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	Civ. No. 12-169 (AET) (LHG) **RETURN DATE: November 5, 2012** **ORAL ARGUMENT REQUESTED**

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

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I. INTRODUCTION.

This case is a copycat lawsuit filed mere days after an investigation by the United States Federal Trade Commission ("FTC") became public. Defendants McWane, Inc. ("McWane"), Star Pipe Products Ltd. ("Star"), and SIGMA Corporation ("SIGMA") are manufacturers and/or importers of ductile iron pipe fittings ("DIPF"), which are used in water-transportation systems. Plaintiffs purport to represent a class of indirect purchasers of DIPF. The FTC has entered into separate agreements containing consent orders ("consent decrees") with two of the defendants -- SIGMA and Star -- and has filed an administrative complaint against McWane. Neither SIGMA nor Star admitted wrongdoing in the consent decrees, and neither paid any monetary penalties. McWane continues to litigate the case in front of the FTC.

Defendants McWane and SIGMA[1] respectfully submit that the Court should dismiss plaintiffs' amended class action complaint, principally for the following reasons:

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[1] McWane joins this brief in its entirety. SIGMA takes no position as to the arguments related to counts II, V, VI, and IX, which are directed to other defendants. As to counts II and IX, which are directed to McWane alone, McWane is moving to dismiss those counts for the reasons set forth herein, as well as in the memoranda of law filed in the coordinated action (No. 12-711) in support of the motion to dismiss the direct purchaser plaintiffs' consolidated complaint.

- Plaintiffs have failed to set forth viable claims based on antitrust and consumer protection violations, for the reasons set forth in the motion to dismiss the direct purchaser complaint and accompanying memorandum of law (No. 12-711);

- Plaintiffs have failed to plead sufficient facts supporting their various claims based on overcharges for ductile iron pipe fittings ("DIPF");

- Plaintiffs do not have standing to bring antitrust and consumer protection claims under the laws of states other than their home states;

- Plaintiffs have not asserted claims under the laws of their home states -- specifically, Michigan, Nebraska, New Hampshire, New York, North Carolina, and North Dakota antitrust law, and Florida, Nebraska, and New Hampshire consumer protection law -- because those states require a showing of intrastate conduct and/or effects;

- Plaintiffs have failed to identify the states under which they are pursuing unjust enrichment claims; and

- Plaintiffs have failed to state a claim for injunctive relief because they have not alleged ongoing and irreparable harm, and they have not alleged that the consent decrees entered into with the FTC are deficient in any respect.

Defendants McWane and SIGMA respectfully submit that, upon consideration of these points, plaintiffs' complaint should be dismissed in its entirety.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

A. Industry Background.

This case relates to the manufacture, purchase, and sale of DIPF used in water-transportation systems when pipes

need to change directions, change size, split apart, or connect to other pipes. (Compl. ¶ 29.) They can be used either underground or in water treatment plants. DIPF are pipe fittings made from "ductile" iron, and are manufactured both domestically ("domestic DIPF") and overseas. McWane and Star both manufacture DIPF domestically as well as import DIPF. (Compl. ¶¶ 24, 25, 48, 61.) SIGMA imports DIPF but does not manufacture it domestically. (Compl. ¶¶ 23, 71.)

Plaintiffs allege that they are "indirect purchasers" of DIPF. Although plaintiffs plead that "[i]ndependent wholesale distributors ... are the primary channel of distribution of DIPF," plaintiffs fail to plead whether any purchases of DIPF they made were from distributors -- i.e., wholesalers who bought directly from defendants. (Compl. ¶¶ 16-22, 30.) Plaintiffs allege that "[w]aterworks distributors specialize in distributing products for water infrastructure projects, and generally handle the full spectrum of waterworks products, including pipes, DIPF, valves and hydrants." (Compl. ¶ 30.) Although not apparent from their "factual allegations," plaintiffs acknowledge in defining their proposed classes that DIPF may be purchased by itself, that is, as a "stand-alone" product, or as a part of a larger project, namely, as "part of a water systems project." (Compl. ¶ 104.)

According to plaintiffs, one component of price for DIPF is a published price list issued by each seller of DIPF. (Compl. ¶¶ 33, 54, 57, 58, 65, 67.) Plaintiffs allege that defendants periodically publish state-by-state multipliers (a percentage discount off the price list) and deviate from them. (Id. ¶ 90.) Plaintiffs choose to ignore that, apart from published price lists and multipliers, many other terms -- such as rebates, individual discounts, shipping terms, special payment plans and other terms -- actually determine the transaction price. Plaintiffs also do not allege whether direct purchasers bought DIPF at published list prices or multipliers, or individually negotiated prices (whether because of rebates, individual discounts, special freight terms or otherwise).

Plaintiffs also fail to plead how they fit into the multi-tiered and variable manner in which DIPF is bought and resold by the different players in the marketplace. It is logical to assume that the distributor directly purchasing DIPF from a defendant sells to its customer at some (presumably negotiated) price, and some of those customers (such as contractors), in turn, sell to end users at (some presumably negotiated) price on an installed basis. It is also logical that additional entities may exist in the distribution chain depending on the circumstances (e.g., where a distributor sells

to a subcontractor who contracts with a general contractor who in turn contracts with the owner of the waterworks system).

B. Allegations in the Amended Class Action Complaint.

On July 11, 2012, seven plaintiffs filed an amended class action complaint ("complaint") against defendants. The complaint followed the Court's consolidation of nine individual indirect-purchaser complaints, filed between January 10, 2012, and May 3, 2012. (Dkt. No. 60.) Of the nine original plaintiffs, six -- Waterline Industries Corporation & Waterline Services, LLC (located in New Hampshire); Yates Construction Co., Inc. (located in North Carolina), the City of Hallandale Beach, Florida; Wayne County, Michigan; South Huntington Water District, New York; and City of Fargo, North Dakota -- are named plaintiffs. The seventh named plaintiff -- the City of Blair, Nebraska -- had not appeared in this action prior to filing of the amended complaint. Because no named plaintiff alleges to have purchased DIPF directly from any defendant, all named plaintiffs and putative class members in this action are considered "indirect" purchasers of DIPF.

As indirect purchasers, plaintiffs have no Sherman Act damages claim under Illinois Brick v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), and therefore may only recover for damages under state law. Plaintiffs seek damages against all defendants under the antitrust and consumer-

protection statutes of 27 states and the District of Columbia (32 statutes in total) and injunctive relief against McWane and SIGMA for alleged violations of the Sherman Act. To support their claims, the complaint makes four sets of allegations that break down as follows:

> (1) that McWane, Star, and SIGMA conspired to "manipulate" DIPF prices beginning in January 2008 and ending in January 2009 (the "2008 conspiracy to fix prices among all defendants" allegation) (Compl. ¶¶ 32-46);
>
> (2) that McWane and Star entered a separate price-fixing conspiracy, beginning in May 2009 (the "McWane-Star 2009 conspiracy to fix published list prices" allegation) (Compl. ¶¶ 50-61);
>
> (3) that McWane and SIGMA conspired to "restrain competition and capacity" in the production and sale of domestically manufactured DIPF beginning in September 2009 (the "McWane-SIGMA conspiracy to monopolize domestically manufactured DIPF" allegation) (Compl. ¶¶ 62-73); and
>
> (4) that McWane engaged in "monopolistic conduct" with respect to domestically manufactured DIPF (the "McWane unilateral monopolization" allegation) (Compl. ¶¶ 74-83).

Plaintiffs seek damages for alleged overcharges of DIPF against all defendants and injunctive relief against McWane and SIGMA. (Compl. ¶¶ 11, 12, 126.)

C. The FTC Investigation.

Plaintiffs' complaint and the companion complaint filed on behalf of a putative class of direct purchasers (No. 12-711) are largely duplicative of the complaints filed by the FTC; they do not include any material allegations either not

contained in the FTC complaints or gleaned from heavily redacted filings publicly available on the FTC's docket.

The FTC currently is involved in administrative litigation with McWane under Section 5 of the FTC Act. (Compl. ¶ 81.) Star and SIGMA are no longer involved as parties in any FTC proceedings, as both have signed consent decrees: SIGMA on January 4, 2012, and Star Pipe on March 20, 2012.[2] The FTC did not find liability on the part of either Star or SIGMA, and neither party's consent decree required monetary payments to FTC. SIGMA and Star did not admit any wrongdoing. As the FTC itself explained in its press release related to the complaints, "[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 a law violation[.]" (Press Release, dated Jan. 4, 2012, available at http://ftc.gov/opa/2012/01/ mcwane.shtm.)

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[2] See In the Matter of SIGMA Corporation, FTC File No. 101 0080, available at http://ftc.gov/os/caselist/1010080/index.shtm; In the Matter of McWane, Inc., and Star Pipe Products, Ltd., Docket No. 9351, available at http://ftc.gov/os/adjpro/d9351/index.shtm.

As the FTC docket is a public record, the Court may consider it in determining this motion to dismiss. 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.

D. Class action allegations in the complaint.

Plaintiffs seek to certify three classes of indirect purchasers. Plaintiffs define the "Class Period" as January 11, 2008 through the present. (Compl. ¶ 2.) Two of the putative classes are damages classes pursuant to Rule 23(b)(3) under the "antitrust, unfair competition, consumer and common laws" of 28 states and the District of Columbia (collectively, the "29 states"). (Compl. ¶ 104.) The first class purportedly consists of "persons and entities who, during the Class Period, purchased Domestic DIPF as a stand-alone product indirectly from Defendants . . . or, from January 11, 2008 through January 2009, purchased imported DIPF as a stand-alone product indirectly from Defendants." (Compl. ¶ 104.) The second class allegedly consists of "persons and entities who, during the Class Period, purchased Domestic DIPF as part of a water systems project indirectly from Defendants . . . or, from January 11, 2008 through January 2009, purchased imported DIPF as a part of a water systems project contract indirectly from Defendants." (Compl. ¶ 104.) The third class is alleged to be an "Injunction Class" on behalf of all "persons and entities that, during the Class Period, purchased Domestic DIPF indirectly from Defendants," pursuant to Rule 23(b)(2). (Compl. ¶¶ 103, 125.) The Injunction Class seeks relief under federal law. (Compl. ¶ 115.)

III. STANDARD OF REVIEW.

The complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In order to avoid dismissal under Rule 12(b)(1), plaintiffs bear the burden of establishing their standing to sue in federal court. In re Flonase Antitrust Litig., 610 F. Supp. 2d 409, 412 (E.D. Pa. 2009) (quoting Ballentine v. United States, 486 F.3d 806, 810 (3d Cir. 2007)). In order to withstand a motion to dismiss for failure to state a claim under Rule 12(b)(6), plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929, 949 (2007). While "well-pleaded allegations" should be taken as true, Register v. PNC Fin. Servs. Group, Inc., 477 F.3d 56, 61 (3d Cir. 2007), "conclusory allegations or legal conclusions masquerading as factual allegations will not suffice to prevent a motion to dismiss." Bailey v. Reed, 29 F. App'x 874, 874 (3d Cir. 2002) (quoting Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)).

As the Supreme Court explained in Twombly, because "proceeding to antitrust discovery can be expensive . . . 'a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" supra, 550 U.S. at 558, 127 S. Ct. at 1967, 167 L. Ed. 2d at 942 (quoting Associated Gen.

Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17, 103 S. Ct. 897, 904 n.17, 74 L. Ed. 2d 723, 732 n.17 (1983)). In Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), it amplified Twombly's holding, admonishing that "Rule 8 . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id. at 662, 678, 129 S. Ct. at 1949, 173 L. Ed. 2d at 883. That is, conclusory or vague allegations do not suffice. Ibid. Instead, Rule 8 requires that "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678, 129 S. Ct. at 1949, 173 L. Ed. 2d at 884 (emphasis supplied); see also Twombly, supra, 550 U.S. at 556 n.3, 127 S. Ct. at 1965 n.3, 167 L. Ed. 2d at 940 n.3 ("Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."). Thus, a Court should not accept "unsupported conclusions and unwarranted inferences." City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1998).

Federal law 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) (stating that "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, the Court must dismiss an antitrust complaint when the plaintiff fails to plead facts to support an essential element of its claim, such as standing, conspiracy, 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 principal respects. These are:

First and foremost, plaintiffs have not properly pleaded antitrust claims under Twombly. Mere reliance on an FTC complaint is not enough. See Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026, 1040 (3d Cir. 1997) (rejecting the plaintiffs' "reliance on the allegations in the government's antitrust case"). Hence, the conclusory pleading deficiencies that infect the direct purchaser complaint also pervade the indirect purchaser complaint. Even apart from the shared infirmities, however, there are a set of pleading deficiencies unique to the indirect purchaser complaint.

Second, plaintiffs have not included the necessary allegations of what they purchased and when those purchases were made. In particular, there are no allegations that any plaintiff purchased domestically manufactured DIPF. There are no allegations at all that relate to the claims of price fixing for DIPF as a part of a "water systems project." And there are no allegations that any DIPF bought by any plaintiff had been sold at the allegedly-fixed published price.

Third, as to the state specific claims, class action principles preclude plaintiffs from bringing claims as part of a putative class action unless they themselves can assert those claims. Yet, plaintiffs have alleged no facts that could establish standing for any named plaintiff to assert claims under the laws of states in which no named plaintiff resides. Moreover, under the laws of the seven states in which plaintiffs arguably could have standing -- their home states of New Hampshire, North Carolina, Florida, Nebraska, New York, North Dakota, and Michigan -- plaintiffs fail to meet the legal prerequisites for the claims they have brought. Their unjust enrichment claim fails for lack of specificity as well as for the reasons their statutory state claims fail.

And, fourth, the complaint also seeks injunctive relief, but includes no allegations of ongoing acts, a prerequisite for injunctive relief. More to the point, the

complaint acknowledges SIGMA's FTC consent decree, with terms that encompass the relief plaintiffs seek, thus mooting any claim that did exist.

One must turn, then, to a more detailed examination of each of these deficiencies.

A. Plaintiffs' claims should be dismissed under Twombly.

1. Plaintiffs' state law claims fail for the reasons set forth in the motion to dismiss the direct purchasers' complaint.

Each of the state law claims should be dismissed for failure to state a claim upon which relief can be granted. Plaintiffs predicate their claims on violations of the antitrust laws, and the pleading requirements that apply to federal antitrust law apply to these claims. See U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 599 (1st Cir. 1993) (rejecting plaintiff's state law claims as insufficient for same reasons as federal claims and asserting that there is "no authority to suggest that New Hampshire antitrust law diverges from federal law"); Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196, 1220 (W.D.N.C. 1989) (holding that elements of antitrust claim under North Carolina law mirror elements required under federal law); Goldman v. Loubella Extendables, 283 N.W.2d 695,699 (Mich. Ct. App. 1979) (stating that "[f]ederal court interpretations of the Sherman Act are persuasive authority as to the meaning of the Michigan act");

Westgo Indus., Inc. v. W.J. King Co., No. A3-75-82, 1981 WL 2064, at *6 (D.N.D. Mar.1, 1981) (holding that evidence required to establish violation of North Dakota antitrust law is same as that required to show violation of federal antitrust law); St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc., 457 So. 2d 1028, 1032 (Fla. Dist. Ct. App. 1984) ("[T]he Florida legislature has, in effect, adopted as the law of Florida the body of antitrust law developed by the federal courts under the Sherman Act."); Neb. Rev. Stat. § 59-829 (2010) (stating that Nebraska antitrust claims "shall" be interpreted in accordance with federal law); see generally In re Magnesium Oxide Antitrust Litig., No. 10-5943, 2011 WL 5008090, at * 7 n.9 (D.N.J. Oct. 11, 2011) (concluding that state law claims should be interpreted in accordance with federal antitrust law).[3]

The allegations in the indirect purchaser complaint are materially indistinguishable from those in the direct purchaser complaint (No. 12-711). For the reasons explained in the motion to dismiss the direct purchaser complaint and the

[3] The seven specific states identified in this string cite are the home states of the named plaintiffs, which, as argued in Section B, below, are the only states whose laws plaintiffs conceivably could have standing to invoke. Even beyond their home states, as Magnesium Oxide Antitrust Litigation makes clear, there is no basis to conclude that the state law claims under any of the states may survive when the federal law claims fail. 2011 WL 5008090 at *7 n.9.

accompanying memoranda (which are incorporated fully herein), all of plaintiffs' claims in this action should be dismissed.

2. Plaintiffs' claims should be dismissed because they have failed to plead sufficient facts supporting their overcharge claims.

The indirect purchaser complaint suffers from additional defects under Twombly that are separate from those revealed in respect of the direct purchaser complaint. Plaintiffs have failed to allege facts that support their allegations that they themselves were overcharged and, therefore, they have failed to allege the individual injury necessary for their claims. See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008) ("Importantly, individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation."). Without viable claims of their own, plaintiffs cannot bring claims on behalf of the putative classes; the complaint must fail. See Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1169 (3d Cir. 1987) ("[T]o be a class representative on a particular claim, the plaintiff must himself have a cause of action on that claim."); Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987) ("[E]ach claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the

injury that gives rise to that claim."). Thus, even beyond the failure to plead antitrust injury as set forth in briefing in the companion case, these plaintiffs have failed to plead antitrust impact.

(a) Plaintiffs have failed to plead sufficient facts showing any injury from their DIPF purchases.

Although plaintiffs base their claims on alleged "overcharges" for DIPF during "the Class Period," they have not alleged facts sufficient to support their claim that they were overcharged for their purchases. For example, plaintiffs complain of three specific conspiracies to fix prices for DIPF: (1) the alleged 2008 conspiracy to fix prices among all defendants (although not specific as to whether they mean published list prices or the multipliers); (2) the alleged McWane-Star 2009 conspiracy to fix published list prices; and (3) the alleged McWane-SIGMA conspiracy to monopolize domestically manufactured DIPF. Yet, plaintiffs concede that these alleged conspiracies did not involve each defendant except for a one-year time period, and that each alleged conspiracy did not involve both imported and domestically manufactured DIPF.

The complaint lacks allegations of the date of any purchases made, whether those purchases were of imported or domestically manufactured DIPF, and who imported or manufactured the product eventually bought by plaintiffs. In the absence of

those necessary allegations, plaintiffs cannot support a claim that they paid "overcharges," and they have not alleged an individual injury. Those allegations are critical. If, for instance, plaintiffs only purchased imported DIPF from SIGMA after January 2009, they had no injury because plaintiffs do not include such purchases as a subject of any of the alleged conspiracies. Each of plaintiffs' claims therefore fail because they fail to plead injury.

(b) Plaintiffs have failed to plead that they purchased domestic DIPF.

The complaint suffers from similar defects related to the distinct claims that are specific to the purchase of domestically manufactured DIPF (counts I, II, V, VI, VII, VIII, IX). Plaintiffs allege that they paid overcharges for domestic DIPF as a result of an alleged conspiracy between McWane and Star that began April 2009 and ended July 2010. (Compl. ¶¶ 54, 59, ¶¶ 173-220.) Plaintiffs also allege they paid overcharges for domestic DIPF as a result of an alleged McWane-SIGMA conspiracy to monopolize that began on September 17, 2009. (Compl. ¶¶ 65, 115, 221-268.) There are, however, no allegations anywhere in the complaint -- absolutely none -- that plaintiffs ever purchased domestic DIPF, let alone during the relevant time periods. If no plaintiff purchased domestic DIPF, then no plaintiff has standing to assert claims arising from the

purchase of domestic DIPF; each of the seven counts based on purchases of domestic DIPF necessarily fails.

(c) Plaintiffs have failed to plead the price at which they purchased DIPF.

Plaintiffs allege no facts about the prices that they paid for DIPF, other than to label the prices "inflated." (Compl. 91, 93, 96.) Plaintiffs merely plead that they "indirectly purchased" DIPF that was originally manufactured, imported, marketed, or sold by one or more defendants. The complaint does not allege whether the direct purchaser who was the source of the DIPF eventually received by a particular plaintiff paid the allegedly-fixed published price rather than some individually negotiated deviation such as a rebate, individual discount, cash discount, or special freight allowance. Nor does the Complaint contain facts as to how plaintiffs then obtained the DIPF. There is no allegation as to whether the price paid by plaintiffs' suppliers were at the list price or some individually negotiated or specially bid price, or whether the price of the DIPF was an indistinguishable part of a larger price for an entire project (e.g., "a water systems project").

By alleging no facts regarding the price at which they actually purchased DIPF, plaintiffs ask this Court to infer not only that they bought the list-priced product in question, but

also an antitrust violation somehow arises from a theoretical base price rather than the actual price paid. Courts have rejected this theory. See Lum v. Bank of Am., 361 F.3d 217, 231-32 (3d Cir. 2004) (dismissing antitrust claims where borrower plaintiffs alleged price parallelism as to prime rate set by banks, but not to final interest rate charged); In re Baby Food Antitrust Litig., 166 F.3d 112, 128 (3d Cir. 1999) ("In an industry with hundreds of products and a pervasive policy of allowing discounts and promotional allowances to purchasers, ... charts and reports focusing on list prices rather than transactional prices have little value."); see also Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478, 482-83 (1st Cir. 1988) (Breyer, J.) (finding as fact that defendants in a concentrated industry routinely discounted from identical price lists, thereby supporting inference that decisions to copy price list were individual decisions, rather than a formal pricing agreement). Because plaintiffs fail to adequately plead antitrust injury, the complaint should be dismissed.

3. Plaintiffs' claims based on purchases of DIPF as part of water systems project contracts should be dismissed because they have failed to plead any facts related to an antitrust violation covering such purchases.

Plaintiffs purport to represent two separate classes "seeking damages," one on behalf of "Stand-Alone Product

Plaintiffs" and the other on behalf of "Water Project Plaintiffs." (Compl. ¶ 104.) Five of the named plaintiffs allege they purchased DIPF both "as a stand-alone product" and "as part of a water systems project contract." (Compl. ¶¶ 16-18, 20-22.) One named plaintiff alleges that it purchased DIPF only "as a stand-alone product." (Compl. ¶ 19.) Another named plaintiff -- the City of Blair, Nebraska -- alleges that it purchased DIPF only "as part of a water systems project contract." (Compl. ¶ 19.)

In contrast, all of the factual allegations in the complaint pertain to only so-called stand-alone sales of DIPF, which is most apparent from the allegations and exhibit related to price lists. (See Compl. ¶ 57.) Nothing in the complaint refers to prices or purchases of DIPF "as part of a water systems project." (Compl. ¶ 104.) Indeed, plaintiffs have not even alleged what constitutes a "water systems project." They have included no allegations to support a claim that defendants conspired or monopolized the market for DIPF sold as a part of a water systems project. Nor have plaintiffs even alleged that prices for DIPF sold as a part of a water systems project were fixed, or how the prices for DIPF that were a part of a larger project could be fixed.

Without those necessary allegations, there is no basis for including any claims related to DIPF sold as a part of a

water systems project. As a result, any such claims should be dismissed, the proposed class of "Water Project Plaintiffs" should be stricken, and the City of Blair -- which admittedly only purchased DIPF as a part of a water systems project -- should be dismissed as a plaintiff.

B. Plaintiffs' state law statutory claims suffer from fundamental flaws.

Beyond the pleading failures described above, plaintiffs face three insurmountable problems in bringing their state law statutory claims. As a threshold matter, they lack standing to bring claims under most of statutes alleged in the complaint. In respect of the statutory claims for which they arguably have standing, they have failed to state a claim under any of the underlying statutes. And, their unjust enrichment claim cannot save their state law allegations; that claim itself is too vague and, in any event, fails in tandem with their statutory claims.

1. Plaintiffs cannot bring antitrust and consumer protection claims under the laws of states where they were not injured.

Plaintiffs assert causes of action under the statutory laws of 28 jurisdictions -- the antitrust statutes of 22 states and the District of Columbia and the consumer protection statutes of nine states (four of which overlap with their antitrust claims), and for unjust enrichment under the laws of

unspecified states -- all premised on the unsubstantiated claim that defendants allegedly overcharged plaintiffs for DIPF. Plaintiffs, however, have no standing to sue under the laws of states in which they do not personally allege any injury. The United States Court of Appeals for the Third Circuit has made it clear "that to be a class representative on a particular claim, the plaintiff must himself have a cause of action on that claim." Zimmerman, supra, 834 F.2d at 1169; see also Griffin v. Dugger, 823 F.2d at 1483 ("[E]ach claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim."); Kahn v. Option One Mortg. Corp., No. 05-5268, 2006 WL 156942, at *7 (E.D. Pa. Jan. 18, 2006) ("Despite the fact that a matter is pled as a putative class action, the named plaintiffs must establish their own standing to assert each claim against the Defendant.").

Further, the Supreme Court has explained that "named plaintiffs who represent a class 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." Lewis v. Casey, 518 U.S. 343, 357, 116 S. Ct. 2174, 2183, 135 L. Ed. 2d 606, 622 (1996) (citation and internal quotation marks omitted); see also DaimlerChrystler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct.

1854, 1867, 164 L. Ed. 2d 589, 608 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."); Allen v. Wright, 468 U.S. 737, 752, 104 S. Ct. 3315, 3325, 82 L. Ed. 2d 556, 570 (1984) ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."); Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343, 356 (1975) (citation omitted) ("To satisfy the traceability requirement, a class action plaintiff must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."). Therefore, at least one named plaintiff must have standing and a cause of action on each claim the class representatives seek to bring.

At the outset, plaintiffs fail to allege injury in any jurisdiction. That is, the complaint contains no allegations connecting plaintiffs' alleged injury -- to wit, "pa[ying] more during the Class Period for DIPF than they otherwise would have paid in a competitive market" (Compl. ¶ 10) -- to any particular state. That failure is fatal to all of plaintiffs' claims. Simply said, without alleging purchases connected to any of the states whose laws they seek to invoke, each of their state law claims must be dismissed.

Even if plaintiffs were entitled to the benefit of every possible inference, thereby construing the complaint to imply what it fails to state explicitly, that is, that plaintiffs experienced injury at least within their home states, their claims nevertheless must be dismissed under the laws of all other states where no named plaintiff resides. It is axiomatic that plaintiffs cannot rely on potential claims of putative class members to establish standing, a principle well-recognized in antitrust litigation in this Circuit and elsewhere.

In numerous other indirect purchaser cases, courts have dismissed claims under the laws of all states in which no named plaintiff resided or alleged any injury. For example, In re Wellbutrin XL Antitrust Litigation, 260 F.R.D. 143, 154-56 (E.D. Pa. 2009), reasoned that allowing plaintiffs to proceed under statutes for which they could not establish standing would "allow named plaintiffs in a proposed class, 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." See also In re: Processed Egg Products 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., 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) ("[L]acking named representatives from Arizona, New Mexico, and South Dakota, [p]laintiffs do not have standing to maintain a class action in those states.").

Other courts have recognized as well that indirect purchasers do not have free rein to proceed under the laws of any state that may give certain indirect purchasers a cause of action. In re Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d 1365 (S.D. Fla. 2001), is instructive. There, as here, indirect purchasers alleged that the defendant's anticompetitive conduct caused class members to "pay[] more" for certain goods, in that case 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. As another court recently explained, "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 these core propositions is overwhelming.[4]

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[4] 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., 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).

Most recently, in this District, the Honorable Dickinson R. Debevoise dismissed indirect-purchaser claims under the laws of states for which the plaintiffs could not establish standing. See In re Magnesium Oxide Antitrust Litig., No. 10-5943, 2011 WL 5008090 (D.N.J. Oct. 11, 2011). In that case, the plaintiffs alleged that the defendants' anticompetitive conduct caused the plaintiffs to pay more than they should have for magnesium oxide. They, like plaintiffs here, brought claims under the laws of several states. Judge Debevoise reasoned that, if plaintiffs were allowed to proceed under all state statutes, then 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).][5]

[5] Judge Debevoise departed from the other cited precedent, including numerous cases in this Circuit, in one significant respect. He concluded that out-of-state named plaintiffs "have standing to sue under [four defined states'] antitrust laws, as they provide a private right of action and have no discernible requirement of in-state conduct or effect, or residency." Id. at *8 n.10. However, no precedent other than the relevant state statutes was cited to support that conclusion.

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Because plaintiffs have not alleged injury in any state, the complaint should be dismissed for lack of standing. Even if plaintiffs' unsubstantiated assumption that they must

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Defendants respectfully submit that, in respect of that point, In re Magnesium Oxide Antitrust Litigation should not be followed and that the Court should adopt the analysis applied in the many other cases cited above. To that extent, In re Magnesium Oxide Antitrust Litigation is inconsistent with the salutary principle of federalism that a state's statutes are designed to protect that state's residents and do not extend beyond its borders. See Harmar Bottling Co., supra, 218 S.W.3d at 681-82 ("It is an especially sensitive matter for a jurisdiction to extend its laws governing economic competition beyond its borders. Such laws necessarily reflect fundamental policy choices that the people of one jurisdiction should not impose on the people of another."); Westwind Acquisition Co LLC v. Univ. Weather and Aviation, Inc., 668 F. Supp. 2d 749, 752 (E.D. Va. 2009) ("[I]t is ordinarily presumed that state laws are intended to apply only within the state's territorial jurisdiction and not extraterritorially."); In re Sony SXRD Rear Projection TV Class Action Litig., No. 06-5173, 2008 U.S. Dist. LEXIS 36093, at *21 (S.D.N.Y. May 1, 2008) (footnote omitted) (explaining that "courts have consistently held that each class member's consumer protection claim is governed by the law of his or her home state"); Lyon, supra, 194 F.R.D. at 216 (holding that "state consumer protection acts are designed to protect the residents of the states in which the statutes are promulgated"); Chin v. Chrysler Corp., 182 F.R.D. 448, 457 (D.N.J. 1998) ("Each Plaintiff's home state has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws."). This principle is consistent with the Supreme Court's long-maintained injunction that "a State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction[.]" N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 162, 34 S. Ct. 879, 882, 58 L. Ed. 1259, 1264 (1914); see also BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571, 116 S. Ct. 1589, 1597, 134 L. Ed. 2d 809, 824 (1996) (stating that "no single State could . . . impose its own policy choice on neighboring States").

have experienced injury in their respective home states were to suffice, all claims made under the laws of states where no named plaintiff resides nevertheless should be dismissed. Thus, even under the most liberal of interpretations, the only states in which plaintiffs could potentially assert claims would be the seven home states of the plaintiffs: Florida, Michigan, Nebraska, New Hampshire, New York, North Carolina, and North Dakota. In respect of the state antitrust law claims asserted in counts III, V, VII, and IX, the only possibly surviving claims would be under the laws of Michigan, Nebraska, New Hampshire, New York, North Carolina, and North Dakota; in respect of the state consumer protection law claims in counts IV, VI, VIII, and IX, the only possibly surviving claims would be under the laws of Florida, Nebraska, and New Hampshire.

As more fully described below, all but one of these even potentially remaining statutory claims nonetheless should be dismissed because, regardless of standing, plaintiffs have not stated a claim under the relevant state statutes for which relief can be granted.

2. Plaintiffs cannot bring claims Under Michigan, Nebraska, New Hampshire, New York, North Carolina, and North Dakota antitrust laws, or Florida and Nebraska consumer protection laws because those statutes require allegations concerning intrastate conduct and/or effects.

Many state antitrust statutes specifically focus on intrastate or "predominantly local" conduct, or, at a minimum, require a concrete connection to the state. In stark contrast, the complaint offers no allegations at all as to conduct in any state, and certainly fails to link the alleged conduct to any wrongful effects in a particular state. In like circumstances, courts routinely have dismissed state law statutory claims. See In re Flonase Antitrust Litig., supra, 610 F. Supp. 2d at 416 (dismissing named plaintiff's claim under Tennessee antitrust law for failing to plead substantial intrastate effects as required by statute).

Here, each of the antitrust statutes in plaintiffs' respective home states -- Michigan, Nebraska, New Hampshire, New York, North Carolina, and North Dakota -- explicitly requires a connection between the alleged conduct and the state.[6]

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[6] *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"); *Nebraska:* Neb. Rev. St. § 59-801 ("Every contract combination in the form of trust or

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Likewise, the Nebraska consumer protection statute and the New Hampshire consumer protection statute are limited to conduct that has an effect in that state. Neb. Rev. St. § 59-1602 ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful."); Neb. Rev. St. § 59-1601(2) (defining "trade and commerce" to "mean the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska"); N. H. Rev. Stat. § 358-A:1 ("It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any

(...continued)
otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal."); *New Hampshire:* Mueller Co. v. U.S. Pipe & Foundry Co., No. Civ. 03-170-JD, 2003 WL 22272135, at *6 (D.N.H. Oct. 2, 2003) ("[C]ommercial conduct which affects the people of New Hampshire is actionable under section 358-A:2 only if it occurs within New Hampshire."); *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 defendant because court was not persuaded that "that the Defendants' alleged acts have had a substantial in-state effect on North Carolina trade or commerce"); *North Dakota:* N.D. Cent. Code § 51-08.1-02 ("A contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful."); N.D. Cent. Code § 51-08.1-01(2) (defining "relevant market" as "the geographical area of actual or potential competition in a line of commerce, all or any part of which is within this state").

trade or commerce within this state."). And, an in-state connection is required to assert claims under Florida's Unfair and Deceptive Trade Practices Act ("FDUTPA"). Montgomery v. New Piper Aircraft Inc., 209 F.R.D. 221, 227 (S.D. Fla. 2002) (holding that FDUTPA does not apply when the "alleged injuries did not take place 'entirely within [Florida].'"); NationsRent Rental Fee Litig., No. 06-60924, 2009 WL 636188, at *4 (S.D. Fla. Feb. 24, 2009) (citations omitted) (noting that "[FDUPTA and the Consumer Protection Act] are for the protection of in-state consumers" and that statutes "prohibit unfair, deceptive, and/or unconscionable practices which have transpired within the territorial boundaries of this state").[7]

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[7] Moreover, state antitrust laws generally must be read in harmony with federal antitrust law. See, e.g., Neb. Rev. St. § 59-829 ("When any provision . . . of Chapter 59 is the same or similar to the language of a federal antitrust law, the courts of this state in construing such . . . chapter shall follow the construction given to the federal law by the federal courts."). As the Texas Supreme Court has explained, such a requirement requires that the state's antitrust laws apply only within its borders. Harmar Bottling Co., supra, 218 S.W.3d at 683 ("The TFEAA does not, in clear language, afford a cause of action for injury outside the state, and we will not imply one. This construction is consistent with the requirement . . . that the Act be 'construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with [its] purpose.' The Sherman Antitrust Act is a comparable federal antitrust statute, and the United States Supreme Court has construed it to 'reach conduct outside our borders . . . only when the conduct has an effect on American commerce.'").

Lacking any allegation that defendants' challenged conduct occurred or had a substantial effect on commerce in any of the home states of the seven named plaintiffs, all of plaintiffs' state antitrust claims and their claim under the FDUTPA should be dismissed.

3. Plaintiffs' claim for unjust enrichment must be dismissed.

Plaintiffs' vague claim for "unjust enrichment" is based on but one flimsy allegation: that defendants "have been unjustly enriched by the receipt of unlawfully inflated prices and unlawful profits on sales of DIPF[.]" (Compl. ¶ 300) That claim cannot survive. Plaintiffs do not identify any state under whose laws the unjust enrichment claims pled in count X arise. When faced with similarly deficient pleadings for unjust enrichment, courts repeatedly have dismissed those claims.

Because the theory of unjust enrichment can and does vary in material respects from state to state, the sufficiency of plaintiffs' pleadings cannot be evaluated without reference to a particular 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., In re Flonase Antirust Litig., supra, 692 F. Supp. 2d at 544 (dismissing unjust enrichment claims

under both Florida and North Carolina law as indirect purchasers cannot satisfy their "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 Resources Group, Inc., 603 N.W.2d 891, 895 (N.D. 1999) (requiring that defendant have received direct benefit from plaintiff under North Dakota law).

Because these variations require the dismissal of certain state law claims for unjust enrichment, one cannot proceed without knowing under which state laws the sufficiency of the allegations for unjust enrichment must be gauged. Plaintiffs have failed to meet this basic pleading requirement; hence, the unjust enrichment claim should be dismissed as pled. See, e.g., In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 167 (E.D. Pa. 2009) (dismissing unjust enrichment claim for failure to specify particular state law); In re Flonase Antitrust Litig., supra, 610 F. Supp. 2d at 409 (same); In re Static Random Access Memory (SRAM) Antitrust Litig., supra, 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, 2008 WL 3916309, at *11-12 (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 decisions expressed in the governing statutes, and violates the fundamental and long-standing principle that plaintiffs cannot use equity to expand statutorily defined rights 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[.]" Hedges v. Dixon County, 150 U.S. 182, 192, 14 S. Ct. 71, 74, 37 L. Ed. 1044, 1048 (1893). The governing rule of decision is straightforward:

> where 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. This is true although unjust enrichment has in some cases provided a remedy where there was no adequate remedy at law.
>
> [In re Flonase Antitrust Litig., supra, 692 F. Supp. 2d at 542.]

In other words, an unjust enrichment claim cannot be used as in derogation of the antitrust and consumer-protection policy

decisions of a state legislature. In re Terazosin Hydrochloride Antitrust Litig., supra, 160 F. Supp. 2d at 1380.

Even if plaintiffs' entire unjust enrichment claim is not dismissed due to its lack of specificity, plaintiffs would only be able to purse that claim under the laws of states where their statutory claims survive. The result, however, provides plaintiffs only cold comfort: as demonstrated above, there are no states in which plaintiffs' statutory claims survive.

C. Plaintiffs' claim for injunctive relief should be dismissed.

Plaintiffs tether their claims for injunctive relief exclusively on the purported consequences of the September 2009 distribution agreement between McWane and SIGMA. (Compl. ¶¶ 116, 121, 123.) Specifically, they seek an injunction against McWane and SIGMA prohibiting the following:

- "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. ¶ 116.) Without any more specificity, plaintiffs also seek an injunction "against Defendant McWane, preventing and restraining the violations alleged [in the complaint.] (Compl. ¶ 126.)

To obtain permanent injunctive relief, plaintiffs must, among other things, show that they likely will achieve "actual success on the merits," and that they "will be irreparably injured by the denial of injunctive relief." See Gucci Am., Inc. v. Daffy's, Inc., 354 F.3d 228, 236 (3d Cir. 2003). 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 America, 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[.]").

Bearing these principles in mind, there is no 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 is September 22, 2009, the date McWane and SIGMA entered into a Master Distribution Agreement ("MDA") through which SIGMA would sell domestic DIPF manufactured by McWane. (Compl. ¶¶ 66-67.) Plaintiffs, however, do not even

allege that the MDA is still in existence (which it is not). Plaintiffs' vague and unsubstantiated allegation that the conduct is "continuing to the present" is woefully insufficient. Lacking any allegations showing an existing, actual threat, plaintiffs' claim must fail. 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), appeal dismissed, 142 Fed. App'x. 62 (3d Cir. 2005); 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").

Moreover, the injunctive relief claims likewise are defective because they mimic the terms of SIGMA's consent decree with the FTC, thereby negating the irreparable-harm element of plaintiffs' claim. At least one appellate court addressing a similar circumstance held "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 also 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 found 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 the Matter of SIGMA Corporation, Federal Trade Commission Docket No. C-4347, Decision and Order at 4 (Feb. 27, 2012), available at http://ftc.gov/os/caselist/1010080/120228sigmado.pdf. In addition, the consent decree prohibits SIGMA from "Communicating Competitively Sensitive Information to

any other Competitor." Id. at 5. It defines "Competitively Sensitive Information" to include "any information regarding the . . .price . . . for DIPF[.]" Id. at 2.

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, candidly, plaintiffs know it is not). (Compl. ¶ 62-83.) Therefore, 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").

V. CONCLUSION

For the foregoing authorities, arguments and reasons, together with those set forth in the motion to dismiss the direct purchaser complaint, defendants McWane and SIGMA respectfully request that the complaint be dismissed.

Respectfully submitted,

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DATED: September 26, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing defendants' consolidated notice of motion to dismiss the amended class action complaint, and the memorandum in support thereof, to be filed via the CM/ECF system established for the United States District Court for the District of New Jersey.

I hereby further certify that, via the CM/ECF system, I have caused true and correct copies of the foregoing to be served electronically on:

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