UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

IN RE DUCTILE IRON PIPE FITTINGS ("DIPF") INDIRECT PURCHASER ANTITRUST LITIGATION	:	Civ. No. 12-169 (AET) (LHG) Oral Argument Requested

INDIRECT PURCHASER PLAINTIFFS' OPPOSITION TO DEFENDANTS MCWANE INC., SIGMA CORPORATION, AND STAR PIPE PRODUCT LTD.'S MOTIONS TO DISMISS PLAINTIFFS' AMENDED CLASS ACTION COMPLAINT

David Kovel
Daniel Hume
David Bishop
KIRBY MCINERNEY LLP
825 Third Avenue, 16th Floor
New York, NY 10022
Tel: (212) 317-2300
Fax: (212) 751-2540 (Fax)

Steven A. Asher
Mindee J. Reuben
Jeremy S. Spiegel
WEINSTEIN KITCHENOFF & ASHER LLC
1845 Walnut Street, Suite 1100
Philadelphia, Pa 19103
Tel: (215) 545-7200
Fax: (215) 545-6535 (Fax)

Lisa J. Rodriguez
Ira N. Richards
TRUJILLO RODGRIGUEZ
& RICHARDS LLC
258 Kings Highway, East
Haddonfield, NJ 08033
Tel: (856) 795-9002
Fax: (856) 795-9887 (Fax)

Joseph C. Kohn
William E. Hoese
Douglas A. Abrahams
KOHN, SWIFT & GRAF, P.C.
One South Broad Street
Suite 2100
Philadelphia, PA 19107
Tel: (215) 238-1700
Fax: (215) 238-1968 (Fax)

Interim Lead and Liaison Counsel for the Indirect Purchasers

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Indirect Purchaser Plaintiffs[1] respectfully submit their opposition to: (1) Defendants McWane Inc. and SIGMA Corporation's Motion to Dismiss (Dkt. No. 96); and (2) Star Pipe Products, Ltd.'s Motion to Dismiss (Dkt. No. 89) Plaintiffs' Amended Class Action Complaint (Dkt. No. 85) ("Complaint" or "ACAC"). For the reasons set forth below, Defendants' Motions should be denied and they should answer the Complaint.

I. THE COMPLAINT'S ALLEGATIONS

This case arises out of Defendants' unlawful conspiracy to raise and fix prices in the market for ductile iron pipe fittings ("DIPF") throughout the United States. ACAC ¶ 1. DIPF are commonly used to join pipes, valves and hydrants in pipeline systems that transport drinking and waste water under pressurized conditions in municipal distribution systems and treatment plants. ACAC ¶ 29. They are commodity products produced to industry-wide standards. ACAC ¶ 86. DIPF typically are not sold directly to users such as contractors or municipalities (such as Plaintiffs herein), but, instead, are sold through independent wholesale distributors known as "waterworks distributors." ACAC ¶ 30.

There are two relevant markets for DIPF: (1) the nationwide DIPF market, which includes both domestically-produced and foreign-manufactured DIPF; and (2) the nationwide Domestic DIPF market, which includes only domestically-produced DIPF. ACAC ¶ 84 . These markets have several features that facilitate collusion, including product homogeneity, market concentration of DIPF suppliers, barriers to timely entry of new DIPF suppliers, inelastic demand, and uniform published prices. ACAC ¶ 85.

Defendants' antitrust violations had three principal elements. ***First***, from January 2008

[1] Waterline Industries Corporation and Waterline Services, LLC, Yates Construction Co., Inc., City of Hallandale Beach, Wayne County, South Huntington Water District, City of Fargo, and City of Blair (collectively, "Plaintiffs").

until early 2009, all Defendants conspired to fix the prices of DIPF sold in the United States. ACAC ¶ 4. This portion of the conspiracy was effected through a plan McWane orchestrated and communicated to SIGMA and Star; at least two coordinated price increases; communications to ensure implementation of the price increases, and the (mis)use of an association, the Ductile Iron Fittings Research Association ("DIFRA"), to facilitate an exchange of information between the competitors to manage pricing. ACAC ¶¶ 33-46.

Second, McWane and Star conspired to fix DIPF prices (both domestically-produced and foreign DIPF) beginning in April 2009, ACAC ¶ 6, and implemented identical price lists for DIPF, which remained in effect until at least July 2010. ACAC ¶¶ 50-61. This was also part of McWane's plan to maintain a monopoly in the market for domestically-produced DIPF following the enactment of a Federal "Buy-American" provision for waterworks projects in early 2009.

Third, beginning in September 2009, McWane and SIGMA reached an illegal distribution agreement that effectively eliminated SIGMA from competing with McWane in the domestically-produced DIPF market. ACAC ¶¶ 7-8. Through this agreement (the "MDA"), McWane exclusively sold its domestically produced DIPF to SIGMA at a discount, and placed a number of restrictions on the resale of DIPF to waterworks distributors. ACAC ¶¶ 64-73. As a consequence, McWane was able to maintain its dominant position in the market for domestically-produced DIPF, excluding both SIGMA (through the MDA) and Star (through the MDA's resale restrictions) as competitors. ACAC ¶¶ 9, 76-79.

A. All Defendants Conspired To Manipulate Nationwide DIPF Prices Beginning In January 2008

In January 2008, Defendants were the major players in the United States market for DIPF, accounting for approximately 90% of DIPF sales. ACAC ¶ 3. That month they began to collude on DIPF.

In order to raise and stabilize DIPF prices, McWane formulated a plan to trade its support for a price increase in exchange for SIGMA and Star changing their business methods to ensure that they would not sell DIPF at prices lower than published levels. ACAC ¶ 33. SIGMA and Star agreed to and made the necessary changes to their business practices, ACAC ¶ 34, while McWane, on January 11, 2008, initiated a price increase that SIGMA and Star followed. ACAC ¶ 35. In furtherance of the conspiracy, on or about March 10, 2008, McWane and SIGMA executives discussed their implementation of the January 2008 price increase. ACAC ¶ 36.

In June 2008, McWane devised a second strategy to support higher prices that involved SIGMA and Star sharing information regarding their monthly DIPF sales volume. This exchange of information was to be achieved using the DIFRA. ACAC ¶ 37, 39-41. The information exchange, which principally occurred between June 2008 and January 2009, operated as follows: (1) each Defendant submitted a report of its previous month's sales to an accounting firm; (2) shipments were reported in tons shipped, subdivided by diameter size range and joint type; and (3) data submissions were aggregated and distributed to each Defendant. ACAC ¶ 38. This enabled each Defendant to determine and monitor its own market share as well as to determine and monitor its rivals' output levels. ACAC ¶ 39. In this way, the DIFRA information exchange facilitated price coordination among the Defendants. ACAC ¶ 39.

Based on the illegal information exchange and as agreed among the Defendants, McWane led a price increase on June 17, 2008, which the other Defendants followed. ACAC ¶ 42. On August 22, 2008, McWane and SIGMA further discussed the implementation of the June 2008 increase, and senior executives from each Defendant had additional communications with each other that related to DIPF price and output. ACAC ¶ 44.

B. Congress Enacts The ARRA And McWane Initiates Its Plan To Control The Domestic DIPF Market

In February 2009, Congress enacted the American Recovery and Reinvestment Act ("ARRA"), which allocated over $6 billion to water infrastructure projects on the condition that those projects use domestically-produced materials, including DIPF. This requirement is known as the "Buy American Provision," ACAC ¶ 47, and, as a result, a market for domestically-produced DIPF ("Domestic DIPF market") was created. At the time the ARRA was enacted, neither Star nor SIGMA produced ARRA-compliant DIPF. *See* ACAC ¶ 48. McWane, however, did, and wanted to maintain its dominance in the Domestic DIPF market.

1. Step 1 - McWane And Star Agree To Implement Identical Price Lists For Domestically-Produced And Foreign-Manufactured DIPF Beginning In 2009

Following ARRA's enactment, Star readied itself to produce a full line of domestically-produced DIPF. ACAC ¶ 50. However, Star did not intend to compete. Instead, it conspired with McWane to manipulate the prices of domestically-produced DIPF, and agreed to implement identical price lists for both domestically-produced and foreign DIPF. ACAC ¶¶ 51, 60.

On April 15, 2009, McWane announced a new DIPF price list. ACAC ¶ 52. On April 22, 2009, Star announced that it intended to change its price list, although it did not yet specify the new prices. ACAC ¶ 53. Star's anticipated price list, however, would include domestically-produced DIPF for the first time. *See* ACAC ¶ 58.

Before implementing its new prices, Star sought assurance from McWane that McWane would implement its announced price list, which included prices for both domestically-produced DIPF and foreign DIPF. ACAC ¶ 54. McWane promised Star that it would implement its price list as announced, and Star, accordingly, adopted an almost identical price list (effective May 2009). ACAC ¶¶ 56-59. By eliminating competition between themselves, McWane and Star

were able to maintain domestically-produced and foreign DIPF prices. These identical price lists remained in effect until at least July 2010. ACAC ¶ 59.

2. Step 2 - McWane And SIGMA Execute A Master Distribution Agreement To Restrain Competition And Capacity In The Domestic DIPF Market

Like Star, SIGMA also sought to enter the Domestic DIPF market following ARRA's enactment. It took such steps as: formulating a marketing plan; arranging for an infusion of equity capital to fund domestic production of DIPF; obtaining the approval of its board of directors to enter the Domestic DIPF market; and casting prototype product. ACAC ¶ 62. In a September 22, 2009 letter to its customers, SIGMA stated that "it has adequate engineering and production expertise and the needed resources to develop and manufacture a competitive range of AWWA Fittings using a few quality foundries in USA." ACAC ¶ 63.

McWane, recognizing SIGMA's preparedness to enter the Domestic DIPF market, sought to induce SIGMA to abandon its plans and, instead, to become a captive distributor of McWane's Domestic DIPF, thereby eliminating SIGMA as a competitor. ACAC ¶ 64. The parties executed the MDA in September, 2009, effectively foreclosing SIGMA from entering the Domestic DIPF market. ACAC ¶¶ 65, 69-70. Per the MDA: (1) McWane would sell domestically-produced DIPF to SIGMA at a 20% discount from McWane's published prices; (2) McWane would be SIGMA's exclusive source for domestically-produced DIPF; (3) SIGMA would resell McWane's domestically-produced DIPF at or very near McWane's published prices (prices that were established and maintained pursuant to McWane's collusion with Star); and (4) SIGMA could resell McWane's domestically-produced DIPF to waterworks distributors only on the condition that the distributor agreed to purchase domestically-produced DIPF exclusively from McWane or SIGMA. ACAC ¶¶ 65, 67-69. Thus, through the MDA, McWane and SIGMA were able to artificially maintain prices for domestically-produced DIPF, which were set pursuant to

McWane's collusion with Star, and McWane was able to exclude SIGMA from the Domestic DIPF market. ACAC ¶ 67.

C. McWane Monopolizes the Market for Domestically-Produced DIPF

McWane systematically and illegally acted to preserve its monopoly in the Domestic DIPF market by agreeing with Star to set identical price lists and excluding SIGMA as a competitor in the Domestic DIPF market through execution of the MDA. McWane took its plot one step further, however, by using the MDA's restrictive and exclusive distribution policies to preclude Star from obtaining a toe-hold in the Domestic DIPF market. ACAC ¶ 77.

First, McWane threatened waterworks distributors with delayed or diminished access to McWane's domestically-produced DIPF, as well as the loss of accrued rebates on the purchase of such DIPF, if the distributors purchased domestically-produced DIPF from Star. ACAC ¶ 77a. Second, McWane threatened waterworks distributors with the loss of rebates in other product categories if the distributors purchased domestically-produced DIPF from Star. ACAC ¶ 77b. Finally, in 2011, McWane went so far as to modify its rebate structure for domestically-produced DIPF to require waterworks distributors to make certain minimum (but high) shares of their total domestically-produced DIPF purchases from McWane in order to qualify for rebates, ACAC ¶ 77c, all with the intent of minimizing Star's Domestic DIPF market share.

As a consequence of McWane's policies, SIGMA (as a captive distributor for McWane) and Star were effectively excluded from the Domestic DIPF market as competitors. ACAC ¶¶ 76, 78-79. Moreover, McWane's monopolistic actions created artificial barriers to entry into the Domestic DIPF market; reduced competition in the marketplace; reduced DIPF supply; and artificially raised prices for domestically-produced DIPF. ACAC ¶ 80.

D. Defendants' Anticompetitive Conduct Is Revealed

On January 4, 2012, the Federal Trade Commission ("FTC"), following an investigation,

filed complaints against Defendants concerning their anticompetitive conduct. The FTC complaints document Defendants' anticompetitive conduct beginning in January 2008. ACAC ¶ 81.

SIGMA entered into a consent agreement with the FTC. ACAC ¶ 82. SIGMA agreed to refrain from participating in, or maintaining, any combination or conspiracy between any competitors to fix, raise or stabilize the prices at which DIPF are sold in the United States, or to allocate or divide markets, customers or business opportunities. ACAC ¶ 83.

On March 20, 2012, Star agreed to settle FTC charges that it conspired with McWane and SIGMA to increase the prices at which DIPF were sold nationwide. ACAC ¶ 83. Under the order settling the FTC's charges, Star is barred from participating in or maintaining any combination or conspiracy between any competitors to fix, raise or stabilize the prices at which DIPF are sold in the United States, or to allocate or divide markets, customers or business opportunities. ACAC ¶ 83. The proceeding against McWane is pending before the FTC.

II. ARGUMENT

A. The Complaint Sufficiently States Claims Against Defendants Under Rule 12, 8, And *Twombly*

1. Standard On A Motion To Dismiss Under Rule 12(b)(1) and (b)(6)

Defendants move to dismiss the ACAC under Fed. R. Civ. P. 12(b)(1) and (b)(6). Their Rule 12(b)(1) jurisdictional motions challenge the Plaintiffs' standing. These motions mount a facial attack on the Complaint because they contend that it lacks sufficient allegations to establish Plaintiffs' standing. When addressing a facial challenge, "the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elec. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000). In determining whether the ACAC adequately pleads the elements of standing, the

standards are the same as that used when considering a motion to dismiss under Rule 12(b)(6). *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007).

A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of the complaint." *Sturm v. Clark*, 835 F.2d at 1009, 1101 (3d Cir. 1987). Its purpose is not to resolve disputed factual issues or to decide the merits of the case. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). Defendants' burden of proof to prevail is "high." *Sakhrani v. Escala*, 2006 WL 2376746, at *4 (D.N.J. Aug. 16, 2006).[2]

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a plaintiff to, *inter alia*, set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), a complaint satisfies Rule 8 when it sets forth sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Importantly, "[a]sking for plausible grounds . . . does not impose a probability requirement at the pleading stage," *Twombly*, 550 U.S. at 556, nor does it require "'detailed factual allegations,'" *Iqbal*, 556 U.S. at 678 (quoting *id.*). Rather, Rule 8 "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal[ity]." *Twombly*, 544 U.S. at 556; *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 319 (3d Cir. 2010).

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[2] In their motion to dismiss Plaintiffs' ACAC, Defendants generally incorporate by reference the *Twombly* arguments from their motion to dismiss the direct purchaser plaintiffs' consolidated amended complaint. Def. Consol. Br. at 14-15. They do so, however, without referencing the allegations in the Indirect Purchasers' ACAC.

Accordingly, dismissal under *Twombly* is appropriate only where: (1) a complaint offers nothing more than "'labels and conclusions'" or a "'formulaic recitation of the elements of a cause of action'"; or (2) where the "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. 678-79 (quoting *Twombly*, 550 U.S. at 555).

2. Plaintiffs' Complaint Plausibly Sets Forth Sufficient Grounds for Relief

Against, this backdrop, Plaintiffs' allegations easily pass muster under *Twombly*. The Complaint sets forth: (1) the Defendants' anticompetitive conduct; (2) their participation in the relevant markets; and (3) that, as a result, Plaintiffs were injured because they paid supra-competitive prices for DIPF during the relevant class periods. ACAC ¶¶ 10, 32-80, 91-94, 96-97. Such allegations are sufficient under Rule 8. *See, e.g.*, *In re Fasteners Antitrust Litig.*, 2011 WL 3563989 (E.D. Pa. 2011) (denying motion to dismiss in action involving horizontal price-fixing conspiracy).

Defendants impermissibly parse the Complaint to argue that Plaintiffs have not plausibly alleged that they suffered an antitrust injury based on DIPF overcharges. *See* Def. Consol. Br. at 15-19. But the purported critical missing information is nothing more than transactional minutia, such as "the date of any purchases," the type of DIPF purchased, the specific defendant that imported or manufactured the DIPF for each such transaction, and the specific prices Plaintiffs paid for DIPF.[3] *Id.*

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[3] In fact, Plaintiffs do provide details regarding pricing to Plaintiffs, including, *inter alia*, what types of DIPF were affected (both domestically-produced and foreign), *e.g., A*CAC ¶¶ 46, 61, 73; who was affected by the conspiracy (Plaintiffs and the class, indirect purchasers of DIPF), *e.g.,* ACAC ¶¶ 16-22, and the time period, *e.g.,* ACAC ¶¶ 10, 104; and even provide a sampling of identical price lists (as between McWane and Star, attached to the ACAC as Exhibit A). Defendants cannot contend that they do not have sufficient notice of the claims against them.

As an initial matter, Defendants fail to: (1) cite a single case holding that, on a Rule 12(b)(6) motion, *Twombly* requires the level of detail they currently demand, *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 323 (2d Cir. 2011) (reversing dismissal where district court "demanded . . . a level of specificity that was not justified by *Twombly*");[4] or (2) argue that the ACAC has not provided them with fair notice of the substance of Plaintiffs' claims, *see also In re Tousa, Inc.*, 442 B.R. 852, 856 (Bankr. D.N.J. 2010) ("[s]o long as the Defendant is provided fair notice" of plaintiffs' claims, Rule 8 is satisfied and "[t]o require more is to mandate pedantry").

In any event, Defendants largely quibble over information that, even if not expressly stated to Defendants' satisfaction, is obvious from any reasonable reading of the allegations. For example, Defendants complain that the Complaint does not differentiate sufficiently between domestic and imported DIPF purchases. Def. Consol. Br. at 15-19. But the Complaint states that: (1) each Plaintiff purchased DIPF indirectly from one or more of the Defendants, ACAC ¶¶ 16-22; and (2) depending on the claim at issue, that Plaintiffs were injured during the relevant time period due to overcharges for "domestic DIPF" or "DIPF sold in the United States" (*i.e.*, the national market, which includes both domestic and imported DIPF), *see id.* at ¶¶ 16-22, 91-94, 118-19, 123-24, 130. The ACAC thus specifically alleges Plaintiffs suffered injury from Defendants' conduct in the form of overpaying for domestic or imported DIPF. This suffices to state a plausible entitlement to relief. *See, e.g.*, *Ideal Steel Supply Corp. v. Anza*, *supra* ("'A complaint attacked by a Rule 12(b)(6) motion to dismiss'" need only raise "'[f]actual allegations

[4] *See also United States v. Osborne*, 2011 WL 7640985, at *2 (N.D. Ohio Dec. 15, 2011) (*Twombly* "neither imposes a probability requirement nor requires ultra specific factual allegations").

[that are] enough to raise the right to relief above the speculative level.'") (quoting *Twombly*, 550 U.S. at 555) (alterations in *Ideal Steel*).

Defendants next fault the ACAC for not identifying Plaintiffs' specific DIPF purchase prices, in order to expressly foreclose the theoretical possibility that Plaintiffs purchased DIPF from the distributors at a discount *vis-à-vis* Defendants' list prices. *See* Def. Consol. Br. at 18-19. But Defendants cite absolutely no authority for the proposition that, in order to satisfy Rule 8, a complaint must prophylactically negate all facts that defendants could possibly adduce during discovery to mount a defense. *See, e.g.*, *Nieves v. CCC Transp., LLC*, 2012 WL 3880590, at *4 (E.D. Va. Sept. 6, 2012) ("federal pleading standards are not so exacting as to require a plaintiff to include detailed factual allegations proving his case on paper") (internal quotations omitted); *TruePosition, Inc. v. LM Ericsson Tele. Co.*, 2012 WL 3584626, at *25 (E.D. Pa. Aug. 21, 2012) (*Twombly* does not require "an antitrust plaintiff to plead facts that, if true, definitively rule out all possible explanations.") (citing *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 642 (E.D. Pa. 2010)).[5]

Moreover, the ACAC clearly alleges that the distributors passed-on Defendants' supra-competitive prices to the Plaintiffs, which is sufficient to state an antitrust injury:

> Plaintiffs also allege sufficient facts to suggest that defendants' action threaten them with antitrust injury . . . . Here, plaintiffs allege that they are participants in the relevant market . . . because they are end users of [after-market sheet metal auto] parts, and they are being injured *because the higher prices defendants charge for [the] parts are being passed on to the end users by direct purchasers and others in the chain of distribution.*"

[5] *Cf. Davis v. Indiana State Police*, 541 F.3d 760, 763 (7th Cir. 2008) ("Complaints need not anticipate, and attempt to plead around, potential affirmative defenses."); *In re Tousa*, 442 B.R. at 856 ("under no reasonable interpretation of *Twombly* and *Iqbal* is a plaintiff required to negate affirmative defenses . . . in its complaint").

Fon du Lac Bumper Exchange, Inc. v. Jui Li Enter. Co., Ltd., 2012 WL 3841397, at *3 (E.D. Wis. Sept. 5, 2012) (emphasis added); *see also Smith v. Ebay Corp.*, 2012 WL 27718, at *8 (N.D. Cal. Jan. 5, 2012) (plaintiffs sufficiently alleged antitrust injury where they described anticompetitive conduct and alleged that it resulted in "artificially high" prices).

The cases Defendants cite on this point, *see* Def. Consol. Br. at 19, are completely inapt because, unlike here, they involved a developed factual record, or focus on facts otherwise admitted by the plaintiff. *See Lum v. Bank of Am.*, 361 F.3d 217, 230-31 (1st Cir. 2004) (concluding, based on facts admitted in RICO case statement, that "the only reasonable conclusion that can be drawn . . . is that there was price competition as to the final interest" charged by banks); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 128 (3d Cir. 1999) (summary judgment motion); *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 482-83 (1st Cir. 1988) (same); *but see Rowen Petroleum Properties, LLC v. Hollywood Tanning Sys., Inc.*, 2011 WL 6755838, at *6 (D.N.J. Dec. 23, 2011) ("Of course, the standard of proof for a motion for summary judgment is higher than that for a motion to dismiss.")

Last, Defendants' argument that the ACAC's allegations regarding DIPF purchases as part of a "water systems project contract" are insufficient because "all the factual allegations in the complaint pertain to only so-called stand-alone sales of DIPF," is mistaken.[6] The ACAC alleges that certain of the Plaintiffs purchased DIPF "as part of a water systems project contract" and further alleges that Defendants' supra-competitive DIPF prices were passed on to Plaintiffs. *See* ACAC ¶¶ 10, 93 (making no distinction between stand-alone and water systems project contract purchases of DIPF); *see Fon du Lac Bumper Exchange, Inc.*, 2012 WL 3841397, at *3

[6] Although Defendants complain that "plaintiffs have not even alleged what constitutes a 'water systems project,'" the title of the project provides its own description.

("Since [the] parts travel down the chain of distribution substantially unchanged, the price charged by the manufacturer will largely determine the price paid by the end user.").

3. Plaintiffs' Response To The Arguments Made In Defendants' Brief In Support Of Their Motion To Dismiss the Direct Purchasers' Complaint

Plaintiffs, in an abundance of caution, respond to the arguments asserted against the direct purchasers as if directed to Indirect Purchaser Plaintiffs.

B. Defendants Engaged In Conspiratorial Conduct Beyond Parallel Pricing

Defendants complain that the ACAC does not satisfy *Twombly* because Plaintiffs have pleaded parallel pricing conduct without plausibly suggesting the existence of a prior agreement. Defendants' Mem. of Law in Support of their Motion to Dismiss Direct Purchaser Plaintiffs' Consolidated Amended Complaint ("Def. DPP Mem.") at 14-28. But Defendants simply ignore that the ACAC is not based on mere parallel conduct, but describes at length several unlawful agreements. Moreover, even if the price increase allegations were construed as parallel conduct, that conduct arises "in a context that raises a suggestion of a preceding agreement". *See, e.g., Twombly*, 550 U.S. at 557.

Twombly and *Iqbal* reaffirmed that a Sherman Act Section 1 case can be properly pled by either: (1) sufficient allegations of an actual agreement, or (2) allegations of parallel action placed in a context plausibly suggesting such an agreement. *Id.* at 564 (distinguishing "independent allegation[s] of actual agreement" from "descriptions of parallel conduct"); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 323-324. Here, the ACAC does both, in that it plausibly alleges the existence of a series of unlawful agreements. Moreover, the price increases themselves are placed in a context that not only suggests a preceding agreement, but actually

specifies the of the preceding agreement's terms.[7]

Moreover, Defendants' argument is belied by the ACAC's allegations beginning in 2008, all Defendants conspired to raise and stabilize prices for DIPF sold in the United States. ACAC ¶¶ 32-36 (describing the Defendants' agreement for the January 2008 price increase); ¶¶ 41-42 (describing the Defendants' agreement for the June 2008 price increase). Further, the ACAC describes McWane and Star's 2009 agreement to fix prices for DIPF. ACAC ¶¶ 52-58. Accordingly, Defendants' argument that Plaintiffs have only pleaded parallel conduct is without merit.

C. Plaintiffs Are Not Required To Allege Facts That Tend To Exclude The Possibility Of Lawful Behavior By Defendants

Confusing a motion to dismiss with one for summary judgment, Defendants next complain that Plaintiffs "have not alleged facts tending to exclude the possibility" that Defendants acted lawfully. *See, e.g.,* Def. DPP Mem. at 21-27. But Plaintiffs are not required to disprove all possible alternative explanations for Defendants' misconduct, and Defendants cite no law in support of such a proposition. To the contrary, *Twombly* only requires that Plaintiffs plead a "plausible" case that places Defendants on notice of the allegations against them. *See Iqbal*, 129 S. Ct. at 1950. *See also Twombly*, 550 U.S. at 554 ("proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action … and at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently"); *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2010) ("Although the Twombly court acknowledged that for purposes of summary

[7] *Compare Twombly*, 550 U.S. at 564-565. There, the Supreme Court made clear that it considered the complaint to "proceed *exclusively* via allegations of parallel conduct," *id.* at 565 n.11 (emphasis added), and "not on any independent allegation of actual agreement among the [defendants]," *id.* at 564.

judgment a plaintiff must present evidence that tends to exclude the possibility of independent action … it specifically held that, to survive a motion to dismiss, plaintiffs need only 'enough factual matter (taken as true) to suggest that an agreement was made….'"). *See also* 2 Areeda & Hovenkamp § 307d1 (3d ed. 2007).

Defendants next complain that the ACAC only contains specific dates for conspiratorial communications that occurred after the price increases occurred. Def. DPP Mem. at 24. But Plaintiffs are not required to plead the precise date of every communication among competitors. In any event, the ACAC clearly sets forth enough about price increase communications to render their claims plausible. ACAC ¶¶ 33-35, 37, 42, 52-58.

Finally, although Defendants attempt to persuade this Court that DIFRA was completely legitimate, Def. DPP Mem. at 24-28, the factual allegations in the ACAC belie Defendants' position. ACAC ¶¶ 38-39 (DIFRA enabled Defendants to monitor market share and police output of competitors). Moreover, conduct in furtherance of a conspiracy, even within the context of a trade association, can suffice to connect a defendant to the conspiracy. *See In re OSB Antitrust Litig.*, 2007 WL 2253419, at *3 (E.D. Pa. Aug. 3, 2007) (denying motion to dismiss where the defendants allegedly "confirmed their agreements during meetings at industry trade shows and events"); *In re Automotive Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 492 (E.D. Pa. 2005).

D. Plaintiffs Have Adequately Pled Monopolization

Defendants' argument that Plaintiffs have not sufficiently pled their monopolization claim likewise fails for the above stated reasons. Rather than focus on what Plaintiffs actually allege, Defendants provide the Court with unsupported "facts" (for example, that McWane's exclusive distribution policy was "pro-competitive" and that Star "successfully" entered the

Domestic DIPF market) and cite to erroneous sources that cannot be considered on a motion to dismiss.

Liability for a Section 2 monopolization claim requires: (1) the possession of monopoly power in a relevant market; and (2) its willful acquisition or maintenance through anticompetitive means. *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 306-307 (3d Cir. 2007). To successfully plead the first element, "a plaintiff typically must plead . . . that a firm has a dominant share in a relevant market, and that significant 'barriers' protect that market." *Id.* *Broadcom* further requires that the "relevant market" be defined in terms of the substitutability of products and the elasticity of demand, which define the market's "outer boundaries." *Id.* However, "the scope of the market is a question of fact." *Id.*

The relevant market for Plaintiffs' monopolization claim is the "Domestic DIPF market." ACAC ¶ 123. Plaintiffs have further alleged that "there are no widely used substitutes for the product" (*id.* at ¶ 89), and that the market has "inelastic demand" because of the lack of substitutes and because "DIPF are a relatively small portion of the cost of materials of a typical waterworks project" (*id.* at ¶¶ 85, 89). In addition, ARRA's enactment in February 2009 with its "Buy American" provision created a market for Domestic DIPF, which by definition excluded imported DIPF as a substitutable product. ACAC ¶¶ 47-48.

Defendants argue that no domestic market existed because foreign-made DIPF was still used, even after the ARRA was enacted, citing outside sources. In so doing, Defendants ignore the rule that "a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings," unless those matters were integral to or expressly relied upon in the Complaint. *W. Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 97 n.6 (3d Cir. 2010). None of the material that Defendants cite was relied upon or integral to the ACAC. Moreover, whether or

not waivers to the Buy American provision were granted under the ARRA, and their impact, if any, on the Domestic DIPF market, are questions of fact that cannot be decided at this stage.

Plaintiffs have also adequately plead the "dominant share in a relevant market" and "significant 'entry barriers' that protect the market." *Broadcom*, 501 F.3d at 307. Specifically, Plaintiffs have pled that "[a]t the time of the ARRA enactment [when the Domestic DIPF market was created], McWane was the sole supplier of a full line of domestically-produced DIPF in commonly-used sizes." ACAC ¶ 48. Plaintiffs further allege specific entry barriers into the DIPF market, including the need for new entrants to develop a distribution network and a reputation among customers for quality and service. *Id.* ¶ 88. As for the Domestic DIPF market, the definition of the market itself implies that there are substantial barriers to entry. Namely, this includes new infrastructure, capital outlay, and the start-up costs required to produce a full line of domestic DIPF in commonly-used sizes, so that a new entrant into the market could actually compete with McWane.

Defendants argue that none of these entry barriers were substantially different for potential entrants. This allegation not only defies common sense, it is rebutted by Defendants' arguments just a few pages later. In section III.A of Def. DPP Mem., which Defendants incorporate into their motions to dismiss the ACAC, Defendants argue that SIGMA could not have been McWane's competitor in the Domestic DIPF market because of the significant entry barriers including, in Defendants' own words, the need for a domestic foundry, "experience with the marketing and sale of domestic fittings," and "the expense or difficulty associated with producing a full line of domestic fittings from scratch." *Id.* at 38.

Finally, Defendants attempt to argue that McWane must have lacked monopoly power because it could not completely foreclose Star's entry into the market. However, to actually

address this argument would require several fact intensive inquiries such as, if not for McWane's exclusionary conduct, would Star have entered the market earlier. This and other questions cannot be answered now. In any event, Plaintiffs have alleged that "[d]espite Star's entry in the domestic DIPF market in 2009, McWane continues to control over 90 percent of Domestic DIPF sales." ACAC ¶ 9. This is more than sufficient to allege that McWane continued to possess monopoly power even after Star entered the market. *See, e.g., LePage's, Inc. v. 3M*, 324 F.3d 121, 144 (3d Cir. 2003) (3M, with 90% of market share of transparent tape market, admitted it had monopoly power); *see also Fineman v. Armstrong World Indus.*, 980 F.2d 171, 202 (3d Cir. 1992) (citing to cases showing that monopoly power can be presumed where market share is above 80%).

As to willful acquisition or maintenance of monopoly power through anticompetitive means, Defendants again argue that Star's entry into the Domestic DIPF market negates the allegation that McWane's conduct was anticompetitive. Def. DPP Mem. at 34-35. This argument misconstrues the standard for pleading anticompetitive conduct. The Third Circuit in *Broadcom* explained that "[c]onduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive *way* may be deemed anticompetitive." 501 F.3d at 308 (internal citations omitted). A monopoly claim will lie where McWane's anticompetitive conduct resulted in unnecessarily restricted competition. *See, e.g., BanxCorp. v. Bankrate, Inc.*, 2012 WL 3133786, at *2 (D.N.J. July 30, 2012) (exclusionary conduct element of § 2 claim adequately plead where plaintiff alleged defendant engaged in predatory pricing designed to restrict plaintiff's ability to compete with defendant); *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products, LLC,* 2011 WL 1883815, at *3 (M.D. Pa. May 17, 2011) (plaintiff adequately alleged anticompetitive conduct where it alleged that

defendant "excluded and suppressed competition").

Finally, Defendants argue that the exclusive distribution policies that McWane foisted on its customers beginning in 2009 were not anticompetitive. This is yet another question of fact, and Defendants again support their argument with case law derived almost exclusively from post-discovery rulings.[8] Exclusionary dealing is as a form of anticompetitive conduct prohibited under antitrust law. *See, e.g., In re: Hypodermic Products Antitrust Litig.*, 2007 WL 1959224, at *15-16 (D.N.J. June 29, 2007) (finding that Plaintiffs properly plead anticompetitive conduct by alleging and describing exclusive dealing contracts, and that Defendants' citations to summary judgment case law were inappropriate and unhelpful at the motion to dismiss stage). Plaintiffs need not prove their allegations at this stage; they need only assert facially plausible allegations. *Id.* (citing *Twombly*) To this end, Plaintiffs' claims that McWane "threatened waterworks distributors with delayed or diminished access to McWane's Domestic DIPF, and the loss of accrued rebates . . . if those distributors purchased Domestic DIPF from Star" and "threatened some waterworks distributors with the loss of rebates in other product categories . . . if those distributors purchased Domestic DIPF from Star" (ACAC ¶ 77) plausibly allege anticompetitive conduct.

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[8] The cases that Defendants cite that were decided on motions to dismiss, *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007) and *Eastern Food Servs., Inc. v. Pontificial Catholic Univ. Servs. Ass'n*, 357 F.3d 1 (1st Cir. 2004), are factually inapposite to this case. In *NicSand*, the court, while recognizing that exclusive dealing arrangements could be anticompetitive, dismissed a competitor's monopolization claim because the purported antitrust injury (*i.e.*, lost market share in a market that it used to dominate) was the result of its own inability to meet competition. 507 F.3d at 454. In *Eastern Foods*, plaintiff's claims were dismissed because of its inability to allege facts sufficient to show substantial foreclosure in a properly defined relevant market. 357 F.3d at 7-8.

E. Plaintiffs Sufficiently State A Claim For Unjust Enrichment (Count X) And Injunctive Relief (Count I)

1. Plaintiffs Sufficiently Plead A Claim For Unjust Enrichment

Defendants seek dismissal of Plaintiffs' claim for unjust enrichment, arguing that: (1) the claim cannot survive because the laws governing unjust enrichment vary from state to state; and (2) Plaintiffs cannot use an unjust enrichment claim to pursue relief otherwise unavailable under state antitrust or consumer-protection laws. Defendants' arguments are without merit.

Defendants' first argument ignores the fact that there is little variation in the law of unjust enrichment from state to state, and a District of New Jersey decision on point. First, Defendants mischaracterize these differences as "material." "But, "almost…all states at minimum require plaintiffs to allege that they conferred a benefit or enrichment upon defendant and that it would be inequitable or unjust for defendant to accept and retain the benefit." *In re Flonase,* 692 F.Supp.2d 524, 541 (E.D. Pa. 2010); *see also Golden Pac. Bancorp v. FDIC,* 273 F.3d 509, 519 (2d Cir. 2001). Slight variations do not significantly alter the thrust of an unjust enrichment claim. Unjust enrichment attempts to return victims wealth improperly acquired by wrongdoers, no matter the particular state law applied. *See In re Abbott Labs. Norvir Antitrust Litig.*, 2007 WL 1689899, at *9 (N.D. Cal. June 11, 2007) ("[T]he variations among some States' unjust enrichment laws do not significantly alter the central issue or the manner of proof.").

Second, because unjust enrichment is a universally recognized cause of action that is essentially the same throughout the United States, Plaintiffs' pleading can be evaluated without reference to a particular body of case law at this stage of the litigation. In a case on point, *In re K-Dur Antitrust Litig.*, the court denied the defendant's motion to dismiss the indirect purchaser plaintiffs' fifty state unjust enrichment claims, finding that the critical inquiry is whether the plaintiffs' detriment and the defendant's benefit are related to, and flow from, the challenged

conduct. 338 F. Supp. 2d 517, 544, 546 (D. N.J. 2004). The court further noted that "[a]lthough individual states may impose additional requirements of privity which may ultimately be fatal to plaintiffs' unjust enrichment claims, at [the motion to dismiss] stage it is premature to consider these requirements on a state by state basis." *Id. See Norvir,* 2007 WL 1689899, at *9-10 (class certification appropriate for indirect purchasers who sued for unjust enrichment on a nationwide basis, reasoning that the individual differences between state unjust enrichment laws are not sufficiently substantive to predominate over the shared claims). Defendants' argument is consequently unavailing.

Defendants also contend that an indirect purchaser can only state a claim for unjust enrichment if the jurisdiction in question recognizes a statutory antitrust or consumer protection claim on behalf of indirect purchasers. Defendants' second argument confuses Plaintiffs' right to plead an equitable remedy based on principles of unjust enrichment with the right to recover a remedy at law for an alleged violation of a state's antitrust laws.

Under Rule 8, a party may not only plead alternative theories of liability, but "may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds." Fed. R. Civ. P. 8(e)(2). Relying on this rule, the Eastern District of Pennsylvania rejected an argument similar to Defendants' "end-run" argument. In *D.R. Ward Construction Co. v. Rohm & Haas Co.,* the court reasoned that the viability of an unjust enrichment claim does not hinge upon the success of the state statutory antitrust claims "because the Federal Rules of Civil Procedure permit parties to plead claims in the alternative and because, in practice, equitable remedies for unjust enrichment claims are often awarded when state statutory claims prove unsuccessful." 470 F. Supp. 2d 485, 506 (E.D. Pa. 2006); *see also In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d at 544; *In re Cardizem CD*

Antitrust Litig., 105 F. Supp. 2d 618, 669-71 (E.D. Mich. 2000). Accordingly, the Court should not dismiss Plaintiffs' unjust enrichment claim.

2. Plaintiffs Sufficiently Plead A Claim For Injunctive Relief

Defendants argue for dismissal of Plaintiffs' claim for injunctive relief because: (1) the Complaint purportedly lacks no allegations of ongoing anticompetitive acts; and (2) the injunctive relief claims mimic the terms of SIGMA's consent decree with the FTC.

Defendants' first argument rests on incorrect assertions. The Complaint expressly includes adequate allegations of anticompetitive conduct "continuing to the present" in both the first and second claim that are sufficient to survive Defendants' motion to dismiss. ACAC ¶¶ 115, 116.

The Complaint, read in the light most favorable to Plaintiffs, alleges not only that the anticompetitive conduct is "continuing into the present" and that members of the Injunctive Class have been injured, but also the factual basis underlying the allegations. ACAC ¶¶ 62-83, 115, 119, 123-124. When read together and taken as true, these allegations support a claim for injunctive relief. *See Ammond v. McGahn*, 532 F.2d 325, 329 (3d Cir. 1976) (characterizing the requirement for injunctive relief as a "clear showing of immediate irreparable injury.")

Furthermore, Defendants rest much of their argument on case law that addresses the requirement necessary to ultimately obtain injunctive relief, not the showing necessary to survive a motion to dismiss. *See, e.g., Gucci Am., Inc. v. Daffy's Inc.*, 354 F.3d 228, 238-39 (3d Cir. 2003). Defendant's argument is therefore premature.

Defendants also contend that the injunctive claims should be dismissed because they mimic the terms of SIGMA's consent decree with the FTC. Defendants rely principally on a case that is procedurally inapposite, *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 476 (6th Cir.

2004). In *Ellis,* after reviewing the lower court's decision rendered after trial, the court ultimately denied the plaintiff's request for injunctive relief only after addressing the claims' merits. *Id.* at 476. The plaintiff was unsuccessful because of a failure to satisfy the traditional requirements necessary for obtaining an injunction, not because the pleadings could not survive a Rule 12(b)(6) motion.

Ellis also did not, as the Defendants imply, deny injunctive relief because a similar consent decree was in existence. Instead, the plaintiff in *Ellis* was given the opportunity to show why the consent decrees did not adequately deal with the plaintiff's claims. *Id.* at 476.

Furthermore, in *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), the court rejected the defendants' argument opposing plaintiffs' requested injunction. In so doing the Third Circuit relied on *United States v. Borden Co.*, 347 U.S. 514 (1954), stating:

> [W]e do not regard the plaintiffs to be necessarily foreclosed from injunctive relief by the mere pendency of the government and direct purchaser suits for similar remedies. Generally, '[t]hey may proceed simultaneously or in disregard of each other," and should be permitted to do so if, considering all the circumstances (including the present status of the government and direct purchaser suits), the plaintiffs are still able to establish a 'significant threat of injury' under general equity principles.

Id. at 590 n. 85 (quoting *Borden*, 347 U.S. at 519). As indicated in *Mid-West* and *Borden*, the mere existence of a similar injunction or, in this case, consent decree, does not foreclose the possibility of relief. Instead, the key inquiry is whether the Plaintiffs can establish a significant threat of injury. Moreover, the consent decree at issue involves Defendant SIGMA and the FTC. Defendant McWane has not signed or entered into a consent decree. As a result, Plaintiffs are not shielded from irreparable harm.

F. Plaintiffs Adequately Allege Standing Under Their Home States' Laws

Defendants seek dismissal of Plaintiffs' claims under their home state's law based on their assertion that "many state antitrust statutes specifically focus on intrastate or 'predominantly local' conduct, or, at a minimum, require a concrete connection to the state . . .," Def. Consol. Br. at 30, and because the Complaint purportedly "fails to link the alleged conduct to any wrongful *effects* in a particular state," *id.* (emphasis added). Contrary to Defendants' arguments, Plaintiffs adequately plead a cause of action under the antitrust and consumer protection laws of the states in which they reside, exist, and do business.

The named Plaintiffs hail from New Hampshire (Waterline Industries Corporation and Waterline Services, LLC), North Carolina (Yates Construction Co., Inc.), Florida (City of Hallendale Beach), Michigan (Wayne County), New York (South Huntington Water District), North Dakota (City of Fargo), and Nebraska (City of Blair). As is obvious from their names, all but Waterline and Yates are public entities and state subdivisions.

The Complaint alleges that the Defendants and their coconspirators carried out an unlawful conspiracy that had the "purpose and effect of raising and fixing prices in the market for ductile iron pipe fittings throughout the United States." ACAC ¶ 1. The conspiracy affected the DIPF market in the United States. *Id.* It can be inferred that this includes all the subject states.

Plaintiffs indirectly purchased such fittings during the class period and as a result of the unlawful acts of the Defendants "paid more . . . for [fittings] than they otherwise would have paid in a competitive market and have therefore been injured in their respective businesses and property." *Id.* ¶ 10. Paragraphs 10 and 16-22 of the ACAC (along with many other allegations in the ACAC, *e.g.*, ¶¶ 92-94, 119, 156, 170-71, 202, 218-219, 250, 267, 297) rebuts Defendants'

assertion that there has been no allegation of effect (harm) in the Plaintiffs' home states. The governmental entities suffered the injuries directly in their home states. The business entities suffered injuries to their businesses, *i.e.*, in their home states, as well as perhaps anywhere else where they do business. Thus, Plaintiffs have sufficiently alleged that the harmful effect of Defendants' actions was suffered in each of their home states.

Counts III, V, VII and IX of the ACAC make claims under state antitrust statutes. Counts IV, VI, VIII and IX make claims under state consumer protection or unfair trade practices statutes. While Federal antitrust law does not permit actions for damages by indirect purchasers, the Plaintiffs' home states permit actions by indirect purchasers under their "Little Sherman Acts," or under consumer protection laws that prohibit unfair and deceptive trade practices. Many, if not most, such cases involve downstream buyers of products or services in the home state against businesses whose schemes originated elsewhere. In response, Defendants cite some cases or simply quote statutes, which they then assert stand for the proposition that to be actionable under these states' laws harm attributable to the illegal conduct must take place solely or predominantly within the subject states. Defendants are wrong.

Defendants cite *In re Flonase Antirust Litig.*, 610 F.Supp.2d 409 (E.D. Pa. 2009), for the very broad proposition that "courts routinely have dismissed state law statutory claims" in like circumstances to this case. Def. Consol. Br. at 30. *Flonase* does not reach as far as Defendants imply. Rather, the *Flonase* court recognized that numerous states "provide antitrust remedies to indirect purchases under their own law." *Id.* at 414-15, citing, *inter alia*, *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa Dist. Ct. 2002) (stating that 19 states, the District of Columbia, and Puerto Rico have statutes authorizing indirect purchasers to bring an antitrust suit and that

"some states that do not allow indirect purchasers to bring antitrust claims, allow them to bring suit under state consumer protection laws or unfair trade practices statutes.")

As such, the court "infer[ed] that each named plaintiff can establish enough contacts in the state where they reside or have a principal place of business to allege injury under that state's law." *Id.* at 415. Here, the ACAC specifically alleges harm in the Plaintiffs' home states, so no inference is necessary. Even if an inference were necessary, one would be appropriate here.

Defendants then argue that "each of the antitrust statutes in Plaintiffs' respective home states . . . explicitly requires a connection between the alleged conduct and the state." Def. Consol. Br. at 30. As noted, the Complaint makes such a connection. Further, the statutes and cases that Defendants cite do not provide support for dismissal.

Michigan - Plaintiffs assert antitrust claims under Michigan law.[9] Mich. Corp. Law Ann. § 445.778(2) explicitly authorizes indirect purchaser actions. *See also In re Vitamins Antitrust Litig.*, 259 F.Supp.2d 1 (D. D.C. 2003); *A & M Supply Co. v. Microsoft Corp.*, 252 Mich. App. 580, 654 N.W.2d 572 (Mich. 2002) (effects of Microsoft general monopolistic behavior in Michigan).

Defendants cite *Aurora Cable Communications, Inc. v. Jones Intercable, Inc.*, 720 F.Supp. 600, 603 (W.D. Mich. 1989), for the proposition that Michigan's Antitrust Reform Act applies to intrastate conduct. *Aurora*, however, had nothing to do with the sufficiency of a complaint for a price fixing antitrust conspiracy, and at the cited page was merely making a general (and rather vague) observation about the fact that Michigan's statute parallels the Sherman Act on an intrastate level. The scope and location of challenged activity was not an

[9] Paragraphs 139, 185, and 233 of the ACAC make a claim under Mich. Corp. Law Ann. § 445.771, *et seq.* Paragraph 279 makes a claim under § 445.772, *et seq.*

issue. Defendants also cite *People's Savings Bank v. Stoddard*, 359 Mich. 297, 102 N.W.2d 777 (Mich. 1960), claiming that it "stands for permitting application of state antitrust law in cases where alleged monopoly is 'predominantly local.'" Def. Consol. Br. at 30 n.6. *People's*, however, is a preemption case, not one where the issue was the locality of the conduct or injury. Thus, there is no justification for the Court to dismiss claims under Michigan law.

Nebraska - The ACAC pleads claims against Defendants under Nebraska law.[10] Defendants cite only Neb. Rev. Stat. § 59-801 as support for their proposition that the Nebraska statute "explicitly requires a connection between the alleged conduct and the state." *See* Def. Consol. Br. at 30 n.6 (apparently focusing on the "within this state" language in the statute). As noted, the connection is that the ACAC alleges that the antitrust violations were aimed at and harmed consumers of Defendants' DIPF in every state and damaged a Nebraska entity in Nebraska. Nebraska permits indirect purchaser actions under its consumer protection/anti-trust statute. *A & M v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004) (general nationwide Microsoft antitrust violations, effects in Nebraska). The Nebraska law claims should not be dismissed.

New York - Plaintiffs' claims are brought under N.Y. Gen. Bus. Laws § 340, *et seq.* ACAC ¶¶ 146, 192, 240 and 286. Sec. 340(6) explicitly authorizes indirect purchaser actions. *See Ho v. Visa USA, Inc.*, 3 Misc.3d 1105A, 787 N.Y.S.2d 677, *aff'd on other grounds*, 16 A.3d 256, 793 N.Y.S.2d 8 (1st Dist. 2005) (general monopolistic business practices with effect in New York). For the proposition that New York's antitrust statute cannot reach the instant case, Defendants again cite inapt cases. First, they cite *Bowlus v. Alexander & Alexander Servs., Inc.*,

[10] Paragraphs 142, 188 and 236 of the ACAC make claims under Neb. Rev. Statutes § 59-81, *et seq.* Paragraph 282 makes a claim under § 59-802 *et seq.*

659 F.Supp. 914 (S.D.N.Y. 1987). *Bowlus* involved an Illinois plaintiff suing his prior employers (in Illinois) in New York state court because of non-competition agreements, alleging they were anti-competitive under the "Donnelly Act." Defendants' principal place of business was New York. The *Bowlus* court did not make any holding whatsoever about the effect, intent, or scope of the Donnelly Act, except insofar as it related to whether the case should be remanded.

Baker v. Walter Reed Theatres, Inc., 37 Misc. 2d 172, 237 N.Y.S. 2d 795 (N.Y. Sup. Ct. 1962), cited in *Bowlus*, however, does discuss the Donnelly Act, but does not stand for the proposition cited. In *Baker,* a New York plaintiff complained about a defendant's anti-competitive activities in New Jersey. There was an attempt to monopolize the business in New Jersey. The court stated that the emphasis and objective of the statute is "not contracts having their impact outside the state." 237 N.Y.S.2d at 796 (emphasis added). Indeed, the court stated that "free competition in the business trade or commerce or the furnishing of any service in this state is the emphasis and objective of the statute . . . ." *Id.* It went on to say that states can enact and implement legislation "which affects interstate commerce, when such commerce has significant local consequences." *Id.* at 796-97. *Baker* does not support the Defendants' position. The South Huntington Water District has properly stated a claim under New York law for injuries suffered in New York.

North Carolina - Plaintiffs' claims are brought under N.C. Gen. Stat. § 75-1 *et seq.* ACAC ¶¶ 148, 193, 215 and 241. North Carolina allows indirect purchasers to bring damages actions under its antitrust laws. *Hyde v. Abbott Labs., Inc.*, 473 S.E.2d 680 (N.C. Ct. App. 1996) (conspiracy to fix price of infant formula sold in United States actionable, effects in North Carolina).

Defendants cite *Lawrence v. UMLIC-5 Corp.*, 2007 WL 2570256 (N.C. Sup. Ct. Mack. Cty. 2007). *Lawrence* is neither a class action, nor an antitrust case. *Lawrence* involved a North Carolina company suing the Lawrences, who were residents of Texas, for fraud and misrepresentations in Texas. Again, a case that states that harm suffered by out-of-state plaintiffs from out-of-state activities cannot be brought in North Carolina says nothing about whether a North Carolina plaintiff can bring an action for harm suffered in North Carolina. However, *Lawrence* does speak to that issue, at least indirectly, when it cites, *Jacobs v. Cent. Trans., Inc.*, 891 F.Supp. 1088, 1112 (E.D.N.C. 1995), *aff'd. in relevant part, rev.'d in part*, 83 F.3d 415 (4th Cir. 1996), for the proposition that even a foreign plaintiff suing a resident defendant over alleged foreign injuries having a substantial in-state effect on North Carolina trade or commerce can bring a claim under this statute. The North Carolina law claim should not be dismissed.

North Dakota - Plaintiffs' claim under North Dakota Cent. Code § 51-08.1-01 *et seq.* ACAC ¶¶148, 194, 242, and 288 N.D. Cent. Code § 51-08.1-08(3) (2003), which explicitly authorizes indirect purchaser actions. *See Beckler v. Visa USA, Inc.*, 2004 WL 2475100 (N.D. Dist. Ct. 2004).

With respect to North Dakota, the Defendants only cite two statutes. Those laws make unlawful antitrust violations "in a relevant market." N.D. Cent. Code § 51-08.1-02. Defendants then cite the statute's definition of a 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." N.D. Cent. Code § 51-08.1-01(2) (emphasis added). The Complaint alleges that the conspiracy thwarted competition in North Dakota (which is part of the entire United States which is the market that Defendants intended to harm) and harmed the City of Fargo there.

Defendants' arguments against the use of consumer protection statutes fare no better.

Nebraska - Plaintiffs' bring a claim under Neb. Rev. Stat. §§ 59-1601 *et seq.* ACAC ¶¶ 166, 212. Nebraska's consumer protection/antitrust laws permit indirect purchaser actions. *See Arthur v. Microsoft Corp.*, 267 §§ 59-1601 *et seq.* Neb. 586, 676 N.W.2d 29 (2004) (Microsoft's nationwide economic practices). Defendants cite Neb. Rev. Stat. § 59-1602, which prohibits unfair methods of competition and deceptive acts and practices, and Neb. Rev. Stat. § 59-1601, which defines trade and commerce to mean "the sale of assets or services and any commerce directly or indirectly affecting the state of Nebraska". This broad definition encompasses the City of Blair's claims that Defendants' anticompetitive acts are unlawful and harmed the City of Blair and its business and property in Nebraska.

New Hampshire - Plaintiffs bring claims under New Hampshire's law.[11] Indirect purchaser claims are permitted under New Hampshire law. *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 374 (D. D.C. 2002). The New Hampshire Supreme Court allows indirect purchaser class actions under N.H. Rev. Stat. § 358-A:2(XIV). *LaChance v. United States Smokeless Tobacco Co.*, 156 N.H. 88, 931 A.2d 571 (N.H. 2007) (general anti-competition business practices amount to antitrust violations, effects in New Hampshire). *Accord Chocolate Confectionary Antitrust Litig.,* 749 F. Supp. 2d 224, 234-35 (M.D. Pa. 2010). Defendants cite *Mueller Co. v. U.S. Pipe & Foundry Co.*, 2003 WL 22272135, at *6 (D. N.H. 2003) for the proposition that commercial conduct is only actionable under N.H. Rev. Stat. Ann. § 358-a:2 if it occurs within New Hampshire. Again, the Defendants have cited an inapt trade dress case.

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[11] *See* ACAC ¶¶ 167, 213 and 261, asserting claims under N.H. Rev. Stat. Ann. §§358-A:1 *et seq.*

Florida - Plaintiffs' claims under Florida's consumer protection statute, Fla. Stat. § 501-201, *et seq.,* are made at paragraphs 163, 209 and 257 of the ACAC. Florida permits indirect purchaser claims under its consumer protection statutes. *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 110 (Fla. Dist. Ct. App. 1996) (national conspiracy of infant formula manufacturers overcharges Florida consumers).

Defendants assert that *Montgomery v. New Piper Aircraft, Inc.*, 209 F.R.D. 221, 227 (S.D. Fla. 2002), purportedly requires an "in-state connection" to assert claims under Florida's Unfair and Deceptive Trade Practices Act (" FUDTPA"). In *Montgomery*, the plaintiffs could not establish that there had been any actions or effect in Florida. The named plaintiff, for instance, was involved in a transaction entirely in the state of Texas where he was a resident and where the damage was suffered. His claim was that the Florida company had made misrepresentations, but the court found that any misrepresentations and wrongful activity were actually committed by entities elsewhere. A class was not certified because "there is no evidence in the record of any putative class members having suffered any alleged injury in Florida." 209 F.R.D. at 227.

Here, the exact opposite is true. The City of Hallendale Beach alleges that it was injured in its business and property, which are in Florida.

Defendants also cite *NationsRent Rental Fee Litig.*, 2009 WL 636188 (S.D. Fla. 2009). There, the plaintiffs and the proposed class representatives were not from Florida. They entered into transactions in their respective states, later seeking to bring unfair trade practices claims against the Florida defendant in Florida. The court cited *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So.2d 7 (Fla. 4th D. Ca. 1999), reaffirmed in *Hutson v. Rexall Sundown, Inc.*, 837 So.2d 1090, 1094 (Fla. 4th D. Ca. 2003), for the proposition that "[FUDTPA

and the Consumer Protection Act] are for the protection of in-state consumers from either in-state or out-of-state debt collectors . . . Other states can protect their own residents as Florida itself does with respect to out-of-state collectors." Florida, in other words, does not bar claims by Florida citizens suffering damage in Florida even from activities out of state.

Upon examination, the Defendants have not supplied any authority for the broad proposition that both challenged activity and harm must occur entirely within the subject state for a cause of action to exist. The Complaint's direct allegations of harm within the subject states to the Plaintiffs, especially when you add inferences in the Plaintiffs' favor, demonstrate that the antitrust and unfair trade practices claims have been sufficiently alleged to survive a motion to dismiss.

G. The Court Should Not Dismiss Any Of The State Law Claims On Standing Grounds

Defendants invite the court to prematurely address their argument that Plaintiffs do not have "standing to sue under the laws of states in which they do not personally allege injury." Def. Consol. Br. at 22. None of the cases Defendants cite, however, is precedential, and the better reasoned decisions lead to a contrary conclusion.

In a class action, once it is determined that a plaintiff has individual standing to assert a claim against the defendants then the relevant inquiry is plaintiff's ability to represent other class members. That question is governed by Rule 23's class certification requirements, and thus should be addressed during the class certification stage of the litigation. This makes sense because the standing concern only exists when the named plaintiff seeks to represent class members in various states. If consideration of the class action requirements results in denial of class certification, then any standing issue becomes moot. Waiting to consider the issue is not the legal equivalent of kicking the can down the road. Instead, it is the most logical and

efficient way to address it.

1. The ACAC Sufficiently Alleges The Standing Elements

Defendants' facial attack on the ACAC's standing allegations fails because the ACAC sufficiently sets forth the basis for the Plaintiffs' standing. The ACAC alleges that "Plaintiffs indirectly purchased DIPF during the Class Period. As a direct and proximate result of the unlawful conduct and conspiracy of Defendants alleged herein, Plaintiffs and other members of the Class…have paid more during the Class Period for DIPF than they otherwise would have paid in a competitive market and have therefore been injured in their respective business and property." *Id.* ¶10. Paragraph 15 goes on to allege that, "[a]s a result of the activities described [in the ACAC], Defendants have: (a) Caused damage to the residents of every state, including the states identified herein; (b) Caused damage in every state, including each of the states identified herein, by acts or omissions committed outside each such state by regularly doing or soliciting business in each such state; (c) Engaged in persistent courses of conduct within every state and/or derived substantial revenue from the marketing of DIPF; and (d) Committed acts or omissions that they knew or should have known would cause damage (and did, in fact, cause such damage) in every state while regularly doing or soliciting business in each such state, engaging in other persistent courses of conduct in each such state, and/or deriving substantial revenue from the marketing of DIPF in each such state."

Each Plaintiff alleges the states where they have their principal place of business or are located, that they indirectly purchased DIPF, and that they were each "injured as a result of Defendants' illegal conduct as alleged [in the ACAC]." ACAC ¶¶16-22.

The ACAC goes on to allege the following effects from Defendants' anticompetitive conduct: "(a) Price competition has been restrained or eliminated with respect to DIPF; (b) the

prices of DIPF have been fixed, raised, maintained, or stabilized at artificially inflated levels; and (c) Indirect purchasers of DIPF have been deprived of free and open competition. ACAC ¶¶91, 117; *see also* ACAC ¶¶ 80, 171, 176, 202, 218, 219, 250, 267 and 297.

The ACAC alleges further alleges that "Plaintiffs and the members of the Classes have paid supra-competitive prices for DIPF" (ACAC ¶92); "[t]he inflated prices of DIPF resulting from Defendants' price-fixing conspiracy have been passed on to Plaintiffs and the other Class members (ACAC ¶93); and that "[b]y reason of the alleged violations of the antitrust laws, Plaintiffs and the members of the Classes have sustained injury to their businesses or property, having paid higher prices for DIPF than they would have paid in the absence of Defendants' illegal contract, combination, or conspiracy … This is an antitrust injury of the type that the antitrust laws were meant to punish and prevent." ACAC ¶94.

In addition to the allegations set forth above, the Plaintiffs allege injury to themselves and the class members at many other places in the ACAC. For example, the ACAC states that "Plaintiffs and members of the Damages Classes in each of the above states have been injured in their business and property by reason of Defendants' unlawful combination, contract, conspiracy or agreement. Plaintiffs and members of the Damages Classes have paid more for DIPF than they otherwise would have paid in the absence of Defendants' unlawful conduct. This injury is of the type the laws of the above states were designed to prevent and flows from that which makes Defendants' conduct unlawful." ACAC ¶¶156.[12]

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[12] Paying "an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress." *Blue Shield of Va. v. McCready,* 457 U.S. 465, 482-83 (1982); *see also Reiter v. Sonotone Corp.,* 442 U.S. 330, 339, 340-41 (1979) ("When a commercial enterprise suffers a loss of money it suffers an injury in both its 'business' and its 'property.'"); *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 531 (3d Cir. 2004) ("[I]t [is] well recognized that a purchaser in a market where competition has

The ACAC adequately alleges the elements of Plaintiffs' standing. It avers that: (1) Plaintiffs suffered an injury in fact; (2) caused by the Defendants' conduct; (3) that can be redressed by the relief they are seeking. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). To establish Article III standing, Plaintiffs are not required to allege that they indirectly purchased or were harmed in a particular state. *Fond Du Lac Bumper Exchange , Inc.,* 2012 WL 3841397, at *4 n.1. In a class action, "standing requires that the named plaintiffs' injury be typical of the class members he or she seeks to represent." *In re Chocolate Confectionary Antitrust Litig.,* 602 F. Supp 2d 538, 579 (M.D. Pa. 2009) (citing Fed.R.Civ.P. 23(a)(3); *In re Wafarin Sodium Antitrust Litig.,* 212 F.R.D. 231, 246 (D. Del. 2002)).[13]

2. Any Standing Concern Should Be Considered In Connection With Class Certification Proceedings

Since each Plaintiff's Article III standing is pled, whether they can represent class members in other states should not be addressed now. Defendants' argument conflates standing and class certification, and this is not the appropriate time to delve into class certification.

Arrayed against Defendants' position are numerous cases from the District of New

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been wrongfully restrained has suffered an antitrust injury."). Injury in the form of higher prices to consumers is the type of injury that antitrust laws are designed to prevent. *Allegheny Gen. Hosp. v. Phillip Morris, Inc.,* 228 F.3d 429, 439 (3d Cir. 2000); *In re Wafarin Sodium Antirust Litig.,* 214 F.3d 395, 401 (3d Cir. 2000); *In re Mercedes-Benz Antitrust Litig.,* 157 F. Supp. 2d 355, 364 (D.N.J. 2001).

[13] The inaptness of Defendants' argument about class standing is underscored by the first case that they cite, *Zimmerman v. HBO Affiliate Group,* 834 F.2d 1163 (3d Cir. 1987). In *Zimmerman,* the plaintiff pled only personal injury in the form of mental distress, which the Supreme Court had earlier ruled was excluded from the definition of "business or property", injury to which being necessary to state a RICO claim. Because the plaintiff could not plead the required injury, he had no claim whatsoever. Here, in contrast, Plaintiffs have pled that they suffered injury in the form of paying higher prices for DIPF due to the anticompetitive acts of Defendants. This is a quintessential redressable injury under antitrust and consumer protection laws.

Jersey, other District Courts in the Third Circuit, and beyond. One is *Ramirez v. Sti Prepaid LLC,* 644 F. Supp. 2d 496, 504-06 (D.N.J. 2009). In *Ramirez,* the two named plaintiffs brought a class action alleging that defendants had violated the consumer protection laws of at least eleven states by selling prepaid phone cards with inadequate or non-existent disclosures about the cards' charges and fees. *Id.* at 499. Plaintiffs further alleged that they purchased the offending cards, and that had the charges and fees been adequately disclosed, they would not have purchased the cards or would not have paid full price for them. *Id.* Plaintiffs sought to represent the injured consumers in not only New Jersey and New York, the states where they resided, but also in nine other states with similar laws. *Id.* at 498-99. Defendants claimed the plaintiffs had no standing to do so.

The court rejected defendants' standing argument, reasoning as follows. First, "in the class action context, named representatives need only establish that they individually have standing to bring their claims." *Id.* at 504. "'[W]hether or not other class members have standing'" is not a relevant inquiry. *Id.* at 505 (quoting *Winer Family Trust v. Queen*, 503 F.3d 319, 325-26 (3d Cir. 2007)). Since the named plaintiffs had standing to assert their individual claims, defendants' argument fell flat. Second, "Defendants' [standing] argument …conflate[d] the issue of whether the named Plaintiffs have standing to bring their individual claims with the secondary issue of whether they can meet the requirements to certify a class under Rule 23." *Id.* at 505. But since "the named plaintiffs have standing to bring their individual claims…[t]hat is all that is required at this stage of the litigation." *Id.* at 506.

So long as the named plaintiffs have individual standing to sue defendants, the relevant question is "'whether [the named class representatives'] injuries are sufficiently similar to those of the purported class to justify the prosecution of a nationwide class action.'" *Id.* at 506

(quoting *In re Grand Theft Auto Video Game Consumer Litig.* (No. II), 2006 WL 3039993, at *3 (S.D.N.Y. Oct. 25, 2006) (citing *In re Buspirone,* 185 F. Supp. 2d 363, 377 (S.D.N.Y. 2002)). The answer to this question is appropriately determined at the class certification stage. *Id.*

The court in *In re Chocolate Confectionary Antirust Litig., supra*, also squarely addressed the standing issues raised there (and here) by defendants, and followed the better reasoned opinions in determining that such issues are more appropriately considered at the class certification stage of the proceedings. In *Chocolate*, the named indirect purchaser plaintiffs in an action alleging collusion by the major chocolate manufacturers claimed that the defendants' activities violated the antitrust and consumer protection statutes of twenty-four states and the District of Columbia. Defendants sought dismissal of the claims under the state statutes of the states where no class representative resided or did business, claiming that the plaintiffs had no standing to assert claims based on the laws of states where they were not injured. *Id.* at 578.

The court decided the appropriate time to consider the standing challenge was at the class certification stage. Relying on *Clark v. McDonald's Corp.,* 213 F.R.D. 198, 204 (D.N.J. 2003), the court decided that *Ortiz v. Fibreboard Corp.* 527 U.S. 815, 831 (1999) and *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 612 (1997), authorize district courts in class action cases to evaluate class issues before standing concerns if the latter are "logically antecedent" to the former. *Chocolate*, 602 F. Supp. 2d at 579. The reason class certification should be decided first is the rule that once a class has been properly certified, standing requirements must be assessed by considering the class, not just the named class representative plaintiff. *Id.* at 579. When the possibility of class certification gives rise to the standing issue, then class certification is logically antecedent to a standing question. *Id.* (quoting *Clark*, 213 F.R.D. at 204). In *Chocolate,* because the named plaintiffs' capacity to represent class members from other states

depended upon certification of a class including them, there would be no standing issue but for the named plaintiffs' asserting state claims on behalf of class members in those states. *Id.* at 579.[14]

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[14] Defendants' position has been rejected numerous times. *E.g., In re Polyurethane Foam Antitrust Litig.,* 799 F. Supp. 2d 777 (N.D. Ohio 2011)(There the defendants moved to dismiss for lack of standing indirect purchaser claims under the laws of states in which a plaintiff did not reside or, to use defendants' lingo, was not otherwise sufficiently connected. *Id.* at 805. The court deferred consideration of standing issues until class certification. Once the plaintiff's standing is established and if the named plaintiff's and the absent class members' injuries have the same source, "[the plaintiff's] capacity to seek relief for the absent class members of the proposed class should [be] determined according to the requirements of [Fed.R.Civ.P.] 23, not a motion to dismiss…." *Id.* at 806.); *K-Dur Antitrust Litig.,* 338 F. Supp. 2d 517, 543-544 (D.N.J. 2004) (The court decided not to address defendants' claim that named plaintiffs who did not purchase K-Dur in certain states were not injured and thus had no standing to bring claims under the laws of those states prior to determining class certification); *Sheet Metal Workers National Health Fund v. Amgen Inc.*, 2008 WL 3833577 at *8-9 (D.N.J. Aug. 13, 2008) (In an antitrust tying case brought by indirect purchasers, the court denied as premature defendant's motion to dismiss state law claims based on the argument that if the plaintiff did not reimburse clinics in a particular state it did not sustain an injury there and thus had no standing to assert that states law claims.); *In re Hypodermic Prods. Antitrust Litig.,* 2007 WL 1959225, at *15 (D.N.J. June 29, 2007); *In re Aftermarket Filters Antitrust Litig.,* 2009 WL 3754041, at *4-5 (N.D. Ill. Nov. 5, 2009) (The court denied a motion to dismiss on standing grounds, finding that the question of class certification was logically antecedent to the standing issue because the plaintiffs had individual standing to sue the defendants and all plaintiffs allegedly suffered the same type of injuries caused by defendants' antitrust conspiracy. Thus, "the name[d] plaintiffs' capacity to represent individuals from other states depends upon obtaining class certification, and the standing issue would not exist but for their assertion of state law claims on behalf of class members in those states."); *In re Buspirone Patent Litig.,* 185 F. Supp. 2d 363, 377-78 (S.D.N.Y. 2002)(The "alleged problems of standing will not arise unless class certification is granted" and if the court certified the class asserting state law antitrust and unfair competition claims, the "only relevant question about the named plaintiffs' standing to represent them will be whether the named plaintiffs meet the ordinary criteria for class standing" such as whether "their claims are typical of those of the class, [and] whether they will adequately represent the interests of the class…."); *In re Grand Theft Auto,* 2006 WL 3039993, at *2-3 (While noting the split of authority on the question, the court found "that the better interpretation is to treat class certification as logically antecedent to standing where class certification is the source of the potential standing problems.").

III. CONCLUSION

For the reasons set forth above and in the direct purchasers' opposition to the Defendants' Motions to dismiss the direct purchaser complaint, Defendants' motions to dismiss the ACAC should be denied.

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Respectfully submitted,

David Kovel
Daniel Hume
David Bishop
KIRBY MCINERNEY LLP
825 Third Avenue, 16th Floor
New York, NY 10022

Steven A. Asher
Mindee J. Reuben
Jeremy S. Spiegel
WEINSTEIN KITCHENOFF & ASHER LLC
1845 Walnut Street, Suite 1100
Philadelphia, Pa 19103

/s/ Lisa J. Rodriguez
Lisa J. Rodriguez
Ira N. Richards
TRUJILLO RODGRIGUEZ
& RICHARDS LLC
258 Kings Highway, East
Haddonfield, NJ 08033

Joseph C. Kohn
William E. Hoese
Douglas A. Abrahams
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107

Interim Lead and Liaison Counsel for the Indirect Purchasers