IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: HYDROGEN PEROXIDE ANTITRUST LITIGATION	CIVIL ACTION NO. 05-666
This Document Relates To: INDIRECT PURCHASER ACTION	MDL DOCKET NO. 1682

MEMORANDUM

Dalzell, J. April 11, 2006

On January 31, 2005, European Union antitrust regulators charged eighteen global hydrogen peroxide manufacturers with price-fixing. On the heels of the European claims, the United States Department of Justice began a criminal investigation. About a month ago, this U.S. investigation led two manufacturers, both defendants in this litigation before us, to agree to plead guilty and pay over $72 million in criminal fines. See United States Department of Justice, Belgian and Dutch Companies Agree To Plead Guilty to Participating in Chemical Industry Price-Fixing Conspiracies (March 14, 2006), at http://www.usdoj.gov/atr/public/press_releases/2006/215056.htm.

Shortly after the Government investigations began, a buyer filed in this Court the first of thirty-three federal putative class actions. In the wake of that initial filing, the Judicial Panel on Multidistrict Litigation transferred every cognate federal action to us. See In re: Hydrogen Peroxide Antitrust Litig., 374 F. Supp. 2d 1345 (J.P.M.L. 2005). We

consolidated these cases and then divided them into two actions, one for direct purchasers,[1] the other for indirect purchasers. See Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

In the indirect purchaser action, plaintiffs assert antitrust claims under the laws of Arizona, California, Nebraska, Tennessee, and Vermont. See Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005). Before us are ten defendants' motions for a more definite statement and partially to dismiss the second consolidated amended class action complaint. These defendants urge us to: (1) dismiss or stay the California claims because they duplicate pre-existing claims in California Superior Court, see Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1979); (2) require plaintiffs to file a new pleading that identifies the specific hydrogen peroxide products plaintiffs bought and the seller of them, see Fed. R. Civ. P. 12(e); and (3) dismiss plaintiffs' treble damages claims under Nebraska and Tennessee law. Aside from the third request, which is unopposed, we shall deny defendants' motions.

[1] Last November, we denied defendants' motion to dismiss the direct purchaser action. See In re: Hydrogen Peroxide Antitrust Litig., 401 F. Supp. 2d 451 (E.D. Pa. 2005).

A. Factual and Procedural Background

On May 20, 2005, plaintiffs filed the first indirect purchaser action[2] in this Court. See Jimmy F. Hux v. Atofina Chemicals et al., C.A. No. 05-2392 (2005). More of these actions soon followed, and plaintiffs' counsel ultimately merged their claims into one consolidated amended class action complaint. Anticipating a motion to dismiss, on August 29, 2005 we ordered defendants first to serve a "Reservation of Grounds for Dismissal Memorandum" (the "Memorandum") on plaintiffs. This Memorandum would, in theory, apprise plaintiffs about any perceived deficiencies in the first complaint and enable them, if they

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[2] Indirect purchasers are individuals who allege that they have overpaid for a particular product as a result of a defendant's anticompetitive actions, but who did not purchase the allegedly affected product from the defendant. This happens most often when "a consumer (or other down-the-line purchaser) buys from an innocent intermediary who was overcharged due to its supplier's antitrust violation." 2 Phillip E. Areeda, Roger D. Blair, & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application § 346a, at 359 (2d ed. 2000). In that situation, the intermediary may sue the offender for damages, but the consumer, under Illinois Brick, may (except in extremely limited circumstances) sue only for injunctive relief. Id. Illinois Brick prompted as many as thirty-seven states to enact "Illinois Brick Repealer" statutes, which permit indirect purchasers to sue for treble damages under state law. See, e.g., Donald I. Baker, Federalism and Futility: Hitting Potholes on the Illinois Brick Road, Antitrust, Fall 2002, at 14; Jonathan T. Tomlin & Dale J. Giali, Federalism and the Indirect Purchaser Mess, 11 Geo. Mason L. Rev. 157, 161 (2002).

Under CAFA, plaintiffs attorneys must now bring most indirect purchaser class actions under state antitrust law in federal court. See, e.g., Bruce V. Spiva & Jonathan K. Tycko, Indirect Purchaser Litigation on Behalf of Consumers After CAFA, Antitrust, Fall 2005, at 12. As one commentator has remarked, this means that, "as a practical matter, state courts will rarely get to interpret their own state antitrust laws, particularly in indirect purchaser suits, because they are so often brought as class actions." Id.

concurred, to file a second, supplemented one.[3]

In their December 1, 2005 Memorandum, defendants, inter alia, asserted that: (1) plaintiffs' claims on behalf of purchasers in Minnesota and New York could not survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, and (2) "Plaintiffs fail to allege whether they actually purchased Hydrogen Peroxide as *manufactured and sold by Defendants*, or whether they purchased a different, diluted form of H_2O_2, or H_2O_2 (diluted or not) that had been repackaged or bundled with other non-H_2O_2 products for sale as a single product unit." Mem., at 9.

On January 9, 2006, plaintiffs filed a second consolidated amended class action complaint. This second complaint dropped claims on behalf of Minnesota and New York purchasers. Plaintiffs also clarified that they were suing only on behalf of those who "indirectly purchased hydrogen peroxide and its downstream products, sodium perborate or sodium percarbonate, as manufactured and sold by the Defendants. . . ." Second Consolidated Amended Class Action Compl. ("Compl."), Preamble (emphasis added).

In their second amended complaint, nine named plaintiffs[4] sued fifteen defendants[5] on behalf of themselves and

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[3] Under our Order, defendants' failure to identify a deficiency in the first complaint would have waived their right to attack that deficiency in a subsequent motion to dismiss.

[4] The named plaintiffs are: (1) Joelle Prochera (Arizona); (2) Colorfast Dye and Printhouse, Inc. (California); (3) Frank Gerenscer (California); (4) Bernard Lawrence Winery (California); (5) Terry Muzzey (Nebraska); (6) Melinda Owens (Tennessee); (7)

others similarly situated in Arizona, Nebraska, Tennessee, Vermont, and California.[6] Plaintiffs claim that from January 1, 1994 to the present, these defendants and others conspired to fix the price and restrict the output of hydrogen peroxide sold in the United States. Compl. ¶¶ 37-58. Plaintiffs claim that they indirectly purchased hydrogen peroxide during this period and, because of defendants' conspiracy, paid too much for it. Compl. ¶¶ 49-51.

1. The California Litigation

In February of 2005, about three months before Hux was

Elizabeth Armstrong (Vermont); (8) the City of Stockton (California); and (9) Orange County Sanitation District (California). See Compl. ¶¶ 3-11.

[5] Defendants fall into six groups:

(1) Atofina Chemicals, Inc., Arkema, Inc., TotalFinaElf S.A., and Total S.A. (the "Atofina Defendants");

(2) Solvay Interox, Inc., Solvay America, Inc., Solvay Chemicals, Inc., and Solvay S.A. (the "Solvay Defendants");

(3) Degussa Corporation and Degussa A.G. (the "Degussa Defendants");

(4) EKA Chemicals, Inc., Akzo Nobel, Inc., and Akzo Nobel Chemical International B.V. (the "Akzo Defendants");

(5) Kemira Chemicals, Inc. and Kemira Oyj (the "Kemira Defendants"); and

(6) FMC Corporation.

See Compl. ¶¶ 12-33; see also February 2, 2006 Order ¶ 2.

[6] Unlike the Arizona, Nebraska, Tennessee, and Vermont sub-classes, the California sub-class may be more further divided into private and public indirect purchasers. Compare Compl. ¶¶ 108-117 with Compl. ¶¶ 77-86.

filed, certain plaintiffs filed four putative indirect purchaser class actions in California Superior Court. Those plaintiffs have also sued here. At plaintiffs' request, the California Judicial Council consolidated these actions before Superior Court Judge Richard A. Kramer in San Francisco.[7]

The legal claims in Judge Kramer's proceeding duplicate the California claims asserted before us. In a February 1, 2006 case management conference, Judge Kramer had the parties address this overlap. William Parish, Esq. responded for plaintiffs. After conceding that "[t]he federal indirect action includes identical claims to the California indirect action," Def.s' Mem., Ex. A, at 5, Parish advised Judge Kramer that plaintiffs wished to litigate all California claims here: "[W]e would ask the Court in this proceeding simply stay this proceeding and allow the matters to proceed in conjunction with the direct actions now pending in Pennsylvania." Id.; see also Pl.s' Mem., at 11 ("[I]f the Court declines to abstain, plaintiffs will pursue their claims in the MDL proceeding and request that the state case, which remains in a preliminary posture, be stayed."). At the end of that conference, Judge Kramer decided to "allow [the parties] to get to the federal court, allow you to talk some more, decide what we're going to do." Def.s' Mem., Ex. A, at 8. No material later events have occurred before Judge Kramer.

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[7] As defendants note, Judge Kramer has extensive experience adjudicating complex cases. See Def.s' Mem., at 20 n.20.

2. The Instant Motions

On February 9, 2006, ten of this action's defendants filed a motion for a more definite statement and a partial motion to dismiss. These defendants ask us to: (1) compel plaintiffs to file a third complaint that would specify what products they bought and the seller of them; (2) dismiss, or, in the alternative, stay the California claims;[8] and (3) dismiss plaintiffs' claims under Nebraska and Tennessee law for treble damages. Aside from the third request, which is unopposed, see Pl.s' Resp., at 17, we shall deny the motions.

B. Legal Analysis

These motions require us to resolve two issues. First, we must decide under Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1979), whether to dismiss or stay our California claims out of deference to Judge Kramer's proceeding. Second, under Fed. R. Civ. P. 12(e), we must decide whether to require plaintiffs to file a third amended complaint that could provide information that might allow defendants to file a motion to dismiss for lack of standing.

1. Colorado River Abstention

It is well-settled that federal courts have a "virtually unflagging obligation . . . to exercise the

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[8] While the California public indirect purchasers ask us to abstain, the private ones take no position on this issue. See Pl.s' Resp., at 9, 17.

jurisdiction given them." Colorado River, 424 U.S. at 817. Despite the inefficiencies that may result, this principle is no less true in cases where there is parallel litigation in state court: "[T]he pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction. . . ." Id. (quoting McClellan v. Carland, 217 U.S. 268, 282 (1910)). While the Supreme Court in Colorado River nonetheless held that a district court may in certain circumstances defer to parallel state proceedings, it held that those circumstances must be "exceptional," and "[o]nly the clearest of justifications will warrant dismissal." Id. at 813, 819.

Colorado River requires us to take two steps. We must first determine whether the federal and state actions are indeed parallel. IFC Interconsult, AG v. Safeguard Int'l Partners, LLC, 438 F.3d 298, 306 (3d Cir. 2006). If they are, in the second step we must balance six factors set forth in Colorado River and Moses Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). IFC, 438 F.3d at 307 n.4.

a. Parallelism

For matters to be parallel, "there must be identities of parties, claims, and time." Id. at 306; see also Yang v. Tsui, 416 F.3d 199, 205 n.5 (3d Cir. 2005) ("[P]arallel cases involve the same parties and 'substantially identical' claims, raising 'nearly identical allegations and issues.'" (quoting

Timoney v. Upper Merion Twp., App. Nos. 02-2096, 02-2228, 66 Fed. Appx. 403, 405 (3d Cir. May 27, 2003)).

Here, both proceedings are parallel. The legal claims are, by plaintiffs' admission, "identical." Def.s' Mem., Ex. A, at 5. Because both proceedings are pending simultaneously, they share the identity of time. Last, the proceedings share many of the same parties, which is all the jurisprudence requires. See IFC, 438 F.3d at 306 ("We have never required complete identity of parties for abstention.").

b. Balancing

Once a court finds that the state and federal proceedings are parallel, it must consider:

> [1] which court first assumed jurisdiction over a relevant res, if any; [2] whether the federal court is inconvenient; [3] whether abstention would aid in avoiding piecemeal litigation; [4] which court first obtained jurisdiction; [5] whether federal or state law applies; and [6] whether the state action is sufficient to protect the federal plaintiff's rights.

IFC, 438 F.3d at 307 n.4 (citing Rycoline Prods., Inc. v. C & W Unlimited, 109 F.3d 883, 890 (3d Cir. 1997)). The balance is "heavily weighted in favor of the exercise of jurisdiction." Moses Cone, 460 U.S. at 16.

Because none of these factors compels abstention, let alone favors it, dismissing or staying this case would amount to an abuse of discretion. See Ryan v. Johnson, 115 F.3d 193, 200 (3d Cir. 1997) (citing "the heavy presumption the Supreme Court

has enunciated in favor of exercising federal jurisdiction" and reversing district court's Colorado River abstention); Spring City Corp. v. Am. Bldgs. Comp., 193 F.3d 165, 173 (3d Cir. 1999) (seeing no "exceptional circumstances" and reversing district court's Colorado River abstention); see also IFC, 438 F.3d at 307 (describing "the disfavor in which we hold [Colorado River] abstention" and affirming district court's refusal to stay case).

Three factors are neutral. Because neither court has asserted jurisdiction over any property, the first factor is neutral, as is the second, inconvenience. Regardless of where the California action proceeds, the defense would still have to litigate the Vermont, Tennessee, Nebraska, and Arizona claims here. The adequacy of the state action -- the sixth factor -- is also neutral. Only when the state forum would be inadequate does this factor come to play. See Ryan, 115 F.3d at 200.

Defendants claim that the third factor, avoiding piecemeal litigation, strongly supports abstention. They predicate this argument on a faulty assumption. Defendants assume that, if we exercise jurisdiction, plaintiffs will ask Judge Kramer to exercise it concurrently. But on page eleven of their Memorandum, plaintiffs advise, "[I]f the Court declines to abstain, plaintiffs will pursue their claims in the MDL proceeding and request that the state case, which remains in a preliminary posture, be stayed." Moreover, plaintiffs advised Judge Kramer that, if we retain jurisdiction, they would ask him to suspend it: "So we would ask the Court in this proceeding

simply stay this proceeding and allow the matters to proceed in conjunction with the direct actions now pending in Pennsylvania." Def.s' Mem., Ex. A, at 5.

Turning to the fourth factor -- which court first obtained jurisdiction -- it would appear, at first glance, that defendants have a stronger argument. Plaintiffs filed their action in California Superior Court, only later filing here. The Supreme Court, however, has cautioned not to apply this factor too mechanistically: "[P]riority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." Moses Cone, 460 U.S. at 22. Under this lens, our MDL proceeding is more advanced. In Judge Kramer's proceeding, unlike here, plaintiffs have not yet filed a consolidated amended class action complaint. Nor have plaintiffs there, unlike here, appointed interim counsel or begun discovery.

The remaining factor is whether state or federal law applies. This is nuanced, at least before CAFA. "As *Cone* made clear, while the presence of federal issues militates against abstention, the converse cannot be said; abstention cannot be justified merely because a case arises entirely under state law." Ryan, 115 F.3d at 199 (interpreting Moses Cone, 460 U.S. at 26). The indirect purchaser action involves no federal issues. Further, as Ryan emphasizes, that California law will ultimately govern our substantive inquiry has little, if any, bearing. This is particularly so now that Congress has put its thumb heavily on

the federal side of the scales in class actions like these.[9] Hence, this last factor, like all of the others, does not weigh in favor of abstention. CAFA itself weighs against it.

2. More Definite Statement

Defendants next argue that, under Fed. R. Civ. P. 12(e), we should require plaintiffs to file yet a third amended complaint that would identify the specific products plaintiffs bought and the seller of them. Defendants seek this information

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[9] The Senate Judiciary Committee Report on CAFA begins with its authors' conclusions about the shortcomings of state court class action litigation:

> By now, there should be little debate about the numerous problems with our current class action system. A mounting stack of evidence reviewed by the Committee demonstrates that abuses are undermining the rights of both plaintiffs and defendants. One key reason for these problems is that most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements.
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> To make matters worse, current law enables lawyers to "game" the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests. In this environment, consumers are the big losers: In too many cases, state court judges are readily approving class action settlements that offer little -- if any -- meaningful recovery to the class members and simply transfer money from corporations to class counsel.

S. Rep. 109-14, at 4 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 5-6.

for two reasons. First, under Nebraska, Vermont, Tennessee, Arizona, and California law, one may not sue for an antitrust violation if the buyer "did not purchase the product actually sold by defendants, or where plaintiffs were too remote in the chain of distribution." Def.s' Mem., at 9. Defendants surmise that this purchasing information may allow them to file a motion to dismiss for lack of standing. The second reason defendants seek this purchasing information is that they are allegedly unable to admit or deny that plaintiffs bought hydrogen peroxide "as manufactured and sold by the Defendants . . . ." See Compl. Preamble & ¶¶ 3-11.

Fed. R. Civ. P. 12(e) allows one to move for a more definite statement "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, . . ." Motions for more definite statements arise in "the rare case where because of the vagueness or ambiguity of the pleading the answering party will not be able to frame a responsive pleading." Schaedler v. Reading Eagle Publ'ns Inc., 370 F.2d 795, 798 (3d Cir. 1967). "Motions for a more definite statement are generally disfavored, and should [be granted only] if a pleading is unintelligible, making it virtually impossible for the opposing party to craft a responsive pleading." Synagro-WWT v. Rush Twp., 204 F. Supp. 2d 827, 849-50 (M.D. Pa. 2002) (quoting Sabugo-Reyes v. Travelers Indem. Co. of Illinois, C.A. No. 99-5755, 2000 WL 62627, at *3 (E.D. Pa. January 14, 2000)). This is because

> the theoretical overall scheme of the federal rules calls for relatively skeletal pleadings and places the burden of unearthing the underlying factual details on the discovery process, . . . [and] the permissive allowance of Rule 12(e) motions seeking detailed factual averments will shift the burden of fact elicitation from the discovery phase back to the pleadings, with a resulting delay in joinder of issue and resolution of the merits.

Charles Alan Wright & Arthur R. Miller, 5C Federal Practice and Procedure § 1376, at 322 (3d ed. 2004).

In the second amended complaint, plaintiffs allege that they "indirectly purchased hydrogen peroxide and its downstream products, sodium perborate or sodium percarbonate, as manufactured and sold by the Defendants . . . ." Compl., Preamble. Each plaintiff also alleges that it "indirectly purchased Hydrogen Peroxide . . . ." Compl. ¶¶ 3-11.

Defendants contend that these allegations are so ambiguous that it is impossible for them to "admit or deny that each Plaintiff indirectly purchased from Defendants a hydrogen peroxide product, let alone hydrogen peroxide 'as manufactured and sold by the Defendants.'" Def.s' Mem., at 11. Yet defendants overlook a third possibility. Under Rule 8(b), if a party "is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial." Defendants point to no reason why they cannot simply do that.

Defendants also claim that the information they seek may enable them to file a motion to dismiss for lack of standing.

It would be inappropriate now to require plaintiffs to file yet a third amended complaint with great particularity simply on the off chance that defendants might be able to unearth a dispositive threshold defense. This action already trails the direct purchaser action by months. It would be imprudent to delay it even longer just so defendants can sniff for Rule 12(b)(1) fodder. If there is a standing issue, defendants must find it in discovery. If they do, Rule 56 is at their service.

C. Conclusion

For these reasons, we shall deny defendants' motions as they pertain to Colorado River abstention and Rule 12(e). We shall grant the unopposed part of their partial motion to dismiss, however, and dismiss plaintiffs' treble-damage claims under Nebraska and Tennessee law.

BY THE COURT:

/s/ Stewart Dalzell, J.