UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE DUCTILE IRON PIPE FITTINGS ("DIPF") INDIRECT PURCHASER ANTITRUST LITIGATION	Civil Action No.: 12-169 (AET)(LHG)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT STAR PIPE PRODUCTS, LTD.'s MOTION TO DISMISS COUNTS 3, 4, AND 8 OF THE SECOND AMENDED COMPLAINT

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PRELIMINARY STATEMENT

On March 18, 2013, the Court dismissed Plaintiffs' amended class action complaint, concluding that "Indirect Purchaser Plaintiffs' pleadings regarding antitrust impact are insufficient as to each claim" by failing to specify when and from which Defendant a Plaintiff purchased, and whether the DIPF purchased was domestic or imported. Mar. 18, 2013 Slip Op. at 8-10 ("Slip Op."). Although granting leave to amend, the Court "encouraged" plaintiffs "to anticipate those [other] arguments" raised by defendants, and "address any additional potential pleading deficiencies when amending the Amended Complaint." *Id.* Plaintiffs have disregarded the Court's direction.

The majority of Plaintiffs still fail to plead facts regarding their purchases of ductile iron pipe fittings ("DIPF") sufficient to support standing or antitrust injury as to the alleged 2008-2009 conspiracy period, which is the only one alleged to be relevant to Defendant Star Pipe Products, Ltd. ("Star"). Further, scrutiny of the various state law claims, which is routinely performed by courts on a Rule 12(b) motion directed at indirect purchaser complaints, reveals that each Plaintiff has failed for a variety of overlapping reasons to plead the other elements of any of their claims against Star, which reasons are set forth in this motion and summarized with citations in the appended charts.

Specifically, the Third, Fourth, and Eighth Claims for Relief in the Second Amended Complaint ("SAC"), which are the only claims asserted against Star, should be dismissed in their entirety pursuant to Rules 12(b)(1) and 12(b)(6) because:

- Six named plaintiffs—Waterline Industries Corporation (New Hampshire), City of Blair (Nebraska), City of Fargo (North Dakota), Village of Woodridge (New York), Water District No. 1 of Johnson County (Kansas), and Town of Fallsburg (New York)—fail to plead sufficient facts to support their claims that they bought imported DIPF in the January 2008-May 2009 time period and thus have not pled facts sufficient to show standing or antitrust impact;

- Plaintiffs lack standing to bring claims under the laws of states where no Named Plaintiff resides or was injured;

- Plaintiffs fail to plead facts supporting standing or antitrust impact for purchases of DIPF that were not made separately, but were instead part of the purchase of comprehensive water systems projects;

- Plaintiffs fail to identify the states under which they are pursuing unjust enrichment claims, and any such claims are further barred for failure to plead facts sufficient to show standing, injury, and required elements under the various state laws; and

- Plaintiffs fail to state claims under the antitrust laws or consumer protection laws of their home states or other states for a variety of reasons, including failure to plead required elements of the state law, asserting claims barred by state law, failure to comply with federal pleading requirements, and failure to comply with the state law requirements.[1]

Developments in the FTC proceeding, the allegations of which were incorporated in large part in Plaintiffs' SAC, further demonstrate that dismissal is appropriate. On May 9, 2013, the administrative law judge (ALJ) issued an Initial Decision which held that the FTC failed to prove that McWane conspired with Star (or Sigma) to fix prices in the 2008-2009 time period and, therefore, no conspiracy in restraint of trade had been shown. *In the Matter of McWane, Inc.*, Federal Trade Commission Docket No. 9351 (May 8, 2013) (available at http://www.ftc.gov/os/adjpro/d9351/130509mcwanechappelldecision.pdf).

STATEMENT OF FACTS

Plaintiffs, as indirect purchasers of DIPF, have brought the instant action against Defendants, who are manufacturers and importers of DIPF, alleging violations of state antitrust laws, violations of state consumer protection and unfair competition laws, and unjust enrichment.

[1] Star also incorporates by reference as if set forth herein the arguments in the Motion to Dismiss the Second Amended Class Action Complaint and Consolidated Memorandum in Support filed by Defendants McWane, Inc. and Sigma Corporation ("Other Defendants' Motion") as to Counts 3, 4, and 8.

Plaintiffs request relief against Star in only the third, fourth, and eighth claims,[2] alleging that Star was involved in a price-fixing conspiracy from January 2008 through May 2009. SAC at ¶¶ 54-75, 155-203, 283-286. The Third Claim for Relief alleges that a price-fixing conspiracy from January 2008 through May 2009 violated the antitrust laws of 22 states and the District of Columbia.[3] SAC at ¶¶161-183; Appendix 1 (chart of state antitrust claims and grounds for dismissal). The Fourth Claim for Relief alleges that the same conspiracy violated the consumer protection laws of 11 states. SAC at ¶¶ 190-200; Appendix 2 (chart of state consumer protection claims and grounds for dismissal). The Eighth Claim for Relief seeks recovery for unjust enrichment without reference to any particular state laws. SAC at ¶¶ 283-286; Appendix 3 (chart of unjust enrichment claim and grounds for dismissal).

In the remaining counts, Star was the target of the exclusionary conduct alleged against Defendants McWane and Sigma, and hence no claims are asserted against Star in those other counts.

Star's motion to dismiss addresses only Counts 3, 4, and 8.

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[2] No claims for injunctive relief are asserted against Star; however, the prayer for relief erroneously requests an injunction against all "Defendants." SAC at p. 47. Because no claim seeks injunctive relief against Star, any request for relief for such an injunction against Star should be stricken from the SAC and/or dismissed. *See, e.g., Soder v. Chenot*, No. 4:CV-06-1522, 2007 WL 4556670, at *6 (M.D. Pa. Dec. 20, 2007) (dismissing RICO claim where cover sheet and prayer requested relief under RICO statute, but complaint failed to allege any facts supporting that claim); *Nelson v. Pennsylvania*, 1997 WL 793060, at *1 (E.D. Pa. Dec. 9, 1997) (directing clerk to strike references to certain parties from the prayer where there were no allegations against them in the complaint); *see also Hartford Ins. Co. v. Corbett*, 2000 WL 892838, at *2 (E.D. Pa. June 30, 2000) ("[A] prayer for relief is not equivalent to an allegation").

[3] While Plaintiffs additionally cite to the Rhode Island consumer protection statute in their Fourth Claim for Relief, the proposed class definition does not include the state of Rhode Island. *Compare* SAC at ¶ 132 to ¶ 199. Therefore, any claims involving Rhode Island should be dismissed. Regardless, there are independent grounds for dismissing the Rhode Island consumer protection claim with prejudice. *See* Appendix 2.

ARGUMENT & AUTHORITIES[4]

I. Plaintiffs have failed once again to allege facts demonstrating the standing or antitrust impact necessary to bring their claims.

A. Six Named Plaintiffs have no standing for any claim against Star pursuant to the Court's March 18, 2013 Order.

In its March 18, 2013 Opinion, the Court set forth the legal principles that require a showing of "individual injury" to proceed with indirect purchaser claims, regardless of whether there are class action allegations. Slip. Op. at 7, citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008). The Court explained that Plaintiffs must allege that they "actually purchased DIPF during the time periods relevant [to the claims at issue]." Slip. Op. at 9. Therefore, for purposes of stating a claim against Star, Plaintiffs must allege that they purchased non-domestic DIPF that originated from at least one Defendant during the January 2008-May 2009 time period.

Six of the Named Plaintiffs did not do so, and, therefore, they fail to allege the individualized injury necessary to show standing or antitrust impact for any of the claims in Counts 3, 4, or 8:

- Waterline Industries Corporation (New Hampshire) alleges that it indirectly purchased DIPF in 2008 and 2009, but fails to allege that it purchased DIPF that originated from any Defendant. SAC at ¶ 16.

- The City of Blair (Nebraska) alleges only that it "indirectly purchased DIPF as part of water systems project contracts in 2011 and 2012." SAC at ¶ 27. No purchases in 2008 or 2009 are alleged.

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[4] Star agrees with and incorporates by reference as if set forth herein the standards of review for this motion set forth in the Other Defendants' Motion at Section III.

- The Village of Woodridge (New York) alleges only that it indirectly purchased DIPF as part of water systems project contracts in 2010 and 2011. SAC at ¶ 38. No purchases in 2008 or 2009 are alleged.

- The Town of Fallsburg (New York) alleges only purchases of domestic DIPF between 2010 and 2011. SAC at ¶ 42. No purchases in 2008 or 2009 are alleged.

- Water District No. 1 of Johnson County (Kansas) alleges only purchases of *domestic* DIPF from April 2008 through December 2009. SAC at ¶ 40. No purchases of imported DIPF—the subject of the alleged 2008-2009 conspiracy—are alleged.

- The City of Fargo (North Dakota) alleges that "[b]etween 2008 and the present, Fargo indirectly purchased DIPF that was originally manufactured by one or more of the [d]efendants as part of many water systems project contracts." SAC at ¶ 33. But the City of Fargo does not allege that it in fact purchased DIPF during the alleged 2008-2009 conspiracy period.[5]

Therefore, Counts 3, 4, and 8 against Star should be dismissed as to these six Plaintiffs. These claims should be dismissed with prejudice, as Plaintiffs have already been given a chance to re-plead and failed to heed this Court's instructions on the allegations necessary to support standing. Slip. Op. at 8-10. Further, because dismissing these Named Plaintiffs eliminates the

[5] The Affidavit of Mike Miller, Esq., which Plaintiffs submitted as an exhibit to the SAC, states that Plaintiff City of Fargo ("Fargo") needs third party discovery to provide additional information about its DIPF purchases. But Fargo need only to plead "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary" elements of its claims. *See Phillips v. Cnty. Of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007)). Fargo has failed to plead even one purchase of Star DIPF in the relevant time period, and fails to explain why it would not have *any* information in its own files that would reveal the manufacturer of a component purchased for placement in its own water systems on which it solicited and accepted bids. Thus, Fargo essentially is asking the Court to permit expensive and time-consuming discovery to find out if it even has any claims against Star.

only Named Plaintiff for the states of New Hampshire, Kansas, and North Dakota, all claims asserted under those state laws also should be dismissed because no other Plaintiffs have standing to assert those claims, as explained below. *See* Appendix 1, column 1.

B. Plaintiffs have no standing to assert a claim in a state where no Named Plaintiff resides or alleges injury to itself.

In the Third, Fourth, and Eighth Claim for Relief, Plaintiffs seek to recover under the laws of a number of states where no Named Plaintiff resides or alleges injury to itself. As set forth more fully and supported by a great weight of authority in the Other Defendants' Motion at Section IV.B, courts routinely hold that indirect purchaser plaintiffs do not have standing to sue under the laws of states where they do not reside, unless they specifically allege injury in those states outside of their home states. *See, e.g., In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042, 2013 WL 1431756, at *5 (E.D. Mich. Apr. 9, 2013); *In re Magnesium Oxide Antitrust Litig.*, No. 10-5943 (DRD), 2011 WL 5008090, at *10 (D.N.J. Oct. 20, 2011); *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 154-56 (E.D. Pa. 2009); *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 657-58 (E.D. Mich. 2011); *In re Terazosin Hydrochloride Antitrust Litig.*, 160 F. Supp. 2d 1365, 1371-72 (S.D. Fla. 2001); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1124-25 (N.D. Cal. 2008) (all dismissing indirect purchaser plaintiffs' claims under state laws where no named plaintiff resided).

As shown in column 3 of Appendices 1 and 2, this is a ground for dismissal with prejudice of all but seven state antitrust law claims in Count 3 and all but four state consumer protection law claims in Count 4 of the SAC.

C. Plaintiffs have no standing to assert an antitrust claim where the DIPF product was not purchased separately.

In the Third, Fourth, and Eighth Claim for Relief, Plaintiffs seek to recover for purchases by the Named Plaintiffs of DIPF, not as a separate product purchase, but as part of a water systems project for which DIPF was just one small component. Plaintiffs have failed to allege facts showing the effect of any alleged conduct in the DIPF market on the price of such larger systems. As set forth more fully and supported by a great weight of authority in the Other Defendants' Motion at Section IV.E, such a purchase is not sufficient for antitrust standing, both: (1) where there are not facts alleged sufficient to show a "more than a minimal foreseeable effect on the price of products" containing DIPF in any state and (2) under the U.S. Supreme Court's decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters* ("*AGC*"), 459 U.S. 519, 545 (1983), a decision that is followed by 21 of the states for which Plaintiffs have alleged a state law antitrust violation.

Following the standing test set forth by the United States Supreme Court regarding whether a defendant's alleged antitrust violation proximately caused an injury, the Court in *In re Magnesium Oxide Antitrust Litigation* dismissed indirect purchasers claims based upon purchases of a product containing only a small percentage of the allegedly price-fixed material as a component. No. 10-5943 (DRD), 2012 WL 1150123, at *9-10 (D.N.J. Apr. 5, 2012) (citing *Blue Shield of Va. v. McCready*, 457 U.S. 465, 478 (1982)). "While a small percentage of a price-fixed ingredient in a product may not be fatal to a product purchaser's standing to bring antitrust claims, there must be a showing that a price increase in that ingredient has a significant foreseeable effect on the price of the purchased product." *Id.* at *9. There has been no such showing by Plaintiffs. In fact, they admit the opposite—that "DIPF are a relatively small portion of the cost of materials of a typical waterworks project[.]" SAC at ¶ 116.

Additionally, in *AGC*, the United States Supreme Court identified five factors that courts are to weigh to determine whether a plaintiff is a proper party to bring a private antitrust action: (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation. Courts applying the AGC test have held that indirect purchasers of a larger product merely containing an allegedly price-fixed component do not have standing. The AGC test applies in 21 states relevant to this suit.[6]

Therefore, any claims based upon instances where a purchase of DIPF was not separate, but was part of a water systems project, must be dismissed for all states under the first theory and for all states except Minnesota and North Carolina under the second theory. *See* Appendix 1, column 2 (summarizing relevant authority).

II. Plaintiffs have failed to state a claim for unjust enrichment.[7]

Plaintiffs' Eighth Claim for Relief asserts "Unjust Enrichment" based upon three conclusory paragraphs which fail to identify any specific state or law applicable to any such claim. As set forth more fully and supported by a great weight of authority in the Other Defendants' Motion at Section IV.D, this vague and conclusory pleading is insufficient to support a claim for unjust enrichment. *See, e.g., In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042, 2013 WL 1431756, at *23 (E.D. Mich. Apr. 9, 2013); *In re Wellbutrin XL*

[6] *See generally* Appendix 1, column 2, setting forth the states that follow AGC and the relevant authorities.

[7] *See generally* Appendix 3, setting forth the grounds for dismissal and relevant authorities for the unjust enrichment claims against Star (Count 8).

Antitrust Litig., 260 F.R.D. 143, 167 (E.D. Pa. 2009); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 910 (N.D. Cal. 2008) (all dismissing unjust enrichment claims for failure to specify particular state laws); Appendix 3, column 2.

Further, Plaintiffs' unjust enrichment claim should be dismissed with prejudice against Star because it is not possible for Plaintiffs to sufficiently plead any such claim against Star. The unjust enrichment allegations are based on the idea that a Defendant which sold product to a Plaintiff and was unjustly enriched through receipt of profits on sales of DIPF from that Plaintiff should disgorge those profits. The only time period during which Star is alleged to have participated in any wrongdoing is from January 2008 through May 2009; therefore only purchases by a Plaintiff of Star DIPF product during that time period would support a claim for unjust enrichment against Star. However, not a single Plaintiff alleges any purchase of Star DIPF product during that time period. *See* SAC at ¶¶ 15-42 (only alleged purchases of Star product are in 2010 or 2011). Therefore, no claim for unjust enrichment against Star can be stated. *See* Appendix 3, column 1.

There are various other reasons that an unjust enrichment claim would fail under the laws of many of the states for which Plaintiffs seek to represent a class. These reasons include: (1) state law requires a benefit to be directly conferred from a plaintiff to a defendant, a requirement that cannot be satisfied by an indirect purchaser; (2) state law precludes an unjust enrichment claim where there is an adequate remedy at law; (3) state law requires allegations of exhaustion of remedies, which has not been pled by Plaintiffs; and (4) state law bars indirect purchaser actions, and unjust enrichment cannot be used as an end-run to pursue relief otherwise not available. *In re Flonase Antitrust Litig.*, 692 F. Supp. 2d 524, 542 (E.D. Pa. 2010) ("[a]llowing indirect purchasers to recover and recoup a benefit from the defendant under an unjust

enrichment theory would circumvent the policy choice of Illinois Brick"). The state laws applicable to these arguments, and the relevant authority, are summarized in Appendix 3, columns 4-7.

For these reasons, Count 8 of the Second Amended Complaint should be dismissed in its entirety against Star, with prejudice.

III. Plaintiffs have also failed to state a claim for relief for the antitrust laws of various states, including four of their seven home states. [8]

Plaintiffs' Third Claim for Relief asserts violations of the antitrust laws of 22 states and the District of Columbia. As previously discussed, after consideration of the standing issues, only one state claim remains—North Carolina. A claim under the North Carolina state antitrust law is barred on another ground—the state statute requires allegations of in-state conduct or effects. *See In re Magnesium Oxide Antitrust Litig.*, 2011 WL 5008090, at *8 n.10 (D.N.J. Oct. 20, 2011) (citing N.C. Gen. Stat. § 75-1 and holding that indirect purchaser plaintiffs lacked standing to assert antitrust claims under North Carolina state law because plaintiffs were required to show that conduct occurred in-state or effects were felt in-state). There is no such allegations in the SAC. None of the Defendants is based in North Carolina, and no specific actions were pled to have take place in North Carolina or to have been directed specifically at North Carolina. *See, e.g., In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042, 2013 WL 1431756, at *19 (E.D. Mich. Apr. 9, 2013) (dismissing North Carolina claim where there were no facts to support a "substantial in-state injury" as opposed to "merely an incidental in-state injury"). Instead, the SAC alleges a nationwide conspiracy with Defendants being present in and

[8] *See generally* Appendix 1, setting forth the grounds for dismissal and relevant authorities for the state antitrust claims against Star (Count 3).

taking action in New Jersey, Alabama, and Texas (three states whose laws are not alleged to have been violated).

The lack of allegations supporting either in-state conduct or a substantial effect on intrastate commerce also supports the dismissal of claims for Plaintiffs' home states of Kansas, Michigan, and New York, as well as additional states. *See* Appendix 1, column 4 (summarizing relevant authority) and Other Defendants' Motion at Section IV.B.

Further, state laws requiring notice to the state attorney general to proceed also bar claims from additional states. *See* Appendix 1, column 5 (summarizing relevant authority).

For all these reasons, Count 3 of the Second Amended Complaint should be dismissed in its entirety against Star, with prejudice.

IV. Plaintiffs have failed to state a claim for relief for the consumer protection laws of various states, including three of their four home states. [9]

Plaintiffs' Fourth Claim for Relief asserts violations of the antitrust laws of 11 states. As previously discussed, after consideration of the standing issues, only two state claims remain—Florida and North Carolina.

A claim under North Carolina's consumer protection law is barred because there are no allegations in the SAC supporting a "substantial in-state effect" on North Carolina trade or commerce from Defendants' actions, as required. *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 the Defendants' acts have had a substantial in-state effect on North Carolina trade or commerce").

[9] *See* Appendix 2, setting forth the grounds for dismissal and relevant authorities for the consumer protection claims against Star (Count 4).

The lack of allegations supporting either in-state conduct or a substantial effect on intrastate commerce also support the dismissal of claims for Plaintiffs' home state of New Hampshire, as well as additional states. *See* Appendix 2, column 6 (summarizing relevant authority) and Other Defendants' Motion at Section IV.C.

The Florida state law claim is also barred because the relevant deceptive practices consumer protection law requires Plaintiffs' pleading to adequately allege misrepresentations which comply with Rule 9(b). *Wrestleunion, LLC v. Live Nation Television Holdings, Inc.*, No. 8:07-cv-2093-JDW-MSS, 2008 WL 3048859, at *3 (M.D. Fla. Aug. 4, 2008) (dismissing Florida DUTPA claim for failing to comply with Rule 9(b)); *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 665 (E.D. Mich. 2011) (dismissing indirect purchaser claims under FDUTPA for failure to comply with Rule 9(b) by failing to identify any public statements with particularity, attribute them to any particular defendant, or allege how any representation was deceptive). The SAC purports to be based on such conduct, stating "Defendants engaged in unfair competition or unfair, unconscionable, *deceptive, or fraudulent acts or practices* with respect to the sale of DIPF." SAC at ¶ 188. Yet the SAC does not comply with Rule 9(b)—it fails to identify any particular statements by any particular defendant(s) and fails to explain how any statements by defendants deceived any plaintiff(s).

Rule 9(b) also applies in similar circumstances to the state consumer protection laws of Arkansas, California, Hawaii, Massachusetts, New Hampshire, New Mexico, and North Carolina, and supports the dismissal of those claims. *See* Appendix 2, column 2 (summarizing relevant authority).

Further, state laws requiring consumer protection claims to be based upon the purchase of goods for personal or household use or barring indirect purchaser actions also bar claims from additional states. *See* Appendix 3, columns 4 and 5 (summarizing relevant authority).

For all these reasons, Count 4 of the Second Amended Complaint should be dismissed in its entirety against Star, with prejudice.

CONCLUSION

For the many and overlapping reasons stated above, and those set forth as to Counts 3, 4, and 8 in Defendants McWane, Inc. and Sigma Corporation's Motion to Dismiss the Second Amended Complaint, Star respectfully requests this Court to dismiss Counts 3, 4, and 8 of the Second Amended Complaint against Star pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

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Respectfully submitted,

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