UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

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

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I. PLAINTIFFS' FAILURE TO SATISFY THE *TWOMBLY* TEST IS CONFIRMED

Plaintiffs' opposition exposes their claim for what it is: The music companies all allegedly charged about the same prices, belonged to the same trade association, and formed joint ventures to sell their music (which was being widely downloaded without authorization)—in other words, alleged **parallel pricing** and the **opportunity** to conspire. Although embellished with conclusory accusations of "agreement" and "opportunity" for agreement, the complaint contains **not one allegation of unlawful conduct.**

Plaintiffs' claims are weaker than those rejected by the Supreme Court in *Twombly* and weaker than those recently rejected by the Second Circuit in *In re Elevator Antitrust Litigation*, --- F.3d ---, No. 06-3128-CV, 2007 WL 2471805, at *1 (2d Cir. Sept. 4, 2007). *Twombly* involved allegations of anticompetitive conduct, including refusing to deal with competitors, providing inferior connections to networks, overcharging, and engaging in improper billing practices, combined with a CEO's published statement that competition "might be a good way to turn a quick dollar but that doesn't make it right." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1962 (2007). This was not enough to state a claim.

In *Elevator*, plaintiffs pleaded that defendants: "(a) Participated in meetings in the United States and Europe to discuss pricing and market divisions; (b) Agreed to fix prices for elevators and services; (c) Rigged bids for sales and maintenance; (d) Exchanged price quotes; (e) Allocated markets for sales and maintenance; (f) 'Collusively' required customers to enter long-term maintenance contracts; and (g) Collectively took actions to drive independent repair companies out of business." 2007 WL 2471805, at *6 n.5. This was not enough to state a claim. As the District Court held, the complaint "enumerat[ed] 'basically every type of conspiratorial activity that one could imagine . . . . The list is in entirely general terms without any specification of any particular activities by any particular defendant[; it] **is nothing more than a**

list of theoretical possibilities, which one could postulate without knowing any facts whatever.'" *Id*. (quoting the district court, emphasis added).

Here, plaintiffs' "list" is even more theoretical and lacking in detail. All plaintiffs have ever pleaded is that every defendant charged about the same price and, because defendants (a) had opportunities to communicate, (b) could have charged less, (c) were few in number, (d) had a motive to make as much money as they could, and (e) have been accused of conspiring before, the Court should infer conspiracy. Opp. at 9-15. Not one of these allegations stands up to the *Twombly* test. As in *Elevator,* these are "nothing more than a list of theoretical possibilities" that should be dismissed as "conclusory allegations" and "bald assertions." 2007 WL 2471805, at *2 (quoting *Twombly*, 127 S. Ct. at 1966, and *Amron v. Morgan Stanley*, 464 F.3d 338, 344 (2d Cir. 2006)).[1] Plaintiffs' failure to plead any set of claims that satisfies the requirements of *Twombly* is dispositive of this motion and requires dismissal of the complaint in its entirety.

A. The Rejected "Plus Factor" Approach

Plaintiffs try to save their complaint by arguing that *Twombly* did nothing more than confirm the prior "plus factor" analysis, in which "conscious parallelism" was pursued as a Sherman Act violation even if supported only by amorphous "plus factors" such as "motive" or "opportunity" to conspire or "pervasiveness."[2]

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[1] Plaintiffs cite *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007), for the proposition that specific facts are not necessary to provide defendants fair notice of the claims (Opp. at 4), but *Erickson*, a wholly inapposite Eighth Amendment action, cites and reconfirms *Twombly*.

[2] *See* Blechman, *Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. SCH. L. REV. 881, 883-87 & nn.11-19 (1979). Plaintiffs rely on *Iqbal v. Hasty*, but that was a qualified immunity case, and the court there acknowledged that the "full force" of *Twombly* applies (and "is limited to") the "antitrust context." 490 F.3d 143, 157 (2d Cir. 2007).

Plaintiffs are wrong. *See Twombly*, 127 S. Ct. at 1968 n.7 (explaining that the Supreme Court repeatedly has rejected the notion that conscious parallelism alone may state a claim under § 1 of the Sherman Act). The Supreme Court did not include "plus factors" in its new test; instead, the Court required "factual enhancement" adding up to "enough facts to state a claim to relief that is plausible," such as the "specific time, place, or person involved in the alleged conspiracies." *Id.* at 1959, 1966, 1970 n.10. *See also Wellnx Life Sciences Inc. v. Iovate Health Sciences Res. Inc.*, No. 06 Civ. 7785 (PKC), 2007 WL 2789469, at *13 (S.D.N.Y. Sept. 26, 2007) ("plus factors" held "not [to] constitute plausible grounds to infer an agreement"); *Jones v. Consumer Inform. Dispute Resolution*, No. 06 Civ. 1809 (LAP), 2007 WL 2398811, at *1 (S.D.N.Y. Aug. 16, 2007); *Schafer v. State Farm Fire & Cas. Co.*, --- F. Supp. 2d ---, No. 06-8262, 2007 WL 2388899, at *7 (E.D. La. Aug. 22, 2007) ("the *Twombly* ruling supersedes any articulation of the 'plus factor' test").[3]

The more amorphous "factors" in the now defunct conscious parallelism analysis—including motive or opportunity to conspire and pervasiveness of a practice—have been roundly criticized because they are not reliable indicators of collusion and are consistent with "parallel conduct that could just as well be independent action." 127 S. Ct. at 1966; *see, e.g.*, Blechman, *supra*, at 898. Indeed, read in its entirety, the law review article cited in *Twombly*, on which plaintiffs rely for the proposition that courts have recognized parallel pricing and a "plus factor" as sufficient to infer conspiracy (Opp. at 8), actually undercuts plaintiffs' position. The article strongly criticizes those "plus factors" listed by plaintiffs as having little probative value because

[3] Not only do plaintiffs misleadingly contend that *Twombly* "endorses" the "plus factor" approach, but they also err in claiming that Second Circuit embraced the "plus factor" approach prior to *Twombly* in *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001), and then "relied" upon *Todd* after *Twombly* in the *Elevator* case. In *Elevator*, the Second Circuit cited *Todd* only for a wholly-distinct proposition related to cross-elasticity of demand—a point not at issue here.

they do not adequately "distinguish between conscious parallelism and conspiracy." Blechman, *supra,* at 898. *Twombly* cited a different page of the article (page 899), and not for the proposition that amorphous "plus factors" suffice, but to demonstrate that there exist "examples" of alleged conduct that legitimately *could* provide "plausible grounds to infer an agreement." 127 S. Ct. at 1966 n.4. These examples, which the Supreme Court cited, demonstrate a "consciousness of commitment" to an agreement by exhibiting both "restricted freedom of action" and a "sense of obligation" (e.g., companies that imposed penalties upon themselves for price cutting and companies that felt the need to explain their pricing errors to competitors).[4]

The allegations in the complaint do not reflect commitment and obligation to an agreement; rather, they merely suggest parallel but independent conduct. And not one allegation claims defendants did anything that would provide grounds to infer illegal behavior:

"Interfirm Communications and Opportunities to Conspire." Plaintiffs contend that high levels of interfirm communication and the exchange of price information constitute a "plus factor," but then concede that they allege only "that Defendants' common membership in the RIAA, pressplay and MusicNet *allowed* them to exchange pricing and licensing terms." Opp. at 10 (emphasis added). The "opportunity to conspire" allegations in both *Twombly* (communications through the press) and *Elevator* (participation in meetings) were stronger than those here, yet were still rejected as insufficient.

The only case plaintiffs cite suggesting that mere opportunity to communicate was ever a "plus factor," *C-O Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952),

[4] More specifically, the examples cited were of companies that (1) decline to pursue profitable business in arbitrary categories; (2) rigidly refuse to make sales by lowering prices by even *de minimis* amounts; (3) furnish competitors detailed information about their own operations; (4) impose penalties upon themselves for price cutting; or (5) feel the need to report and explain pricing errors to competitors.

superseded by Theatre Enters., Inc. v. Paramount Film Dist. Corp., 346 U.S. 537 (1954), was a case brought *before* the Supreme Court clarified that conscious parallelism alone does not violate the Sherman Act—and a case that involved additional evidence (submitting identical bids, raising prices during a time of surplus, artificial standardization of products and policing of pricing compliance) not present here. *See Twombly*, 127 S. Ct. at 1968 n.7. None of the other cases cited by plaintiffs holds that the mere existence of interfirm communication, even a high volume of interfirm communication, is sufficient. *See Merck-Medco Managed Care v. Rite Aid Corp.*, 22 F. Supp. 2d 447, 473 (D. Md. 1998) (communications between firms having "legitimate business dealings" with each other do not suggest antitrust conspiracy).

Plaintiffs' fallback is to portray defendants' position as a claim that joint ventures "enjoy a protected status," immunizing them from antitrust scrutiny. Opp. at 41 n.52. But defendants never made such a claim. Rather, defendants' point—to which plaintiffs have no response—is that allegations that defendants formed joint ventures to sell their music, and that such ventures generated communication between defendants, are at least as consistent with lawful conduct as with unlawful conduct. Consequently, those allegations, by themselves, fail to satisfy the *Twombly* test requiring "allegations plausibly suggesting (not merely consistent with) agreement." 127 S. Ct. at 1963, *citing* 313 F. Supp. 2d at 179 ("the District Court understood that allegations of parallel business conduct, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts that 'ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior").

The formation of a joint venture is, of course, fully consistent with lawful behavior; otherwise, competitors would not be able to form joint ventures such as the one approved by the

Supreme Court in *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).[5] In *Dagher*, two refiners of gasoline, Texaco and Shell, pooled their resources in a joint venture that took over the sale of both companies' brands in the western United States, charging the same prices for both brands. The Court held that setting the price of the products being sold was a "core activity" of the venture, and although this "may be price fixing in a literal sense, it is not price fixing in the antitrust sense." 547 U.S. at 6. Plaintiffs try to distinguish *Dagher* by asserting that *Dagher* involved full economic integration between Texaco and Shell and that competition between them "had ended," while here the defendants are alleged to have remained in competition when selling Digital Music directly to retailers they did not control (*i.e.*, to third-party website operators). This, however, is the same as the situation upheld in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), where music companies sold licenses through ASCAP and BMI at set prices, but were free to compete on any terms they chose when selling outside those ventures, directly to customers. *Id.* at 23-24. Plaintiffs also argue that the joint venture in *Dagher* was "lawful" while the ventures here allegedly were created to serve as

[5] The cases plaintiffs cite (Opp. at 41-42 n.52) in which the Supreme Court addressed joint ventures are all either distinguishable or support defendants' position. *Timkin Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), involved a sham patent licensing arrangement that had no real function other than to divide territories. *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332 (1982), involved a straightforward price-fixing agreement of maximum prices. *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447 (1986), involved a concerted refusal to deal on the terms requested. *NCAA v. Board of Regents of Oklahoma*, 468 U.S. 85 (1984), involved an output agreement. *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); and *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969), all involved ventures that prohibited their participants from competing outside the venture, and all preceded *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979), which supports defendants' position by upholding the formation of a venture among competitors that fixed the prices at which it offered the competitors' products but served the legitimate purpose of facilitating distribution of the competitors' products by enabling one-stop-shopping for music licenses.

"vehicles" to restrain output—that is just one more utterly conclusory assertion that is squarely at odds with *Broadcast Music*.[6]

Thus, the allegation in the complaint that the defendants formed joint ventures and had the opportunity to communicate through those joint ventures does not provide the "factual enhancement" required by *Twombly*. 127 S. Ct. at 1960, 1974 (holding there were not "enough facts to state a claim to relief that is plausible on its face" despite claim that defendants "'communicate amongst themselves' through numerous industry associations").

"Parallel Prices that Bear No Relationship to Costs." Plaintiffs next contend that the prices defendants charged and the DRM rules defendants adopted "were not explained by changes in Defendants' costs." Opp. at 11. Plaintiffs confuse unexplained price ***increases***—in which a group of competing sellers (usually of undifferentiated commodities) all raise their prices at the same time even though costs remain the same[7]—with sellers who continue to charge

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[6] Plaintiffs rely on *Citizen Publishing* (Opp. at 42 n.53) in support of their assertion that *Dagher* is not controlling authority. In *Citizen Publishing*, however, there was an agreement between the venturers not to engage in any other publishing business in the same region, 394 U.S. at 135, while here plaintiffs explicitly assert that "defendants remained in competition in connection with Digital Music sold directly to retailers they did not control" (Opp. at 43)—more like *Broadcast Music.*

[7] This is what Areeda and Turner discuss in the passage cited in *Twombly*, 127 S. Ct. at 1965 n.4, and what Posner discusses in the article cited by plaintiffs (Opp. at 10): "Simultaneous price increases and output reductions unexplained by any increases in cost . . . ." R. POSNER, ANTITRUST LAW 88 (2d ed. 2001); "When two competitors announce a price increase or an identical change in business at the very same moment . . . ." 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1425c, at 170 (2d ed. 2003). Moreover, although plaintiffs disingenuously indicate that the complaint alleges "price increases" (Opp. at 11), citing paragraphs 70 through 79 of the complaint, the complaint never actually alleges price increases at all. There is a world of difference between a group of competitors all raising their prices at the same time notwithstanding the absence of any concurrent change in cost (or demand) and a group of competitors keeping their prices the same during a period when costs begin to fall (or demand begins to rise). *See Twombly*, 127 S. Ct. at 1971 ("resisting competition is routine"). *Accord Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1244 (3d Cir. 1993) (sellers might all charge the same above-marginal cost price because they assume that

the same prices over a period during which their costs decline. Without conceding that plaintiffs have adequately alleged a material reduction in costs at all (as explained in defendants' Opening Brief at page 16, they have not), it is hardly probative of conspiracy for competitors to continue to charge the same prices when customers keep buying their products at those prices, and *not* to begin charging less just because they can. The Supreme Court recognized this in *Twombly*. 127 S. Ct. at 1971 ("there is no reason to infer" that companies which could have competed harder than they did "had agreed among themselves . . . to resist competition"). *See also Elevator,* 2007 WL 2571085, at *3 ("similar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy").[8]

"Market Concentration." Plaintiffs claim that defendants account for over 70% of the relevant market. Opp. at 11. Assuming this is true for purposes of this motion, it cannot suffice as a fact that "raises a suggestion of a preceding agreement" to fix prices under *Twombly*. Whether or not the level of market concentration is consistent with particular conduct, the *number* of firms competing in an industry is not "conduct" and does not imply that an anticompetitive agreement was made. If simply alleging parallel conduct within a concentrated

"competitors would match any price cut. . . . Accordingly, Areeda warns courts not to consider a failure to cut prices . . . as an action against self-interest").

[8] Similarly, parallel use of most favored nation clauses is not probative of collusion. Plaintiffs accuse defendants of "conflating" buyer-side and seller-side MFNs (Opp. at 6 n.5), but they appear to be using the terms "buyer-side" and "seller-side" in a manner opposite to that used by defendants. Defendants (at page 12 of their Opening Brief) termed a clause "by which a buyer promises to pay each seller as much as it pays any other seller" a "buyer-side MFN" clause, while plaintiffs term a clause by which "retailers [*i.e.*, buyers] . . . guaranteed each 'seller' [*i.e.*, each defendant] the best price negotiated by other sellers" a "seller side MFN" clause. These are in essence the same, and they have the effect of creating a *ceiling* on prices, not a floor, because a buyer could not agree to pay one seller a higher price without subjecting itself to higher prices from other sellers as well.

market ever was enough to plead a Section 1 violation, that day has past. *Twombly*, 127 S. Ct. at 1968 n.7 (rejecting *Nagler v. Admiral Corp.*, 248 F.2d 319, 325 (2d Cir. 1957)).[9]

"Motive to Conspire." Plaintiffs claim that defendants had a motive to fix prices and slow the introduction of Internet Music (Opp. at 11), and cite cases purportedly holding that parallel pricing plus a motive to conspire to charge higher prices can overcome a motion to dismiss. This is precisely what *Twombly* rejects by eschewing amorphous "plus factors" and recognizing that "natural" instinct is not probative of conspiracy. 127 S. Ct. at 1971. Moreover, the very sources on which plaintiffs rely denounce "motive" as a worthless indicator of collusion.[10]

"Antitrust Record." Plaintiffs state that defendants are "under investigation" and, therefore, have a "record of price fixing." Opp. at 12-15. However, an "investigation" does not constitute a "record," and was never a "plus factor" under the old conscious parallelism test, let alone a probative factual allegation under *Twombly*. Indeed, all of the "records" referenced in the sources plaintiffs cite are convictions, guilty pleas or consent decrees, not just mere investigations, which is all that is alleged here. *In re Graphics Processing Units Antitrust Litigation*, No. C 06-07417 WHA, MDL No. 1826, 2007 WL 2875686, at *12 (N.D. Cal Sept.

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[9] Plaintiffs also claim that there were high barriers to entry (Opp. at 11), but entry is simply one determinant of "market concentration" and not a fact that implies a preceding agreement to fix prices under *Twombly*.

[10] *See* AREEDA & HOVENKAMP, *supra*, ¶¶ 1434c, 1434 c1, 1434c2 ("motivation" is merely "synonymous" with "interdependent parallelism," which is not a § 1 violation, and "conspicuous by its rarity is the occasional court suggesting that conspiratorial motivation" suffices); Blechman, *supra*, at 898 ("The problem . . . with a 'plus factor' test which depends upon whether particular conduct is or is not contrary to companies' 'independent self-interest' is that it does not, by itself, distinguish between conscious parallelism and conspiracy."). *Fuentes v. South Hills Cardiology*, 946 F.2d 196, 202 (9th Cir. 1991), the case on which plaintiffs principally rely, has been very narrowly interpreted on exactly this point. *See In re Bath and Kitchen Fixtures Antitrust Litig.*, No. 05-cv-00510, 2006 WL 2038605, at *5-6 (E.D. Pa. July 19, 2006).

27, 2007) (holding that an investigation is a "non-factor" which "carries no weight in pleading an antitrust conspiracy claim").[11]

B. The "Plausibility" Standard

Finally, plaintiffs contend that defendants propose a "probability" standard rather than *Twombly's* "plausibility" standard and assert that "in support of their position, defendants curiously rely on three inapposite cases." Opp. at 15 & n.14. **In fact, none of these three cases actually appears anywhere in defendants' brief.** Whether plaintiffs mistakenly incorporated a section from another brief addressing arguments made in another case, or actually misapprehended defendants' position, defendants' position is quite clear: As the Second Circuit recently instructed, *Twombly* "does require enough facts" to make the claims in a complaint plausible, and "conclusory allegations of agreement" will not suffice. *Elevator*, 2007 WL 2471805, at *2. This is the standard, and plaintiffs do not come close to meeting it.

* * *

For the reasons stated above and in defendants' Opening Brief, and even without reaching the complaint's numerous other deficiencies, the complaint should be dismissed in its entirety for failure to state a claim under *Twombly*.[12]

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[11] For these reasons and for the reasons stated at pages 38 through 41 in Defendants' Opening Brief, paragraphs 106 through 112 in plaintiffs' complaint concerning these prior investigations should be stricken.

[12] Defendants Opening Brief exposed the inconsistency between the *Tucker* case—which alleges that Apple has monopolized the market for Internet music in order to keep prices for music low (and prices for iPods high)—and this case, which alleges that defendants are trying to raise prices for Internet music. Defs. Mem. at 3 n.2. Plaintiffs try to sidestep this inconsistency by focusing only on the contention in *Tucker* that Apple rendered its iTunes website incompatible with music players other than its own iPods. Plaintiffs simply ignore the fact that the *Tucker* complaint attributes the power behind the pricing of Internet music to Apple, not to defendants. Moreover, the reference to the fact that the Lerach Coughlin firm filed both complaints was not an *ad hominem* argument at all, but was made to demonstrate that the present

II. ALL CLAIMS THROUGH FEBRUARY 1, 2005 HAVE BEEN RELEASED

Plaintiffs concede that the release given by the settlement class in *Ottinger v. EMI Music Distribution*, Civil Action No. 24885-II (Tenn. Cir. Ct.) (the "*Ottinger* Cases"), bars their claims to the extent they are related to the purchase of CDs on or before September 29, 2003. Accordingly, those claims must be dismissed.

Plaintiffs argue, however, that defendants have overstated the extent to which their claims are barred by the *Ottinger* release. Plaintiffs are wrong. First, although the settlement class in *Ottinger* consists of indirect purchasers who purchased CDs between June 1, 1991, and September 29, 2003, plaintiffs err in conflating this *class period* with the *claims* that the *Ottinger* class members released. Class members who purchased CDs during the class period were capable of releasing claims arising outside the class period, just as they were capable of releasing claims that they could have but did not specifically allege. Indeed, that is precisely what the *Ottinger* settlement class did.

The *Ottinger* Stipulation of Settlement provides that "[u]pon the Effective Date . . . each Settlement Class Member shall be deemed to have, and by operation of the Judgment shall have, fully, finally and forever released, relinquished and discharged any and all Released Claims . . . " Almeida Decl. Ex. E at § 8.1. The "Released Claims," in turn, are claims that the settlement class "*alleged or could have alleged"* in that litigation. *Id*. at § 1.16 (emphasis added). Thus, as of February 1, 2005, defined as the "Effective Date" in Section 8.1 of the Stipulation of Settlement, the *Ottinger* settlement class members released the claims that they had or could have asserted in that litigation.

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complaint could not have been drafted without knowledge of the *Tucker* theory.

Second, the Released Claims in *Ottinger* include all claims "based upon the matters alleged (or which could have been alleged) in the Complaints in the Litigation or the Related State Actions." *Id.* at § 1.16. This broad language was specifically approved by the *Ottinger* court following notice to members of the settlement class, an opportunity to opt out, and a fairness hearing at which members of the settlement class had the opportunity to be heard. Almeida Decl. Ex. F at § 3.

As set forth in *Wal-Mart Stores, Inc. v. Visa*, 396 F.3d 96 (2d Cir. 2005) (Opp. at 16):

> Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country. Practically speaking, "class action settlements simply will not occur if the parties cannot set definitive limits on the defendants' liability."

Id. at 106; *see also In re AOL Time Warner ERISA Litig.*, No. 02 Civ. 8853 (SWK), 2006 WL 2789862, at *12 (S.D.N.Y. Sept. 27, 2006) ("class action plaintiffs 'may release claims that were or could have been pled in exchange for settlement relief'"). Thus, a court may release claims that could have been (but were not) alleged if the released claims share a common nexus with a matter alleged in the settled complaint: "A court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged by reason of or in connection with any matter or fact set forth or referred to in the complaint." *Wal-Mart Stores, Inc.,* 396 F.3d at 108 (quoting *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981)). Although the released claims must arise out of the same factual predicate as the settled claims, they need not be identical to the settled claims, as plaintiffs argue here. It is sufficient that the released claims *could have* been alleged *in connection with* the settled claims.[13]

[13] Indeed, in two of the three cases cited by plaintiffs, the Second Circuit *enforced* broad

The *Ottinger* Cases and this litigation stem from the same misguided factual predicate. Plaintiffs in both cases claim that defendants' conspiracy had the effect of elevating prices of CDs and maintaining them at artificially high levels despite a decline in the cost of delivering music to consumers due to technological advancements. Although plaintiffs argue that their complaint and the complaint in *Ottinger* differ because "nowhere does the *Ottinger* [complaint] mention Internet Music" (Opp. at 18-19), plaintiffs' Opposition repeatedly emphasizes the close relationship between CDs and Internet Music. For example, plaintiffs maintain that (1) "Internet Music and CDs are viewed as substitutes by both record labels and consumers" and claim "that a motive, purpose and intended effect of the conspiracy . . . was to maintain and increase the price of Digital Music sold on CDs." (Opp. at 21); (2) defendants entered into "a single, industry-wide conspiracy involving Internet Music and CDs" (*id*. at 21; *see also id.* at 22); (3) CDs and Internet Music are part of a single "Digital Music" market (*id.* at 23 n.20); and (4) CD purchasers' "transactions with Defendants were an object of Defendants' collusion" (*id.* at 24).[14] In short,

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releases of the sort that plaintiffs contest here. *Wal-Mart* 396 F.3d at 108; *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982). The third case, *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 12 (2d Cir. 1981), is distinguishable. In *National Super Spuds*, the notice sent to class members made "[n]o mention … of the provision in the settlement agreement barring all claims of class members whether or not asserted in the [class] action . . . ." Here, the *Ottinger* class members were specifically given notice of the broad release and had the ability to exclude themselves from it. Siddiqui Decl. Ex. C (*Ottinger* Notice of Proposed Class Settlement and Cash Rebate Settlement Hearing) at ¶ 7 ("unless members of the Settlement Class exclude themselves from the Settlement Class, they will be barred from bringing their own lawsuits that in any way relate to the Fifth Amended Complaint.").

[14] The *Ottinger* complaint and the complaint in this case provide a laundry list of identical allegations with respect to the defendants' conduct, such as: (1) defendants conspired to sell CDs at supracompetitive prices (Almeida Decl. Ex. G (*Ottinger* 5th Amended Compl.) at ¶¶ 45, 59; Compl. ¶¶ 66, 126); (2) defendants maintained artificially high prices in spite of technological advancements that reduced their costs (Ex. G at ¶¶ 1, 40-42; Compl. ¶ 101); (3) defendants used their membership in the RIAA to collude (Ex. G at ¶¶ 50-51; Compl. ¶ 88); (4) defendants exchanged price information (Ex. G at ¶ 48; Compl. ¶¶ 68, 119); (5) defendants failed to pass the lower costs for CDs on to consumers (Ex. G at ¶¶ 39-46; Compl. ¶¶ 74, 83); (6) prior

according to plaintiffs, the two conspiracies took place in the same product market, at the same time, and for the same purpose.[15]

Finally, plaintiffs argue that applying the *Ottinger* release to their claims would violate due process. That argument also lacks merit. The class notice in *Ottinger* set forth the relevant release provision virtually verbatim and informed class members of their right to opt out. *See* Siddiqui Decl. Ex. C at ¶ 7. The law requires no more. *Wal-Mart Stores, Inc.,* 396 F.3d at 115-16 (where release was quoted in class notice, "the expansive reach of the release could not have been clearer. This is all that was required."); *O'Brien v. Nat'l Property Analysts Partners*, 739 F. Supp. 896, 902 (S.D.N.Y. 1990) ("class notice [that] accurately represented the release provision" satisfied due process requirements). No legitimate due process concern is raised by holding members of a settlement class to a contractual commitment made after adequate notice, an opportunity to opt out and a fairness hearing.[16]

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antitrust cases and government investigations are evidence of wrongdoing (Ex. G at ¶¶ 30-38; Compl. ¶¶ 106-112).

In addition, the two complaints make common allegations regarding the market structure and its impact on defendants' behavior: (1) defendants exercise significant market power (Ex. G at ¶¶ 28, 29; Compl. ¶ 40); (2) the market is characterized by high barriers to entry by new firms (Ex. G at ¶ 29; Compl. ¶ 125); (3) industry structure enables and facilitates defendants' ability to coordinate their pricing and other practices (Ex. G at ¶ 28; Compl. ¶ 124); (4) market share stability is inconsistent with the industry which has been subject to sweeping advancements in technology and changes in public taste and fashion (Ex. G at ¶ 28; Compl. ¶ 124); and (5) industry concentration and significant barriers to entry have insulated defendants from price competition and new market entrants (Ex. G at ¶ 29; Compl. ¶ 125).

[15] In addition, both the *Ottinger* complaint and the complaint in this action allege violations of the same state antitrust and unfair and deceptive acts and practices statutes (except the Nebraska Consumer Protection Act, which is alleged in this action but was not alleged in *Ottinger*), and both assert claims for unjust enrichment. *See* Almeida Decl. Ex. G at Counts I, II, III; Compl. Counts II, III.

[16] Plaintiffs rely on *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001) (Opp. at 21), in support of their argument that defendants must present evidence that the settlement and release of future claims was considered independently of current claims. *Stephenson*, however, is

Accordingly, the *Ottinger* release bars the claims of the *Ottinger* class members through February 1, 2005.

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

Plaintiffs concede that nowhere in the complaint do they allege that defendants did anything to limit the output or fix the prices of CDs. Plaintiffs also concede that they do not allege any theory under which purchasers of CDs were injured by being unable to buy Internet Music. Their only possible theory of injury to CD purchasers (a theory not actually alleged in the complaint) is that alleged restrictions on Internet Music sustained the demand for, and thus the price of, CDs.

Plaintiffs cite no case in which the only connection between the challenged conduct and the injury is that alleged restrictions on one product sustained the demand for another product.[17] Such a radical expansion of antitrust doctrine would mean that every case alleging restrictions on one product would be accompanied by claims of purchasers of other substitutes, claiming that

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distinguishable. In *Stephenson*, plaintiffs were members of a class injured by exposure to Agent Orange. *Id.* at 260. A prior litigation purported to settle all future claims, but only provided recovery for those whose death or disability was discovered before 1994. *Id.* at 261. The court found that the plaintiffs who did not discover their Agent Orange-related injuries until after 1994 were not afforded due process because they were not adequately represented in the prior litigation. *Id.* Unlike plaintiffs in *Stephenson* and the other cases cited by plaintiffs, members of the *Ottinger* class, who were entitled to recovery under the *Ottinger* settlement, are now trying to assert a second claim for the alleged injury for which they already were compensated and which they already released.

[17] Plaintiffs' reliance on *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982), is misplaced. In that case, Blue Shield refused to pay for psychology services, which injured psychologists and their patients who, together, were included in the transaction for which Blue Shield refused to pay. To be analogous with plaintiffs' theory here, the *McCready* plaintiff would have to have been a purchaser of *psychiatry* services, a separate but related service that Blue Shield did reimburse, and would have had to allege that the prices of his *psychiatry* services had been inflated due to demand from patients who otherwise would be purchasers of *psychology* services. Nothing in *McCready*, a 5-4 decision, suggests that the Court would have made that leap and allowed such a claim.

their prices, too, went up or were sustained. Plaintiffs do not and cannot defend the absurd consequence inherent in their theory.

Indeed, the Second Circuit's decision in *Reading Indus., Inc. v. Kennecott Copper Corp*., 631 F.2d 10, 12 (2d Cir. 1980), demonstrates that these indirect CD purchasers have no actionable claims. In *Reading*, the plaintiff alleged that copper manufacturers rationed copper among their customers, and customers who could not buy copper from defendants at the rationed price turned to scrap copper and "bid up" its price. *Id.* at 12. Plaintiff bought scrap copper at those higher prices. The Second Circuit rejected plaintiff's claim for losses "even though causally related to" the conduct of the defendants. *Id*. According to the Second Circuit, the increase in demand for another product (scrap copper) did not create a claim for a plaintiff who did not buy the product (copper) that was the subject of the conspiracy.

Plaintiffs cite *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 476 (7th Cir. 2002), another case involving the copper industry, but that case is inapposite. In *Sumitomo,* defendants fixed prices on the futures market, and the court allowed claims by some purchasers of copper products because "the price of physical copper . . . is directly linked to the . . . price for copper futures, and dealers in all forms of physical copper quote prices based on rigid formulas related to copper cathode futures."[18] Here, as in *Reading,* there are no allegations of "rigid formulas"—

[18] The other cases plaintiffs cite involving alleged restrictions on futures markets are similarly distinguishable. *See Sanner v. Bd. of Trade of Chicago*, 62 F.3d 918, 929 (7th Cir. 1995) (soybean futures and soybean cash markets involve "the same commodities" which "tend[] to move in lockstep"); *Ice Cream Liquidation, Inc. v. Land O' Lakes, Inc.,* 253 F. Supp. 2d 262, 274 (D. Conn. 2003) ("cheese and butter processors generally base their contract sales on [futures] prices" (citation omitted)).

just the claim that the alleged inflation in the prices of CDs stems from market forces as would-be purchasers of Internet Music turn instead to CDs and thereby bid up the prices of CDs. *Id.*[19]

For purposes of both antitrust injury and antitrust standing, plaintiffs' theory depends upon speculative assumptions regarding indirect consequences of restrictions upon Internet Music. Plaintiffs' allegation that the prices of Internet Music and CDs are interrelated by operation of market forces is a far cry from cases where one product is an ingredient in the other or the prices of two products are contractually tied together (as with products traded on a futures exchange). If, as the court rejected in *Reading*, it were enough to allege that restrictions on one product cause prices of another substitute to be "bid up," then antitrust standing would be expanded dramatically. 631 F.2d at 12. That is not the law. Rather, the established rule provides that only purchasers of Internet Music can complain about restrictions on Internet Music.

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

Plaintiffs have asserted claims under the laws of fourteen jurisdictions in which there is no named plaintiff who has incurred an alleged injury.[20] Plaintiffs could not bring a claim on

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[19] Most of plaintiffs' other cases involve defendants who conspired to restrict an intermediate step in the production process that necessarily raised the price of the final product. For example, *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 159 (3d Cir. 2002), defendants, who were vertically integrated, restricted linerboard production, which increased the prices of corrugated containers and sheets that defendants themselves made with the linerboard. Plaintiffs were buying the restricted product, linerboard, albeit after its incorporation by defendants into corrugated containers and sheets. And in *Crimpers Promotions Inc. v. HBO, Inc.*, 724 F.2d 290, 294 (2d Cir. 1983), HBO organized a boycott of plaintiff's business. The court found that "[i]njury to [plaintiff] was the precisely intended consequence of defendant's boycott" and injury was "even more 'direct' than to the producers or stations who defendants concede would have standing." *Id.*

[20] The "Non-Resident States" are Arizona, District of Columbia, Iowa, Kansas, Maine, Nebraska, Nevada, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, West Virginia and Wisconsin. Defs. Mem. at 26 n.16.

behalf of themselves under those states' laws. It thus makes absolutely no sense to allow them to come into this Court and assert claims on behalf of the residents of those other states.

Plaintiffs purport to justify their overreaching by arguing that because this is a putative class action, this Court can disregard jurisdictional limits and ignore plaintiffs' lack of standing until class certification. The Supreme Court disagrees. It is well settled that a named plaintiff cannot base his or her individual standing on the injury of putative class members. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *see also Allee v. Medrano*, 416 U.S. 802, 829 (1974) (Burger, C.J., concurring) ("Standing cannot be acquired through the back door of a class action."). And contrary to plaintiffs' suggestion that this issue is premature at the pleading stage, the Supreme Court has made clear that "standing is to be determined as of the commencement of suit." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992). Because plaintiffs' "class action allegation adds nothing to the standing inquiry," *Doe v. Blum*, 729 F.2d 186, 190 n.4 (2d Cir. 1984), the named plaintiffs' standing (or, more appropriately, their lack thereof) should be determined now, and should be decided without any consideration of the possible standing of unidentified putative class members. *See* 1 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 1:2 (4th ed. 2002) ("Significantly, procedural Rule 23 cannot be construed to extend or limit the jurisdiction and venue of federal courts or to abridge, modify, or enlarge any substantive right." (citing 28 U.S.C. § 2072)).

Both *In re Terazosin Hydrochloride Antitrust Litigation*, 160 F. Supp. 2d 1365, 1370-72 (S.D. Fla. 2001), and *Association for Disabled Americans, Inc. v. 7-Eleven, Inc.* ("*ADA*"), No. Civ. 3:01-CV-0230-H, 2002 WL 546478, at *4 (N.D. Tex. Apr. 10, 2002), are directly on point

and entirely consistent with Supreme Court precedent. Those cases hold that named plaintiffs do not have standing to assert the state law claims of putative class members when those named plaintiffs did not incur an injury under those state laws. *Terazosin*, 160 F. Supp. 2d at 1370-72; *ADA*, 2002 WL 546478, at *5 (dismissing state law claims for which no named class representative had standing and noting "the plaintiffs have presented absolutely no evidence of their standing to assert a claim under the laws of any state other than Florida"); *see also James v. City of Dallas*, 254 F.3d 551, 563 (5th Cir. 2001) (holding that "at least one named Plaintiff must have standing to seek [] relief on ***each of the claims*** against" a defendant).

This case is no different. The named plaintiffs have asserted no injuries under the laws of the Non-Resident States, nor have plaintiffs pointed to any persuasive authority permitting the issue of constitutional standing to be ignored. The complaint should be dismissed to the extent it purports to assert claims under the laws of any of the fourteen jurisdictions in which no named plaintiff resides.

Plaintiffs' reliance on *In re Buspirone Patent Litigation*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002), and *In re Grand Theft Auto Video Game Consumer Litigation (No. II)*, No. 06 MD 1739 (SWK)(MHD), 2006 WL 3039993, at *1 (S.D.N.Y. Oct. 25, 2006), is unpersuasive.[21] Nowhere

[21] Plaintiffs also rely on *In re Relafen Antitrust Litig.*, 221 F.R.D. 260 (D. Mass. 2004). That case, however, rests on an incorrect interpretation of *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). There, the Supreme Court established a "limited exception" to the general rule that standing may be addressed before class certification where the absent class members lack constitutional standing and class certification issues are dispositive of the whole case. *See Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 n.6 (5th Cir. 2002). Indeed, *Relafen* stands in conflict with numerous post-*Ortiz* courts that have addressed Article III standing ***before*** analyzing class certification issues. *See, e.g.*, *Matte v. Sunshine Mobile Homes, Inc.*, 270 F. Supp. 2d 805, 822-23 (W.D. La. 2003); *Dash v. FirstPlus Home Loan Owner Trust*, 248 F. Supp. 2d 489, 503-05 (M.D.N.C. 2003); *Miller v. Pac. Shore Funding*, 224 F. Supp. 2d 977, 995-96 (D. Md. 2002); *Mull v. Alliance Mortgage Banking Corp.*, 219 F. Supp. 2d 895, 909 n.10 (W.D. Tenn. 2002); *Caranci v. Blue Cross & Blue Shield of R.I.*, 194 F.R.D. 27, 32 (D.R.I. 2000); *Doe*

did these courts discuss—much less distinguish—the controlling Supreme Court precedent cited above. Instead, the *Buspirone* court explained that it did not need to analyze the named plaintiffs' standing because "[i]f certification is granted, the proposed class would contain plaintiffs who have personal standing to raise claims under the laws governing purchases in all of the fifty states." 185 F. Supp. 2d at 377; *see also Grand Theft,* 2006 WL 3039993, at *2-3. But that reasoning conflicts directly with the Supreme Court's holding that 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." *Blum v. Yaretsky*, 457 U.S. 991, 1001 n.13 (1982) (internal quotation marks omitted).[22] And neither case (both decided before *Twombly*) addresses the Supreme Court's concern in *Twombly*: resolving potentially dispositive issues before undertaking the "potentially enormous expense of discovery." 127 S. Ct. at 1967; *Elevator*, 2007 WL 2471805, at *6 n.4.

V. PLAINTIFFS' INDIVIDUAL STATE CLAIMS ARE INSUFFICIENTLY PLED

As demonstrated below and in defendants' Opening Brief, plaintiffs' Arizona, District of Columbia, Iowa, Michigan, Minnesota, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin antitrust claims and claims under the consumer

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v. Unocal Corp., 67 F. Supp. 2d 1140, 1142 (C.D. Cal. 1999).

[22] Plaintiffs' reliance on *Payton v. County of Kane*, 308 F.3d 673 (7th Cir. 2002), is misplaced. In *Payton*, the court remanded a proposed class action to the district court to determine class certification before standing. In doing so, the court distinguished the case before it from one like the case at bar, noting: "This is not a case where the named plaintiff is trying to piggy-back on the injuries of the unnamed class members. That, of course, would be impermissible, in light of the fact that a named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action." *Id.* at 682.

protection laws of New Mexico, New York and North Carolina are insufficiently pled and must be dismissed.

A. Plaintiffs' Allegations Are Insufficient To State A Claim Under State Antitrust and Consumer Protection Laws Requiring A Nexus Between The Conduct and The State

Plaintiffs' allegation that defendants' conduct occurred "throughout the United States" is insufficient to state claims under the antitrust laws of the District of Columbia, Michigan, South Dakota, Tennessee, West Virginia, and Wisconsin and the consumer protection laws of North Carolina.[23] Each of these states requires allegations of a specific nexus—ranging from "conduct within" to "substantial effects"—to the jurisdiction. Plaintiffs' bare and generalized allegation of conduct and/or effects occurring "throughout the United States" fails to establish any nexus whatsoever with *any particular* state. In fact, this very argument was recently rejected by the Northern District of California. *California v. Infineon Tech. AG*, No. C 06-4333 PJH, 2007 WL 2523363, at *30-34 (N.D. Cal. Aug. 31, 2007) (holding that an allegation that "defendants 'engaged in the business of marketing and selling [their products] throughout the United States' . . . sweeps too broadly—and without any distinction among the [plaintiff states]—to credibly suggest that economic activity within [one particular state] has been affected in any way . . . .'"). *See also Meyers v. Bayer AG*, 735 N.W.2d 448, 462-63 (Wis. 2007) ("[A] complaint must allege effects on Wisconsin, and not merely nationwide effects."). Even assuming that plaintiffs' allegations of nationwide conduct raise an inference of intrastate activity, those allegations still fall far short of a "substantial effects or impact" threshold, which plaintiffs do not dispute is required by the Tennessee and Wisconsin antitrust laws and the North Carolina consumer protection laws.

[23] Plaintiffs admit that they assert no claim under New York antitrust law. Opp. at 34.

Because the complaint contains no allegations of jurisdiction-specific conduct or effects, plaintiffs' claims under the antitrust laws of the District of Columbia,[24] Michigan,[25] South Dakota,[26] Tennessee,[27] West Virginia[28] and Wisconsin[29] and the consumer protection laws of North Carolina[30] should be dismissed.

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[24] Plaintiffs agree that the D.C. antitrust statute requires a "connection" within the District of Columbia. *GTE New Media Servs., Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27, 45 (D.D.C. 1998). Plaintiffs rely on *In re Intel Corp. Microprocessor Antitrust Litig.*, which affirms the "connection" requirement and found standing based, in part, on the complaint's *specific allegations* of injurious conduct *in the District of Columbia*, 496 F. Supp. 2d 404, 412 (D. Del. 2007)—allegations absent here.

[25] The Michigan Antitrust Reform Act holds unlawful "[a] contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in *a relevant market* . . .", and it defines a "relevant market" as "the geographical area of actual or potential competition in a line of trade or commerce, *all or any part of which is within this state.*" MICH. COMP. LAWS ANN. § 445.771-§445.772 (emphasis added). *See Aurora Cable Communic'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*"). At a minimum, plaintiffs must allege that the purported misconduct affected Michigan commerce, which they fail to do.

[26] The South Dakota antitrust statute provides 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) (emphasis added). Plaintiffs' reliance on *In re New Motor Vehicles Canadian Export Antitrust Litigation* is misplaced: unlike the case at bar, the plaintiffs in *New Motor Vehicles* alleged that "part of the trade or commerce occurred within South Dakota." 350 F. Supp. 2d 160, 172 (D. Me. 2004).

[27] Plaintiffs do not dispute that the Tennessee antitrust statute applies to conduct that "affects Tennessee trade or commerce to a *substantial* degree." *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 523 (Tenn. 2005) (emphasis added) (dismissing claim under Tennessee Trade Practices Act for failure to allege conduct substantially affecting *Tennessee commerce*, despite plaintiff's allegations that it paid higher prices to retailers). Where, as here, the complaint is "devoid of any mention of Tennessee commerce," a claim under the TTPA must be dismissed. *Infineon Tech*, 2007 WL 2523363, at *34.

[28] West Virginia's antitrust statute provides that "[e]very contract…or conspiracy in restraint of trade or commerce *in this State* shall be unlawful." W.VA. CODE § 47-18-3. *State ex rel Palumbo v. Graley's Body Shop, Inc.*, 425 S.E.2d 177, 183 n.11 (W.Va. 1992) ("Federal antitrust law is obviously directed toward *interstate* commerce. West Virginia's antitrust law is directed towards *intrastate* commerce.") (internal quotations omitted; emphasis in original). The *New Motor Vehicles* court held that plaintiffs had sufficiently alleged that a part of the trade or commerce occurred within West Virginia. 350 F. Supp. 2d at 175. Here, plaintiffs make no

B. Plaintiffs' Allegations Are Insufficient To State A Claim Under State Antitrust Laws Presumed To Require A Nexus Between The Conduct and The State

Plaintiffs' antitrust claims under six state antitrust laws whose application to interstate conduct has not yet been addressed also must fail. The Commerce Clause prohibits direct regulation of interstate commerce by states as well as "the application of a state statute to commerce that takes place wholly outside of the State's borders*, whether or not the commerce has effects within the State.*" *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (emphasis added). *See also In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 612-13 (7th Cir. 1997) ("The plaintiffs may well be stretching the Alabama statute to the breaking point in seeking damages for nonresident plaintiffs from nonresident defendants who sell primarily in other states . . . . A state's power to regulate interstate commerce is limited . . . [it] cannot

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allegations whatsoever concerning commerce within West Virginia.

[29] Plaintiffs concede that the proper standard under Wisconsin antitrust law is whether a plaintiff has alleged "substantial effects," citing *Meyers*, 735 N.W.2d at 461 ("[A] complaint under the Wisconsin Antitrust Act, where the circumstances involve interstate commerce and the challenged conduct occurred outside of Wisconsin, is sufficient if it alleges price fixing as a result of the formation of a combination or conspiracy that substantially affected the people of Wisconsin and had impacts in this state."). *See also Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 158 (Wis. 2005). In *Meyers*, the court held that the plaintiffs had met the "substantial effects" threshold by alleging "a broad price-fixing scheme affecting 'at a minimum, thousands . . . in Wisconsin' who purchased the [defendants' products]." 735 N.W.2d at 451. *See also Infineon*, 2007 WL 2523363, at *35 (allegations that violations "substantially affected the people of Wisconsin and had impacts within the State of Wisconsin" are sufficient). Here, by contrast, plaintiffs make no allegations as to *any* effects in Wisconsin, let alone *substantial* effects.

[30] Again, plaintiffs concede that North Carolina consumer protection law requires allegations of "substantial effects" in the state, citing the same authorities cited by defendants. *Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1463 (M.D.N.C. 1996) ("incidental" injury is not sufficient to survive dismissal). *See also Lawrence v. UMLIC-Five Corp.*, No. 06 CVS 20643, 2007 WL 2570256, at *7 (N.C. Super. June 18, 2007) (dismissing claim where the alleged injury does not arise from competition or consumption in North Carolina nor does the alleged conduct have substantial in-state effect). Plaintiffs neither allege substantial effects nor injury arising from consumption in North Carolina.

regulate sales that take place wholly outside it."). The Supreme Court has held that "[t]he Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989); *see also Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 220 (2d. Cir. 2004). As set forth in Defendants' Opening Brief, the individual state antitrust regimes differ, especially with respect to their intrastate nexus and standing requirements. Thus, the extraterritorial application of these regimes would cause conflict impermissible under the Commerce Clause.

Plaintiffs have not alleged any specific conduct or effects with respect to *any* particular state. Absent a connection to the regulating state, extraterritorial regulation is impermissible under the Commerce Clause. In order to avoid this conflict, the antitrust laws of Arizona, Iowa, Minnesota, North Carolina, North Dakota and Vermont should be interpreted to require a specific nexus between the conduct or its effects and that jurisdiction. For the reasons set forth in Section V(A), plaintiffs' allegations of nationwide conduct are insufficient to establish the requisite nexus and must be dismissed.

C. Plaintiffs Fail To State Claims Under The Consumer Protection Statutes of New Mexico, New York and North Carolina

Plaintiffs cannot transform their defective antitrust claims into alleged violations of the consumer protection statutes of New Mexico, New York and North Carolina.[31]

First, in an effort to allege fraudulent, deceptive or misleading conduct by defendants, plaintiffs rely on allegations that defendants concealed a price-fixing conspiracy. Opp. at 34 n.39. This attempt to equate defendants' alleged concealment of an antitrust conspiracy with deceptive conduct fails even under the case law on which plaintiffs rely. As the *New Motor*

[31] Plaintiffs concede that they are not bringing a claim under Kansas's Consumer Protection Act, KAN. STAT. ANN. § 50-623 *et seq*. (2006). Opp. at 33.

Vehicles court held: "[i]f failure to disclose participation in a purported antitrust conspiracy were sufficient to state a consumer-protection claim, then *any* Section 1 antitrust case would automatically become a consumer-protection case. That is not the law.'" 350 F. Supp. 2d at 177 n.22 (alteration in original) (citation omitted).

In any event, contrary to plaintiffs' assertions, neither *Intel* nor *New Motor Vehicles* (cited in Opp. at 32 n.34) established a bright-line rule that allegations of price fixing or monopolization, standing alone, are sufficient to allege deceptive or unconscionable conduct under state consumer protection statutes. Rather, both courts conducted fact-specific, conduct-specific inquiries, focusing on defendants' alleged conduct.[32] The complaint here does not allege that defendants engaged in anything even remotely resembling discriminatory rebates, threats, intimidation, retaliation, and destructive conduct, or that a gross disparity exists between the value of Digital Music received by plaintiffs and the price they paid.

Second, plaintiffs' argument that antitrust allegations alone are sufficient to allege deceptive conduct under New York General Business Law § 349 (Opp. at 33) has been considered and rejected.[33] Notably, the same courts that have rejected this argument have

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[32] For example, the court in *Intel* focused on the alleged use of discriminatory rebates and discounts, threats, intimidation and retaliation against direct purchasers who were considering making deals with competitors, and the alleged use of programs that could degrade performance of programs run on a competitor's platform. 496 F. Supp. 2d at 418. The court in *New Motor Vehicles* focused on the allegation that the conspiracy maintained motor vehicles prices in the United States up to 30% higher than vehicle prices in Canada. 350 F. Supp. 2d at 196.

[33] *See In re Automotive Refinishing Paint Antitrust Litig.*, MDL Docket No. 1426, 2007 WL 1377700, at *9 (E.D. Pa. May 8, 2007) ("New York state courts and federal courts have opined that mere anticompetitive conduct alone does not constitute deceptive conduct under § 349 and that to come within the scope of the statute, the Complaint must allege some additional deception or misrepresentation."); *see also Leider v. Ralfe*, 387 F. Supp. 2d 283, 295 (S.D.N.Y. 2005) (anticompetitive conduct alone is insufficient for a § 349 claim when the antitrust allegations were not "imbued with a degree of subterfuge"); *New Motor Vehicles*, 350 F. Supp. 2d at 197 ("An antitrust violation may violate section 349, but only if it is deceptive."). *Accord*

distinguished and found unpersuasive the very authority plaintiffs cite in support of their misguided argument.[34]

Finally, to the extent plaintiffs rely on defendants' alleged conspiracy to fix prices in order to support allegations of "unconscionable trade practices,"[35] "deceptive acts or practices"[36] or "unfair methods of competition,"[37] plaintiffs' state consumer protection claims must fail for the same reason as their antitrust claim. As discussed in detail in Section I, plaintiffs fail to allege sufficient factual matter to plausibly suggest the existence of an antitrust conspiracy under the standards announced in *Twombly*. 127 S. Ct. at 1965-66.[38]

Accordingly, plaintiffs' New Mexico, New York and North Carolina consumer protection claims should be dismissed.[39]

Worldhomecenter.com, Inc. v. Thermasol, Ltd., 05 Civ. 3298 (DRH) (ETB), 2006 WL 1896344, at *5 (E.D.N.Y. July 10, 2006).

[34] *See In re Automotive Refinishing Paint Antitrust Litig.*, 2007 WL 1377700, at *9 n.9 ("While *Feldman* does not fully explain how the defendants' alleged conduct was deceptive, we are persuaded by *Leider*, *In re New Motor Vehicles Canadian Export Antitrust Litig.*, *Sperry*, and *Cox* that § 349 requires more than mere allegations of anticompetitive behavior and price fixing."); *see also New Motor Vehicles*, 350 F. Supp. 2d at 197 n.60.

[35] N.M. STAT. ANN. § 57-12-2(E)(2) (West 2007).

[36] N.Y. GEN. BUS. LAW § 349(a) (McKinney 2004).

[37] N.C. GEN. STAT. ANN. § 75-1.1 (West 2007).

[38] *See In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 198 (2d Cir. 2006) (affirming the dismissal of plaintiffs' consumer protection claims based, in part, on the district court finding that "those claims were based on the same allegations as the plaintiffs' [failed] federal antitrust claims"); *see also R. J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362, 396 (M.D.N.C. 2002), *aff'd*, 67 F. App'x 810 (4th Cir. 2003) (concluding that "[b]ecause Plaintiffs do not allege any facts that suggest that Defendant's conduct is unlawful beyond the conduct that is the basis for their failed federal [Sherman Act] claims, Plaintiffs' state common law and statutory claims [including N.C. General Statutes § 75-1.1] fail as well").

[39] Plaintiffs concede that they seek only restitution in connection with their California Unfair Competition Law §17200 claim, and that they are not bringing a claim under New York's Donnelly Act. Opp. at 34-35. Even with plaintiffs' waiver of treble and special damages,

VI. PLAINTIFFS' UNJUST ENRICHMENT CLAIMS MUST BE DISMISSED

Regardless of the label, plaintiffs' unjust enrichment claim boils down to nothing more than a claim for damages for an alleged antitrust violation. It is therefore exactly the type of claim that the Supreme Court disallowed under the antitrust laws over a quarter century ago. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728-29 (1977).

Clearly, plaintiffs' claims in those states that follow the direct purchaser rule of *Illinois Brick* are barred whether brought under the antitrust laws or some undefined theory of common law "unjust enrichment" or "restitution." *See FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 42-43 (D.D.C. 1999), *modified on other grounds*, 99 F. Supp. 2d 1 (D.D.C. 1999) (holding that plaintiffs "should not be allowed to circumvent *Illinois Brick*" by seeking disgorgement rather than damages on behalf of indirect purchasers "***absent express authority for such relief under state law.***") (emphasis added); *In re Terazosin*, 160 F. Supp. 2d at 1379-80 (rejecting indirect purchaser-plaintiffs' unjust enrichment claim under the common law of the fifty states with respect to each state that did not allow indirect purchasers to sue under that state's antitrust laws). Similarly, plaintiffs' claim that they can bring unjust enrichment claims for those states that do not follow *Illinois Brick* ignores the decision in *Mylan* and fails to address state law holding that general equitable remedies such as restitution and disgorgement are foreclosed by the specific requirements of a state's statutory scheme. Defs. Mem. at 36-37. Even in states that do not follow *Illinois Brick*, plaintiffs' exclusive remedy should lie in the state antitrust laws, ***not*** in some undefined and unsupported claim for unjust enrichment. *See Mylan,* 62 F. Supp. 2d at 44-53 (permitting disgorgement claims only if expressly allowed under state antitrust laws, ***not***

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plaintiffs have not stated a cognizable conspiracy claim and, therefore, plaintiffs' claims based upon New York General Business Law § 349 and California Unfair Competition Law § 17200 must be dismissed.

under general unjust enrichment principles); *see also In re Vitamins Antitrust Litig.*, No. Misc. 99-197 (TFH), MDL 1285, 2001 WL 34088807, at *4 (D.D.C. Mar. 13, 2001) (dismissing claim for unjust enrichment under Alabama law because the Alabama antitrust statute was limited to actual damages). Plaintiffs offer no persuasive authority to the contrary. Thus, Count III should be dismissed in its entirety.[40]

[40] Finally, plaintiffs argue that the last sentence of paragraph 38 (the "*Lexecon*" allegation) should not be stricken from the complaint because (1) it is a "proper" statement of jurisdiction that includes "reference to a federal statute" and (2) because the issue of whether remand under *Lexecon* is appropriate involves a "substantial dispute over a question of law." Opp. at 43-44 & n.54. Both arguments are unavailing. Rule 12(f) clearly states that a court may strike any "immaterial" allegations. The issue of whether there should be remand to a transferor court following pretrial proceedings in this Court is no more appropriate for inclusion in a complaint than an allegation seeking to establish the number of trial days that should be allotted to plaintiffs' case-in-chief or an allegation stating plaintiffs' rationale as to why the seven-hour time limit for depositions under the Federal Rules should be waived. While these issues may be "important" to plaintiffs, they do not belong in a complaint. The cases cited by plaintiffs themselves only confirm this point, as they involve allegations that are clearly material to and, indeed, go to the core of the underlying litigation. *Atkins v. School Bd. of Halifax Cty.*, 379 F. Supp. 1060, 1061 (D. Va. 1974) (involving argument that federal subject matter jurisdiction was not properly pled and therefore dismissal of the entire action was appropriate); *Sample v. Gotham Football Club, Inc.*, 59 F.R.D. 160, 169 (S.D.N.Y. 1973) (refusing to strike defendant's third affirmative defense because it involved disputed questions of fact related to a key contractual provision at issue in the litigation).

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 or, 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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