IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON VICINAGE

IN RE DUCTILE IRON PIPE FITTINGS ("DIPF") INDIRECT PURCHASER ANTITRUST LITIGATION	Civ. No. 12-169 (AET) (LHG) **RETURN DATE: September 3, 2013** **ORAL ARGUMENT REQUESTED**
STATE OF INDIANA, by its Attorney General Greg Zoeller, Plaintiff, v. McWANE INC., SIGMA CORPORATION, and STAR PIPE PRODUCTS, LTD., Defendants.	Civ. No. 12-6667 (AET) (LHG)

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

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I. INTRODUCTION.

Despite clear instructions to the contrary, plaintiffs doggedly have pursued the panoply of ill-conceived and boilerplate claims asserted in their dismissed complaint. Although they contend that they "heeded the Court's words regarding the necessary specificity of each claim for relief" (Opp. Br. at 1), their protests ring hollow. Not only have they failed to cure the ills resulting in the Court's March 18, 2013 opinion and order dismissing their prior claims for failure to allege antitrust impact, they ignored the Court's direction to address the additional pleading deficiencies in respect of which the Court reserved decision. (Slip Op. at 10.) Plaintiffs also overlook binding and overwhelming precedent in this Circuit that is fatal to many of their claims. Accordingly, defendants McWane and SIGMA ("defendants") again respectfully submit that the complaint should be dismissed as to all but three of the plaintiffs and three of the state statutory claims.

II. ARGUMENT.

A. Three plaintiffs have not alleged facts that, if proven true, would entitle them to relief.

In their quixotic campaign to include as many named plaintiffs as possible, plaintiffs include three -- Township of Fallsburg ("Fallsburg"), City of Blair ("Blair"), and City of Fargo ("Fargo") -- that admittedly have no basis to assert that they were "actually injured by Defendants' conduct." (Slip Op.

at 8.) These plaintiffs and their corresponding claims should be dismissed, again.

Plaintiffs admit that (i) Fallsburg purchased only from defendant Star Pipe Products, Inc. and then only after the alleged conspiracy among McWane, SIGMA, and Star ended, and (ii) Blair only purchased DIPF after that alleged conspiracy ended and it does not know from what company -- a defendant or another company -- Blair purchased DIPF. (Opp. Br. at 9.) Yet, plaintiffs contend that Fallsburg and Blair have alleged antitrust impact based on "umbrella standing," that is, standing for purchases they made from non-conspirators (i.e., non-defendants). (Id. at 34.) In doing so, they rely on In re Uranium Antitrust Litigation, 552 F.Supp. 518 (N.D. Ill. 1982). (Ibid.) That reliance is misplaced: that decision specifically refused to follow Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979), which rejected "umbrella standing." Uranium Antitrust, supra, 552 F.Supp. at 524. Plainly said, there is no "umbrella standing" in this Circuit. Fallsburg and Blair, and their corresponding claims under New York and Nebraska law, should be dismissed.

As to Fargo, plaintiffs advance solely the naked assertion that they "have plausibly alleged" purchases made by Fargo. (Opp. Br. at 8.) Their choice, however, is stark: Fargo either did or did not purchase DIPF manufactured or

imported by defendants during the proper time period. Rank speculation cannot suffice. (Defs. Mem. at 12-13.) More to the point, "the plausibility standard has been explained specifically as not preventing a party from 'pleading facts alleged upon information and belief' where the facts are peculiarly within the possession and control of the defendant." Marketvision/Gateway Research, Inc. v. Priority Pay Payroll, LLC, No. 10-1537, 2011 WL 1640459, at *6 (D.N.J. May 2, 2011) (emphasis added) (quoting Arista Records, LLC v. Doe, 604 F.3d 110, 120 (2d Cir. 2010)). Fargo's speculation that it may have been overcharged cannot establish antitrust impact. Lacking any credible allegations of purchases within plaintiffs' knowledge, Fargo's dismissal and dismissal of its claims under North Dakota law must follow.[1]

B. Plaintiffs have not alleged facts supporting their claim for injunctive relief under federal law.

Plaintiffs' injunctive relief claims fare no better. In response to defendants' argument that plaintiffs have not included any allegations that plausibly establish an actual and imminent threat, City of Los Angeles v. Lyons, 461 U.S. 95, 103, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675, 684 (1983), plaintiffs

[1] To the extent plaintiffs contend that these three entities have standing to assert injunctive relief claims against McWane and SIGMA, that contention fails as well. These entities have failed to sufficiently allege any purchases from McWane or SIGMA on which to base such a claim.

point only to their bare allegations that the conduct is "continuing to the present." (Opp. Br. at 39.) Yet, none of plaintiffs' purported facts show that any complained-of conduct in fact is continuing or imminent. Without stubborn but necessary facts -- dates and particular acts -- showing the likelihood of ongoing or imminent harm, plaintiffs cannot state a claim for injunctive relief.[2]

Plaintiffs' reliance on In re Warfarin Sodium Antitrust Litigation, 214 F.3d 395 (3d Cir. 2000), highlights their desperation. (Opp. Br. at 38.) That case turns on the issue of standing. Id. at 317 ("The only issue relevant to this appeal is the District Court's decision that the class plaintiffs lack standing to seek injunctive relief under section 16 of the Clayton Act."). Defendants have not yet raised whether the indirect purchasers have standing to seek injunctive relief; pointedly, defendants question whether, as a matter of law, such claims are properly supported.

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[2] See In re Plavix Indirect Purchaser Antitrust Litig., No. 06-cv-226, 2011 WL 335034, at *4 (S.D. Ohio Jan. 31, 2011) (stating that "[p]laintiffs provide no factual basis for their claims that there is any kind of threatened violation on the part of defendants"); In re Nifedipine Antitrust Litig., 335 F. Supp. 2d 6, 17-18 (D.D.C. 2004) (dismissing injunctive relief claim where no factual basis supported claim that defendants continued to act unlawfully after entry of consent order).

Common sense explains plaintiffs' failure. Two of the three alleged wrongdoers -- SIGMA and Star -- have entered into 30-year consent decrees barring them from engaging in broadly defined pricing action and unlawful communications, conspiracies, agreements, or understandings with competitors; the third -- McWane -- is defending the same allegations in administrative proceedings before the FTC. (Compl. ¶¶ 82-83.) In such circumstances, courts routinely reject transparent attempts to gild the lily and readily dismiss claims for injunctive relief. (Def. Mem. at 36-37 (citing cases).)

C. Plaintiffs' unjust enrichment claim should be dismissed.

Plaintiffs continue to ignore the fundamental deficiency in their unjust enrichment claims: nowhere in their complaint do they identify any state under whose laws their unjust enrichment claims arise. While pretending that they have identified the states through some ill-defined "incorporation by reference" (Opp. Br. at 36; Compl. ¶ 283), plaintiffs' contention is belied by their own complaint. (Compl. ¶¶ 283-86.) In fact, they concede that they could have "more clearly state[d] the laws under which they are bringing the unjust enrichment claims." (Opp. Br. at 36 n.16.) In reply, defendants then ask: if not now, when? Plaintiffs now have had three chances to plead this claim with specificity, and they

have failed to do so even after the Court's admonishment to "address any potential pleading deficiencies." (Slip Op. at 10.) The unjust enrichment claim should be dismissed outright and with prejudice. See Wellbutrin, supra, 260 F.R.D. at 167 (dismissing without leave to amend unjust enrichment claim for failure to specify particular state law).

Plaintiffs also incorrectly claim that "there are no material differences in the law of unjust enrichment from state to state." (Opp. Br. at 35.) That notion -- that a common law claim, such as unjust enrichment, can be evaluated without reference to state law -- defies logic or reason. Making matters worse, nowhere do plaintiffs even state what the supposed "universal" elements of unjust enrichment are.

In contrast, the vast majority of courts that have addressed unjust enrichment claims brought by indirect purchasers have recognized that "[t]he elements necessary to allege unjust enrichment vary state by state," In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 544 (E.D. Pa. 2010) ("Flonase II"), and that indirect purchasers must identify the state or states under which they were making the claim. In re Flonase Antitrust Litig., 610 F. Supp. 2d 409, 419 (E.D. Pa. 2009) ("Flonase I"). That is so because many states, such as Florida and North Carolina, require that the plaintiff confer a "direct benefit" on the defendant, something that indirect

purchasers by definition cannot do. Flonase II, 692 F. Supp. 2d at 544-46. Indeed, even the cases relied on by plaintiffs for other reasons echo the fundamental principle that "IPPs' failure to identify the unjust enrichment laws of any particular jurisdiction subjects the causes of action to dismissal." In re Automotive Parts Antitrust Litig., No. 12-md-02311, 2013 U.S. Dist. LEXIS 80338 (E.D. Mich. June 6, 2013) (Opp. Br. at 26); see also In re Chocolate Confectionary Antitrust Litig., 602 F.Supp. 2d 538, 587 (M.D.Pa. 2009) (dismissing claim). (Opp. Br. at 27).

D. Plaintiffs do not have standing to assert claims under the laws of states where they do not reside.

Plaintiffs allege that they are residents of eight states. (Compl. ¶¶ 15-41.) Tellingly, they do not argue that they allege any actual or inferred injury in respect of the remaining 21 jurisdictions under whose laws they also expansively claim damages.[3] Without pleading injury for each of those claims, plaintiffs have no standing.

Plaintiffs' response is unpersuasive for several reasons. First, they contend that, as long as they have standing to assert claims under their home state's laws, they

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[3] Plaintiffs tacitly admit this point: their recitation of the claims that they contend are alleged properly notably omits any reference to any claims other than those under the laws of their home states. (Opp. Br. at 5-9.)

ipso facto have standing to assert claims under the laws of every state that permits indirect purchasers to sue. (Opp. Br. at 22-23.) That theory categorically has been rejected in this Circuit because "'standing is not dispensed in gross.'" In re Schering Plough Corp., 678 F.3d 235, 244 (3d Cir. 2012) (quoting Lewis v. Casey, 518 U.S. 343, 358 n.6, 116 S. Ct. 2174, 2193 n.6, 135 L. Ed. 2d 606, 622 n.6 (1996), and rejecting similar argument made by named plaintiffs in putative class action). Schering Plough plainly held that "a plaintiff who raises multiple causes of action 'must demonstrate standing for each claim he seeks to press[,]'" id. at 244 (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct. 1854, 1858, 164 L. Ed. 2d 589, 609 (2006)); and that a plaintiff cannot "defend[] its standing to sue . . . on the basis of . . . purchases made by [absent] [p]laintiffs[.]" Id. at 245, 247.

Second, the Court should reject plaintiffs' invitation to defer the inquiry into plaintiffs' standing until class certification. It goes without saying that "[a]n analysis into the legal viability of asserted claims is properly considered through a motion to dismiss under Rule 12(b) [and] not as part of a Rule 23 certification process." Sullivan v. DB Investments, Inc., 667 F.3d 273, 305 (3d Cir. 2011)

The logic undergirding this point is made patent in Wellbutrin, supra, 260 F.R.D. at 154: "Courts do not wait for

potentially dispositive issues to arise at later stages of litigation solely in an effort to postpone and avoid constitutional adjudication." In particular, courts have endorsed the following reasoning:

> The alternative proposed by the plaintiffs would allow named plaintiffs in a proposed class action, with no injuries in relation to the laws of certain states referenced in their complaint, to embark on lengthy class discovery with respect to injuries in potentially every state in the Union. At the conclusion of discovery, the plaintiffs would apply for class certification, proposing to represent the claims of parties whose injuries and modes of redress they would not share. That would present the precise problem that the limitations of standing seek to avoid. The Court will not indulge in the prolonged and expensive implications of the plaintiffs' position only to be faced with the same problem months down the road.
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> [Id. at 155; In re Refrigerant Compressors Antitrust Litig., No. 2:09-md-02042, 2012 WL 2917365, at *6 (E.D. Mich. July 17, 2012) ("Refrigerant Compressors I") (quoting this language); In re Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 655 (E.D. Mich. 2011) (same).]

Rather than confront this precedent, plaintiffs rely on Chocolate Confectionary, supra, 602 F. Supp. 2d at 579, and other cases that either (a) predate Schering Plough and Sullivan or (b) misapply Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 2307, 144 L. Ed. 2d 715 (1999), and Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 612, 117 S. Ct. 2231,

2244, 138 L. Ed. 2d 689 (1997). According to plaintiffs, Ortiz and Amchem "authorize" district courts "to evaluate class issues before standing concerns if the latter are 'logically antecedent' to the former." (Opp. Br. at 27.) Even setting aside the cited Third Circuit precedent to the contrary, plaintiffs are simply wrong. As explained by courts both within and without this Circuit,[4] neither Ortiz nor Amchem authorizes a court to defer standing issues until it considers class certification. Those authorities reason that at the heart of the "logically antecedent" language in Ortiz and Amchem lies a jurisprudential obligation: that a court simultaneously facing both class certification and Article III standing issues should consider the Rule 23 issues before standing only when the Rule

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[4] See, e.g., Wellbutrin, supra, 260 F.R.D. at 157; Flonase I, supra, 610 F. Supp. 2d at 413-14; see also Refrigerant Compressors I, supra, at *7 (dismissing claims under laws of 11 states where no named plaintiff plausibly alleged injury); In re Packaged Ice Antitrust Litig., supra, 779 F. Supp. 2d at 657 (collecting cases granting dismissal because "named plaintiffs lack standing to assert claims under the laws of the states in which they do not reside or in which they suffered no injury"); In re Checking Account Overdraft Antitrust Litig., 694 F. Supp. 2d 1302, 1324-25 (S.D. Fla. 2010) (dismissing state law claims where no representative plaintiff resides); In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1164 (N.D. Cal. 2009) ("Where ... a representative plaintiff is lacking for a particular state, all claims based on that state's laws are subject to dismissal."); In re Potash Antitrust Litig., 667 F. Supp. 2d 907, 923 (N.D. Ill. 2009) (same); Temple v. Circuit City Stores, Inc., No. 06 CV 5303 (JG), 2007 WL 2790154, at *8-9 (E.D.N.Y. Sept. 25, 2007) (same).

23 issues are dispositive in favor of the same party asserting the constitutional issues. The underlying rationale is salutary: "a court need not reach difficult questions of jurisdiction when the case can be resolved on some other ground in favor of the same party." Georgine v. Amchem Prods., Inc., 83 F.3d 610, 623 (3d Cir. 1996), aff'd, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). Postponing challenges to standing beyond the pleading stage is not consistent with this rationale and needlessly imposes lengthy and expensive class certification discovery on antitrust defendants, which is one of the inefficiencies that courts specifically are instructed must be avoided at the pleading stage. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558, 127 S. Ct. 1955, 1966-67, 167 L. Ed. 2d 929, 941-42 (2007).

E. Supreme Court precedent requires dismissal of state law claims based on purchases of DIPF as a part of a waterworks project

Plaintiffs' necessary but damning admission that "DIPF are a relatively small portion of the cost of materials of a typical waterworks project" dooms much of their claim. (Compl. ¶ 116; Indiana Compl. ¶ 39.) Because of that admission, both the standing requirements of Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) ("AGC"), and the Article III standing requirements in Blue Shield of Va. v.

McCready, 457 U.S. 465, 476-77, 102 S. Ct. 2540, 2546-47, 73 L. Ed. 2d 149, 159-60 (1982), require dismissal of plaintiffs' claims based on DIPF as a component of waterworks projects.

Rather than dispute defendants' state-by-state analysis of whether AGC applies to their state law claims (Def. Mem. Appx. II), or proffer their own analysis, plaintiffs baldly but incorrectly assert that "AGC does not apply to state indirect purchaser actions absent a clear directive from the states' legislatures or highest courts – even in the face of state harmonization provisions or reference to federal antitrust precedents." (Opp. Br. at 31.)[5] In the absence of a controlling precedent from a state's highest court, federal courts must predict how the state court would rule based on "all available legal sources," including lower court and federal decisions and state legislation. Cohen v. Chase Bank, N.A., 679 F. Supp. 2d 582, 590-91 (D.N.J. 2010) (citations omitted); see also Lomando v. United States, 667 F.3d 363, 385 (3d Cir. 2011). When doing so in like cases, courts have looked at state harmonization

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[5] In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1153 (N.D. Cal. 2009), and the decisions citing to it are distinguishable. In that case, the defendants failed to analyze AGC's applicability on a state-by-state basis. Moreover, that court concluded that AGC's requirements had been satisfied. Ibid. Decisions that "simply say that even if AGC is applicable it has been satisfied" do not support the proposition that AGC is inapplicable. Sahagian v. Genera Corp., 2009 U.S. LEXIS 132583, at *17 (C.D. Cal. July 6, 2009).

provisions and lower court decisions. See, e.g., In re Refrigerant Compressors Antitrust Litig., No. 2:09-md-02042, 2013 WL 1431756, at *10 (E.D. Mich. Apr. 9, 2013) ("Refrigerant Compressors II"). Appendix II to defendants' moving memorandum makes clear that all but two of the relevant jurisdictions here (Minnesota and North Carolina) apply the AGC factors.

Plaintiffs' overarching argument -- that this Court should not apply the AGC test or other restrictions to claims asserted under the antitrust laws of Illinois Brick repealer states -- lacks support. (Opp. Br. at 31 n.15; Indiana Opp. Br. at 10.) It conflates the direct-purchaser doctrine of Illinois Brick with the direct-injury doctrine of AGC, which doctrines are "analytically distinct." Int'l Bd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris Inc., 196 F.3d 818, 828 (7th Cir. 1999) (applying AGC test to Illinois Brick repealer state). Courts consistently have recognized that "the Illinois Brick doctrine is only one of several obstacles to [a plaintiff's] recovery on an antitrust claim." Ibid. When every single Illinois Brick repealer was passed, one of those obstacles was "antitrust standing," a concept akin to proximate cause. AGC, supra, 459 U.S. at 531-36, 103 S. Ct. at 905-08, 74 L. Ed. 2d at 734-37 (analogizing antitrust standing to proximate cause). Illinois Brick did not alter the Supreme Court's

antitrust standing jurisprudence and, therefore, implicates nothing about standing or other limitations.[6]

The application of the AGC factors for DIPF bought as a part of a waterworks project is straightforward. (Def. Mem. at 31-33.) Plaintiffs instead only address portions of the test or assert irrelevancies. For instance, they fail to address the "causal connection" requirement and nowhere explain away their concession that DIPF was only a small part of any bid for a contract for a waterworks project. Instead, they either rely on authorities that do not address AGC or involve obviously dissimilar products (e.g., Warfarin, supra), or untethered statements nowhere supported by their complaint (e.g., "the cost of DIPF is traceable," Opp. Br. at 33).

Illinois Brick does not affect the application of McCready to plaintiffs' claims, as it sets forth Article III

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[6] This reasoning applies with equal force to the arguments set forth by plaintiff Indiana in its opposition. It relies on Indiana Code § 24-1-1-5.1 ("The attorney general may bring an action on behalf of the state or a political subdivision for injuries or damages sustained directly or indirectly[.]"). That section, however, was enacted after McCready and AGC, and it is clear that it was intended to do nothing more than to remove Illinois Brick's per se bar on indirect purchaser suits by the Attorney General. If the Indiana Legislature had intended to eliminate separate antitrust standing requirements, a clear statement aimed at repealing AGC would have been needed in light of the jurisprudence limiting Indiana's antitrust statute to the bounds of federal antitrust law. See Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 725 (7th Cir. 1979).

standing limitations on indirect purchaser actions. In re Magnesium Oxide Antitrust Litig., No. 10-5943 (DRD), 2012 WL 1150123 (D.N.J. Apr. 5, 2012) ("Magnesium Oxide II"). Where, as here, a product admittedly is "a relatively small portion of the cost of materials of" the overall product (Compl. ¶ 116; Indiana Compl. ¶ 39), the key consideration is whether plaintiffs sufficiently have alleged that the price increase "has a significant foreseeable effect on the price of the purchased product." Magnesium Oxide II, 2012 WL 1150123, at *9.[7] Here, nothing supports the notion that a price increase in DIPF could have had any significant foreseeable effect on the price of waterworks projects.

III. CONCLUSION.

For the foregoing authorities, arguments and reasons, together with those set forth in defendants' moving memorandum, defendants McWane and SIGMA respectfully request that the indirect purchasers' consolidated class action complaint be dismissed.

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[7] Cases where the allegedly price-fixed product was a large proportion of the finished product are distinguishable. See, e.g., In re Cathode Ray Tube (CRT) Antitrust Litig., 738 F. Supp. 2d 1011, 1024 (N.D. Cal. 2010) (applying AGC factors and noting allegations that CRTs accounted for approximately 60% of the cost of computer monitor manufacturing); In re Linerboard Antitrust Litig., 305 F.3d 145, 153 (3d Cir. 2002) ("[C]orrugated container prices are strongly influenced by linerboard prices.")

Respectfully submitted,

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DATED: August 14, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2013, a copy of the foregoing defendants' consolidated reply memorandum in support of their motion to dismiss the second amended class action complaint was filed electronically, and is available for viewing and downloading through the Court's CM/ECF System. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to any parties that are unable to accept electronic filing as indicated on the Notice of Electronic Filing.

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