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

MYLAN PHARMACEUTICALS, INC., ROCHESTER DRUG CO-OPERATIVE, INC., MEIJER, INC., MEIJER DISTRIBUTION, INC., and AMERICAN SALES COMPANY, LLC,	:	**Civ. No. 12-3824 CONSOLIDATED**
Plaintiffs,	:	
v.	:	
WARNER CHILCOTT PUBLIC LIMITED COMPANY, WARNER CHILCOTT COMPANY, LLC, WARNER CHILCOTT (US), LLC, WARNER CHILCOTT LABORATORIES IRELAND LTD., MAYNE PHARMA GROUP LIMITED, and MAYNE PHARMA INTERNATIONAL PTY. LTD.	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS MAYNE PHARMA GROUP LIMITED'S AND MAYNE PHARMA INTERNATIONAL PTY. LTD.'S MOTION TO DISMISS

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INTRODUCTION

Defendants Mayne Pharma Group Limited and Mayne Pharma International Pty. Ltd. (collectively "Mayne"), by counsel, respectfully state as follows in support of their Rule 12(b)(6) Motion to Dismiss the Sherman Act Section 1 and 2 conspiracy claims asserted against them in the Complaint filed by Mylan Pharmaceuticals Inc. ("Mylan") and the Consolidated Amended Class Action Complaint filed by Direct Purchaser Class Plaintiffs Rochester Drug Co-Operative, Inc., Meijer, Inc., Meijer Distribution, Inc. and American Sales Company, LLC (collectively, the "Direct Purchaser Plaintiffs"). Mylan's Complaint ("Mylan Compl.") and Direct Purchasers Plaintiffs' Consolidated Amended Class Action Complaint ("Class Compl.") are referred to herein collectively as the "Plaintiffs' Complaints."

Mayne joins in asserting all of the arguments made by Defendants Warner Chilcott Laboratories Ireland Limited, Warner Chilcott Public Limited Company, Warner Chilcott Company, LLC, Warner Chilcott (US) LLC, Warner Chilcott Holdings Company III, Ltd. and Warner Chilcott Public Limited Company (collectively "Warner Chilcott") in their motion to dismiss the claims asserted against them (as well as against Mayne) in the Complaints filed by Mylan and Direct Purchaser Plaintiffs. Mayne seeks the Rule 12(b)(6) dismissal of **all** claims asserted against it in the Plaintiffs' Complaints on the basis of the arguments set forth by Warner Chilcott in its motion to dismiss.

Rule 12(b)(6) dismissal of the Sherman Act Section 1 and 2 (15 U.S.C. §§ 1 and 2) conspiracy claims in the Plaintiffs' Complaints is proper because the factual allegations of the Plaintiffs' Complaints are insufficient as a matter of law to state a claim for an unlawful restraint of trade.

PRELIMINARY STATEMENT

Mylan and Direct Purchaser Plaintiffs have not come forward with any specific factual allegations to support their conclusion that Mayne and Warner Chilcott entered into an illegal agreement, or a series of illegal agreements, to perform several different exclusionary acts over a period of years in violation of Section 1 of the Sherman Act. Plaintiffs have not alleged **what** specific agreements Mayne and Warner Chilcott entered into, **who** from Mayne and Warner Chilcott entered into these alleged agreements and **when** these alleged agreements were reached. Indeed, Plaintiffs' only specific factual allegations of agreement between Mayne and Warner Chilcott consist of (a) an exclusive licensing agreement between Mayne and Warner Chilcott; and (b) innuendo and unreasonable interferences arising from statements made by Mayne and Warner Chilcott on earnings calls and in financial reporting documents and press releases. These allegations, and Plaintiffs' other conclusory allegations, are insufficient as a matter of law to plausibly allege the "contract, combination, or conspiracy" required by Section 1 of the Sherman Act. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Plaintiffs' conspiracy claims should be dismissed for the additional independent reasons that the Plaintiffs' Complaints fail to allege an unreasonable restraint of trade and cognizable antitrust injury.

Moreover, even if Plaintiffs' conspiracy allegations are sufficiently detailed to satisfy the requirements of Rule 12(b)(6) as interpreted by the Supreme Court in *Twombly* and *Iqbal*, Plaintiffs still fail to state a valid Sherman Act Section 1 claim because Mayne and its exclusive patent licensee, Warner Chilcott, are a single entity or enterprise that are incapable of conspiring to violate Section 1 as a matter of law. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

For all of the same reasons, Plaintiffs fail to plausibly allege a conspiracy to monopolize in violation of Section 2 of the Sherman Act. Accordingly, Plaintiffs' Sherman Act Section 1 and 2 conspiracy claims against Mayne and Warner Chilcott should be dismissed.

ARGUMENT

I. Plaintiffs' Factual Allegations Against Mayne and Warner Chilcott Fail to Allege a "Contract, Combination, or Conspiracy" That Unlawfully Restrains Trade

A. Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual allegations must be "enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, 570, and "nudge[] . . . [the] claims . . . across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680.

While courts must accept all well-pled *facts* on a motion to dismiss, they need not accept "naked assertion[s] devoid of . . . factual enhancement" or "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" or draw any unreasonable inferences. *See id.* at 678; *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011); *Local Union No. 98 Int'l Bhd. of Elec. Workers v. RGB Servs., LLC*, No. 10-3486, 2011 WL 292233, at *1 n.1 (E.D. Pa. Jan. 28, 2011). Courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states." 15 U.S.C. § 1. To state a claim for a violation of Section 1, a plaintiff must allege:

> (1) concerted action by the defendants; [2] that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions

> were illegal; and (4) that it was injured as a proximate result of the concerted action.

Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 253 (3d Cir. 2010) (quoting *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 (3d Cir. 2005)). "A plaintiff must allege facts plausibly suggesting 'a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful agreement.'" *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 253 (3d Cir. 2010) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984)); *see TruePosition, Inc. v. LM Ericsson Telephone Co.*, 844 F. Supp. 2d 571, 593 (E.D. Pa. 2012). A plaintiff must also allege the "specific time, place or person[s]" involved in the alleged conspiracy," *Twombly*, 550 U.S. at 565, n. 10, and establish that the alleged conspirators "'had a conscious commitment to a common scheme *designed to achieve an unlawful objective*.'" *TruePosition, Inc. v. LM Ericsson Telephone Co.*, 844 F. Supp. 2d 571, 593 (E.D. Pa. 2012) (emphasis in original) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

B. Plaintiffs Fail to Allege an Unlawful Agreement Between Mayne and Warner Chilcott

Plaintiffs' vague and conclusory allegations of a "contract, combination, or conspiracy" in restraint of trade are fatally deficient under Rule 12(b)(6). When stripped to their bare "facts," the Complaints contain only "labels and conclusions" and "formulaic recitation of the elements of a cause of action" that—under *Twombly*—simply "will not do." 550 U.S. at 555.

Plaintiffs fail to allege detailed facts to support the existence of an agreement between Mayne and Warner Chilcott to perform each of the alleged exclusionary acts in furtherance of the alleged conspiracy. Plaintiffs' Sherman Act Section 1 conspiracy claims against Mayne and Warner-Chilcott should be dismissed to avoid the "potentially enormous expense of discovery in

cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim." *Twombly*, 550 U.S. at 559 (citations omitted).

Plaintiffs make only undifferentiated and conclusory allegations about agreements between Mayne and Warner Chilcott to perform specific exclusionary acts. On many occasions, Plaintiffs simply lump Mayne and Warner Chilcott together as "Defendants" and allege that "Defendants" engaged in certain exclusionary acts. *See, e.g.*, Mylan Compl. ¶¶ 2–6, 53, 50, 57–58, 62–63, 65, 69, 73–74; Class Compl. ¶¶ 2–6, 58, 61, 67, 72. Alternatively, Plaintiffs make purely conclusory allegations of a conspiracy between Mayne and Warner Chilcott. *See, e.g.*, Mylan Compl. ¶¶ 88; Class Compl. ¶¶ 1, 55, 81, 114–115.

Absent from both Complaints are the "circumstances, occurrences, and events" that *Twombly* requires to establish the plausible existence of a "contract, combination, and conspiracy." 550 U.S. at 556, n.3. Plaintiffs make undifferentiated allegations that "Defendants" engaged in an exclusionary act in furtherance of the alleged conspiracy, but fail to allege the details of any agreement between Mayne and Warner Chilcott to engage in any such individual exclusionary act. Plaintiffs' undifferentiated allegations that "Defendants" entered into unspecified agreements to pursue an "anti-generic" strategy through various exclusionary acts fails to establish ***when*** Mayne and Warner Chilcott agreed to engage in any of the alleged exclusionary acts***, who*** from Mayne and Warner Chilcott communicated with each other to agree to engage in any of the alleged exclusionary acts, and precisely ***what*** exclusionary acts Mayne and Warner Chilcott allegedly agreed to take. Plaintiffs' allegations simply do not provide the requisite specificity to be "plausible."

Indeed, the only agreement that Plaintiffs allege between Mayne and Warner Chilcott are the undisputed terms of the exclusive license agreement:

> In 1997, Mayne granted Warner Chilcott an exclusive license to market and sell the Doryx 100 mg Capsule Product (and later all other Doryx product lines) in the United States. Mayne continues to manufacture Doryx for Warner Chilcott to sell in the United States.

Mylan Compl. ¶41; Class Compl. ¶53. But the license agreement itself is not an **illegal** agreement that violates Section 1. Any argument by Plaintiffs' to the contrary finds no support in the law and ignores that Congress, the antitrust enforcement agencies, and others encourage intellectual property licensing. For example, the Department of Justice Antitrust Division and the Federal Trade Commission ("FTC") consider licensing agreements to have significant pro-competitive benefits as well. *See* Department of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property at 3. The DOJ and FTC Guidelines recognize such agreements "may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible." DOJ and FTC Guidelines at 5. Further, "[t]hese various forms of exclusivity can be used to give a licensee the licensed intellectual property and to develop additional applications for the licensed property." *Id.* at 5. Although the DOJ and the FTC note the potential for antitrust concerns with exclusive licensing, those concerns are not present here. Defendants are not competitors in any product or market. Without the integration of the development, manufacturing, and distribution by Defendants, consumers would be wholly deprived of Doryx® as a choice for anti-acne treatment because the product would not be in the United States marketplace at all.

Plaintiffs make no allegations of a separate, unlawful side agreement between Defendants and the Complaints contain no specific factual allegations from which this Court could reasonably conclude that any amount of discovery will reveal evidence of any **illegal** agreement between Mayne and Warner Chilcott.

C. Plaintiffs Fail to Allege an Unreasonable Restraint of Trade

The Complaints are also devoid of any sufficient allegations that Defendants' alleged concerted action unreasonably restrained trade. *See also Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2206 (2010) ("The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade."). The failure to plead an unreasonable restraint of trade is fatal to Plaintiffs' claims. *See Brunson Commc'ns v. Abitron, Inc.*, 239 F. Supp. 2d 550, 558–68 (E.D. Pa. 2002) (dismissing section 1 claim for failure to plead concerted action and a restraint of trade); *Pipe Fitters Local Union No. 120 Pension Fund v. Barclays Capital Inc.*, No. C 11-01064, 2011 3844196 (N.D. Ca. Aug. 30, 2011) (dismissing section 1 claim for failing to plead an unreasonable restraint of trade under any of the tests for determining the legality of a restraint of trade).

The allegations in Plaintiffs' Complaints do not plausibly state a claim for relief because they provide "no set of facts in support of its Sherman Act, Section One claim that would entitle [them] to relief."[1] *Brunson Commc'ns*, 239 F. Supp. 2d at 568. As an initial matter, the Complaints fail to allege any *restraint* at all. Neither Warner Chilcott nor Mayne is alleged to have refrained from taking any action it otherwise would have taken to affect competition. As in *Brunson*, Plaintiffs' Complaints actually allege restraint of trade only once, and in a conclusory fashion. *See* Mylan Compl. ¶ 88; Class Compl. ¶ 115. Plaintiffs fail to explain "how trade has been restrained, or how the market in which [Mylan] does business has become less competitive due to the actions of Defendant[s]." *Brunson Commc'ns*, 239 F. Supp. 2d at 565.

[1] Although the Direct Purchaser Plaintiffs allege Defendants are "per se liable for the conspiracy and its effects," due to Defendants' vertical relationship coupled with the absence of any allegations of an agreement on prices for Doryx®, Defendants' conduct must be evaluated under the antitrust rule of reason. Class Compl. ¶ 118; *see Brunson Commc'ns v. Abitron, Inc.*, 239 F. Supp. 2d 550, 567 (E.D. Pa. 2002).

D. Plaintiffs Fail to Allege Antitrust Injury

Dismissal of Plaintiffs' Section 1 claim is appropriate for the independent reason that Plaintiffs fail to allege antitrust injury. Under *Atlantic Richfield* and other authorities, even if plaintiffs plausibly allege an illegal agreement (unlike here), they nonetheless may not recover under the antitrust laws if the agreement did not cause cognizable antitrust injury. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341–42 (1990) ("The *per se* rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act."); *Cavarocchi v. St. Luke's Hosp.*, No. 98-3105, 1999 WL 257695, at *7 (E.D. Pa. Apr. 28, 1999) (dismissing Section 1 claims where plaintiff "fail[ed] to allege facts which, if proven, would establish harm to competition in the relevant market").

E. Plaintiffs' Attempts to Rely Upon Public Statements by Mayne and Warner Chilcott Fail to Allege an Agreement That Unlawfully Restrains Trade

Even when Plaintiffs attempt to allege the details of any purported agreement(s) between Mayne and Warner Chilcott to engage in specific exclusionary acts, those allegations also fall short of pleading a plausible conspiracy. Rather than pleading the details of any unlawful agreement between Mayne and Warner Chilcott, Plaintiffs attempt to rely upon certain public statements made by Mayne and/or Warner Chilcott in earnings calls, financial reporting documents and press releases. For example, Plaintiffs allege that:

> In order to protect Doryx market position, Mayne Pharma is continuing to work with Warner Chilcott on a number of life cycle management activities. (Announcement of FY2011 Final Results, Mayne Pharma Group Ltd.). Class Compl. ¶75.
>
> One of the challenges of achieving visible success with a key proprietary product such as Doryx® tablets is that the competition is keenly seeking ways to access the market. We remain relentless in defending our proprietary position and market share with our marketing partners and maintain a life-cycle management programme to stay ahead of potential competition. (Mayne (at the time named

> Halcygen Pharmaceuticals Limited) 2010 Annual Report at 16) (emphasis added). Defendants note their achievements using life-cycle management strategies to 'protect the market position of Doryx®' by 'successfully reformulating Doryx® from capsules into tablets in 2005 and then subsequently releasing a new 150 mg tablet in July 2008.' (Mayne 2011 Annual Report at 11). (alteration omitted) Mylan Compl. ¶48; *see also* Class Compl. ¶77.
>
> Defendants intent to use this change in scoring as a means to delay generic entry is further evidenced by Mayne's press release announcing its September 14, 2011 FDA Approval of the dual- scored Doryx 150 mg Tablet Product, highlighting Defendants' commitment 'to continue its strategy to lifecycle manage Doryx into new dose strengths and formulations' and its 'expectation that the FDA is likely to ask companies with a single-scored 150mg generic tablet to develop and gain approval for a dual-scored 150 mg generic tablet prior to launch. (Mayne Press Release (Sept. 14, 2011) at 1).' Mylan Compl. ¶67; Class Compl. ¶77.

But Plaintiffs cannot rely upon general public statements by each Defendant as to "life cycle management" or "defending its market position" to allege that an agreement existed between Mayne and Warner Chilcott to engage in specific exclusionary acts that violate Sherman Act Section 1. No reasonable inference can be drawn from these general public statements to establish that such an agreement existed.

Plaintiffs continue to rely upon innuendo and unreasonable inferences when alleging that a Mayne internal document addressing the switch from capsules to tablets states that "[t]he tablet is to be used as an anti-generic strategy" and that "[i]t is [Warner Chilcott's] intention to discontinue the Doryx capsule as soon as the tablet is available to eliminate generic competition." (Doryx Trial Tr. at 84, 86)." Mylan Compl. ¶49. Notwithstanding that this allegation contains no details of any agreement between Mayne and Warner Chilcott, Plaintiffs' conclude that it "further confirm[s] their scheme to monopolize the Relevant Markets through their product hopping strategy." *Id*. Plaintiffs' conclusory allegations and unreasonable inferences of an unlawful agreement between Mayne and Warner Chilcott are not "plausible" because they do not "plead[] factual content that allows the court to draw the reasonable

inference that [Mayne and Warner Chilcott are] … liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

In the absence of any factual allegations—much less "direct or circumstantial evidence"—that "reasonably tend[] to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective," *Spray-Rite*, 465 U.S. at 764 (internal citations omitted), Plaintiffs' Section 1 conspiracy claims against Mayne and Warner Chilcott are insufficient as a matter of law and should be dismissed pursuant to *Twombly*.

II. Mayne and Warner Chilcott Cannot Conspire as a Matter of Law Pursuant to the Single Entity Rule

Even if Plaintiffs' Section 1 conspiracy claims against Mayne and Warner Chilcott are sufficiently detailed to be "plausible," Plaintiffs still fail to state a valid Section 1 claim because Mayne and its exclusive patent licensee, Warner Chilcott, are a single entity or enterprise that are incapable of conspiring to violate Section 1 as a matter of law.

Sherman Act Section 1 contains a "basic distinction between concerted and independent action." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). It reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between separate actors. Thus, a plurality of actors is required to establish liability under Section 1 of the Sherman Act. *See City of Mt. Pleasant v. Assoc. Electric Cooperative*, 838 F. 2d 268, 274 (8th Cir. 1998); *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1131 (3d Cir. 1995) ("Proof of concerted action requires evidence that two or more distinct entities agree to take action against a plaintiff.").

In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770–71 (1984), the Supreme Court explained that a conglomeration of two or more legally distinct entities cannot

conspire among themselves if they "pursue[] the common interests of the whole rather than interests separate from those of the [group] itself…. Because [such] coordination … does not represent a sudden joining of two independent sources of economic power previously pursing separate interests, it is not activity that warrants § 1 scrutiny." *City of Mt. Pleasant*, 838 F.2d at 275 (citing *Copperweld*, 467 U.S. 770–71). The Supreme Court again emphasized in *Am. Needle, Inc. v. Nat'l Football League* that single entity status depends upon the degree of alignment of economic interests. 130 S. Ct. 2201, 2206–07, 2213 (2010). Concerted action under Section 1 does not turn simply on whether the parties involved are legally distinct entities, but instead on a functional consideration of how the parties involved actually operate. *See City of Mt. Pleasant*, 838 F.2d at 275*; Am. Needle, Inc.*, 130 S. Ct. at 2211 (stating that "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1.").

Plaintiffs' Section 1 conspiracy claims fail because they do not allege facts demonstrating that Mayne and Warner Chilcott constitute a legally cognizable "plurality of actors" necessary to sustain a Section 1 claim. Pursuant to the exclusive patent licensing agreement between the parties, Mayne manufacturers and supplies Doryx® at a fixed price to Warner Chilcott who has the exclusive right to package, store, distribute, advertise and sell Doryx® commercially in the United States. Mayne and Warner Chilcott share a common economic interest with respect to Doryx® and they do not compete with each another in the sale of Doryx®. Consequently, any agreement between them does not deprive the marketplace of "independent sources of economic power previously pursuing separate interests." *See Copperweld*, 467 U.S. at 770–71. Under *Copperweld*, Mayne and Warner Chilcott cannot "conspire" to violate Section 1 of the Sherman Act as a matter of law.

Other cases have applied *Copperweld* outside of the parent-subsidiary context to find as a matter of law that interdependent economic relationships similar to that which exist between Mayne and Warner Chilcott lack the plurality of interests necessary to support a Sherman Act Section 1 conspiracy claim as a matter of law. *See, e.g., City of Mt. Pleasant v. Assoc. Electric Cooperative*, 838 F.2d 268, 274 (8th Cir. 1998); *Siegel Transfer, Inc. v. Carrier Express, Inc.,* 54 F.3d 1125 (3d Cir. 1995) (extending *Copperweld* to other corporate relationships where the entities "were, in substance, one economic unit"); *Eichorn v. AT&T Corp.,* 248 F.3d 131 (3d Cir. 2001); *Fresh Made, Inc. v. Lifeway Foods, Inc.,* No. Civ. A. 01-4254, 2002 WL 31246922 (E.D. Pa. Aug. 9, 2002).

In *City of Mt. Pleasant v. Associated Electric Cooperative, Inc.*, the Court analyzed whether a group of separate corporations comprising part of a rural electric cooperative could conspire to violate Sections 1 and 2 of the Sherman Act, as well as the Clayton Act and the Robinson-Patman Act. 838 F.2d at 276–77. The Court held that while "[i]t will always be true that separate companies, in one enterprise, that are located in separate areas and serve separate customers, will have varying interests," that is not "a sufficient basis from which to draw a reasonable inference that the defendants' coordination was a 'joining of two independent sources of economic power previously pursing separate interests.'" *Id.* at 277. The Court found that "[e]ven though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are independent sources of that power. Their power depends, and has always depended, on the cooperation among themselves. They are interdependent, not independent." *Id.*

In *Siegel Transfer, Inc. v. Carrier Express, Inc.*, the Court held that a corporate principal and its agents represented a single enterprise and thus could not enter into a conspiracy to

restrain trade under Section 1 of the Sherman Act. In examining the economic substance of the affiliation between the principal and its agents as required by *Copperweld*, the Court found that the agents, whose only function was to make arrangements for the transport of the principal's freight, did not compete with the principal. *See Siegel Transfer,* 54 F.3d at 1135. The Court concluded that because the agents received a commission from the principal based on the loads they arranged for the company to transport, the parties' economic interests were entirely congruent and, thus, represented a single enterprise. *See id.*

The reasoning of *Cooperweld* has also been applied in the context of an alleged Sherman Act Section 1 conspiracy between a patent holder and its exclusive licensee – similar to the relationship between Mayne and Warner Chilcott. *See Levi Case Co. v. ATS Products, Inc.*, 788 F.Supp. 428 (N.D. Cal. April 9, 1992); *Wahl v. Rexnord, Inc.*, 481 F.Supp. 573 (D.N.J. 1979); *Shionogi Pharma., Inc. v. Mylan, Inc.*, No. 10-1077, 2011 WL 2174499 (D. Del. May 26, 2011) (dismissing Section 1 claim by Mylan *inter alia* because patent holder and licensee defendants were a single entity incapable of conspiring with one another under *Copperweld*) (Baylson, J., sitting in transferred case)..

In *Levi Case Co. v. ATS Products, Inc.*, the court held that the patent holder, Shea, was legally incapable of conspiring with its exclusive patent licensee, ATS, to violate Section 1 of the Sherman Act. 788 F.Supp. at 432. In so holding, the court explained that:

> it strains credibility to argue that Shea and ATS had any independent decision making authority regarding the exploitation of the patent, or that any concerted activity the two defendants might take with regard to the patent would coalesce economic power previously directed at disparate goals. Like the interdependence of the electricity cooperatives in *City of Mt. Pleasant*, the economic reality is that Shea and ATS were not independent sources of economic power. Shea, by virtue of the exclusive license, could not compete in the manufacture of the product covered by the patent. Therefore, no agreement between ATS and Shea involving the exploitation of the patent in which they both held an interest can be considered to deprive the marketplace of 'independent sources of economic power previously

> pursuing separate interests.' Even if there were no agreements between them at all, there was no opportunity for them to compete. Thus, they could not "conspire" in violation of the antitrust laws.

Id. Likewise, in *Wahl v. Rexnord, Inc.*, the court was faced with a similar set of facts and reached the same conclusion. 481 F.Supp. 573 (D.N.J. 1979). A patent holder, Wahl, entered into an exclusive licensing agreement with Vibra Screw whereby Vibra Screw paid Wahl a royalty on the net sales price of all patented devices sold by Vibra Screw. The court held that Wahl could not conspire with Vibra Screw pursuant to Section 1 of the Sherman Act because the parties economic interests were coextensive. It was in Wahl's economic interest to promote greater sales by Vibra Screw so as to increase the amount the royalties that Vibra Screw would pay to Wahl.

Similarly, in *Shionogi Pharma., Inc. v. Mylan, Inc.*, Mylan asserted counterclaims against Shionogi and CIMA pursuant to Section 1 of the Sherman Act for monopolization and attempted monopolization and combination and conspiracy in restraint of trade. 2011 WL 2174499 at *1. CIMA, the patent holder, had entered into an exclusive licensing agreement with Shionogi for the sale of Orapred ODT®. *See id.* at *1. The court, Judge Baylson, dismissed Mylan's Section 1 claim because, among other reasons, Shionogi and CIMA, an exclusive licensee and patent holder, were incapable of conspiring with each other. *See id.* at *5. The court cited to both *Copperweld* and *Levi Case* for the proposition that a patent holder and exclusive licensee are incapable of conspiring as a matter of law. *See Id.*

As in *City of Mt. Pleasant*, *Levi, Shionogi, Siegel, and Wahl*, in the instant case, Mayne's economic interest in the sale of Doryx® is coextensive with that of Warner Chilcott. Mayne receives, by virtue of its exclusive license agreement with Warner Chilcott, a fixed price for the Doryx® purchased by Warner Chilcott. It is in Mayne's economic interest to promote greater sales of Doryx® by Warner Chilcott which results in increased purchases by Warner Chilcott

from Mayne. Mayne is not acting, and has no economic incentive to act, independently of Warner Chilcott with respect to the sale of Doryx®. Because Warner Chilcott is the exclusive seller of Doryx® in the United States pursuant to the exclusive license agreement, Mayne stands to financially benefit from the sale of Doryx® in the United States only through sales made by Warner Chilcott. Mayne and Warner Chilcott simply do not compete with each other in the sale of Doryx® and their "economic interests are entirely congruent." *See Siegel Transfer*, 54 F. 3d at 1135. Accordingly, any alleged agreement between Mayne and Warner Chilcott cannot be considered to deprive the marketplace of "independent sources of economic power previously pursuing separate interests" within the meaning of *Copperweld*, *City of Mt. Pleasant*, *Levi, Shionogi, Siegel, and Wahl*.

Further supporting the treatment of patent holders and licensees in this way, on August 13, 2012, the FTC proposed a new rule that will significantly change the premerger notification filing requirements for pharmaceutical licensing agreements under Hart-Scott-Rodino ("HSR"). Federal Trade Commission Premerger Notification; Reporting and Waiting Period Requirements, 16 CFR Part 801, Fed. Reg. vol. 77, No. 161 Monday, Aug. 20, 2012 Proposed Rules; *see* August 13, 2012 FTC Seeks Public Comments on Proposed Amendments to the Premerger Notification Rules Related to the Transfer of Exclusive Patents Rights in the Pharmaceutical Industry, *available at* http://www.ftc.gov/opa/2012/08/hsr.shtm. Under the current rule, patent licenses are subject to HSR filing only if they are fully exclusive, such that the patent holder retains no rights related to the patent. *Id.* The proposed rule would amend HSR filing requirements for pharmaceutical patents to require notifications when "all commercially significant rights to a patent" are being transferred. *Id.* These expanded reporting requirements

appear to reflect the FTC's recognition of the congruence of interests between a pharmaceutical patent holder and licensee and the importance of intellectual property licensing in this industry.

Plaintiffs have not and cannot allege that any purported agreement between Mayne and Warner Chilcott with respect to Doryx® satisfies the plurality requirement of Section 1 of the Sherman Act that requires the "joining of two independent sources of economic power previously pursuing separate interests." Accordingly, Plaintiffs' Sherman Act Section 1 claims should be dismissed as a matter of law.

III. Direct Purchaser Plaintiffs Fail to Allege an Illegal Conspiracy to Monopolize Under Section 2 of the Sherman Act

Direct Purchaser Plaintiffs additionally allege that Defendants conspired to monopolize in violation of Section 2 of the Sherman Act. Class Compl. ¶¶ 122-130. But this claim fails for the same reasons that Plaintiffs' Section 1 claims fail.

First, as discussed, Mayne and Warner Chilcott are patent holder and exclusive patent licensee, respectively. *See infra* p. 11. They are therefore a single entity incapable of conspiring under Section 2 of the Sherman Act. *See Carpenter Tech. Corp. v. Allegheny Tech., Inc.*, 646 F. Supp. 2d 726, 734 (E.D. Pa. 2009) (holding *Copperweld* doctrine "equally applicable to Section 2 conspiracy to monopolize claims" and dismissing complaint on Copperweld grounds).

Second, even if the Court considers Defendants to be separate entities capable of conspiring under Section 2, Direct Purchaser Plaintiffs fall short of plausibly alleging illegal agreement. *See infra* pp. 4–6; *Howard Hess Dental Labs, Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 254 (3d Cir. 2010) (dismissing complaint where plaintiffs did not adequately allege an agreement between defendants).

Third, Direct Purchaser Plaintiffs' conspiracy to monopolize claim fails because a plaintiff alleging a conspiracy to monopolize claim must plead a relevant product market, but, as

set in Warner Chilcott's Motion to Dismiss, Direct Purchaser Plaintiffs have not done so. *Carpenter Tech.*, 646 F. Supp. 2d at 734 ("The failure to plead a relevant product market is fatal to [a conspiracy to monopolize] claim.").

CONCLUSION

For the reasons set forth herein, Mayne respectfully requests the Rule 12(b)(6) dismissal of Plaintiffs' Sherman Act Section 1 and 2 conspiracy claims against Mayne and Warner Chilcott.

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By: /s/ Mark D. Villanueva

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss and Memorandum of Law has been served this 1st day of October, 2012 by this Court's ECF upon all counsel of record.

/s/ Mark D. Villanueva
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