defendants' Reply (as to Counts 3, 4, and 8 of the Second Amended Class Action Complaint only), and those set forth in Star's Motion to Dismiss Counts 3, 4, and 8 of the Second Amended Class Action Complaint, Star respectfully requests this Court to dismiss all of Counts 3, 4, and 8 of the Second Amended Class Action Complaint against Star pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

³ See Appendix 1 to Motion to Dismiss, Column 4.

Dated: August 14, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2013, a true and correct copy of the above and foregoing was served via the Court's ECF filing system on all registered counsel of record.

/s/ Joseph J. Fleischman

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