Nos. 07-6052, 07-6114, 07-6115, 07-6116

In the United States Court of Appeals for the Sixth Circuit

CARRIER CORPORATION; CARRIER SA; CARRIER ITALIA S.P.A,
Plaintiffs-Appellants Cross-Appellees, 07-6052, 07-6114, 07-6115, 07-6116

v.

OUTOKUMPU OYJ; OUTOKUMPU COPPER PRODUCTS OY; OUTOKUMPU COPPER FRANKLIN, INC.,
Defendants-Appellees Cross-Appellants, 07-6052, 07-6114, 07-6115, 07-6116

MUELLER INDUSTRIES, INC.;
Defendant-Appellee, 07-6052, 07-6114, 07-6116
Defendant-Appellee Cross-Appellant, 07-6115

MUELLER EUROPE LTD,
Defendant-Appellee, 07-6052, 07-6114, 07-6115
Defendant-Appellee Cross-Appellant, 07-6116

and

EUROPA METALLI SPA; TREFIMETAUX SA,
Defendants. 07-6052, 07-6114, 07-6115, 07-6116

On Appeal from the United States District Court for the Western District of Tennessee at Memphis

PROOF SECOND BRIEF OF DEFENDANT-APPELLEE CROSS-APPELLANT MUELLER EUROPE LTD.

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ORAL ARGUMENT REQUESTED

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel for Mueller Europe Ltd., a nongovernmental corporate party, certifies that:

1. Mueller Europe Ltd. is a wholly owned subsidiary of Mueller Industries, Inc., a publicly owned corporation.

2. There are no publicly owned corporations, not a party to the appeal, that have a financial interest in the outcome.

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New York, New York

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a) and 6 Cir. R. 34(a), Defendant-Appellee and Cross-Appellant Mueller Europe Ltd. respectfully requests that the Court permit oral argument. This appeal involves complex legal arguments and oral argument is likely to aid the decisional process significantly.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Carrier Corporation, Carrier S.A., and Carrier Italia S.p.A. (together, "Carrier") filed this action in the United States District Court for the Western District of Tennessee against Outokumpu Oyj, Outokumpu Copper Products Oy, Outokumpu Copper (U.S.A.), Inc., and Outokumpu Copper Franklin, Inc. (collectively "Outokumpu"), Mueller Industries, Inc. ("MLI"), and Mueller Europe Ltd. ("Mueller Europe"). (R. 46, Apx. __.)[1] Carrier sought relief for purported violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, and the Tennessee Trade Practices Act, Tenn. Code Ann. § 47-25-101, *et seq.* (*Id.*, Apx. ___.) Carrier alleged that the district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26. (*Id.* ¶ 9, Apx. ___.)

On July 27, 2007, the district court dismissed Carrier's amended complaint (the "Amended Complaint") pursuant to Federal Rule of Civil Procedure 12(b)(1). (R. 93, Dismissal Order, Apx. ___.) The district court also concluded that, if it "had not found that it lacked subject matter jurisdiction over the matter, it would nevertheless have been obligated to grant Defendants' motions to dismiss on 12(b)(6) grounds for failure to state a claim." (*Id.* at 10-11, Apx. ___.) The district

[1] Citations to "Apx. ___" refer to the Joint Appendix.

court entered a final judgment dismissing the case on July 27, 2007. (R. 94, Judgment, Apx. ___.)

On August 23, 2007, Carrier filed a notice of appeal. (R. 95.) On August 31, 2007, Mueller Europe filed a notice of cross-appeal. (R. 99, Mueller Europe's Notice of Cross-Appeal, Apx. ___.) Because the appeal and cross-appeal are from the district court's final judgment, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The Amended Complaint purports to allege that Mueller Europe participated in a conspiracy that the European Commission found had occurred in Europe and that Carrier claims extended to the United States through the allocation of Carrier's U.S. purchases to Outokumpu. This appeal presents the following issues:

1. Whether the district court properly dismissed the Amended Complaint for lack of subject matter jurisdiction.

2. Whether, even if the district court had subject matter jurisdiction over the claims presented in the Amended Complaint, the Amended Complaint should be dismissed as to Mueller Europe for lack of personal jurisdiction.

3. Whether, even if the district court had subject matter jurisdiction over the claims presented in the Amended Complaint and personal jurisdiction over Mueller Europe, the Amended Complaint should be dismissed for failure to comply with Federal Rules of Civil Procedure 8(a) and 12(b)(6), particularly insofar as it failed to plead a plausible entitlement to relief under *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

4. Whether, even if the district court had subject matter jurisdiction over the claims presented in the Amended Complaint and personal jurisdiction over Mueller Europe, the Amended Complaint should be dismissed because: (a) it is time-barred on its face; and (b) Carrier has failed to allege with particularity fraudulent concealment, as required by Federal Rule of Civil Procedure 9(b), to toll the limitations period.

STATEMENT OF THE CASE

For nearly three years, Mueller Europe, a foreign entity operating under the laws of the United Kingdom, has been forced to defend itself in this action, despite the facts that:

(i) Mueller Europe has no contacts with Tennessee and only *de minimis* contacts with the United States;

(ii) Mueller Europe had no role in the alleged conspiracy that is the basis of Carrier's claims;

(iii) Mueller Europe never sold the product at issue in either Europe or the United States; and

(iv) Carrier's Amended Complaint does not attribute a single conspiratorial act to Mueller Europe, and certainly none that occurred in Tennessee or the United States.

Carrier's claims against Outokumpu, MLI and Mueller Europe, filed in March 2006, rely on a December 16, 2003 European Commission ("EC") decision (the "EC ACR Decision"), which described a *European* cartel with respect to the sale of air conditioning and refrigeration tube ("ACR tube," also known as "copper tube for industrial applications") in Europe and, more specifically, a form of ACR tube known as level-wound coil. (*See* R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision, Part B(1), Apx. ___; *see also* R. 46, Am. Cplt. ¶ 12(a), Apx. ___.) Carrier alleges that Mueller Europe was "engaged in the production or sale of ACR Copper Tubing in the United States, Europe, and elsewhere, directly and/or through its affiliates and/or wholly-owned subsidiaries," and that Mueller Europe supposedly "imported" ACR tube into the United States. (R. 46, Am. Cplt. ¶ 33, Apx. ___.) As discussed below, the Amended Complaint alleges little else against Mueller Europe.

Mueller Europe accordingly moved to dismiss Carrier's initial complaint on October 10, 2006, for lack of personal jurisdiction and on other grounds. Instead of opposing that motion, Carrier filed an Amended Complaint on October 27, 2006, which contained no new allegations as to Mueller Europe. (R. 46, Am. Cplt., Apx. ___.) On December 6, 2006, Mueller Europe therefore again

moved to dismiss. (R. 55, Mot. to Dismiss, Apx. ___.) With respect to its motion pursuant to Rule 12(b)(2), Mueller Europe argued that (i) Mueller Europe had no continuous and systematic contacts with Tennessee or the United States that could support general jurisdiction, and (ii) the district court had no specific jurisdiction because, among other things, Mueller Europe was not involved in the conspiracy found in the EC ACR Decision on which Carrier's claims are predicated.

By order dated July 27, 2007, the district court dismissed Carrier's Sherman Act claim for failure to establish subject matter jurisdiction and concluded that, if it had not found that it lacked subject matter jurisdiction over the matter, the district court would have been obligated to grant defendants' motions to dismiss under Rule 12(b)(6). (R. 93, Dismissal Order at 10-11, Apx. ___.) The district court declined to exercise supplemental jurisdiction over Carrier's state law claim. (*Id.* at 11, Apx. ___.) The district court did not rule on Mueller Europe's motion to dismiss on Rule 12(b)(2) grounds. (*Id.*, Apx. ___.) Judgment was entered on July 27, 2007. (R. 94, Judgment, Apx. ___.)

Carrier filed a notice of appeal thereafter. (R. 95.) Mueller Europe cross-appealed to the extent that the Court of Appeals does not affirm the Judgment on the grounds set forth by the district court and insofar as the Judgment did not dismiss the Amended Complaint as to Mueller Europe for lack of personal jurisdiction and/or on the merits and with prejudice. (R. 99, Mueller Europe's

Notice of Cross-Appeal, Apx. ___.) Mueller Europe's cross-appeal allows Mueller Europe to seek an affirmance of the Judgment with prejudice and precludes any claim that Mueller Europe has waived its objections to personal jurisdiction.

On October 16, 2007, Carrier moved to dismiss Mueller Europe's cross-appeal (and the cross-appeals of other Defendants-Appellees), arguing that Mueller Europe was not aggrieved by the district court's ruling and therefore lacked standing. On December 3, 2007, this Court denied Carrier's motion to dismiss Mueller Europe's cross-appeal (and to dismiss the cross-appeals of other Defendants-Appellees).

For the reasons set forth in the briefs of MLI and Outokumpu, the Judgment of the district court should be affirmed for lack of subject matter jurisdiction. In the event that this Court determines that the district court had subject matter jurisdiction over Carrier's Sherman Act claim, this Court should dismiss the Amended Complaint as to Mueller Europe for lack of personal jurisdiction. Should this Court find that both subject matter jurisdiction and personal jurisdiction over Mueller Europe have been established, it should affirm the Judgment on the basis that Carrier fails to state a claim for which relief can be granted and/or that Carrier's claims are time-barred, as addressed in the briefs of MLI and Outokumpu.

This brief addresses only the argument that the district court lacks personal jurisdiction over Mueller Europe.

STATEMENT OF JOINDER IN BRIEFS OF MLI AND OUTOKUMPU

Defendant-Appellee and Cross-Appellant Mueller Europe hereby joins in, and adopts in all respects applicable to it, the briefs of MLI and Outokumpu, including, without limitation, the Statement of Issues presented for review, the Statement of Facts, the Standard of Review, and the arguments made therein, including without limitation the arguments that the Amended Complaint should be dismissed because the district court lacked subject matter jurisdiction, and because the Amended Complaint fails to state a claim for which relief can be granted and/or Carrier's claims are time-barred.

STATEMENT OF FACTS

The general background of this action is described in the brief of MLI, which is incorporated herein as noted above. Summarized below are the facts relevant to the lack of personal jurisdiction over Mueller Europe, which include references to the declarations of Mueller Europe's then-president Patrick Donovan, presented to the district court below.[2]

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[2] Mr. Donovan retired as President of Mueller Europe, effective December 31, 2008. Mueller Europe is not aware of any material changes in the facts presented to the district court. Mueller Europe reports that it has approximately 170 employees, none of whom reside in the United States. (*Cf*. R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶ 12, Apx. ___ ("Mueller

1. The EC ACR Decision Does Not Name Mueller Europe.

The Amended Complaint borrows nearly all of its factual allegations, including those relating to conspiratorial conduct, from the 102-page EC ACR Decision. The EC ACR Decision, which never once mentions Mueller Europe, found that the Cuproclima Quality Association for ACR Tubes ("Cuproclima") was the vehicle through which a European conspiracy relating to the sale of ACR tubes *in Europe* was carried out. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 2, Apx. ___.) The Amended Complaint parrots that allegation. (*See* R. 46, Am. Cplt. ¶ 66 ("Cuproclima became a principal vehicle, though not the exclusive means, through which Defendants coordinated their price fixing and customer and market allocation activities."), ¶ 67 ("Official Cuproclima meetings would occur two times a year . . . [and] provided a regular opportunity for the cartel participants to discuss and fix prices, allocations and other commercial conditions."), Apx. ___.)

Mueller Europe's absence from the EC ACR Decision is consistent with the detailed affidavits from Mr. Donovan that Mueller Europe offered to the district court. (R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶¶ 31-36, Apx. ___.) Specifically, Mueller Europe was never a member of, or involved in any way with, Cuproclima. (*Id.* ¶ 31, Apx. ___.) In fact, Mueller Europe never sold any form of

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Europe has approximately 430 employees, none of whom reside in the United States.").)

level wound coil (*id.* ¶ 32, Apx. ___), the only form of copper tubing that, according to the EC ACR Decision, was "affected" by the European conspiracy. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 327 ("The Commission notes that the products affected by the infringement within Cuproclima were LWC [level wound coil] tubes, excluding other kinds of industrial tubes . . . ."), Apx. ___.) Carrier offered no evidence below to controvert those facts.

2. The Amended Complaint Ascribes No Conspiratorial Conduct To Mueller Europe.

The district court found that "Plaintiffs have simply 'cut-and-pasted' into their complaint the collusive activities found by the E.C. to have taken place in Europe and tacked on 'in the United States and elsewhere.'" (R. 93, Dismissal Order at 6, Apx. ___.) That conclusion is equally true of Carrier's claims regarding Mueller Europe.

The Amended Complaint generically alleges that "Mueller Europe was engaged in the production or sale of ACR Copper Tubing in the United States, Europe, and elsewhere, directly and/or through its affiliates and/or wholly-owned subsidiaries. . . ." (*See* R. 46, Am. Cplt. ¶ 33, Apx. ___.) It separately concludes in a single allegation that "the Mueller entities" – which Carrier will argue included Mueller Europe – "agreed not to compete for Carrier's business in ACR Copper Tubing . . . ." (*Id.* ¶ 6, Apx. ___.) But the Amended Complaint contains

no factual allegations as to Mueller Europe's supposed ACR tube sales or production, or Mueller Europe's role in the purported agreement not to compete.

3. Mueller Europe Is An Independent UK Entity.

Mueller Europe is an indirect, wholly owned subsidiary of MLI that was and continues to be a company registered under the laws of the United Kingdom. (R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶¶ 7, 22, Apx. ___.) Its principal place of business is located at Oxford Street, Bilston, West Midlands, Great Britain and its copper tube operations are based in Bilston, United Kingdom. (*Id*. ¶¶ 8, 10, Apx. ___.) Since its inception, Mueller Europe has been a stand-alone entity separate and apart from all other Mueller entities. (*Id*. ¶ 30, Apx. ___.) Mueller Europe conducts business on its own behalf and is not an instrument or operating division through which MLI, or any other entities, do business. (*Id.* ¶ 23, Apx. ___.) Mueller Europe always has had, and continues to maintain, financial and operational independence from MLI. (*Id.* ¶ 24, Apx. ___.)

Carrier asserts conclusorily that Mueller Europe and Desnoyers S.A., a French company that is also an indirect, wholly owned subsidiary of MLI (together with its successor entities, "Desnoyers"), "acted jointly as a single enterprise" in connection with the ACR conspiracy alleged in the Amended Complaint. (R. 46, Am. Cplt. ¶ 38, Apx. ___.) Not only does the Amended Complaint contain no factual allegations supporting that assertion, but, in fact,

since Mueller Europe's inception, Mueller Europe and Desnoyers have been separate in form and substance. Mueller Europe is not the parent of, subsidiary of, or successor in interest to Desnoyers, nor is one an operating division of the other. (R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶¶ 26-27, Apx. ___.) Furthermore, Mueller Europe has never owned any shares of Desnoyers, and Desnoyers has never owned any shares of Mueller Europe. (*Id.* ¶ 26, Apx. ___.)

Importantly, Carrier's assertion that Mueller Europe and Desnoyers acted jointly in connection with the alleged ACR conspiracy (R. 46, Am. Cplt. ¶ 38, Apx. ___) is specifically belied by the EC ACR Decision. The decision found that, by the time any affiliation between Desnoyers and Mueller Europe arose, *i.e.*, when MLI purchased Desnoyers' stock, Desnoyers had already *withdrawn* from the conspiracy described in the decision. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 394, Apx. ___.)[3]

[3] The law is clear that the Court should not accept allegations of the Amended Complaint that are contradicted by the EC ACR Decision. *See Mengel Co. v. Nashville Paper Prods. & Specialty Workers Union No. 513*, 221 F.2d 644, 647 (6th Cir. 1955) ("If inconsistent with the allegations of the complaint, the exhibit controls."). *See Nat'l Ass'n of Minority Contractors v. Martinez*, 248 F. Supp. 2d 679, 681 (S.D. Ohio 2002) ("[I]f a factual assertion in the pleadings is inconsistent with a document attached for support, the Court is to accept the facts as stated in the attached document."); *see also Dulude v. Cigna Secs., Inc.*, No. 90-cv-72191-DT, 1993 U.S. Dist. LEXIS 17615, at *6-12 (E.D. Mich. Oct. 4, 1993) (motion to dismiss granted where statements in a document integral to the complaint contradicted complaint's allegations and precluded plaintiffs' claims).

4. Mueller Europe Lacks Sufficient Jurisdictional Contacts With Tennessee And With The United States.

Mueller Europe is not and has never been incorporated or registered to do business in any state in the United States. (R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶ 13, Apx. ___.) Mueller Europe has never owned any assets or inventory situated in the United States. (*Id.* ¶ 17, Apx. ___.) Mueller Europe has never maintained any offices, facilities, or plants in the United States. (*Id.* ¶ 18, Apx. ___.) Nor has Mueller Europe ever owned, used, or possessed any personal property, real property, or bank accounts in the United States. (*Id.* ¶¶ 19-20, Apx. ___.) Similarly, Mueller Europe has never paid any taxes or franchise fees in the United States. (*Id.* ¶ 21, Apx. ___.)

Mueller Europe has not produced or sold ACR tube in or into Tennessee or the United States. (R. 69, Reply Br. in Support of Mot. to Dismiss, Ex. 3, Reply Donovan Dec. ¶ 19, Apx. ___.) Indeed, Carrier does not allege that it purchased ACR tube from Mueller Europe anywhere in the world, let alone in Tennessee or the United States. While Mueller Europe made seven shipments of copper products in 1998 and 1999 to locations in the United States (but to no locations within Tennessee), none of the seven shipments contained ACR tube, the product with respect to which Carrier asserts its causes of action. (*Id.* ¶¶ 17-22, Apx. ___.) The total value of those shipments was less than $120,000, or approximately one hundredth of one percent of Mueller Europe's total sales from

its inception through 2006. (*Id.*, Apx. ___.) All but one of the shipments, which was valued at just $6,339, were made pursuant to intercompany transactions. (*Id.*, Apx. ___.)

5. In A Similar Case And On Similar Facts, The District Court Declined To Exercise Personal Jurisdiction Over Mueller Europe.

In an analogous case involving copper plumbing tubes (the "Plumbing Tube Litigation"), which is a product that is separate and distinct from ACR tube, Judge Donald granted Mueller Europe's motion to dismiss for lack of personal jurisdiction. *See Am. Copper & Brass, Inc. v. Mueller Europe, Ltd.*, 452 F. Supp. 2d 821 (W.D. Tenn. 2006) [hereinafter "*Plumbing Tube Dismissal Order*"]. In that action, plaintiffs purported to assert a Sherman Act claim predicated on a supposed conspiracy involving plumbing tubes in the United States. As Carrier does here, plaintiffs in *Am. Copper & Brass* relied on an EC decision (the September 3, 2004 "EC Plumbing Tubes Decision") that found a European plumbing tubes cartel. Also like the Amended Complaint, the plumbing-tubes pleading sought to transform the EC findings into a wider-ranging conspiracy that involved the United States.

The district court dismissed the plumbing-tubes case as to Mueller Europe on personal jurisdiction grounds. *Plumbing Tube Dismissal Order*, 452 F. Supp. 2d at 832. Specifically, the district court concluded that:

> Plaintiffs have failed to substantiate in any meaningful way their bare allegations against [Mueller Europe]. In the face of [Mueller Europe's] detailed affidavits denying minimum contacts with the U.S. and denying involvement in any conspiracy to fix prices in the U.S., Plaintiffs have failed to satisfy their burden of making a prima facie showing of the Court's jurisdiction over [Mueller Europe].

Id.

SUMMARY OF ARGUMENT

Carrier cannot establish either general or specific jurisdiction over Mueller Europe. Because Mueller Europe is a foreign defendant and assertion of personal jurisdiction over foreign defendants implicates comity concerns, Carrier has a heavier burden than if Mueller Europe were a U.S. entity. *See Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 115 (1987) (holding that great restraint should be exercised when asserting personal jurisdiction over foreign defendants).

General jurisdiction does not exist because Mueller Europe is a *bona-fide* and stand-alone U.K. company that has no continuous or systematic contacts with Tennessee or the United States. Mueller Europe has not sold, distributed, or sold for distribution any products in or into Tennessee or the United States (other

than the seven *de minimis* shipments of copper products previously identified). Nor can general jurisdiction over Mueller Europe be established through MLI. Mueller Europe does not rely in any way on MLI or any of MLI's affiliates in connection with Mueller Europe's production, sales, or operations. Mueller Europe has its own work force, bank accounts, and production facility, conducts business on its own behalf, and has not served as an instrument through which MLI does business.

Carrier has not proffered (and cannot proffer) any facts, moreover, that would warrant piercing the corporate veil and treating the contacts of MLI as those of Mueller Europe. Mueller Europe maintained proper corporate formalities and financial and operational independence. It is not the "alter ego" of MLI.

Nor can Carrier establish specific jurisdiction. First, Mueller Europe has not purposefully availed itself of the privileges of acting in Tennessee or in the United States generally. Second, the Amended Complaint contains not a single factual allegation that Mueller Europe engaged in conspiratorial acts, let alone that it did so in the United States. Finally, Carrier cannot make a *prima facie* case that Mueller Europe engaged in acts with a sufficiently substantial connection to Tennessee or the United States that would make asserting personal jurisdiction over Mueller Europe reasonable – a factor that is particularly important where, as here, the defendant is a foreign entity. *See Asahi*, 480 U.S. at 115.

Recognizing that specific jurisdiction is absent, Carrier resorted in the district court to two alternate theories – the so-called "*Calder* effects test" and the "conspiracy theory" – both of which also fail to supply personal jurisdiction over Mueller Europe.

The *Calder* effects test extends personal jurisdiction to those entities that have "expressly aimed" their anti-competitive conduct at the forum and caused a harmful effect there. *See Calder v. Jones*, 465 U.S. 783, 789 (1984). The test is inapplicable here, for reasons similar to those that the district court found when it dismissed Mueller Europe from the Plumbing Tube Litigation. That is, like the plumbing tube plaintiffs, Carrier has alleged no specific facts indicating that Mueller Europe, or even MLI, committed overt acts in furtherance of price-fixing in Tennessee or the United States. Indeed, Carrier does not allege any wrongful conduct or harmful effects caused by Mueller Europe *anywhere in the world.*

Personal jurisdiction based on the so-called "conspiracy theory" is equally unavailing. That theory permits personal jurisdiction over a non-resident based on a co-conspirator's contacts with the forum. Because the conspiracy theory implicates serious due process concerns, this Court has not yet recognized it as viable, and other courts have soundly rejected it. Even if this Court were to recognize the conspiracy theory (and it should not), its application should be restricted to instances in which (i) the non-resident defendant knowingly authorizes

another to undertake action (ii) for the non-resident defendant's benefit, and on its behalf, and (iii) that the non-resident defendant intended to occur in (or be expressly aimed at) the forum. Carrier, however, has pled no such allegations, and cannot do so.

In sum, in the event that this Court concludes that the district court has subject matter jurisdiction over Carrier's Sherman Act claim (and it should not, for the reasons set forth in the MLI and Outokumpu briefs), it should dismiss all claims as to Mueller Europe for lack of personal jurisdiction.

STATEMENT OF STANDARD OF REVIEW

The Court of Appeals reviews *de novo* district court dismissals pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *See Giesse v. Sec'y of Dep't of Health & Human Servs.*, 522 F.3d 697, 702 (6th Cir. 2008) (12(b)(1)); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, No. 07-4115, 2008 WL 5273309, at *2 (6th Cir. Dec. 22, 2008) (12(b)(6)). If a 12(b)(1) dismissal is based in part on the resolution of factual disputes, the district court's application of the law to the facts is reviewed *de novo*, but the "reviewing court must accept the district court's factual findings unless they are clearly erroneous." *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1135 (6th Cir. 1996). Had the district court reached the issue of personal jurisdiction as to Mueller Europe, any dismissal pursuant to Federal Rule of Civil

Procedure 12(b)(2) would also have been subject to this Court's *de novo* review. *See Harris v. Lloyds TSB Bank, PLC*, 281 F. App'x 489, 492 (6th Cir. 2008).

ARGUMENT

I. CARRIER MUST ESTABLISH A *PRIMA FACIE* CASE OF PERSONAL JURISDICTION OVER MUELLER EUROPE.

A court must possess personal jurisdiction over a defendant to adjudicate its rights and obligations in the forum. *See Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 903 (6th Cir. 2006), *reh'g and reh'g en banc denied* (July 18, 2006). The plaintiff has the burden to establish personal jurisdiction; where a defendant has moved to dismiss pursuant to Rule 12(b)(2) and supports that motion with affidavits, a plaintiff may not stand on the pleadings alone. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936) ("If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, [plaintiff] must support them by competent proof."); *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1214 (11th Cir. 1999) ("[P]laintiff bears the burden of proving by affidavit the basis upon which jurisdiction may be obtained . . . if the defendant challenging jurisdiction files affidavits in support of his position.") (internal quotation marks and citation omitted); *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991) ("[P]laintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction.").

To exercise personal jurisdiction: (1) the defendant must be amenable to suit under the forum state's long-arm statute, and (2) the exercise of personal jurisdiction must be consistent with the due process clause of the United States Constitution. *See Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1115 (6th Cir. 1994). Because Tennessee's long-arm statute is co-extensive with the due process clause, *see* Tenn. Code Ann. § 20-2-214(a)(6) (2008), the only relevant inquiry is consistency with the due process clause. The due process clause requires that a defendant have minimum contacts with the forum such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks and citation omitted).

The due process clause is satisfied where a court has either general jurisdiction or specific jurisdiction over a defendant. *See Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 361 (6th Cir. 2008). General jurisdiction requires that a defendant's contacts with the forum state be continuous and systematic. *See Harris*, 281 F. App'x at 492. Specific jurisdiction, on the other hand, requires that: (1) the defendant has purposefully availed itself of the forum with respect to the acts giving rise to the claim, (2) the subject matter of the lawsuit arose out of the defendant's contacts with the forum, and (3) the defendant's contacts with the forum are substantial enough that

exercising personal jurisdiction is reasonable. *Smith v. Home Depot USA, Inc.*, No. 07-6127, 2008 WL 4280124, at *3 (6th Cir. Sept. 17, 2008). Under both general and specific jurisdiction, the contacts of each defendant must be assessed individually. *See Rush v. Savchuk*, 444 U.S. 320, 332 (1980). Accordingly, common corporate ownership alone is insufficient to impute one corporation's contacts to its affiliate. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984).

Carrier's burden to establish personal jurisdiction over Mueller Europe is particularly heavy because Mueller Europe is a foreign defendant. The Supreme Court has cautioned that, due to comity concerns, "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. 102, 115 (1987) (internal quotation marks and citation omitted) (finding that exercising personal jurisdiction over a Japanese defendant violated the due process clause).

This Court, following that guidance, has scrutinized the reasonableness of asserting personal jurisdiction over a foreign defendant. *See, e.g.*, *Harris*, 281 F. App'x at 496 (holding that assessment of reasonableness factors "compels a conclusion that the exercise of specific jurisdiction [by the district court] was improper" because, among other things, "none of [the United Kingdom defendant's] alleged wrongdoings occurred within Tennessee"); *City of*

Monroe Employees Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 666 (6th Cir. 2005) (affirming dismissal for lack of personal jurisdiction over Japanese defendant because "stretching the long arm of personal jurisdiction over national borders" was not warranted) (citing *Asahi*, 480 U.S. at 114) (internal quotation marks omitted), *cert. denied*, 126 S. Ct. 423 (2005).

Those concerns are even more acute here. The European Commission's Director of anti-Cartel enforcement at the Directorate General for competition, Mr. Kirtikumar Mehta, specifically noted in a letter to the district court that U.S. litigation predicated on European conduct involving ACR tube would compromise the EC's enforcement goals by discouraging companies from informing the European Union about cartels in Europe.[4] (R. 76, Notice of Filing & Service of Correspondence, Ex. A, Letter from Kirtikumar Mehta at 1, Apx. ___.)

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[4] Mr. Mehta's letter to the district court was filed pursuant to a Notice Of Filing & Service Of Correspondence From The European Commission's Director of Anti-Cartel Enforcement on March 7, 2007. (R. 76, Notice of Filing & Service of Correspondence, Ex. A, Letter, Apx. __.) Mr. Mehta's letter related to, among other things, Carrier's litigation and the EC ACR Decision and was, as with the EC Decisions, properly before the district court. *See Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997) ("Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim."); *see also Jorge v. Rumsfeld*, 404 F.3d 556, 559 (1st Cir. 2005) (district court may consider the whole of a document integral to or explicitly relied upon in a complaint, whether or not annexed to it).

"Courts [deciding Rule 12(b)(6) motions] may also consider public records, matters of which a court may take judicial notice, and letter decisions of

As discussed below, Carrier cannot sustain its heavy burden of making a *prima facie* showing that the district court has personal jurisdiction over Mueller Europe. Mueller Europe has offered detailed factual declarations from its then-President that reflect the lack of personal jurisdiction over Mueller Europe; Carrier has offered no affidavit evidence to the contrary. Rather, Carrier relies solely on conclusory allegations that Mueller Europe sold ACR copper tubing in the United States and participated in some supposed agreement that affected U.S. commerce. (R. 46, Am. Cplt. ¶ 33-39, Apx. ___.) Mueller Europe has shown that those allegations are without factual basis and, in any event, are precisely the type of vague allegations that warrant no weight. Carrier therefore cannot establish personal jurisdiction and its Amended Complaint against Mueller Europe should be dismissed.

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governmental agencies." *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999), *overruled on other grounds, Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 n.2 (2002); *see also New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) ("A court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice."). In addition, "[w]hen a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

II. MUELLER EUROPE IS NOT SUBJECT TO EITHER GENERAL OR SPECIFIC PERSONAL JURISDICTION.

A. Carrier Cannot Establish That The Court Has General Jurisdiction Over Mueller Europe.

General jurisdiction requires such "continuous and systematic" contacts with the forum that exercising personal jurisdiction is warranted even in actions unrelated to the defendant's contact with the forum. *Harris*, 281 F. App'x at 492. Mueller Europe has never had any jurisdictional contacts with Tennessee; nor has it had "continuous and systematic" contacts with the United States.[5]

1. Mueller Europe Lacks Continuous And Systematic Contacts With The Forum.

Before the district court, Mueller Europe presented undisputed evidence demonstrating that Mueller Europe has had no continuous and systematic contacts with Tennessee or the United States. (R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶¶ 5-13, 16-30, Apx. ___; R. 69, Reply Br. in Support of Mot. to Dismiss, Ex. 3, Reply Donovan Dec. ¶¶ 5-23, Apx. ___.) Such evidence is properly considered in this Court's jurisdictional analysis. *Theunissen*, 935 F.2d at

[5] This Court should limit its personal jurisdiction analysis to Mueller Europe's contacts with Tennessee, the state in which the action was brought. *See Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 424-25 (2d Cir. 2005); *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir. 2000). Even if this Court were inclined to consider national contacts, however, Mueller Europe lacks sufficient contacts with the United States to warrant the exercise of personal jurisdiction.

1458 (holding that a court may decide a motion to dismiss for lack of personal jurisdiction based on affidavits alone).

This unchallenged affidavit evidence conclusively establishes that Mueller Europe:

- was never incorporated in or registered to do business in any state in the United States;
- had no employees who resided in the United States;
- never engaged in the production or sale of ACR copper tubing in or into the United States;
- never owned assets, including inventory, in the United States;
- never maintained offices, facilities, or plants in the United States;
- never owned, used, or possessed personal or real property situated in the United States;
- never maintained a bank account in the United States; and
- never paid (or was required to pay) taxes or franchise fees in the United States.

(R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶¶ 11-13, 16-21, Apx. ___.) Nor has Mueller Europe sold, distributed, or sold for distribution any products in or into the United States (aside from the largely intercompany *de minimis* non-ACR tube shipments described above).[6]

[6] From its inception in 1997 to February 2007, the value of Mueller Europe's total shipments to the United States was less than $120,000, amounting to approximately *one hundredth of one percent* of Mueller Europe's total sales

Carrier has never disputed those facts. Courts have repeatedly refused to exercise general personal jurisdiction over defendants under such circumstances. *See, e.g.*, *Estate of Thomson*, 545 F.3d at 361 (finding no general jurisdiction over foreign company that did not conduct business, have employees, or own property in the forum); *Harris*, 281 F. App'x at 493-94 (finding no general jurisdiction over U.K. company that maintained no offices, employees, property or licenses in the forum and did not transact or solicit business there).[7]

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during roughly that same period. (R. 69, Reply Br. in Support of Mot. to Dismiss, Ex. 3, Reply Donovan Dec. ¶¶ 17-22, Apx. ___.) Of those few sales, the majority of them were intercompany sales of copper products (for instance, to Mueller Europe's French affiliate Desnoyers) in which the product was shipped directly to the buyer's customer in the United States. (*Id.*, Apx. ___.) Shipments containing goods purchased by Desnoyers and delivered on behalf of Desnoyers cannot establish jurisdictional contacts for Mueller Europe. *See Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik GmbH & Co.*, 295 F.3d 59, 64 n.3 (1st Cir. 2002) ("sales by an independent distributor . . . or separately incorporated subsidiary normally do not count as 'contacts' of the manufacturer or parent corporation") (internal citation omitted).

[7] *See also Premium Balloon Accessories, Inc. v. Control Plastics*, 113 F. App'x 50, 50-51 (6th Cir. 2004) (holding that defendant was not subject to personal jurisdiction in forum where it had only $9,075.90 of in-forum sales during three-year period, amounting to 0.3% of total sales); *Conti v. Pneumatic Prods. Corp.*, 977 F.2d 978, 981 (6th Cir. 1992) (annual sales of $900,000 through agents in forum does not establish a *prima facie* case that non-resident defendant's contacts with forum are "continuous and systematic").

2. The Contacts Of MLI Cannot Be Imputed To Mueller Europe.

Having failed to demonstrate continuous and systematic contacts by Mueller Europe sufficient to establish general jurisdiction, Carrier argued below that MLI's forum contacts should be imputed to Mueller Europe. This "reverse-attribution" theory is not supported by law or even Carrier's own allegations.

Plaintiffs typically seek to obtain personal jurisdiction over a *foreign parent* through its U.S. *subsidiary*, arguing that the foreign parent controls, and does business through, the domestic subsidiary and thereby subjects itself to personal jurisdiction in the forum. Carrier attempts the *reverse* here, suggesting that the parent's (MLI's) U.S. contacts can be attributed to its foreign subsidiary, Mueller Europe.

Courts have routinely rejected such attempts. *See Paz v. Castellini Co.*, No. B-07-036, 2007 WL 3342214, at *9 (S.D. Tex. Nov. 8, 2007) (rejecting theory that contacts of parent company can be attributed to subsidiary for personal jurisdiction purposes); *Vacation Travel Int'l., Inc. v. Sunchase Beachfront Condo. Owners Ass'n, Inc.*, No. 06-cv-02195, 2007 WL 757580, at *5 (D. Colo. Mar. 8, 2007) ("While under some circumstances a subsidiary corporation's contacts may be imputed to a parent for the purposes of jurisdiction, the reverse is not true.") (citing *Home-Stake Prod. Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012, 1021 (10th Cir. 1990)); *see also Plumbing Tube Dismissal Order*, 452 F. Supp. 2d at 829

(finding corporate relationship even more insufficient to establish personal jurisdiction "where the non-resident company in question is not the owner but is *owned* by a corporation subject to jurisdiction in the forum") (emphasis in original).

Even if this Court considered Carrier's attempt to reverse the traditional subsidiary-to-parent flow of contacts, Carrier's allegations as to the MLI-Mueller Europe relationship are deficient. In cases permitting attribution of a parent's contacts to its subsidiary, courts have required allegations that the subsidiary *controlled* its parent. Under the reverse-attribution theory, Carrier would have to demonstrate that *Mueller Europe controlled MLI*. *See Digi-Tel Holdings, Inc. v. Proteq Telecomms., Ltd.*, 89 F.3d 519, 524 (8th Cir. 1996) (requiring parent's activities be directed by or primarily for the benefit of subsidiary for reverse attribution); *Glud & Marstrand A/S v. Microsoft Corp.*, No. CO5-01563RSM, 2006 WL 2380717, at *9 (W.D. Wash. Aug. 15, 2006) (requiring control by subsidiary for reverse attribution theory).

Yet Carrier does not make a single allegation that Mueller Europe controlled MLI (in fact, as discussed below, its allegations are exactly to the contrary). Even if reverse attribution were permitted, MLI's jurisdictional contacts thus cannot be attributed to Mueller Europe. *See Plumbing Tube Dismissal Order*, 452 F. Supp. 2d at 829 (emphasizing, in dismissing Mueller Europe from the

Plumbing Tube Litigation, that "[o]nly if a foreign subsidiary has acted through its U.S. parent, or was utilized by the parent in such a way as to establish 'sufficient minimum contacts' is the parent-subsidiary relationship of any relevance in evaluating jurisdiction over the subsidiary").

While Carrier made no attempt to allege control of MLI by Mueller Europe, it did assert the reverse – that MLI not only owns, but also controls, Mueller Europe's operations. (*See* R. 46, Am. Cplt. ¶¶ 34, 36, 38, Apx. ___). Mueller Europe is entitled to a presumption of corporate separateness. *See Keeton*, 465 U.S. at 781 n.13 (holding that corporate ownership alone is insufficient for the exercise of personal jurisdiction). Even when a plaintiff attempts to attribute a *subsidiary's* contacts to its *parent* (the opposite of what Carrier intends here), the plaintiff must demonstrate that the parent company exercises so much control over the subsidiary that the subsidiary is the alter ego of the parent. *Estate of Thomson*, 545 F.3d at 362 (requiring that plaintiff demonstrate that a parent and subsidiary were alter egos before attributing a subsidiary's contacts to its parent).

This Court has emphasized the high threshold that must be met before treating two legally separate corporate entities as essentially one. "In both Tennessee and Delaware, the principle of piercing the fiction of the corporate veil is to be applied with great caution and not precipitately, since there is a presumption of corporate regularity . . . ." *Se. Tex. Inns, Inc. v. Prime Hospitality*

Corp., 462 F.3d 666, 675 (6th Cir. 2006) (internal quotation marks and citation omitted).

Carrier's allegations lack the specificity necessary to meet the high standard to confer jurisdiction over a foreign defendant based on an alter ego or veil-piercing theory. Here, Carrier admits that Mueller Europe and MLI are separate companies and organized under the laws of different countries. (R. 46, Am. Cplt. ¶¶ 32-33, Apx. ___.) Undisputed evidence adduced before the district court further establishes that Mueller Europe is not an operating division of MLI or in any way controlled by MLI. Rather, it conducts business on its own behalf, separate and apart from MLI. (R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶ 23, Apx. ___.)

In *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998), the Second Circuit affirmed dismissal of a foreign defendant on personal jurisdiction grounds, notwithstanding plaintiffs' allegations about the defendant's relationship with its U.S. affiliate. Plaintiffs there alleged that the foreign defendant "wholly controlled" its U.S. affiliate, and that the U.S. affiliate was "wholly dependent" on the foreign defendant "for its business plan and financing." *Id.* The court found that such conclusory statements without any supporting facts were insufficient to support jurisdiction over the foreign company: "we are not bound to accept as true

a legal conclusion couched as a factual allegation." *Id.* (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)) (internal citations omitted).

Carrier tries to subject Mueller Europe to the "control" of MLI by alleging that a *minority* of Mueller Europe directors also serve as officers of MLI (thereby admitting that a *majority* do not). (*See* R. 46, Am. Cplt. ¶ 36, Apx. ___.) But "[i]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts." *United States v. Bestfoods*, 524 U.S. 51, 69 (1998); *see also Precision, Inc. v. Kenco/Williams, Inc.*, 66 F. App'x 1, 6 (6th Cir. 2003) (rejecting argument that overlapping boards of directors of parent and subsidiary established alter ego liability). Accordingly, common directors and/or officers do not confer jurisdiction over a foreign affiliate. *See Jazini*, 148 F.3d at 185 (finding no personal jurisdiction where "subsidiary not shown to be mere department of parent even though the directors and officers of the two entities overlap to an extent") (internal quotation marks and citation omitted).[8]

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[8] Similarly, although Carrier alleges that MLI funded a capital improvement project at Mueller Europe (R. 46, Am. Cplt. ¶ 36, Apx. ___), undisputed evidence shows that Mueller Europe maintained financial and operational independence. (R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶ 24, Apx. ___.) In any event, such transactions do not confer personal jurisdiction over a foreign company. *See, e.g.*, *Doe v. Unocal Corp.*, 248 F.3d 915, 927 (9th Cir. 2001) (finding no general jurisdiction over foreign parent notwithstanding loans and other types of financing to subsidiaries within the forum); *Great Lakes Overseas, Inc. v. Wah Kwong Shipping Group, Ltd.*,

In short, Carrier's allegations, even if assumed to be true in every regard, cannot overcome the uncontroverted affidavit evidence in the record. And Mueller Europe neither controlled, nor was controlled by, MLI. Mueller Europe, a stand-alone foreign entity, did not have continuous and systematic contacts with the forum. *See, e.g.*, *Good v. Fuji Fire & Marine Ins. Co.*, 271 F. App'x 756, 758 (10th Cir. 2008) ("Only the well-pled facts of the complaint, affidavits, or other writings, as distinguished from conclusory allegations, can establish jurisdiction."). The Court therefore does not have general jurisdiction over Mueller Europe.

B. Carrier Cannot Establish Specific Jurisdiction Over Mueller Europe.

Specific personal jurisdiction is present where "the claims in the case arise from or are related to the defendant's contacts with the forum state." *Harris*, 281 F. App'x at 494. Specific personal jurisdiction requires a showing that: (1) the defendant purposefully availed itself of the privilege of acting in the forum or intentionally caused a consequence in the forum; (2) the cause of action arose from the defendant's activities in the forum; and (3) the acts of the defendant or consequences caused by the defendant have a substantial enough connection with

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990 F.2d 990, 997 (7th Cir. 1993) (finding common directors and injection of funds by foreign company into its affiliate that was subject to personal jurisdiction insufficient to give rise to personal jurisdiction over the foreign company).

the forum to make the exercise of jurisdiction reasonable. *Smith*, 2008 WL 4280124, at *3. Carrier cannot show any of those elements as to Mueller Europe.

1. Mueller Europe Did Not Purposefully Avail Itself Of The Privilege Of Acting In The Forum.

Mueller Europe did not purposefully avail itself of the privilege of acting in Tennessee or the United States. Purposeful availment is the most important of the three criteria for establishing specific jurisdiction because it "allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous' or 'attenuated' contacts." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Each case requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Int'l Techs. Consultants, Inc. v. Euroglas S.A.*, 107 F.3d 386, 395-96 (6th Cir. 1997) (quoting *Burger King*, 471 U.S. at 475).

Mueller Europe adduced facts before the district court demonstrating that Mueller Europe did nothing to invoke the benefits and protections of Tennessee or U.S. law. Carrier did not dispute below, and indeed cannot dispute, affidavit evidence that Mueller Europe was not engaged in the production, sale, or

any type of distribution of ACR tube in Tennessee or the United States. (R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶ 16, Apx. ___; R. 69, Reply Br. in Support of Mot. to Dismiss, Ex. 3, Reply Donovan Dec. ¶ 19, Apx. ___.) Accordingly, the Court must reject Carrier's unsubstantiated allegation to the contrary. (R. 46, Am. Cplt. ¶ 33, Apx. ___.) Carrier therefore cannot establish the first element of specific jurisdiction – purposeful availment.[9]

2. Carrier's Claims Do Not Arise From Activities Of Mueller Europe In The Forum.

Carrier also cannot establish the second requirement to obtain specific personal jurisdiction – that Mueller Europe engaged in acts in the forum giving rise to Carrier's cause of action. *See Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co.*, 91 F.3d 790, 794 (6th Cir. 1996) (holding that specific personal jurisdiction requires that the plaintiff's cause of action arise out of the defendant's contacts in the forum); *Plumbing Tube Dismissal Order*, 452 F. Supp. 2d at 827 (same).

[9] Mueller Europe's seven *de minimis* shipments of copper products into the United States – products different from the ACR tube at issue in this action – cannot support a finding of purposeful availment. *See Smith*, 2008 WL 4280124, at *4 (finding that the defendant had not purposefully availed itself of the forum where it licensed another company to produce and distribute its products in the forum but had no other contacts with it); *Boschetto v. Hansing*, 539 F.3d 1011, 1017 (9th Cir. 2008) (rejecting a finding of purposeful availment where the defendant's contacts did not represent "substantial business" for defendant and created no "ongoing obligations" in the forum).

First, as previously shown, the uncontested affidavit evidence establishes that Mueller Europe did not engage in *any* activities in Tennessee, and had virtually no activity in the United States. (*See, e.g.*, R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶¶ 5-21, Apx. ___.) Indeed, Carrier has not alleged even a single purchase from Mueller Europe.

Second, the Amended Complaint makes no specific allegation of conspiratorial conduct by Mueller Europe, and certainly none that supposedly occurred in this forum. That is not surprising, given that the 102-page EC ACR Decision, which found an exclusively *European* cartel, *never once mentions* Mueller Europe. In fact, it remains uncontroverted that Mueller Europe did not participate in, or even know of, the alleged European conspiracy described in the decision. (R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶ 33 ("Since Mueller Europe's inception in 1997, Mueller Europe did not participate in the conspiracy alleged in the Amended Complaint."), ¶ 35 ("Prior to the publication of the [EC ACR Decision], Mueller Europe did not know (except pursuant to cooperation with the EC) of any of the conspiratorial activities described therein."), Apx. ___.)

Nor has Mueller Europe ever had any association with Cuproclima, the trade association through which the European cartel was supposedly effected. (R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶ 31 ("Mueller Europe is not, and since its inception has not been, a member of, involved with, or associated in any

way with, [Cuproclima]."), Apx. ___.) Mueller Europe has never sold the product that was the subject of the alleged conspiracy. (*Compare* R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 327 ("The Commission notes that the products affected by the infringement within Cuproclima were [level wound coil] tubes, excluding other kinds of industrial tubes"), Apx. ___, *with* R. 55, Mot. to Dismiss, Ex. 10, Donovan Dec. ¶ 32 ("Mueller Europe does not manufacture or sell, and since its inception has not manufactured or sold, any form of level wound coil (as that term is used in paragraph 43 of the Amended Complaint) anywhere in the world."), Apx. ___.)

Recognizing Mueller Europe's absence from the EC ACR Decision, Carrier attempts to link Mueller Europe to Desnoyers' purported participation in the alleged ACR conspiracy, asserting that the two "acted jointly as a single enterprise." (R. 46, Am. Cplt. ¶ 38, Apx. ___.) But the EC ACR Decision specifically found that Desnoyers' involvement with Cuproclima *ceased prior to its acquisition by MLI*. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 394, Apx. ___.) The very document on which the Amended Complaint relies thus negates Carrier's allegation that Mueller Europe and Desnoyers "acted jointly" in connection with the alleged conspiracy.

Facing the clarity and force of Mueller Europe's submissions and the EC's ACR findings, Carrier argued below that the district court could infer Mueller

Europe's participation in a supposed ACR tube conspiracy from Mueller Europe's reported participation in a separate European conspiracy relating to *plumbing tubes*. But the EC Plumbing Tubes Decision, on which that allegation must rely, defeats Carrier's argument by finding that the plumbing tube and ACR tube conspiracies were entirely separate: "the arrangement pertaining to plumbing tubes on the one hand and those relating to industrial tubes [i.e., ACR tubes] on the other hand *involved different companies (and employees), and were organised in a different way*." (R. 55, Mot. to Dismiss, Wax Dec., Ex. 1, EC Plumbing Tubes Decision ¶ 5 (emphasis added), Apx. ___.)

Further, Carrier does not allege a single meeting in common or other overlapping conduct between the two European conspiracies. (*Compare* R. 55, Mot. to Dismiss, Wax Dec., Ex. 1, EC Plumbing Tubes Decision §§ 7, 9, Apx. ___, *with* R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision § 10, Apx. ___.) Indeed, the separateness of the plumbing tube and ACR tube products and conspiracies was confirmed by the letter to the district court from the EC's Director of anti-Cartel enforcement at the Directorate General for competition, in which he stated that "the cartel found and reported in the [EC ACR Decision] was separate from the cartel found and reported in the [EC Plumbing Tubes Decision.]" (R. 76, Notice of Filing & Service of Correspondence, Ex. A, Letter from Kirtikumar Mehta at 2, Apx. ___.)

Even if Carrier could demonstrate participation by Mueller Europe in the alleged ACR cartel, Carrier would still have to establish that the conspiracy arose from conduct by Mueller Europe in Tennessee or the United States. *See Plumbing Tube Dismissal Order*, 452 F. Supp. 2d at 827 (holding that, for specific personal jurisdiction to exist, plaintiffs' cause of action must have arisen from *defendant's activities in the forum*); *Harris*, 281 F. App'x at 495. While Carrier makes the bare allegation that "the Mueller entities agreed not to compete for Carrier's business in ACR Copper Tubing" (R. 46, Am. Cplt. ¶ 6, Apx. ___), Carrier supplies no *factual allegations* as to Mueller Europe's supposed participation in the alleged agreement. Mueller Europe also specifically incorporates by reference those aspects of MLI's brief further establishing why Carrier has not plausibly alleged that the European ACR conspiracy had a U.S. connection. *See* MLI Br. at Point II.C.1. (establishing that Carrier's failure to allege the "who, what, where, when, how or why" of the supposed conspiracy defeats its general global conspiracy allegations).

In sum, as the district court recognized in its *Plumbing Tube Dismissal Order*: "Plaintiffs' citations to the EC decision only provide evidence that some of the European cartel members had interests abroad. They offer no corroboration of Plaintiffs' claims as to the existence of a conspiracy targeted at the United States or elsewhere outside of Europe." 452 F. Supp. 2d at 831. The

circumstances are no different here, particularly as to Mueller Europe. Because Carrier has not shown and cannot show that its claims arose out of Mueller Europe's contacts with this forum, Carrier cannot establish the second requirement for specific jurisdiction.

3. Mueller Europe Has No Sufficiently Substantial Connection With The Forum To Make Assertion Of Jurisdiction Reasonable.

Finally, Carrier fails to meet the third requirement for specific personal jurisdiction – that an act by Mueller Europe (or a consequence caused by Mueller Europe) had a substantial enough connection with the forum to make jurisdiction reasonable. *See Harris*, 281 F. App'x at 494 ("[T]he acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.") (quoting *Intera Corp. v. Henderson*, 428 F.3d 605, 615 (6th Cir. 2005)). Importantly, as discussed above (*see supra* Point I), reasonableness is particularly important where a foreign defendant is involved. *See Asahi*, 480 U.S. at 114 ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."); *City of Monroe*, 399 F.3d at 666 (holding that caution in

extending personal jurisdiction to foreign defendants is expressed through the "reasonableness" component of personal jurisdiction analysis).

As detailed above, Mueller Europe is a foreign entity, and has never engaged in any business that had a substantial connection to Tennessee or the United States. Carrier nonetheless believes that this Court should find personal jurisdiction based on the bare and speculative assertion that Mueller Europe participated in a European ACR cartel that "may" have involved the United States. Carrier maintains that position even though the EC ACR Decision and the factual evidence before this Court are completely to the contrary. Exercising personal jurisdiction over Mueller Europe under those circumstances would not only be unreasonable, but significantly so.

A plaintiff's failure to establish *any one* of the three required elements of specific jurisdiction mandates the complaint's dismissal under Rule 12(b)(2). *Plumbing Tube Dismissal Order*, 452 F. Supp. 2d at 827 (describing the three elements of the test for specific personal jurisdiction as conjunctive (*i.e.*, all three elements must be met)). The failure of Carrier to meet *even one* of those three requirements underscores the injustice of Carrier's attempt to haul Mueller Europe into court in Tennessee.

III. ALTERNATIVE THEORIES OF SPECIFIC JURISDICTION ALSO FAIL TO PROVIDE A BASIS FOR PERSONAL JURISDICTION OVER MUELLER EUROPE.

Carrier implicitly conceded below that it had not satisfied the "purposeful availment" element of the specific jurisdiction test when it resorted to two alternative theories – the "*Calder* effects test" and the "conspiracy theory" of personal jurisdiction. Neither theory applies here. No allegations or evidence that Mueller Europe expressly aimed any action at, or caused a harmful effect in, the forum exist to justify invoking the *Calder* effects test. And the conspiracy theory is neither consistent with the due process clause nor warranted by Carrier's conclusory factual allegations. Finally, even if one of those alternatives to establishing "purposeful availment" applied, the second and third requirements of specific jurisdiction still remain unsatisfied for the reasons described above.

A. The "*Calder* Effects Test" Does Not Establish A Basis For Specific Jurisdiction Over Mueller Europe.

Under certain limited circumstances, the purposeful availment prong of the three-part specific personal jurisdiction test may be satisfied if: (1) the defendant's actions were expressly aimed at the forum such that the forum was the "focal point" of the conduct, and (2) the "brunt of the harm" from defendant's acts occurred in the forum. *See Calder v. Jones*, 465 U.S. 783, 789 (1984) (finding specific jurisdiction in California over Florida newspaper reporter and editor who published defamatory article about California resident). This Court has properly

acknowledged *Calder*'s limited applicability: "[W]e have applied *Calder narrowly* by evaluating whether a defendant's contacts with the forum may be enhanced if the defendant *expressly aimed* its tortious conduct at the forum and plaintiffs' forum state was the *focus of the activities* of the defendant out of which the suit arises." *Scotts Co. v. Aventis, S.A.*, 145 F. App'x 109, 113 n.1 (6th Cir. 2005) (emphasis added) (citing *Reynolds*, 23 F.3d at 1110).

Carrier cannot meet that test. As previously discussed, the EC ACR Decision and, consequently, the Amended Complaint do not identify any conduct or harm caused by Mueller Europe *anywhere in the world*, let alone in Tennessee or the United States. Nor does the Amended Complaint contain any facts that would otherwise support such an argument. *See* MLI Br. at Point II.C.1. (discussing general lack of plausible allegations of ACR conspiracy specially directed at the United States). The absence of factual allegations or evidence defeats any argument by Carrier that Mueller Europe itself "expressly aimed" any of its activities at those jurisdictions.

As the district court held in the related Plumbing Tube Litigation: "Plaintiffs' collection of irrelevant facts, conclusory statements, and bald allegations falls well short of a showing that Mueller Europe 'expressly aimed' its conduct at the forum, causing any injury to Plaintiffs, as required under *Calder*."

Plumbing Tube Dismissal Order, 452 F. Supp. 2d at 829. For the same reasons, the *Calder* effects test should be rejected here.

B. The "Conspiracy Theory" Does Not Supply A Basis For Personal Jurisdiction Over Mueller Europe.

Similar to the *Calder* effects test, some courts have used the so-called "conspiracy theory" to satisfy the purposeful availment prong of a specific jurisdiction analysis when a non-resident defendant lacks the constitutionally required minimum contacts with the forum. This Court should decline to apply that theory because it is inconsistent with the due process clause. Even if the theory were constitutional, Carrier has pled no facts to support its application to Mueller Europe.

1. Application Of The "Conspiracy Theory" Would Be Inconsistent With The Due Process Clause.

Unlike the *Calder* effects test, which focuses on a specific defendant's *own* actions, the conspiracy theory purportedly permits the purposeful availment requirement to be satisfied when (i) a non-resident defendant knowingly authorizes another to undertake action (ii) for the non-resident defendant's benefit, and on its behalf, and (iii) that the non-resident defendant intended to occur in (or be expressly aimed at) the forum. This Court first considered the conspiracy theory of jurisdiction more than twenty-five years ago in *Chrysler Corp. v. Fedders Corp.*,

643 F.2d 1229 (6th Cir. 1981), but has yet to decide the issue of whether the theory is consistent with the due process clause. It is not.

The due process clause requires that "[e]ach defendant's contacts with the forum State must be assessed *individually*." *Keeton*, 465 U.S. at 781 n.13 (emphasis added); *Rush*, 444 U.S. at 331-32 ("The result was the assertion of jurisdiction over Rush based solely on the activities of State Farm. *Such a result is plainly unconstitutional. . . . The requirements of International Shoe . . . must be met as to* <u>*each defendant*</u> *over whom a state court exercises jurisdiction*.") (emphasis added). This Court has consistently emphasized the importance of an individual assessment of contacts: "Personal jurisdiction must be analyzed and established over each defendant independently." *Days Inns*, 445 F.3d at 904; *see also Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1274 (6th Cir. 1998) ("[Plaintiff] must provide sufficient evidence for us to conclude that [the non-resident defendant] is being brought into court for something that it has done, not for something [the domestic defendant] has done.").

Imputing the conduct of one defendant to another under the conspiracy theory violates that fundamental tenet of personal jurisdiction and deprives the absent defendant of its constitutional right to have its forum contacts assessed individually. *See, e.g.*, *Roy v. Brahmbhatt*, No. 07-cv-5082, 2008 WL 5054096, at *8 (D.N.J. Nov. 26, 2008) (declining to recognize the conspiracy

theory of personal jurisdiction because the "central tenets of the theory, at bottom, do not comport with *Int'l Shoe* and its admonition that the assertion of jurisdiction over a non-resident defendant should not 'offend traditional notions of fair play and substantial justice.'"); *In re Reciprocal of Am. (ROA) Sales Practices Litig.*, No. 04-cv-2294, 2005 WL 3593635, at *5 (W.D. Tenn. Dec. 30, 2005) (refusing to apply the conspiracy theory of jurisdiction under Eighth Circuit and Missouri law where "the only connection that provides a potential basis for jurisdiction over [the non-resident defendant] are the alleged personal contacts with plaintiffs in Missouri by certain defendants who are claimed to have conspired with [the non-resident defendant]"); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. C 02-1486, 2005 WL 2988715, at *8 (N.D. Cal. Nov. 7, 2005) (applying Ninth Circuit and California law and rejecting conspiracy theory because it "is not a generally accepted theory").

Consequently, this Court should reject a conspiracy-based theory of personal jurisdiction. Subjecting a non-resident defendant to litigation in a remote forum, based not on its own minimum contacts or conduct, but rather on the minimum contacts or conduct of *others*, would violate the due process clause.

2. No Factual Allegations Support Application Of The Conspiracy Theory Here.

Even assuming that the conspiracy theory of specific personal jurisdiction satisfied the due process clause (which it does not), Carrier has failed to plead facts adequate to warrant application of the theory to Mueller Europe.

Without endorsing the constitutionality of the conspiracy theory, this Court has repeatedly ruled that bare allegations of a conspiracy will not suffice to establish personal jurisdiction over a non-resident defendant. *See Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1155 n.3 (6th Cir. 1990) ("Insofar as appellant alleges that jurisdiction exists based upon the existence of a conspiracy, we find that these allegations are unsupported and therefore do not constitute sufficient contacts to justify an exercise of personal jurisdiction."); *Ecclesiastical Order of the Ism of Am, Inc. v. Chasin*, 845 F.2d 113, 116 (6th Cir. 1988) ("[W]e find that the plaintiffs' unsupported allegations of conspiracy are likewise insufficient to justify an exercise of personal jurisdiction over the nonresident defendants."); *Chrysler Corp.*, 643 F.2d at 1237 (noting that the plaintiffs' "totally unsupported allegations of conspiracy cannot constitute sufficient contacts . . . to justify an exercise of personal jurisdiction").

Rather, courts have required *detailed* factual allegations of conspiratorial conduct before contemplating the assertion of personal jurisdiction over a non-resident defendant based on an alleged co-conspirator's conduct in the

forum. *See, e.g., FC Inv. Group LC v. IFX Mkts, Ltd.*, 529 F.3d 1087, 1097-98 (D.C. Cir. 2008) (finding no personal jurisdiction based on conspiracy theory where plaintiffs failed to "plead with particularity the conspiracy as well as overt acts within the forum taken in furtherance of the conspiracy") (internal quotation marks and citation omitted); *Am. Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449, 1454 (10th Cir. 1983) (holding that plaintiff did not meet its threshold burden of establishing personal jurisdiction where defendants countered plaintiff's allegations of conspiracy "by sworn affidavits" and plaintiff "failed to controvert defendants' affidavits other than by conclusory allegations in its complaints and briefs").

To the extent this Court considers the conspiracy theory, Carrier thus must make a *prima facie* case that Mueller Europe expressly authorized and knew of its alleged co-conspirators' conduct, that Mueller Europe intended that such conduct occur within or be aimed at the forum, and that such conduct was undertaken on behalf and for the benefit of Mueller Europe. *See, e.g., Jin v. Ministry of State Sec'y*, 335 F. Supp. 2d 72, 83 (D.D.C. 2004) (personal jurisdiction may not be based on acts by alleged co-conspirators "about which the plaintiffs fail to show the defendant had *any knowledge, control, approval or discretion*.") (emphasis added); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 26 F. Supp. 2d 593, 602 (S.D.N.Y. 1998) (requiring that: (1) "out-of

state co-conspirator had an awareness of the effects of the activity in [the forum]," (2) "[resident] co-conspirators' activity was for the benefit of the out-of-state conspirators," and (3) "co-conspirators in [the forum] acted at the behest of or on behalf of, or under the control of the out-of-state conspirators."); *Santana Prods., Inc. v. Bobrick Washroom Equip.*, 14 F. Supp. 2d 710, 718 (M.D. Pa. 1998) (holding that plaintiff must demonstrate that "substantial acts in furtherance of the conspiracy occurred in [the forum] and that the non-forum co-conspirator was aware or should have been aware of those acts").

Carrier's Amended Complaint generically alleges that the district court had "*in personam* jurisdiction over each of the Defendants because each was engaged in an illegal customer and market-allocation and price-fixing scheme and conspiracy in unreasonable restraint of trade that was directed at, and had the intended effect of causing injury to, persons and entities residing in, located in, or doing business in the United States." (R. 46, Am. Cplt. ¶ 10, Apx. ___.) But that is precisely the type of bare, conclusory allegation that courts have repeatedly rejected as insufficient:

> In the face of Defendant's affidavits denying any contact with the U.S. or involvement in any conspiracy affecting the U.S., Plaintiffs offer no meaningful substantiation of their conspiracy and price fixing claims, which were unabashedly borrowed from the EC . . . .

Plumbing Tube Dismissal Order, 452 F. Supp. 2d at 828-29 (rejecting application of conspiracy theory based on unsupported allegations).

As previously discussed, the Amended Complaint does not contain a single allegation about the alleged conspiratorial acts of Mueller Europe. Consequently, also missing is an allegation that Mueller Europe expressly authorized a purported co-conspirator to undertake actions on Mueller Europe's behalf and for its benefit that Mueller Europe knew were, and intended to be, targeted at Tennessee or the United States. As shown, the uncontroverted facts demonstrate that Mueller Europe had nothing do with the alleged European ACR cartel. *See supra* at Point II.B.2.

Carrier may attempt to rely on *Chenault v. Walker*, 36 S.W.3d 45 (Tenn. 2001), to support its application of the conspiracy theory of personal jurisdiction. That reliance would be misplaced. Although *Chenault* found that the conspiracy theory is constitutional, this Court is not controlled by that decision. *See, e.g.*, *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1276 (7th Cir. 1997) (holding that it was "beyond cavil" that federal courts are not bound by a state court's interpretation of federal law in evaluating questions of personal jurisdiction) (internal quotation marks and citation omitted). Furthermore, *Chenault* itself acknowledged that bare allegations of conspiracy are insufficient to establish jurisdiction:

> The cases are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough. Otherwise plaintiffs could drag defendants to remote forums for protracted proceedings even though there were grave reasons for questioning whether the defendant was actually suable in those forums.

Chenault, 36 S.W.3d at 55 (quoting *Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992) (Posner, J.)).

Finally, as *Chenault* emphasized: "If the defendant challenges jurisdiction by filing affidavits, the plaintiff must establish a prima facie showing of jurisdiction by responding with its own affidavits and, if useful, other written evidence." *Chenault*, 36 S.W.3d at 56. Carrier has offered no affidavit evidence to contradict the detailed declarations and other evidence submitted by Mueller Europe. Dismissal of Carrier's Amended Complaint would therefore be required even if *Chenault* were applicable.

In sum, even if this Court were to accept the "conspiracy theory," the Amended Complaint's conclusory allegations are insufficient as a matter of law to establish personal jurisdiction over Mueller Europe.

CONCLUSION

For the reasons set forth in the MLI brief, the Outokumpu brief, and herein, the Judgment of the district court should be affirmed on the basis that subject matter jurisdiction is lacking. In the event that the district court determines

that subject matter jurisdiction over Carrier's Sherman Act claim exists, it should dismiss the Amended Complaint as to Mueller Europe for want of personal jurisdiction.

Mueller Europe is a stand-alone foreign entity that has not produced or sold ACR tube in or into the United States. Mueller Europe's business has no material connection to the United States. And Mueller Europe simply has no connection to the alleged conspiracy that forms the basis for Carrier's Amended Complaint. Carrier, therefore, has no basis for asserting personal jurisdiction over Mueller Europe, and the Amended Complaint should be dismissed as to Mueller Europe.

Finally, should the Court find both subject matter jurisdiction and personal jurisdiction over Mueller Europe, the Amended Complaint should be dismissed because it fails to satisfy applicable pleading requirements and/or it is time-barred.

Dated: New York, New York
January 26, 2009

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(A)(7)(C)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B) of 16,500 words for appellee's principal and response brief because this brief contains 11,683 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Sixth Circuit Rule 28(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, 14 point font.

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CERTIFICATE OF SERVICE

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ADDENDUM - COUNTER-DESIGNATION OF JOINT APPENDIX CONTENTS

As a supplement to the documents already designated by Carrier in connection with its principal brief, Mueller Europe hereby counter-designates the following portions of the district court record for inclusion in the Joint Appendix:

Description of Entry	Date	Record Entry No.
Amended Complaint	10/27/2006	46
Motion to Dismiss the Amended Complaint by Mueller Europe Ltd., Attachments 3, 4 and 10	12/06/2006	55
Reply Brief in Support of Motion to Dismiss the Amended Complaint by Mueller Europe Ltd., Attachment 3	02/09/2007	69
Notice by Mueller Industries, Inc. of Filing & Service of Correspondence From the European Commission's Director of Anti-Cartel Enforcement	03/07/2007	76
Order of Dismissal	07/27/2007	93
Judgment	07/27/2007	94
Notice of Cross-Appeal by Mueller Europe Ltd.	08/31/2007	99