Nos. 07-6052 (L) / 07-6114 / 07-6115 / 07-6116

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARRIER CORPORATION, ET AL.,
Plaintiffs-Appellants,

v.

OUTOKUMPU OYJ, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Tennessee, No. 06-2186
The Honorable Bernice B. Donald

PROOF SECOND BRIEF FOR DEFENDANTS-APPELLEES CROSS-APPELLANTS OUTOKUMPU OYJ; OUTOKUMPU COPPER PRODUCTS OY; OUTOKUMPU COPPER FRANKLIN, INC.; AND OUTOKUMPU COPPER (U.S.A.), INC.

ERIC MAHR
CAROLINE T. NGUYEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

January 26, 2009

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel for the non-governmental parties Outokumpu Oyj; Outokumpu Copper Products Oy; Outokumpu Copper Franklin, Inc.; and Outokumpu Copper (U.S.A.), Inc. certify as follows:

1. Outokumpu Oyj is a publicly-held Finnish company; it has no parent companies.

2. Outokumpu Copper Products Oy (now known as Luvata Espoo Oy) is a subsidiary of Luvata Fabrication Oy, a private Finnish company. Luvata Fabrication Oy is an indirect subsidiary of Cidron Eight S.A.R.L., a private company organized under the laws of Luxemburg. Cidron Eight S.A.R.L. is a subsidiary of Cidron Eight Limited, a private company organized under the laws of Jersey, British Channel Islands. Cidron Eight Limited is owned by Nordic Capital V LP, a private equity fund organized under the laws of Jersey, British Channel Islands.

3. Outokumpu Copper Franklin, Inc. and Outokumpu Copper (U.S.A.), Inc. (now known as Luvata Franklin, Inc. and Luvata Sales USA, Inc., respectively) are subsidiaries of Luvata Fabrication North America, Inc. Luvata Fabrication North America, Inc. is a subsidiary of Luvata Espoo Oy, which is identified in paragraph 2 above.

Dated: January 26, 2009
Washington, D.C.

/s/ Caroline T. Nguyen

Caroline T. Nguyen
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 663-6000
Counsel for Defendants-Appellees Cross-Appellants Outokumpu Oyj; Outokumpu Copper Products Oy; Outokumpu Copper Franklin, Inc.; and Outokumpu Copper (U.S.A.), Inc.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a), Defendants-Appellees and Cross-Appellants Outokumpu Oyj; Outokumpu Copper Products Oy; Outokumpu Copper Franklin, Inc.; and Outokumpu Copper (U.S.A.), Inc., ("Outokumpu") respectfully request that the Court permit oral argument. This appeal involves complex factual and legal arguments, and the decisional process is likely to be significantly aided by oral argument.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court properly dismissed Carrier's amended complaint for lack of subject-matter jurisdiction on the grounds that: the sole source of Carrier's factual allegations concerning a violation of Section One of the Sherman Act is a European Commission Decision describing exclusively European anticompetitive conduct targeting exclusively European markets; the only allegations concerning any effect on U.S. commerce are purely conclusory and squarely inconsistent with the European Commission's Decision; and the amended complaint therefore is "wholly insubstantial" under the standard set forth in *Bell v. Hood*, 327 U.S. 678, 682-683 (1946).

2. Whether, in the alternative, dismissal for lack of subject-matter jurisdiction is appropriate because Carrier has failed to adequately plead that the exclusively European conduct on which its Sherman Act claim is based had any "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce, as required by the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a.

3. Whether, even if the District Court has subject-matter jurisdiction, Carrier's amended complaint should be dismissed for failure to state a claim because Carrier failed to establish a plausible entitlement to relief under federal antitrust law as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), and/or because the face of the amended complaint makes apparent that Carrier's claim is time-barred.

STATEMENT OF THE CASE

Plaintiffs-Appellants Carrier Corporation, Carrier S.A., and Carrier Italia S.P.A. ("Carrier") appeal the dismissal of their federal antitrust claim under Section One of the Sherman Act. The District Court dismissed Carrier's amended complaint for lack of subject-matter jurisdiction on the ground that it was "wholly insubstantial" under the doctrine in *Bell v. Hood*, 327 U.S. 678 (1946). The District Court also concluded, in the alternative, that the amended complaint failed to state a claim under Rule 12(b)(6), citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

The District Court based these holdings on its conclusion that the amended complaint contained only (1) factual allegations selectively cut-and-pasted from a decision of the European Commission ("EC" or "Commission") describing an exclusively European cartel targeting exclusively European markets, and (2) "tacked on" conclusory assertions that the European cartel somehow affected U.S. commerce. As a result, the exclusively European conduct on which Carrier's amended complaint is based calls for dismissal of its claim on at least three independent, but related, grounds: failure to plead a substantial basis for federal subject matter jurisdiction; failure to satisfy the FTAIA's requirement that foreign conduct have a direct, substantial, and reasonably foreseeable effect on U.S. commerce in order to support jurisdiction under the Sherman Act; and failure to

adequately plead the requisite elements of a claim under Section One of the Sherman Act. For any and all of these reasons, this Court should affirm the District Court's ruling.

On March 29, 2006, more than five years after the alleged anticompetitive conduct ceased and more than one year after the limitations period under the Sherman Act expired, Carrier filed a complaint in the U.S. District Court for the Western District of Tennessee, alleging violations of Section One of the Sherman Act, 15 U.S.C. § 1, and the Tennessee Trade Practices Act ("TTPA"), § 47-25-101, *et seq*. On September 12, 2006, Defendants-Appellees Outokumpu Oyj, Outokumpu Copper Products Oy, Outokumpu Copper (U.S.A.), Inc., and Outokumpu Copper Franklin, Inc. (collectively "Outokumpu"), as well as Defendants-Appellees Mueller Industries, Inc. and Mueller Europe Ltd. ("Mueller") moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6).

Rather than respond to those motions, Carrier withdrew and amended its complaint on October 27, 2006, to try to address its deficiencies. Outokumpu and Mueller filed motions to dismiss that amended complaint on December 6, 2006, again seeking dismissal pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6). On May 21, 2007, the Supreme Court issued its decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), and Defendants filed a Notice of Filing

Supplemental Authority on June 14, 2007. While Carrier responded to that notice, it did not seek leave to amend its complaint a second time.

On July 27, 2007, the District Court dismissed Carrier's amended complaint in its entirety pursuant to Rule 12(b)(1). It concluded that Carrier had "simply 'cut-and-pasted' into [its] 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, Order of Dismissal ("Order") 6, App. __. The court found that Carrier's assertion "that the European cartel extended to the U.S. is essentially speculative," and that its amended complaint is "hollow" and "wholly insubstantial." Order 6-10, App. __. The District Court held in the alternative that dismissal would have been mandatory pursuant to Rule 12(b)(6) under *Twombly*. Order 11, App. __. The court did not reach Outokumpu's arguments based upon the statute of limitations or Rule 12(b)(2), and declined to exercise supplemental jurisdiction over Carrier's state law claims.[1] *Id.* Carrier filed its Notice of Appeal on August 23, 2007, Outokumpu filed a Notice of Cross-Appeal on August 31, 2008, and sixteen months later—on December 29, 2008—Carrier filed its Principal

[1] The remainder of this Brief discusses only Carrier's Sherman Act claim, the subject of Carrier's appeal. Outokumpu hereby preserves all arguments relating to the state law claims in the event this Court reverses the District Court's judgment and remands for further proceedings.

Brief.[2]

STATEMENT OF FACTS

Air conditioning and refrigeration ("ACR") copper tubing is a specialized type of copper tubing used in certain air conditioning applications. EC Decision, Exhibit 1 to Outokumpu's Mot. to Dismiss Carrier's Am. Compl. ("Outokumpu's Motion") ¶¶3-5, App. __ ("EC"). Also referred to as "industrial tubes" or "level wound coil (LWC)," ACR copper tubing is the mechanism through which heat exchange inside ACR applications takes place. R.46, Amended Complaint ("Am. Compl.") ¶42, App. __. As coolants flow through the inside of the ACR copper tubing, the temperature of the air in contact with the outside of the tube is quickly reduced. *Id*. Copper has long been the preferred material for ACR tubing due to its high level of thermal conductivity. *Id.*

The market for ACR copper tubing is distinct from the market for plumbing tubes (also called "sanitary tubes"), which also utilize copper but require a less-sophisticated manufacturing process and are subject to increasing competition from plastic tubes. EC ¶¶3-4, App. __; EC Plumbing Tubes Decision ¶179, Exhibit 3 to

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[2] This Court's September 19, 2007 Briefing Letter ordered Carrier to submit its Principal Brief on October 29, 2007. Ten days before the deadline, Carrier moved to hold briefing in abeyance, pending the Court's ruling on Carrier's motion to dismiss Defendants-Appellees' cross-appeals. The Court denied Carrier's motion on December 3, 2007. *See Carrier Corp. v. Outokumpu Oyj*, No. 07-6114 (6th Cir. Dec. 3, 2007). Instead of resuming its appeal, however, Carrier did nothing until this Court, *sua sponte*, issued a new Briefing Schedule eleven months later, on November 17, 2008.

Outokumpu's Motion, App. __ ("EC Plumbing Tubes").

In the early 1980s, ACR copper tubing was new to Europe, and quality standards were haphazard. EC ¶6, App. __. In 1985, several European processors, including the Outokumpu Finnish entities, formed the Cuproclima Quality Association for ACR Tubes ("Cuproclima") under Swiss law to promote quality standards for ACR copper tubing in Europe. EC ¶7, App. __. Each member of Cuproclima is or was incorporated and headquartered in Europe, and each operated primarily in Europe during the relevant time period. EC ¶¶17-42, App. __.

In 2001, Cuproclima became the subject of an exhaustive investigation by the European Commission concerning anticompetitive conduct in the European ACR copper tubing markets. The Commission conducted dawn raids of members' offices on March 22-23, 2001. R.57, EC Press Release, Exhibit 10 to Outokumpu's Motion ("Press Release"), App. __. As a result, the cooperation within Cuproclima was "entirely suspended" in March 2001, and the Association was placed into liquidation. EC ¶16, App. __. Nothing in the Record suggests *any* anticompetitive conduct occurring after the dawn raids, and Carrier does not allege otherwise. *See* Am. Compl. ¶69, App. __ ("Cuproclima was officially disbanded" after EC investigation began); EC ¶16, App. __. Based on evidence seized during these raids and extensive interviews with Cuproclima members, the Commission published a 102-page decision ("EC Decision") on December 16, 2003. The EC

Decision provides a detailed factual narrative of the activities of the Cuproclima cartel and supplies the exclusive substantive factual basis for Carrier's Sherman Act claim. *Infra* 26-32.

Importantly, the EC Decision makes clear that Cuproclima was active exclusively in Europe, targeted only European customers, and affected only European commerce. The EC Decision does not identify *any* U.S. conduct related to the Cuproclima cartel and does not identify *any* effect of the cartel on commerce outside of Europe. Indeed, as the Director of the EC's Cartels Directorate expressly confirmed to the District Court, Cuproclima's "scope [was] limited to the European territory." R.76, Letter from Kirtikumar Mehta, Director, Directorate F: Cartels, Competition DG, European Commission, App. ___ ("Mehta ACR letter").

1. The European Markets for ACR Copper Tubing

The ACR copper tubing market is not global. Carrier's filings in the District Court concede that the ACR copper tubing markets in "both Europe and North America traditionally have operated 'self sufficiently.'" R.61, Exhibit 1 to Carrier's Response to Defs.' Mot. to Dismiss ("Carrier's Response"), App. __. The independence of the U.S. market from European markets is illustrated by the presence of major U.S. ACR copper tubing processors like Wolverine Tube, Inc. ("Wolverine"), which held a "40-percent market share in copper alloy tubing in the United States" in 1996, but evidently had no presence in Europe during the

relevant period, R.61, Exhibit 37 to Carrier's Response, App. __, as well as "several [U.S.] domestic tube manufacturers" that were expanding. *Id*. There was very little overlap between U.S. and European ACR copper tubing processors, and imports occurred, if at all, only to "fill[] market shortfalls." Exhibit 1 to Carrier's Response, App. __. For example, beginning at least as early as May 1988, the Finnish entities did not manufacture, market, import, or sell ACR copper tubing in the United States. Decl. of Kalle Luoto, Exhibit 19 to Outokumpu's Motion ¶10, App. __ ("Luoto Decl."); Decl. of Jyrki Siltala, Exhibit 20 to Outokumpu's Motion ¶ 10, App. __ ("Siltala Decl."); *see also* Reply Decl. of Ulf Anvin, Exhibit 7 to Outokumpu's Reply ¶¶2-5, App. __ ("Anvin Reply Decl."). Carrier also concedes that the Asian ACR copper tubing market was independent such that "competition from [Asian manufacturers] outside of . . . Asia was virtually non-existent." Am. Compl. ¶5, App. __.

Carrier's concessions are supported by the EC Decision, which confirms the national or regional nature of the ACR copper tubing markets. The Commission found distinct European markets for ACR copper tubing: It noted that Cuproclima members "sold their products in most Member States of the Community and EEA directly to end-users in these countries." EC ¶54, App. __. The relevant market for Cuproclima "was characterized by important trade flows between the Member States," with only "some trade between Contracting Parties to the EEA

Agreement." EC ¶55, App. __. Indeed, Europe-specific market statistics exist for ACR copper tubing, and the "Cuproclima share of the total Community/EEA market in 2001 was ca. 75% - 80%." EC ¶52, App. __. It is this European commerce—not U.S. commerce—that was the exclusive target of the Cuproclima cartel reported in the EC Decision. *E.g.*, EC ¶197, App. __ ("common aim of [Cuproclima cartel] was to control the European market for industrial tubes").

2. The Cuproclima Cartel

The EC Decision makes clear that the Cuproclima cartel targeted European commerce (and only European commerce), as Cuproclima members sought "to jointly control the European market for industrial tubes." EC ¶289, App. __; *see also* EC ¶¶160, App. __ (Cuproclima members "agreed to explore ways to continue their cooperation in controlling the European market").[3]

The EC Decision repeatedly emphasizes Cuproclima's European focus: First, the very "objective of the [cartel] was to maintain a status quo in the market shares *in the main European markets*." EC ¶103, App. __ (emphasis added).

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[3] The EC Decision explains that, far from reaching globally, the Cuproclima cartel was forced to operate on a national level within Europe. For example, unless the Cuproclima members agreed upon the market share allocation for a particular country or agreed upon the allocation of a particular customer—and sometimes even when they did agree—they competed vigorously for each other's ACR copper tubing business. *See*, *e.g.*, EC ¶87, App. __ (Cuproclima members could not agree on allocation of inner groove ACR copper tubing and would not allocate market shares); EC ¶¶105-107, App. __ (Cuproclima members had occasional price wars to win each other's customers and changed customers "rather often").

Cuproclima members agreed to adopt their respective 1994 market shares as the baseline. *Id.* Because Cuproclima's focus was on Europe, when members shared sales data with one another to assess individual market shares, they shared only "sales data in the *Western and Eastern European markets*." EC ¶14, App. __ (emphasis added).

Second, discussions at Cuproclima meetings revolved around European customers, European commerce, and European markets. *See* EC ¶195, App. __ (Cuproclima involved "the European market of LWC tubes"). In the context of customer allocation, for example, Cuproclima members prepared spreadsheets as the basis for their discussions at meetings that "contained the main *European* customers of Cuproclima tubes, their demand of the particular sizes as well as additional data." EC ¶¶116-118, App. __ (emphasis added). And "[f]rom 1998 onwards, the discussions concerned only the 70 largest *European* customers." EC ¶116, App. __ (emphasis added).

Market assessments by the Cuproclima cartel focused on "sales volumes and individual market share developments as well as general price level *in Europe*." EC ¶160, App. __ (emphasis added). Discussions centered on "different *European* markets," EC ¶126, App. __ (emphasis added), "the *European* market situation in Cuproclima tubes," EC ¶111, App. __ (emphasis added), "price changes in *Southern Europe*," EC ¶127, App. __ (emphasis added), "data on consumption in

Europe in Q1 [of 1993] as compared to 1992," EC ¶137, App. __ (emphasis added), and "[p]rice assessments for the *European* market." EC ¶141, App. __ (emphasis added). Working meetings held outside of Cuproclima's regular schedule similarly "related to the major *European* markets of industrial tubes subject to official Cuproclima meetings." EC ¶168, App. __ (emphasis added).

Third, "the corner stone in the implementation of the Cuproclima discipline" was the market leader system through which the organization's objectives were enforced. EC ¶¶108-112, App. __. But the market leader system operated only in European countries. EC ¶195, App. __ (Cuproclima's "monitoring system consist[ed] of a market leader arrangement for various *European* territories" (emphasis added)). Market leaders were Cuproclima members with "the highest sales . . . in a certain country" and were directly responsible for implementing Cuproclima decisions and monitoring members in their territory. EC ¶¶108-112, App. __. Market leaders were appointed only in France, Spain, Norway, Sweden, Finland, Ireland, the United Kingdom, Belgium, the Netherlands, Luxembourg, Italy, Germany, Denmark, Portugal, and Switzerland. EC ¶146, App. __; *see also* EC ¶79, App. __ (referring to "market leader arrangement for European territories"). There was no market leader appointed for the United States or, indeed, anywhere outside of Europe. *See* EC ¶195, App. __.

Even with the market leader system, Cuproclima members struggled to reach

market share agreements and maintain prices at supracompetitive levels. *E.g.*, EC ¶¶137-138, App. __ (describing one breakdown in agreement). Members often cheated on these agreements, and other members dropped their prices in response. EC ¶¶105, 137-138, 158, App. __. Outokumpu, for example, instigated a price war in 1997 in various European countries, EC ¶¶157-159, App. __, and another Cuproclima member mounted "price attacks" in 1993. EC ¶138, App. __.

Fourth, *every* Cuproclima meeting took place in Europe. EC ¶¶124-176, App. __. "[B]oard meetings were normally held in Zurich," EC ¶12, App. __, and the "Technical Committee met once a year, mostly in Germany," EC ¶13, App. __. Every meeting that Carrier recites similarly occurred in Europe. *See* Carrier Br. 10. The Spring 1993 meeting took place at Tegernsee, Germany. EC ¶137, App. __. The July 24, 1995 meeting occurred in Oslo, Norway. EC ¶152, App. __. The October 31, 1995 meeting took place in Prague, Czech Republic. EC ¶¶151, 153, App. __. The February 2, 2001 meeting occurred in Zurich, Switzerland. EC ¶175, App. __.

Thus, the EC Decision is completely inconsistent with Carrier's claim that the Cuproclima cartel extended to, much less targeted, the United States. Indeed, the *only* reference in the 102-page EC Decision to the U.S. market for ACR copper tubing suggests just the opposite: Because of Outokumpu's increasing attention to non-European markets, Cuproclima members worried about the organization's

capacity to continue jointly managing the "Cuproclima European market." EC ¶160, App. __ ("Cuproclima association has lost some of its weight" because members' attention elsewhere).

On January 9, 2001, Mueller informed the Commission of potential cartel activity in the European ACR copper tubing markets and sought leniency in exchange for cooperation with the Commission's investigation. EC ¶56, App. __. On March 22 and 23, 2001, the Commission conducted dawn raids of Cuproclima members. EC ¶176, App. __. Within days of the raids, Cuproclima suspended its activities and began liquidation. *Id.* On April 9, 2001, Outokumpu began cooperating with the Commission's investigation, responding to numerous requests for information and providing interviews. EC ¶¶59-67, App. __. Six months later, on October 15, 2002, KME also began cooperating with the Commission, and Wieland Werke followed suit on December 19, 2002. EC ¶¶68-71, App. __. The EC Decision clearly states—and Carrier does not contest—that Cuproclima members have not engaged in any cooperation since March 2001. *Id.*

3. "Elephants" And The Plumbing Tubes Market

While unrelated to the ACR copper tubing markets that are the subject of Carrier's claim, one additional area of factual background merits attention. After Outokumpu and Mueller first pointed out the jurisdictional defects in Carrier's complaint with their September 12, 2006 motions to dismiss, Carrier amended its

complaint in an attempt to address its failings. Instead of doing so, however, Carrier merely continued its pattern of borrowing allegations from European sources—this time reaching beyond the ACR copper tubing market to crib allegations from the Commission's Plumbing Tubes Decision, an entirely *different* EC investigation of an entirely *different* European cartel. *See* Mehta ACR Letter, App. ___ (Cuproclima "was separate from the cartel found and reported in [EC Plumbing Tubes Decision]").

For example, the amended complaint asserts that Cuproclima used the code name "elephants" to identify the "executives of the major tube manufacturers" in the cartel. *See* Am. Compl. ¶37, App. __. This term appears nowhere in the EC Decision concerning ACR copper tubing. It does, however, appear repeatedly in the EC Plumbing Tubes Decision describing the results of the Commission's investigation into anticompetitive activity in the European *plumbing tubes* markets. *See* EC Plumbing Tubes ¶¶220-221, 305, 331, 333, 363, 374, 397, App. __.

The Commission has repeatedly concluded that plumbing tubes and ACR copper tubes are not substitutes and "constitute different product markets." *See, e.g.*, EC Plumbing Tubes ¶¶3-5, App. __ . Whereas plumbing tubes are commodity goods used for water, oil, gas, and heating installations and are generally sold directly to end users, EC Plumbing Tubes ¶5, App. __, ACR copper tubing is a tailor-made, substantially more expensive product sold to original

equipment manufacturers and industrial customers. EC ¶4, App. __. ("On average, industrial [ACR] tubes are higher added value products than sanitary [plumbing] tubes. Production costs of sanitary and industrial tubes differ also significantly from each other."). The Commission also found that their respective technical specifications differ greatly, EC Plumbing Tubes ¶10, App. __; EC ¶5, App. __, as do the participants in and organization of their respective industries. EC ¶¶2-5, App. __; EC Plumbing Tubes ¶5.

If all this were not enough, the EC's Cartels Director confirmed in a letter to the District Court that "the cartel formed and reported in the [ACR] Decision was separate from the cartel found and reported in the [Plumbing Tubes] Decision." Mehta ACR Letter, App. __. Consequently, facts lifted from the EC Plumbing Tubes Decision are not—by any stretch of the imagination—applicable to the ACR copper tubing market.

4. Corporate Structure of Defendant-Appellee Outokumpu

Outokumpu Oyj and Outokumpu Copper Products Oy are European companies based in Finland ("Finnish entities"). Outokumpu Copper Franklin, Inc. and Outokumpu Copper (U.S.A.), Inc. are U.S. entities, based in Franklin, KY and Buffalo, NY, respectively ("U.S. entities"). The EC Decision identifies only the Finnish entities as members of Cuproclima, EC ¶17, App. __, and makes no reference at all to the U.S. entities.

The Finnish entities are organized under the laws of Finland and have their principal places of business in Finland. Luoto Decl. ¶¶2, App. __; Siltala Decl. ¶2-3, App. __. Neither company is qualified to do business in any state of the United States. Luoto Decl. ¶¶3-5, App. __; Siltala Decl. ¶¶4-6, App. __. Neither Finnish entity has ever maintained an office, manufacturing plant, or other facility in the United States; neither has ever owned, leased, or rented any real or personal property in the United States; and neither has ever stored any inventory in the United States. Luoto Decl. ¶¶6-8, App. __; Siltala Decl. ¶¶7-9, App. __. Neither Finnish entity has had a general agent or an agent for service of process in the United States. *See* Luoto Decl. ¶9, App. __; Siltala Decl. ¶¶10, App. __. And, at least since 1988, neither Finnish entity has manufactured, sold, marketed, or negotiated the sale of ACR copper tubing in the United States. Luoto Decl. ¶10, App. __; Siltala Decl. ¶11, App. __. Nor has either Finnish entity negotiated the sale of ACR copper tubing in a foreign country and then imported that tubing into the United States. Luoto Decl. ¶10, App. __; Siltala Decl. ¶11, App. __.

Outokumpu's U.S. entities negotiate their own sales and produce, market, and sell their goods without assistance from the Finnish entities. *See* Decl. of Ulf Anvin, Exhibit 18 to Outokumpu's Motion ¶15, App. __ ("Anvin Decl."); Decl. of Ronald Beal, Exhibit 19 to Outokumpu's Motion ¶ 11, App. ___ ("Beal Decl."). Each U.S. entity keeps its own books, maintains its own individual headquarters,

and has its own board of directors. *See* Anvin Decl. ¶¶9-10, 12, App. __; Beal Decl. ¶¶5-6, 8, App. __. The Finnish entities provide no goods or routine administrative services to either of the U.S. entities, and the officers of the U.S. entities are responsible for the day-to-day management of their companies. *See* Anvin Decl. ¶¶11, 14, App. __; Beal Decl. ¶¶7, 10, App. __. Moreover, Outokumpu Copper (U.S.A.), Inc. does not now, and did not during the class period, manufacture, market, or sell any ACR copper tubing on its own behalf or on the behalf of the Finnish entities. Anvin Decl ¶5, App. __.

5. The Present Case

Relying on facts contained in the EC Decision, Carrier brought a Sherman Act claim in the U.S. District Court for the Western District of Tennessee on March 29, 2006—five years and one week after the EC first announced its dawn raids and Cuproclima disbanded. On October 27, 2006, after Outokumpu and Mueller moved to dismiss that complaint, citing, *inter alia*, jurisdictional deficiencies, Carrier withdrew it and filed an amended complaint. Outokumpu and Mueller then moved to dismiss the amended complaint pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6). On May 21, 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), holding that plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face" to satisfy Rule 12(b)(6), *id*. at 1974. Outokumpu and Mueller filed a Notice of Filing

Supplemental Authority on June 14, 2007, to notify the District Court of *Twombly* and explain how it further supported their motions. Carrier did not amend its complaint in response, but instead argued that *Twombly* had "no impact" on its amended complaint. Carrier's Response to Defs.' Notice of Filing Supp. Auth. 2, App. __.

On July 27, 2007, the District Court dismissed Carrier's amended complaint in its entirety for lack of subject-matter jurisdiction because it was "wholly insubstantial" pursuant to the substantiality doctrine. Order 9, App. __. In doing so, the District Court determined that Carrier had "relied entirely on facts from the EC decisions peppered with language from the Sherman and Clayton Acts and conclusory statements about a price-fixing conspiracy in the U.S." Order 6, App. __. Carrier had "simply 'cut-and-pasted' into [its] complaint the collusive activities found by the EC to have taken place in Europe and tacked on 'in the United States and elsewhere.'" *Id*. The District Court found that Carrier's amended complaint consequently "has no [legitimate] substance of its own" and "is essentially a work of fiction." Order 9, App. __.

The District Court concluded that "nowhere [does the EC Decision] impl[y] that the cartel extended beyond the European market," Order 7, App. __; Carrier's allegations "are not adequate to suggest conspiracy," *id.*; and "Plaintiffs' conclusion that the European cartel extended to the U.S. is essentially speculative,"

id.

The District Court was especially troubled by Carrier's attempt, in its amended complaint, to pass off facts from the EC Plumbing Tubes Decision—such as the code name "elephants"—to bolster its allegations regarding the ACR copper tubing market. *See* Am. Compl. ¶37, App. __. The District Court found that the code name "elephants" had no relevance to the ACR copper tubing cartel. Order 7, App. __. By including "facts from the plumbing tubing and ACR tubing investigations as if they described a single conspiracy," Carrier "undermined any credibility the complaint otherwise possessed." *Id.*

In dismissing Carrier's amended complaint as "wholly insubstantial," the District Court stated that "allow[ing] Plaintiffs to proceed with discovery in hopes that their speculation bears fruit would be unjust and a gross abuse of the judicial system." Order 9, App. __. The District Court added that it would have been "obligated," in the alternative, "to grant Defendants' motions to dismiss on 12(b)(6) grounds," as clarified by *Twombly*. Order 11, App. __.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a complaint under Fed. R. Civ. P. 12(b)(1) or 12(b)(6). *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 604 (6th Cir. 2007) (Rule 12(b)(1)); *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir. 1997) (Rule 12(b)(6)). Where a district court's 12(b)(1) dismissal

"is based in part on the resolution of factual disputes, a reviewing court must accept the district court's factual findings unless they are clearly erroneous," but the district court's application of law to the facts is reviewed *de novo*. *RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1135 (6th Cir. 1996).

SUMMARY OF ARGUMENT

At bottom, the District Court concluded that the only non-conclusory factual allegations in Carrier's amended complaint were lifted from the EC Decision concerning ACR tubing, but that the EC Decision provided *no* basis whatsoever for a U.S. Sherman Act claim. As the District Court correctly found, *all* of the allegations in Carrier's amended complaint fall into one of two categories: (1) misleading quotations from an EC Decision describing a cartel whose activities and effects were limited exclusively to the *European* markets for ACR tubes, and (2) conclusory assertions, wholly unsupported by specific factual allegations, that the cartel's activities extended to or had an effect on U.S. domestic commerce. *See* Order 6-10, App. __. As a result, Carrier's amended complaint fails to connect the exclusively European conduct from which it derives its factual substance to any U.S. effect, reducing Carrier's central claim to nothing more than "if they did it there, maybe they did it here too."

Such a patently lifeless claim invites dismissal in at least three ways: as wholly insubstantial to invoke federal subject-matter jurisdiction; as failing to

satisfy the FTAIA's requirement that foreign conduct must cause a direct, substantial, and reasonably foreseeable effect on U.S. commerce to be actionable under the Sherman Act; or as failing to adequately plead the elements of a Section One claim because of the absence of any U.S. conduct or effects. Each of these grounds provides ample basis for this Court to uphold the dismissal of Carrier's amended complaint.

First, the District Court correctly concluded that Carrier's complaint was so insubstantial as to fail to invoke federal subject-matter jurisdiction at all. A complaint must be dismissed for lack of subject-matter jurisdiction if it is "wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-683 (1946). On appeal, Carrier contends that the substantiality doctrine permits district courts to reject only *legally* frivolous claims, and not claims based on frivolous factual allegations. But regardless of whether the District Court dismissed Carrier's amended complaint as legally frivolous (because the exclusively European conduct it alleges fails, as a matter of law, to establish a basis for federal subject-matter jurisdiction) or as factually frivolous (because of the insubstantiality of the complaint's factual allegations), its dismissal was perfectly consistent with Supreme Court and Sixth Circuit precedent.

Second, even if Carrier's amended complaint did not rise to the level of "wholly insubstantial," dismissal for lack of subject-matter jurisdiction is

appropriate under the FTAIA, 15 U.S.C. § 6a. The FTAIA deprives federal courts of jurisdiction over Sherman Act claims based on foreign conduct unless that conduct had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Carrier's allegations based on the EC Decision cannot satisfy this fundamental jurisdictional requirement because that decision describes exclusively European conduct affecting exclusively European commerce. The only probative allegations not drawn from the EC Decision, to the extent they are relevant at all, are conclusory and unsupported by any specific facts. Courts applying the FTAIA routinely reject such generic assertions of effects on U.S. commerce. Accordingly, this Court should affirm on the alternative ground that the FTAIA deprived the District Court of jurisdiction over Carrier's claim. This conclusion is proper under either a "facial" or a "factual" jurisdictional analysis, both of which are appropriate in this case.

Third, even if this Court were to reject these jurisdictional arguments, it should still adopt the District Court's alternative conclusion that the amended complaint must be dismissed for failure to state a claim. As the District Court explained, Carrier's amended complaint fails to allege facts sufficient to support a plausible Section One cause of action due to the utter lack of U.S. conduct or

effects.[4] *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Dismissal for failure to state a claim is also appropriate because Carrier's Sherman Act claim is time-barred on the face of its amended complaint, having been brought more than five years after Carrier acknowledges the alleged conduct ended and more than one year after the Sherman Act's four-year statute of limitations ran.

Finally, this Court should reject Carrier's belated request for leave to amend its complaint a second time. Carrier had ample opportunity to present additional facts to the District Court or to seek leave to amend from that court, yet failed to do so. And when it amended its complaint the first time—fully aware of Defendants-Appellees' jurisdictional challenges—Carrier was unable to add any non-conclusory allegations concerning Cuproclima's effect on U.S. commerce and instead chose to disingenuously import unrelated facts lifted from a different EC Decision.

ARGUMENT

Before the District Court, Outokumpu urged dismissal of Carrier's amended complaint for lack of subject-matter jurisdiction pursuant to the FTAIA and, in the alternative, for failure to state a claim pursuant to *Twombly*. The District Court, however, went further in rejecting Carrier's pleadings. The District Court was

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[4] *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 504 (6th Cir. 1983) ("The essential elements of a violation of Section 1 of the Sherman Act are: 1) a contract, combination or conspiracy; 2) affecting interstate commerce; 3) which imposes an 'unreasonable' restraint of trade.").

clearly disturbed at the manner and extent to which Carrier cut-and-pasted its substantive factual allegations from an EC Decision involving purely European conduct, added "in the United States" while dropping European geographic references from the EC findings, and then presented those facts to the court as a U.S. Sherman Act claim. The District Court's review of the EC Decision—which is incorporated by reference into Carrier's amended complaint—convinced it that Carrier's allegations concerning U.S. conduct and effect were completely frivolous. Consequently, the District Court dismissed the amended complaint as "wholly insubstantial" under Rule 12(b)(1) because it utterly lacked any factual basis for U.S. federal subject-matter jurisdiction.

No doubt, the substantiality doctrine is reserved for truly frivolous cases; complaints that are merely meritless do not deprive the court of jurisdiction but rather compel dismissal on their merits. But as explained in Section I below, the District Court's invocation of the substantiality doctrine, while not necessary for dismissal, was justified by the Carrier's extraordinary conduct in this case.

This Court, however, need not go nearly as far as the District Court in order to affirm dismissal. As Section II demonstrates, the FTAIA provides ample basis for dismissing Carrier's amended complaint for lack of subject-matter jurisdiction, and this Court is free to decide the FTAIA issue in the first instance on appeal. Either facially or factually, the Court is permitted to consider the EC Decision, the

sole source of Carrier's allegations of anticompetitive conduct. Once the Court makes proper use of the EC Decision to strip away the conclusory and inconsistent allegations in the amended complaint, it becomes clear that the conduct at issue in this case is purely foreign (European) conduct. Under the FTAIA, the Sherman Act reaches such foreign conduct only if the conduct produces a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. Nothing in Carrier's amended complaint comes close to establishing such an effect.

Finally, as Section III and Mueller's brief explain, even if this Court were to reject both the District Court's substantiality ruling and Outokumpu's FTAIA argument, it should still affirm the District Court's alternative holding dismissing Carrier's amended complaint for failure to state a claim under Rule 12(b)(6). Rule 12(b)(6) dismissal is proper both because Carrier's amended complaint fails to plead U.S. conduct or effects sufficient to state a valid claim under Section One, and because the amended complaint is time-barred on its face by the Sherman Act's four-year statute of limitations. With respect to these arguments, Outokumpu adopts and incorporates the arguments set forth in Mueller's brief to the extent they are applicable to any and all of the Outokumpu defendants.

All three bases are available to this Court, and each leads to the same conclusion that Carrier's Sherman Act claim does not belong in a United States federal court. The District Court's judgment of dismissal should be affirmed.

I. THE DISTRICT COURT PROPERLY DISMISSED CARRIER'S AMENDED COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION BECAUSE THE AMENDED COMPLAINT IS "WHOLLY INSUBSTANTIAL"

Although a complaint's failure to set forth a well-founded cause of action generally goes to the merits rather than to the court's jurisdiction, there is an established exception to this rule: A federal claim must be dismissed for lack of subject-matter jurisdiction if it is so plainly without merit as to be "wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-683 (1946); *accord Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993); *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 444 (6th Cir. 2006). Relying on this rule, the District Court dismissed Carrier's amended complaint after finding that it is "hollow," "has no substance of its own," "illegitimately borrows its substance from elsewhere," and is "essentially a work of fiction." Order 6, 9, App. __.

The focus of the amended complaint's failure was the critical jurisdictional element of U.S. effect, the complete absence of which makes even the most detailed account of foreign cartel activity "wholly insubstantial and frivolous" under the Sherman Act. After properly examining the EC Decision, which is incorporated by reference into Carrier's amended complaint, the District Court concluded that—stripping away the conclusory allegations of U.S. conduct and effect that are clearly inconsistent with that Decision—the substantive allegations of Carrier's complaint make no showing at all of the kind of U.S. connection

required for its subject-matter jurisdiction. The District Court's conclusion was correct, and its dismissal should be affirmed.

Carrier's attempt to manufacture a Sherman Act claim using selective and misleading quotations from an EC Decision addressing exclusively European conduct targeting exclusively European markets was and is egregious. Every probative factual allegation in the amended complaint comes from the EC Decision (albeit generally without attribution), and yet that decision provides no basis for even a reasonable inference of U.S. conduct or effects. Order 7, App. ___ (EC Decision "nowhere implies that the cartel extended beyond the European market"). To avoid this reality, Carrier disingenuously presented conduct determined by the Commission to have reached no further than the borders of Europe as conduct affecting U.S. commerce. To be clear, Carrier did not merely use the EC Decision to fill gaps in a complaint that had an independent factual basis; rather, Carrier wholesale "'cut-and-pasted' into [its] complaint the collusive activities found by the E.C. to have taken place in Europe." Order 6, App. ___. The following chart includes just a few representative examples of this systematic borrowing:

Amended Complaint	EC Decision
"These meetings provided a regular opportunity for the cartel participants to discuss and fix prices, allocations and other commercial conditions." (Am. Compl. ¶67, App. __.)	"The Cuproclima meetings held twice a year provided a regular opportunity to discuss and fix prices and other commercial conditions for industrial tubes…." (EC ¶78, App. __.)
"While the conspiracy involved Cuproclima members, outsiders, such as Desnoyers and Austria Buntmetall, are known to have participated in some of its activities in the 1990's." (Am. Compl. ¶68, App. __.)	"While the arrangement involved generally only Cuproclima members, outsiders, such [as] Buntmetall and Desnoyers, also participated in some of its activities in the mid-1990's." (EC ¶81, App. __.)
"General price increase announcements were not made, because purchasers included large industrial companies for whom prices were individually negotiated once a year." (Am. Compl. ¶73, App. __.)	"General announcements for increases in prices in the industrial tubes sector were not made. According to Wieland, this is due to the fact that the purchasers were big industrial companies with which prices were individually negotiated once a year." (EC ¶98, App. __.)
"The customer allocation was also implemented with Defendants' agreement to quote artificially high prices if a supplier was approached by a customer that was not allocated to it." (Am. Compl. ¶92, App. __.)	"The customer allocation was also implemented by quoting artificially high prices, if a supplier was approached by a customer that was not allocated to it." (EC ¶107, App. __.)
"In 1992, cartel members had bilateral discussions with regard to the target prices and the level of price increase." (Am. Compl. ¶79, App. __.)	"In 1992, Outokumpu and Europa Metalli also had bilateral discussions with regard to the target prices and the level of price increase." (EC ¶136, App. __.)

More troubling, Carrier omitted the European geographic references from many of the allegations it lifted from the EC Decision or replaced them with "'in the United States and elsewhere.'" Order 6, App. ___. The following chart identifies some specific instances in which Carrier's amended complaint omits or changes inconvenient geographic references from the EC Decision:

Amended Complaint	EC Decision
". . . Defendants allocated customers and froze their market shares. Implementation was ensured through a "market leader" arrangement *for certain territories* and key customers." (Am. Compl. ¶72, App. __ (emphasis added).)	". . . the participants allocated customers and froze their market shares. Implementation was ensured through a market leader arrangement *for European territories* and key customers." (EC ¶79, App. __ (emphasis added).)
"From May 17-19, 1995, in France, cartel members met to further memorialize the details of the illegal cartel. Among other things, the parties agreed to certain market conditions and security rules to keep the cartel secret, such as an agreement not to memorialize the content of the meetings." (Am. Compl. ¶83, App. __.)	". . . in the spring meeting of 1995, held at the Château Mirambeau in France on 17-19 May 1995 (the "Mirambeau Meeting").… The participants made several significant decisions at the Mirambeau meeting. Among others, the market leaders for the *European territories* were redefined …. Security rules to be followed in the meetings were also established …." (EC ¶¶150-151, App. __ (emphasis added; footnotes omitted).)
"Unofficial minutes of a Cuproclima meeting note that the Defendants agreed upon specific market shares that would be controlled during a subsequent meeting to monitor eventual	". . . the general objective of the arrangement was to maintain a status quo in the market shares in the main *European markets*.… According to a document provided by KME and identified as unofficial

deviations. Defendants further agreed that if a market share loss was found, they would examine the reasons for the loss and then attempt to reestablish the agreed upon market share percentages." (Am. Compl. ¶90, App. __.)	minutes of a Cuproclima meeting, the purpose was to maintain these shares and monitor compliance in the meetings: '… In case of market share loss, the reasons for this will be examined and the 1994 market share percentage shall be re-established.'" (EC ¶¶103-104, App. __ (emphasis added).)
"At the Cuproclima meeting in Prague on October 31, 1995, Defendants and their co-conspirators presented tables containing each producer and customer, with indication of prices and volumes for each customer and targets Defendants agreed upon to be reached. They also indicated the order in which Defendants would approach a particular customer to announce the price increase, as well as other terms of the agreement." (Am. Compl. ¶84, App. __.)	"[A]nother Cuproclima meeting was held in Prague on 31 October 1995 where, according to Desnoyers, discussions on prices and volumes of the competitors selling LWC *in Europe* took place. At this meeting, the participants presented tables … with indication of prices and volumes for each customer and the targets to be reached. They also indicated for each customer the order in which the producers would approach a particular customer to announce price increases, the dimensions of tube, quotations and payment terms." (EC ¶153, App. __ (emphasis added; footnote omitted).)

The District Court consequently concluded that Carrier had done "further injury to [its] argument by discarding the conclusions of the EC Decision when they deviate from Plaintiffs' agenda, e.g., the fact that the EC findings were limited to European conduct and the distinction between the two copper tubing cartels." Order 7, App.

___.

Remarkably, Carrier continues the same deceptive practices before this Court. First, Carrier continues to omit the location of events that it is well aware took place in Europe. For example, at page ten of its opening brief, Carrier references "[a] July 24, 1995 meeting" and "[a] Cuproclima meeting on February 2, 2001" without identifying locations. The EC Decision from which these allegations were lifted, however, clearly states that the meetings occurred in Oslo, Norway, and Zurich, Switzerland, respectively, EC ¶¶152, 175, App. __, and that the matters discussed at those meetings concerned European commerce. EC ¶¶151-152, 168-175, App. __. Second, Carrier continues to invoke facts, such as the term "elephants," without acknowledging their source in the irrelevant EC Plumbing Tubes Decision. *See* Carrier Br. 5; *supra* 13-15. Carrier continues this strategy on appeal, despite the District Court's having found "troubling the fact that Plaintiffs have presented facts from the plumbing tubes and ACR tubing investigations as if they described a single conspiracy." Order 7, App. ___ ("Through its inclusion of factual details which do not pertain to the cartel at issue in this case, Plaintiffs have undermined any credibility the complaint otherwise possessed.").

In light of Carrier's systematic and misleading borrowing of allegations from the EC Decision, the District Court concluded that the amended complaint

was so lacking in "substance of its own" that it had to be dismissed as "wholly insubstantial." Order 8-9, App. __. The District Court acknowledged that "[t]he test for dismissal" on this basis "is a rigorous one," Order 8, App. ___, but held that Carrier's amended complaint had to be dismissed under even that high standard.

On appeal, Carrier contests neither the basic rule that federal courts lack subject-matter jurisdiction over "wholly insubstantial" claims, nor the District Court's conclusion that the amended complaint "borrows its substance entirely" from two European Commission decisions. Order 9, App. __; Carrier Br. 10 (conceding that Carrier's allegations are based on "findings by the European Commission"); Carrier Br. 19 (facts in amended complaint "were largely drawn from findings by the EC"). Instead, Carrier asserts: (1) that the District Court's decision was based on a determination that the factual allegations in the amended complaint were frivolous and that such a fact-based application of the substantiality doctrine is improper, *see* Carrier Br. 24-29; and (2) that the district court erred by failing to limit its substantiality analysis to the face of the amended complaint, *see* Carrier Br. 29-33. Both of Carrier's arguments are without merit.

1. Carrier's first argument is that a complaint may be dismissed as "wholly insubstantial" only if it is "clearly foreclosed by precedent" or "based on an implausible *legal* theory." Carrier Br. 24 (emphasis added). Accordingly,

Carrier maintains, a court may not dismiss a complaint after concluding that its *factual allegations* are frivolous or wholly implausible.

As a threshold matter, it is far from clear that the District Court's decision was based solely on a finding of *factual* frivolousness. While it does not categorize its frivolousness conclusion as factual or legal, the District Court clearly could have concluded that a complaint seeking to recover under the Sherman Act for conduct that is revealed to have no U.S. connection or effect cannot provide, as a matter of law, the basis for a Sherman Act claim. As Carrier itself acknowledges, a claim that "pleads facts wholly inconsistent with the legal right claimed," Carrier Br. at 25, is "obviously without merit" purely as a matter of law and compels dismissal. *Hagans v. Lavine*, 415 U.S. 528, 536-537 (1974) (internal quotation marks omitted).

But even if Carrier were correct that the District Court found its amended complaint to be factually frivolous, such a determination would be completely appropriate under the substantiality doctrine. It is well-established that a complaint is "wholly insubstantial" within the meaning of *Bell v. Hood* not only if it rests on a plainly meritless legal theory, but also if its factual allegations are irrational, wholly implausible, or otherwise frivolous. *See Neitzke v. Williams*, 490 U.S. 319, 327 & n.6 (1989) ("a judge's disbelief of a complaint's factual allegations" constitutes grounds for finding complaint "patently insubstantial" and subject to

dismissal "for want of subject-matter jurisdiction" (citing *Bell v. Hood*, 327 U.S. 678, 682-683 (1946)).

This Court too has approved dismissals for lack of subject-matter jurisdiction when the frivolousness of a complaint's factual allegations is apparent from the face of the complaint. *See, e.g.*, *Clark v. United States*, 74 Fed. Appx. 561, 563 (6th Cir. 2003) (dismissing a complaint consisting of implausible factual allegations because it "lacked an arguable basis in law *or fact*" (emphasis added)); *DeKoven v. Bell*, 22 Fed. Appx. 496, 498 (6th Cir. 2001) (dismissing complaint for lack of subject-matter jurisdiction because plaintiff's factual allegations were "delusional"). Other circuits, too, recognize that "[d]istrict courts have the authority to dismiss complaints founded on 'wholly fanciful' factual allegations for lack of subject-matter jurisdiction." *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984); *see also, e.g.*, *Best v. Kelly*, 39 F.3d 328, 330 (D.C. Cir. 1994) (same).

The precedents relied upon by Carrier are not to the contrary. Carrier cites two cases dismissing complaints on the basis of legal implausibility, but neither implied—much less held—that legal implausibility is the only ground on which a complaint may be deemed "wholly insubstantial." *See Newburyport Water Co. v. City of Newburyport*, 193 U.S. 561, 577-579 (1904); *Apple v. Glenn*, 183 F.3d 477, 478-479 (6th Cir. 1999). Carrier also cites two cases in which the Supreme Court reversed a lower court's conclusion that a complaint was "wholly insubstantial."

But neither opinion held that federal courts have jurisdiction over complaints that rest on frivolous factual allegations. To the contrary, they simply found that the particular complaints at issue were not "wholly frivolous." *Hart v. B.F. Keith Vaudeville Exch.*, 262 U.S. 271, 274 (1923); *accord Binderup v. Pathe Exch., Inc.*, 263 U.S. 291, 305 (1923).

2. Carrier's second argument fares no better. Carrier contends that the District Court erred by considering evidence outside the "four corners of the complaint" and by failing to presume the truthfulness of the complaint's factual allegations. Carrier Br. 29-33. Even if Carrier were correct and courts are bound by Rule 12(b)(6) requirements under substantiality review,[5] the District Court's actions in this case were entirely proper. Notwithstanding the District Court's recitation of case law regarding its authority to resolve "disputes over jurisdictional facts" by "making reasonable inquiry into the facts," Order 9, App. __, the *only* extra-complaint materials on which the District Court actually relied are the EC Decisions from which the amended complaint's factual allegations were drawn, *see* Order 5-9, App. __. Carrier does not assert otherwise. *See* Carrier Br. 29-33. Those EC Decisions, however, may be considered even under Rule 12(b)(6)

[5] The accuracy of Carrier's position is far from certain. Indeed, at least one circuit has expressly adopted a contrary view, holding that "[i]n determining whether a substantial federal question is present in a case, [courts] may go beyond a plaintiff's complaint to look at facts present in the entire record," *Davis v. Cluet, Peabody & Co.*, 667 F.2d 1371, 1373 n.6 (11th Cir. 1982).

strictures because Carrier's amended complaint relies extensively on them and Outokumpu appropriately attached them to its motion to dismiss: "[D]ocuments 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." *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997) (internal quotations and citation omitted);[6] *see also Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 812 F. Supp. 788, 790 (N.D. Ill. 1992) ("[t]o the extent that the written documents contradict the allegations in the complaint, the former controls").[7]

The District Court's conclusion that Carrier's amended complaint is "wholly insubstantial" entirely accords with Supreme Court precedent and this Court's

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[6] Moreover, even if the EC Decisions had not been referenced in Carrier's amended complaint, the District Court still would have been entitled to consider them because they are public records: "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 governmental agencies." *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999), *abrogated on other grounds*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 n.2 (2002).

[7] Carrier's reliance on *Kulick* is misplaced. In that case, the court reversed the district court's holding that it lacked jurisdiction over a § 1983 suit because the defendants were not state actors. *See Kulick v. Pocono Downs Racing Ass'n*, 816 F.2d 895, 898-899 (3d Cir. 1987). The district court, however, reached that conclusion only after "weigh[ing] conflicting testimony" from several witnesses at a preliminary injunction hearing. *Id.* In this case, by contrast, the District Court did not weigh conflicting—or, indeed, any—testimony. It simply concluded that Carrier's allegations in the amended complaint—considered in light of public documents that Carrier incorporated into its complaint—were factually and legally frivolous and thus wholly insubstantial.

practice, which make clear that a district court may dismiss for lack of subject-matter jurisdiction a complaint it finds to be legally or factually frivolous.[8] The District Court's dismissal should be affirmed.

II. DISMISSAL SHOULD BE AFFIRMED FOR THE INDEPENDENT REASON THAT THE FTAIA PRECLUDES SUBJECT-MATTER JURISDICTION OVER CARRIER'S SHERMAN ACT CLAIM

In dismissing Carrier's complaint as "wholly insubstantial," the District Court did not reach Outokumpu's argument that the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) bars Carrier's Sherman Act claim because the claim arises out of foreign conduct that lacks a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. § 6a(1). This Court, however, is free to affirm on that alternative ground. *See Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 215 (6th Cir. 1985) ("A decision below must be affirmed if correct for any reason, including a reason not considered by the lower court."). Indeed, the FTAIA provides a more direct path to the same conclusion.

When examining federal subject-matter jurisdiction, "[i]t is to be presumed that a cause lies outside [federal courts'] limited jurisdiction," *Kokkonen v.*

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[8] Even in less egregious cases, courts have recognized that allegations lifted from another source and lacking independent support should be accorded no weight and can, in fact, violate Rule 11(b)'s requirement of factual investigation. *See, e.g.*, *In re Connetics Corp. Secs. Litig.*, 542 F. Supp. 2d 996, 1005-1006 (N.D. Cal. 2008) (striking allegations in complaint that had been "taken directly from [an] SEC complaint with no additional investigation" by plaintiffs).

Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994) (citations omitted), and the burden of establishing jurisdiction rests squarely upon the party asserting it, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936). Here, Carrier claims subject-matter jurisdiction by way of the Sherman Act. The FTAIA, however, removes from the Sherman Act's reach claims based on foreign conduct unless that conduct "meant to produce and did in fact produce some substantial effect in the United States." *In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 n.8 (2d Cir. 2007) (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993)). Its requirements are jurisdictional. As the Seventh Circuit put it, "[j]urisdiction stripping is what Congress had in mind in enacting FTAIA." *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 951 (7th Cir. 2003).[9]

To minimize the "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs," *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004), the FTAIA proceeds by initially "placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach." *Id*. at 162 (emphasis in original). It then selectively "brings

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[9] *See also Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1269 (D.C. Cir. 2005) ("we are without subject matter jurisdiction under the FTAIA"), *cert. denied*, 546 U.S. 1092 (2006); H.R. Rep. No. 97-686, at *13 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2498 (intended "effect of [FTAIA] on current antitrust law [is] to address only the subject matter jurisdiction of United States antitrust law").

[foreign] conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) ... has a 'direct, substantial, and reasonably foreseeable effect' on [domestic commerce], *and* (2) ... the effect give[s] rise to a Sherman Act claim." *Id*. (emphasis in original; internal punctuation omitted). These requirements are conjunctive; both must be satisfied before federal jurisdiction exists pursuant to the Sherman Act. 15 U.S.C. § 6a(1), (2).[10]

Here, federal subject-matter jurisdiction exists only if Carrier can establish that the Cuproclima conspiracy had a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce. 15 U.S.C. § 6a(1). It cannot do

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[10] The FTAIA provides in its entirety:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless:
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect –
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of this Act, other than this section.
>
> If this [Act] applies to such conduct only because of the operation of paragraph (1)(B), then this [Act] shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a (2000).

so.[11] When properly viewed in light of the EC Decision from which Carrier lifts all of its substantive factual allegations, it becomes clear that Carrier's Sherman Act claim is based on an exclusively European trade association that was established under Swiss law, targeted European customers, involved European copper processing mills, and affected only European commerce. *See supra* 5-16; EC ¶ 103, App. __. With nothing more to support its bid for U.S. subject-matter jurisdiction, as the District Court explained, Carrier's "conclusion that the European cartel extended to the U.S. is essentially speculative." Order 7, App. __.

A Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction can be evaluated using either a facial or a factual approach. Under the facial approach, a court must apply the pleading rules applicable under Rule 12(b)(6), accepting the plaintiff's non-conclusory factual allegations as true but dismissing if those

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[11] Carrier does not argue on appeal that the Cuproclima cartel involved "import commerce" such that the FTAIA's jurisdictional bar would not apply. *See* 15 U.S.C. § 6a (excluding "import commerce" from scope of FTAIA). Nor could it. The "import exception" requires factual allegations of "conduct by the defendants that was directed at an import market [instead of conduct] directed at controlling the prices [overseas]." *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 303 (3d Cir. 2002). The Cuproclima cartel did not target imports into the United States, and Carrier does not allege otherwise, even conclusorily. "That some of the goods purchased [overseas] may ultimately have been imported by individuals into the United States [is] immaterial to determining if defendants were involved in 'import trade or import commerce.'" *Id.* (citations and internal punctuation marks omitted). A plaintiff must show that the defendants' actions "directly increase or reduce imports into the United States." *Id*. Carrier cannot do so, and the import exception cannot save it from the FTAIA's jurisdictional bar.

allegations fail to establish the required jurisdictional facts. *See RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996). Under the factual approach, by contrast, the court need not apply a presumption of truthfulness to the plaintiff's allegations and may instead determine jurisdictional facts on the basis of any evidence in the record. *See United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). Outokumpu sought dismissal for lack of subject-matter jurisdiction on both facial and factual grounds. *See* Outokumpu Reply 12 n.8, App. __. The result is the same under either approach: Carrier has failed to satisfy the jurisdictional requirements of the FTAIA.

A. The FTAIA Precludes Subject-Matter Jurisdiction Over Carrier's Amended Complaint On Its Face

Under a facial 12(b)(1) analysis, the court need not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see also Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."). Nor must the Court accept as true "allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell*, 266 F.3d at 988; *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002).

Moreover, a court considering a facial 12(b)(1) challenge is not limited to

the four corners of the complaint and its attachments. "[D]ocuments 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." *Weiner*, 108 F.3d at 89 (citations omitted). This Court has explained that such a rule is justified, because "[o]therwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document upon which it relied"—precisely what occurred here. *Id.* In addition, even if not attached to the pleadings, a court "may also consider public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies." *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999), *abrogated on other grounds*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 n.2 (2002).

Application of these basic rules to this case is straightforward. Carrier (now, at least) freely admits that its Sherman Act claim is premised on the factual findings contained in the EC Decision. *See* Carrier Br. 10 (conceding that Carrier's information drawn "from findings by the European Commission"); Carrier Br. 19 (Carrier's facts "were largely drawn from findings by the EC"). Neither its complaint nor its amended complaint identifies a single other source of probative factual information. Because the EC's ACR and plumbing tubes decisions were attached to Outokumpu's motion to dismiss—and because they are

public documents of which the Court may take judicial notice—they may properly be considered in assessing the facial sufficiency of Carrier's claim.

Viewed in light of the EC Decision, it is clear that Carrier has failed to allege facts sufficient to establish subject-matter jurisdiction under the FTAIA. Even after nearly three years of litigation, Carrier still cannot point to a single probative fact (as opposed to a naked assertion) that demonstrates the existence of a "direct, substantial, and reasonably foreseeable" effect of Cuproclima on U.S. domestic commerce. As a result, its complaint must be dismissed.

1. Carrier's Allegations Lifted From The EC Decision Cannot Demonstrate That Cuproclima Conduct Had A "Direct, Substantial, And Reasonably Foreseeable Effect" On U.S. Domestic Commerce

In its attempt to fashion a Sherman Act claim, Carrier distorts the EC Decision on which it relies. *See supra* 5-16, 27-33. This Court should not countenance such action and should read Carrier's allegations in light of the sources from which they derive. When considered in that context, Carrier's allegations plainly fail to establish that the Cuproclima conduct had any "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.

1. As addressed in detail above, *supra* 27-33, a comparison of Carrier's factual allegations with the portions of the EC Decision from which they were drawn demonstrates the failure of those allegations to satisfy the FTAIA's jurisdictional requirements. To take another example, in discussing Cuproclima's

"Customer/Market Allocation Scheme," Carrier Br. 11-12, Carrier asserts that customer allocation "was a key component" to the success of the Cuproclima cartel, and that the cartel targeted "big industrial companies." Carrier Br. 11 (quoting EC ¶98, App. __). These allegations provide the only basis for Carrier's inference that "Carrier's business in the United States was allocated to Outokumpu"—a conclusion that Carrier attempts to substantiate with a citation to the EC Decision. Carrier Br. 11-12 (citing EC ¶98, App. __).

The EC Decision not only does not support this conclusion, it supports precisely the opposite conclusion. In statements that Carrier selectively omits from the amended complaint and now its brief, the EC Decision makes clear that customer-based discussions at Cuproclima meetings involved "*only* the 70 largest *European* customers," EC ¶116, App. __ (emphasis added), and later only "the *main European* customers of Cuproclima tubes," EC ¶¶117-118, App. __ (emphasis added). Cuproclima members sought to "control the European market for industrial tubes," EC ¶197, App. __, and the very objective of the allocation scheme was to maintain individual Cuproclima members' market shares *within Europe*, *see* EC ¶¶103, App. __ (Cuproclima cartel sought to "maintain a status quo in the market shares in the *main European markets*" (emphasis added)). Not once is the United States mentioned in the allocation context.

Similarly, Carrier asserts that—in order to enforce the cartel's allocation

scheme—Cuproclima members "appointed 'market leaders' . . . who were responsible for monitoring compliance [and] ensur[ing] stabilized market shares" in their territories. Carrier Br. 11. But Carrier leaves out the fact that market leaders—the very "corner stone in the implementation of the Cuproclima discipline," EC ¶112, App. __—were appointed only in European countries: France, Spain, Norway, Sweden, Finland, Ireland, the United Kingdom, Belgium, the Netherlands, Luxembourg, Italy, Germany, Denmark, Portugal, and Switzerland. EC ¶¶146, 216, App. __. The market leader scheme did not extend to the United States, *see id*., and the District Court properly rejected Carrier's suggestion to the contrary. *See* Order 7.

Along the same lines, Carrier's account of "Conspiratorial Meetings in Furtherance of an Anticompetitive Cartel," Carrier Br. 9-10, provide no support for its claim that the effects of the alleged conduct extended to the United States. While Carrier correctly reports, for example, that Cuproclima's spring 1993 meeting took place at Tegernsee, Germany, Carrier Br. 10, it fails to mention that—far from implicating United States commerce—the discussion involved "data on consumption *in Europe* in Q1 1993 as compared to 1992." EC ¶137, App. __ (emphasis added). Likewise, while Carrier mentions that the October 31, 1995 meeting took place in Prague, Czech Republic, Carrier Br. 10, it fails to mention that—far from implicating United States commerce—the Prague meeting involved

"discussions on prices and volumes of the competitors selling [ACR tubes] *in Europe*." EC ¶153, App. __ (emphasis added). With respect to the other two meetings it cites on page 10 of its Brief, Carrier fails even now to acknowledge that those meetings also occurred in Europe. Cuproclima members met in Oslo, Norway on July 24, 1995, on the heels of a meeting in France where "market leaders for the *European* territories were redefined." *See* EC ¶¶151, 152, App. __ (emphasis added). And on February 2, 2001, Cuproclima members met in Zurich, Switzerland, to "follow-up" on eight prior meetings, all of which had "related to the major *European* markets of industrial tubes subject to official Cuproclima meetings." EC ¶¶175, 168, App. __ (emphasis added).

In each of these examples, the EC Decision makes clear that the activities and effects of Cuproclima were limited to Europe. To the extent that Carrier's allegations contradict the Decision by alleging otherwise, the Decision controls and Carrier's allegations should simply be disregarded: "[T]o the extent that the written documents contradict the allegations in the complaint, the former controls." *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 812 F. Supp. 788, 790 (N.D. Ill. 1992); *cf. Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454 (7th Cir.1998) ("It is a well-settled rule that when a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegation.").

2. In an effort to avoid this conclusion, Carrier now attempts to argue that the EC Decision does not actually contradict its assertion that Cuproclima extended to the United States. In order to explain away the inconvenient fact that the Decision itself makes no mention whatsoever of U.S. activities or effects (and indeed describes a cartel limited to Europe), Carrier suggests that the Commission ignored the U.S. nexus because the EC is "required [to] focus its investigation on defendants' anticompetitive behavior in the E.U." Carrier Br. 10. But even a cursory review of the EC's cartel decisions makes clear that Commission decisions addressing cartels that extend beyond Europe regularly describe the entire geographic scope of the cartel. As described below, where a cartel involves countries or regions outside of Europe, the Commission says so in its decision.[12]

In the EC Decision concerning the market for the chemical choline chloride, for example, the EC extensively described how the cartel planned "'to bring discipline to the worldwide pricing of choline chloride,' and to stabilize the market positions of participating companies (together accounting for more than 80% of the world market) around the world." EC Choline Chloride Decision, Exhibit 2 to

[12] In any event, Carrier cannot prove a positive with the absence of a negative. As the Plaintiff, Carrier has the affirmative "burden of proving jurisdiction in order to survive" dismissal. *E.g.*, *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 268 (6th Cir. 1990); *McGrady v. U.S. Postal Service*, 289 Fed. Appx. 904, 905 (6th Cir. 2008) (per curiam) (same).

Outokumpu's Reply ¶68.[13] In a section titled "Operation of the Cartel at the Global Level," the EC described how the cartel included an "agreement for the European producers not to export to the North American market and for the North American producers not to export to the European market." *Id.* The EC Choline Chloride Decision also reports that "[a]n agreement was made to increase prices world-wide to identical levels," explaining that "[t]hese identical price levels around the world would . . . help to avoid destabilizing exports between regions." *Id*. That decision even includes a section entitled "Further Contacts Between the European and North American Producers," which describes the cartel's efforts to "regulate exports" to the Americas. *Id*. ¶96. The discussion devoted to non-European components of the choline chloride cartel spans 13 pages. *Id*. at 22-35.[14]

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[13] Past EC decisions can also be considered in the context of a facial 12(b)(1) challenge: Courts are free to rely on "public records . . . and letter decisions of governmental agencies." *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999).

[14] Other EC decisions similarly demonstrate that the Commission does discuss extraterritorial conduct and effects when a cartel reaches beyond Europe. In its Rubber Chemicals decision, for example, the EC reported that "Bayer offered its support for Crompton/Uniroyal's price increase initiative in Europe and North America on several occasions in the first quarter of 2001." EC Rubber Chemicals Decision, Exhibit 1 to Outokumpu's Reply ¶144, App. __. And in the EC Decision concerning specialty graphite, the Commission provided descriptions of "International Working Level meetings," including one in which the participants agreed to a schedule of worldwide price increases, "with an initial growth of 20% in the U.S. and Europe as from October 1993." EC Graphite Decision, Exhibit 3 to Outokumpu's Reply ¶¶132-134, App. __.

This detail contrasts sharply with the lack of *any* mention of U.S. conduct or effects in the Commission's ACR Decision.

3. Carrier next attempts to transform a single reference to a "Global Agreement" in the EC Decision into support for its assertion that Cuproclima was a "global" cartel that encompassed the United States. Carrier Br. 10, 41; Am. Compl. ¶4, App. __. But Carrier's interpretation of "Global Agreement" makes sense only if the phrase is taken entirely out of context. The relevant paragraph of the EC Decision states:

> Towards the end of the summer of 1994, an internal fax within OTK dated 22 August 1994 informed of a price increase within Cuproclima as follows: "… *1. The price increase of ACR-tubes in Europe—target 20% (10%-30%[(]. Because of the strong DEM the Germans are in the most difficult situation. We will go along with the price increase, which will be very difficult, but I personally see that there are realistic possibilities for a substantial price increase. This requires that none of the Cuproclima members slips. If we see some slipping, we will act 'independently' in our best interest and Cuproclima's whole future would be threatened. 2. […] is 'our client' and will also keep it. If […] goes along with the 'Global Agreement,' we will have to take it. (Why is WW dealing with […]?)….*"

EC ¶144, App. __ (alterations and omissions in original).

The first words of this paragraph plainly refer to the "price increase of ACR-tubes *in Europe* …." *Id.* (emphasis added). Carrier's proposed reading also directly contradicts the context of the EC Decision as a whole—a decision that makes clear again and again that it concerns sales to *European* customers for services provided in *Europe*, and that does not speak to anticompetitive conduct in

or affecting the United States. *See supra* 5-16.

4. Finally, Carrier's attempt to escape the FTAIA's jurisdictional bar by limiting its Appeal to "purchases made in the United States," Carrier Br. 22 n.2—while telling—is unavailing: The location of Carrier's purchases is irrelevant where, as here, the conduct Carrier challenges lacks the requisite "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce. *See* 15 U.S.C. §6a (domestic effects inquiry precedes requirement that domestic injury "give[] rise to" Sherman Act claim); *Empagran*, 542 U.S. at 158-163 (reaching §6a(2) inquiry only after assuming existence of domestic effect under §6a(1)).[15]

2. The Few Allegations Not Drawn From The EC Decision Are Conclusory And Also Fail To Establish A "Direct, Substantial, and Reasonably Foreseeable Effect" On U.S. Domestic Commerce

As the District Court observed, there are a few allegations in Carrier's complaint that are not drawn directly from the EC Decision. *See* Order 6-7, App. __. But the District Court rightly concluded that these allegations are conclusory and "essentially speculative." Order 7.

For example, Carrier asserts that Cuproclima allocated Carrier's European business to two of its members, Wieland and KME, while assigning its U.S.

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[15] Carrier's change in position does, however, render the District Court's judgment of dismissal final as to Carrier's claims arising out of foreign purchases. *See, e.g.*, *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007) (dismissing two parties from appeal when appellant narrowed scope of appeal by limiting argument in opening brief), *cert. denied*, 129 S. Ct. 594 (2008).

business to Outokumpu. Carrier Br. 12; Am Compl. ¶101, App. __. The only factual allegation that Carrier offers in support of this conclusion is that Wieland and KME failed to pursue aggressively Carrier's U.S. business prior to 2003. Again, Carrier improperly tries to infer a positive from a negative. Carrier does not allege that it actually sought U.S. bids from Wieland or KME before 2003, that the two companies refused to bid (or bid high) in response to Carrier's request, or that Outokumpu was the sole bidder for Carrier's U.S. business. *See* Order 7, App. __ (Carrier's conclusory allegations that "the other co-conspirators did not pursue Carrier's U.S. business, without more, are not adequate to suggest conspiracy"). Carrier must affirmatively and plausibly allege conspiracy; it cannot meet its pleading obligations by asking for an inference of conspiracy based on European suppliers' failure to compete for business in the United States, especially in light of Carrier's recognition of the self-sufficiency of the U.S. market. *Supra* 7-9.[16]

The absence of supporting facts, coupled with its complete reliance on unreasonable inference, rob Carrier's allegation that Cuproclima allocated its U.S. business to Carrier of any weight: Even in a 12(b)(6) or facial 12(b)(1) posture, a court need not "accept as true allegations that are merely conclusory, unwarranted

[16] Moreover, Carrier's inference is illogical. If it were true that the Cuproclima cartel was the reason why Wieland and KME did not previously compete for Carrier's U.S. business, then it is unclear why they would not have begun to compete as soon as the cartel dissolved in 2001 rather than waiting until 2003. *See* Am. Compl. ¶69, App. __ (Cuproclima officially disbanded after EC investigation began in March 2001).

deductions of fact, or unreasonable inferences." *Sprewell*, 266 F.3d at 988.

3. Carrier's Conclusory Allegations Of "Global" Conspiracy Do Not Establish A "Direct, Substantial, and Reasonably Foreseeable Effect" On U.S. Domestic Commerce

Having failed to allege facts demonstrating a "direct, substantial, and reasonably foreseeable" domestic effect, Carrier asserts—again in conclusory fashion—that the Court should infer a U.S. effect from the "global" reach of ACR copper tubing processors and their customers. "Different prices in one region would have had a direct, substantial and foreseeable effect on prices charged in another region," Carrier speculates. Carrier Br. 20. It then asserts that "prices in Europe and the United States rose in parallel to supra-competitive levels, and the resulting pricing pattern is indicative of an anticompetitive arrangement." *Id*.

Carrier's conclusory allegations of a "global" conspiracy are not nearly sufficient to establish that Cuproclima created domestic effects sufficient to pass the FTAIA's jurisdictional bar. *First*, whether some Cuproclima members or customers are multinational corporations with a presence in the United States is immaterial for the FTAIA analysis. The nationality of defendants/parties is irrelevant, *see Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 300 n.5 (3d Cir. 2002), because the determinative questions are "whether defendants' conduct has a 'direct, substantial and reasonably foreseeable' anticompetitive effect on United States commerce and whether that conduct 'gives rise' to a

Sherman Act claim," *id.* at 301; *see also In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 561 (D. Del. 2006) (allegations that plaintiff is American company engaged in world-wide market "do not create jurisdiction without substantial, direct effects on the domestic market"). Even when "thousands" of United States citizens—availing themselves of a foreign market—suffer monetary harm because of anticompetitive foreign conduct, the FTAIA bars their Sherman Act claims if based on injuries sustained abroad. *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F. Supp. 1071 (S.D.N.Y. 1988) (dismissing for lack of subject-matter jurisdiction). Sherman Act plaintiffs must show "injury to [the] market in general, not merely injury to individuals," *id*. at 1078 (citations omitted), and "[a]n anticompetitive effect on United States commerce is required for jurisdictional nexus," *id*. at 1077 (dismissing under facial 12(b)(1) approach where U.S. plaintiff alleges domestic effect but "present[ed] no facts in support of [its] allegations").

Second, conclusory allegations that a foreign antitrust conspiracy must have had a U.S. effect because of the existence of a global market are insufficient to establish the requisite effect on U.S. commerce. *See, e.g., Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1105-1106 (S.D.N.Y. 1984) (dismissing for lack of subject-matter jurisdiction under FTAIA where plaintiffs alleged "worldwide conspiracy which has affected United States domestic commerce by artificially

inflating the price … within the United States"). "[S]pillover effects on domestic commerce" are insufficient to establish domestic effects under the FTAIA. *Id.* Even an allegation "that 'the domestic component' of the alleged 'worldwide conspiracy' was 'necessary for the conspiracy's overall success' … is too conclusory to avert dismissal." *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004). Where a plaintiff "fail[s] to allege any facts demonstrating a causal connection between defendants' conduct in Europe and the price increase in the United States," dismissal under the FTAIA is proper. *Eurim-Pharm*, 593 F. Supp. at 1106-1107*; see also McElderry*, 678 F. Supp. at 1077-1078 (conclusory allegations of "direct anticompetitive effect on United States commerce" inadequate under FTAIA).

The deficiencies of Carrier's amended complaint are even more obvious than those in the cases cited above. Here, the EC Decision affirmatively demonstrates that the ACR copper tubing market was *not* global and that the Cuproclima cartel exclusively targeted the *European* market. Cuproclima members were all European, discussions specifically involved European markets, European customers, and European commerce; and the cartel's "market leader" enforcement mechanism was limited to Europe. *See supra* 5-16.

A case where plaintiffs have failed to show a "direct, substantial, and reasonably foreseeable effect" on United States commerce "is precisely the type of

case Congress sought to eliminate from United States antitrust jurisdiction when it amended the Sherman Act in 1982." *Eurim-Pharm*, 593 F. Supp. at 1107. Dismissal of such complaints serves the purposes behind the statute. *See United Phosphorus*, 322 F.3d at 952 (prompt dismissals proper under FTAIA). Accordingly, this Court should affirm the District Court's dismissal on the alternative ground that, under a facial 12(b)(1) challenge, the FTAIA bars subject-matter jurisdiction over Carrier's amended complaint.

B. The FTAIA Also Precludes Subject-Matter Jurisdiction Over Carrier's Amended Complaint Under The Factual 12(b)(1) Approach

Under a factual 12(b)(1) approach, too, the FTAIA compels dismissal for all the reasons discussed above, *supra* Section II.A, and for the additional reason that the District Court's conclusions that Carrier's amended complaint is "hollow," "speculative," and fails to establish "that the European cartel extended to the U.S.," Order 6-7, App. __, were properly made and amply supported by the record.[17] *See United States v. LSL Biotechnologies*, 379 F.3d 672, 683 (9th Cir. 2004) (lack of

[17] In dismissing Carrier's amended complaint as "wholly insubstantial," the District Court found Carrier's allegations of a U.S. nexus to be "wholly implausible." *Supra* Section I; *see also* Carrier Br. 40-45 (asserting that District Court's conclusions were erroneous). To the extent the District Court resolved jurisdictional facts before dismissing on alternative grounds, this Court may fairly analyze Carrier's amended complaint under the factual 12(b)(1) approach on appeal. *See also* Outokumpu's Reply 12 n.8, App. __ (raising factual 12(b)(1) challenge to Carrier's amended complaint); Order 9, App. __ (articulating standard of review under factual 12(b)(1) approach).

direct effect on U.S. commerce is finding of jurisdictional fact under FTAIA that is reviewed for clear error); *Commercial Street Express LLC v. Sara Lee Corp.*, No. 08-cv-1179, 2008 WL 5377815, at *4 (N.D. Ill. Dec. 18, 2008) (FTAIA compels dismissal under factual 12(b)(1) approach where plaintiffs "provide no factual allegations" of domestic effect).

Under the factual 12(b)(1) approach, a court has wide discretion to "proceed as it never could" under the facial approach. *RMI Titanium*, 78 F.3d at 1134 (citations omitted). Here, "no presumptive truthfulness applies to the [plaintiff's] factual allegations," *Ritchie*, 15 F.3d at 598; materials outside the pleadings are properly considered, *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986); and the court may "find the facts, choose among conflicting inferences, and make credibility judgments." *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 365 (1st Cir. 2001).

Whereas a court adjudicating a facial 12(b)(1) challenge must accept allegations as true unless they are conclusory or "contradict matters properly subject to judicial notice or by exhibit," *Sprewell*, 266 F.3d at 988, a court presiding over a factual 12(b)(1) challenge is not so bound. It may freely weigh the evidence in the Record and reject factual allegations even when they are not conclusory or contradictory. *See RMI Titanium*, 78 F.3d at 1134-1135 (no presumptive truthfulness of allegations). The plaintiff must prove jurisdiction by a

preponderance of the evidence, *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008), and the appellate court "must accept the district court's factual findings unless they are clearly erroneous." *RMI Titanium*, 78 F.3d at 1135.[18]

Under the factual approach, the District Court properly had before it two comprehensive EC Decisions as well as newspaper articles—submitted by Carrier—concerning the self-sufficient U.S. ACR copper tubing market, *supra* 7-9, and Outokumpu's affidavits certifying that its Finnish entities have had no contact with the U.S. market since at least May 1988. *Supra* 15-17. It also had a letter from the EC's Cartels Director confirming that "[Cuproclima's] scope [was] limited to the European territory." Mehta ACR Letter, App. ____. On this record, the District Court's finding that Carrier's amended complaint lacked the requisite

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[18] Within the FTAIA context, courts have dismissed claims for lack of subject-matter jurisdiction under the factual approach without granting jurisdictional discovery to plaintiffs. *See, e.g.*, *Commercial Street Express*, 2008 WL 5377815, at *4-*5. There is no reason to deviate from that practice in this case, where Carrier had the opportunity to supplement the record with exhibits and affidavits, and the District Court also had two EC decisions with lengthy factual narratives before it. *See, e.g.*, Declaration of Robert Johnson, Exhibit 36 to Carrier's Response, App. __; *see also Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 916 (6th Cir. 1986) (under factual 12(b)(1) approach, "the parties are free to supplement the record by affidavits" without conversion into summary judgment motion). In addition, Carrier did not seek jurisdictional discovery or further supplementation of the record below, and none is merited at this juncture. *See Gould Electronics Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000) ("while [plaintiffs] have argued to this Court that they be allowed to supplement the factual record, they failed to do so before the District Court, thereby waiving the issue at the appellate level").

support and credibility to establish a U.S. effect is well-supported, and certainly not "clearly erroneous." *See Continental Motel Brokers, Inc. v. Blankenship*, 739 F.2d 226, 229-230 (6th Cir. 1984) ("A factual finding is not clearly erroneous unless the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed" and "record is to be viewed in the light most favorable to the appellees.")

Under any of the three approaches discussed above—substantiality review, facial FTAIA analysis, or factual FTAIA analysis—the District Court's dismissal of Carrier's amended complaint pursuant to Rule 12(b)(1) should be affirmed.

III. THE DISTRICT COURT'S ALTERNATIVE JUDGMENT OF DISMISSAL UNDER 12(B)(6) WAS PROPER AND SHOULD BE AFFIRMED

Wholly independent of whether the substantiality doctrine or the FTAIA forecloses subject-matter jurisdiction, Carrier—even after amending its complaint—has failed to plead "enough facts to state a claim to relief that is plausible on its face" under the Sherman Act. *Twombly*, 127 S. Ct. at 1974. The District Court appropriately looked first to its own subject-matter jurisdiction in ruling on the motions to dismiss. *Moir v. Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990) (12(b)(1) motion must be decided before considering motion on merits). But the court also ruled–expressly as a matter of law—that Carrier failed to state a cause of action. Order 2, App. ___ ("Approached from an

alternative legal perspective, . . . Plaintiffs have not met minimal pleading standards and thus have failed to state a cognizable claim.").

While perhaps alleging a plausible conspiracy confined to Europe, Carrier has failed to allege a plausible conspiracy involving either U.S. conduct or effects. Accordingly, this Court should affirm the District Court's alternative judgment of dismissal pursuant to Rule 12(b)(6). Order 10-11; App. __.

1. As an initial matter, Carrier's argument rests on a fundamental misunderstanding of "plausibility" under *Twombly* and should be rejected. In defending its wholesale use of the EC Decision to establish a U.S. antitrust claim, Carrier asserts that "the E.C. Decision in no way *precludes* the plausibility of a conspiracy extending beyond Europe and into the United States." Carrier Br. at 42 (emphasis added). Even if Carrier were correct and the EC Decision did not "preclude" the possibility of a U.S. domestic effect, its Sherman Act claim remains, at best, in the realm of "theoretical possibilities." *See In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-51 (2d Cir. 2007). But plausibility is what *Twombly* requires, and Carrier's claim—based on theoretical possibility—cannot survive a motion to dismiss. *Twombly*, 127 S. Ct. at 1968 (complaints cannot "survive a motion to dismiss whenever the pleadings [leave] open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery").

Similarly, when Carrier attempts to bolster its global market allegations, it asserts that "[i]n an interrelated marketplace for ACR Copper Tubing, purchasers in Europe *would have looked* to the United States for sources of supply," Carrier Br. 45 (emphasis added), and that "for the cartel to succeed, members *had* to engage in conduct across both continents." *Id.* (emphasis in original). Unable to plead "particular activities by any particular defendant" to truly establish a global conspiracy and a domestic effect, *In re Elevator Antitrust Litig*, 502 F.3d at 50 (citations omitted), Carrier resorts to speculation about what it thinks purchasers "would have" done and what members must have "had" to do. But these assertions have no factual basis, and Carrier's sole "support" is a conclusory quote from its own amended complaint. *See* Carrier Br. 45 (quoting Am. Compl. ¶59, App. __). "Naked assertions" like these do not establish a Sherman Act claim. *See In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007) ("Allegations of anticompetitive wrongdoing in Europe—absent any evidence of linkage between such foreign conduct and conduct here" do not state federal antitrust claim).

"[F]ederal courts have been 'reasonably aggressive' in weeding out meritless antitrust claims at the pleading stage." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (citations omitted). Here, Carrier has an affirmative obligation to "put forth factual 'allegations plausibly suggesting (not merely consistent with)'" domestic effects. *Twombly*, 127 S. Ct. at 1966. Probative facts are required, "lest

a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people [and] cost-conscious defendants settle even anemic cases before reaching [discovery]." *Twombly*, 127 S. Ct. at 1966-1967 (citations omitted). Carrier's amended complaint is wholly inadequate and must be dismissed under *Twombly*, "which set out to eliminate this kind of loose antitrust pleading." *NicSand*, 507 F.3d at 458 (citing *Twombly*, 127 S. Ct. at 1966).

2. Carrier's failure to plead probative facts that establish U.S. conduct or effects is indefensible. As a sophisticated multinational corporation with "integrated purchasing operations" throughout the world to "ensure that it was obtaining the best price possible for its purchases," Am. Compl. ¶60, Carrier had more than sufficient resources to investigate its Sherman Act claim before filing a complaint. And as Outokumpu's largest customer for ACR copper tubing, Carrier possesses detailed information about Outokumpu's pricing, sales, and long-term contracts in Europe and in the United States. Carrier could have simply reviewed the prices it paid before and after the 2001 dawn raid, and ascertained any alleged injury.

Carrier's failure to plead with particularity under these circumstances suggests the more plausible alternative that Carrier, which has always had an alternative source in Wolverine and other processors in the United States, *supra* 7-9, never paid supracompetitive prices. *See Scheid v. Fanny Farmer Candy Shops,*

Inc., 859 F.2d 434, 437 (6th Cir. 1988) ("[W]hen a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.").

3. Its failure to adequately plead domestic effects aside, Carrier has entirely failed to make *any* allegations that Outokumpu's U.S. entities (Outokumpu Copper Franklin, Inc. and Outokumpu Copper (U.S.A.), Inc.) participated in the Cuproclima cartel. Nor could it: the E.C. Decision names only Outokumpu Copper Oy and Outokumpu Oyj as members of Cuproclima, and does not even mention the U.S. entities. Carrier's amended complaint thus only avers generally that the U.S. entities are "defendants," and that Outokumpu Copper Franklin sold ACR copper tubing to Carrier. Am. Compl. ¶¶24-25, App. ___. Such general averments are not sufficient to state a claim. *See Jung v. Association of Am. Medical Colleges*, 300 F. Supp. 2d 119, 163 (D.D.C. 2004) ("Plaintiffs cannot escape their burden of alleging that each defendant participated in or agreed to join the conspiracy by using the term 'defendants' to apply to numerous parties without any specific allegations as to [particular defendants]."). The U.S. entities should thus be dismissed from these proceedings on this independent basis alone.

4. Carrier has had more than ample opportunity to amend, and its belated request for leave to amend a second time should be denied. *First*, Carrier already amended its Complaint once, after reviewing Defendants-Appellees' motions to

dismiss that clearly identified the original complaint's deficiencies. *See supra* 3, 17. Nonetheless, Carrier's amended complaint continues to suffer from fundamental deficiencies that compel dismissal. Carrier has offered no indication of what allegations it could add to save its claim, and the last time it amended its complaint, its amendments moved the complaint further from, rather than closer to, stating a cause of action. Amendment would therefore be futile and should be denied. *See Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 573-574 (6th Cir. 2008) (no leave to amend where amendment would be futile).

Second, even setting aside the contradiction in Carrier's argument—that *Twombly* creates no new pleading standard, Carrier Br. 35-38, but that Carrier should be granted leave to amend because "Carrier should not be held to a standard that was not in operation at the time it drafted its complaint," Carrier Br. 57—Carrier had ample opportunity to seek leave to amend its amended complaint before, and even after, the District Court ruled on Defendants-Appellees' motions to dismiss. Following the Supreme Court's decision in *Twombly*, Defendants-Appellees filed Notice of Filing Supplemental Authority on June 14, 2007, to notify the District Court of the decision and explain *Twombly*'s impact on the motions. In response, Carrier argued that *Twombly* did not change the pleading standard and that its amended complaint was adequate. Having chosen to take the risk of an adverse judgment instead of amending its complaint after *Twombly*,

Carrier deserves no second bite at the apple. *See, e.g., Turicentro*, 303 F.3d at 306 (denying leave to amend because "[t]hough they had ample notice of possible deficiencies in their complaint, plaintiffs made no attempt to amend before the District Court ruled on the motion to dismiss").

5. Fundamental pleading failures aside, Carrier's claim should also be dismissed under Rule 12(b)(6) because they are time-barred, and Carrier has pled no affirmative acts of fraudulent concealment with the heightened particularity required under Rule 9(b). Carrier did not file its initial complaint until March 29, 2006, more than five years after Cuproclima publicly disbanded and more than one year after the Sherman Act's limitations period expired. *See* Am. Compl. ¶69 (Cuproclima "was officially disbanded" in March 2001); *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1107 n.6 (6th Cir. 1995) (dismissing claim as time-barred where "face of the complaint affirmatively indicates that the time limit for bringing the claim has passed" and plaintiffs provided no valid excuse) (internal quotations and citation omitted). Carrier's claim is time-barred and cannot be revived by invoking the fraudulent concealment doctrine. *See* Am. Compl. ¶¶103-113.

To plead fraudulent concealment, a plaintiff must allege with the particularity required under Rule 9(b) that (1) it failed to discover the operative facts that are the basis for its antitrust claim within the limitations period, (2) it

acted with due diligence in discovering the facts, and (3) the defendants wrongfully concealed their actions. *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975); *see also Wood v. Carpenter*, 101 U.S. 135, 139-140 (1879) (fraudulent concealment doctrine subject to "stringent rules of pleading and evidence"). But here, Carrier was on inquiry notice as of March 23, 2001, when publications worldwide reported on the Commission's dawn raids and Outokumpu itself issued a press release. (Outokumpu Press Release, Ex. 1-5. Ex. 15, A. ___.); *see also Greenburg v. Hiner*, 359 F. Supp. 2d 675, 682 (6th Cir. 2005) ("inquiry notice is triggered by evidence of the possibility of fraud, not full exposition of the scam itself") (internal citations omitted).

Carrier has also failed to allege due diligence with the requisite particularity. *Greenburg*, 359 F. Supp. 2d at 682 (rejecting fraudulent concealment claim where plaintiff "merely [brought] suit after the scheme has been laid bare through the efforts of others") (internal quotations and citation omitted). The *only* investigatory act that Carrier alleges is that, at some unknown time before the Commission published its Decision, one of Carrier's employees "made an inquiry" of some unnamed representatives of unknown ACR copper tubing supplier or suppliers about the press reports, which may have included Outokumpu, but did not receive any "meaningful" information. Am. Compl. ¶ 108. Carrier does not allege what these unnamed representatives said, how the representatives could

reasonably have been expected to have any knowledge of Cuproclima activities, or why Carrier's claimed reliance on these representatives' statement might be justified. *See Gumbus v. United Food & Commercial Workers Int'l Union*, 47 F.3d 1168 (table), Nos. 93-5113 & 5235, 1995 WL 5935, at *4 (6th Cir. Jan. 6, 1995) ("[R]elying on assurances from a . . . .company official is *not* sufficient to meet the burden of due diligence.") (emphasis in origina).

Similarly, Carrier fails to plead *any* affirmative acts of wrongful concealment by Outokumpu during the statute of limitations. *See Metz v. Unizan Bank*, 416 F. Supp. 2d 568, 579 (N.D. Ohio 2006) (requiring particularized allegations of fraudulent concealment "against each specific Defendant"). Carrier's sole allegation is that Outokumpu "denied any involvement in a cartel," "did not admit any wrongdoing," and "did not disclose details regarding the scope, nature, duration or effect of the cartel alleged by the Commission." Am. Compl. ¶109. Silence and general denials of wrongdoing do not constitute fraudulent acts of concealment as a matter of law, however, and Carrier has not properly alleged any affirmative acts of concealment. *See Browning v. Levy*, 283 F.3d 761, 770 (6th Cir. 2002) ("affirmative concealment must be shown; mere silence or unwillingness to divulge wrongful activities is not sufficient").

For these and other 12(b)(6) reasons more fully discussed in Mueller's Brief, which is hereby incorporated in all respects applicable to Outokumpu, the District

Court's dismissal of Carrier's amended complaint on the alternate grounds of Rule 12(b)(6) should be affirmed.

IV. THE COURT ALSO LACKED PERSONAL JURISDICTION OVER OUTOKUMPU OYJ AND OUTOKUMPU COPPER PRODUCTS OY

Outokumpu Oyj and Outokumpu Copper Products Oy ("Finnish entities") are European companies organized under the laws of Finland with their principal places of business in Finland. *Supra* 15-17. Neither conducts business in the United States, and neither has any direct presence in the United States. *Id*. At least since May 1988, neither Finnish entity has manufactured, sold, marketed, or negotiated the sale of ACR copper tubing in the United States. *Id*.

To survive a Rule 12(b)(2) challenge, Carrier must present specific facts to establish a prima facie showing of jurisdiction as to each individual defendant. *See Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 904 (6th Cir. 2006); *Bridgeport Music, Inc. v. Agarita Music, Inc.*, 182 F. Supp. 2d 653, 660 n.9 (M.D. Tenn. 2002) (specific facts required). Carrier has failed to do so here. The Finnish entities have no significant contacts with the United States, *supra* 15-17, and they operate separately from Outokumpu's U.S. entities such that federal courts may not exercise personal jurisdiction over the Finnish entities through the U.S. entities. *Id*.; *see also Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 944 (7th Cir. 2000) ("[W]here corporate formalities are substantially observed and the parent does not dominate the

subsidiary, a parent and a subsidiary are two separate entities and the acts of one cannot be attributed to the other.")

Because the District Court dismissed Carrier's amended complaint under Rule 12(b)(1) and the alternate ground of Rule 12(b)(6), it found it "unnecessary to rule on individual Defendants' more narrow personal jurisdiction grounds." Order 11, App. __. Should this Court reverse the District Court's judgment, it should nonetheless order the Finnish entities dismissed from the case pursuant to Rule 12(b)(2).

CONCLUSION

For all the reasons stated herein and as incorporated from Defendant-Appellee Mueller's Principal Brief, the District Court's dismissal of Carrier's amended complaint should be affirmed.

Respectfully submitted,

/s/ Eric Mahr

Eric Mahr
Caroline T. Nguyen
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 663-6000
Fascimile: (202) 663-6363
Counsel for Defendants-Appellees Cross-Appellants Outokumpu Oyj; Outokumpu Copper Products Oy; Outokumpu Copper Franklin, Inc.; and Outokumpu Copper (U.S.A.), Inc.

Dated: January 26, 2009
Washington, D.C.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation provided in Federal Rule of Appellate Procedure 32(a)(7)(B). The foregoing Brief contains 16,454 words of Times New Roman (14-point) proportional type. The word processing software used to prepare this Brief was Microsoft Word 2003, version 5.1.2600 Service Pack 2 Build 2600.

/s/ Caroline T. Nguyen

Caroline T. Nguyen
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 663-6079
Facsimile: (202) 663-6363
E-mail: caroline.nguyen@wilmerhale.com
Counsel for Defendants-Appellees Cross-Appellants Outokumpu Oyj; Outokumpu Copper Products Oy; Outokumpu Copper Franklin, Inc.; and Outokumpu Copper (U.S.A.), Inc.

Dated: January 26, 2009
Washington, D.C.

ADDENDUM—DESIGNATION OF JOINT APPENDIX CONTENTS

Defendant-Appellee Outokumpu Oyj hereby designates the following portions of the district court record for inclusion in the Joint Appendix:

Description of Entry	**Date**	**District Court Docket No.**
Amended Complaint	10/27/2006	46
EC Decision, Exhibit 1 to Outokumpu's Motion to Dismiss	12/06/2006	57.3
EC Plumbing Tubes Decision, Exhibit 3 to Outokumpu's Motion to Dismiss Carrier's Amended Complaint	12/6/2006	57.5
EC Press Release, Exhibit 10 to Outokumpu's Motion to Dismiss Carrier's Amended Complaint	12/6/2006	57.10
New York Times Article, Exhibit 9 to Outokumpu's Motion to Dismiss	12/6/2006	57.11
Reuters News Article, Exhibit 10 to Outokumpu's Motion to Dismiss	12/6/2006	57.12
Associated Press Worldstream, Exhibit 11 to Outokumpu's Motion to Dismiss	12/6/2006	57.13
AFX European Focus, Exhibit 12 to Outokumpu's Motion to Dismiss	12/6/2006	57.14
AFX News Limited, Exhibit 13 to Outokumpu's Motion to Dismiss	12/6/2006	57.15
Outokumpu Press Release, Exhibit 9 to Outokumpu's Motion to Dismiss	12/6/2006	57.17

Description of Entry	**Date**	**District Court Docket No.**
Declaration of Ulf Anvin, Exhibit 18 to Outokumpu's Motion to Dismiss Carrier's Amended Complaint	12/6/2006	57.20
Declaration of Kalle Luoto, Exhibit 19 to Outokumpu's Motion to Dismiss Carrier's Amended Complaint	12/6/2006	57.21
Declaration of Jyrki Siltala, Exhibit 20 to Outokumpu's Motion to Dismiss Carrier's Amended Complaint	12/6/2006	57.22
Declaration of Ronald Beal, Exhibit 21 to Outokumpu's Motion to Dismiss Carrier's Amended Complaint	12/6/2006	57.23
Exhibit 1 to Carrier's Response to Defendants' Motions to Dismiss	1/12/2007	61.4
Exhibit 37 to Carrier's Response to Defendants' Motions to Dismiss	1/12/2007	61.5
Outokumpu Reply	2/9/2007	71.1
EC Rubber Chemicals Decision, Exhibit 1 to Outokumpu's Reply	2/9/2007	71.2
EC Choline Chloride Decision, Exhibit 2 to Outokumpu's Reply	2/9/2007	71.3
EC Graphite Decision, Exhibit 3 to Outokumpu's Reply	2/9/2007	71.4
Reply Declaration of Ulf Anvin, Exhibit 7 to Outokumpu's Reply	2/9/2007	71.8
Letter from Kirtikumar Mehta, Director, Directorate F: Cartels, Competition DG,	3/7/2007	76

Description of Entry	**Date**	**District Court Docket No.**
European Commission		
Carrier's Response to Defendants' Notice of Filing Supplemental Authority	7/27/2007	92
Order of Dismissal	7/27/2007	93

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2009, pursuant to 6 Cir. R. 25, I caused one true and accurate copy of the foregoing Brief to be served via First class mail, electronic mail, and/or the Court's Electronic Case Filing ("ECF") system upon the following:

Tim Wade Hellen Farris, Mathews, Branan, Bobango, Hellen & Dunlap One Commerce Square, Suite 2000 Memphis, TN 38103 twh@farris-law.com	David M. Schnorrenberg Crowell & Moring LLP 1001 Pennsylvania Avenue, N.W. Washington, DC 20004 dshnorrenberg@crowell.com
Robert L. Crawford Wyatt, Tarrant & Combs, LLP 1715 Aaron Brenner Drive, Suite 800 Memphis, TN 38120 lcrawford@wyattfirm.com	Matthew F. Scarlato Crowell & Moring LLP 1001 Pennsylvania Avenue, N.W. Washington, DC 20004
Jerome A. Broadhurst Apperson, Crump & Maxwell, PLC 6000 Poplar Avenue, Suite 400 Memphis, TN 38119 jbroadhurst@appersoncrump.com	William H. Rooney Kelly K. Hnatt Willkie, Farr & Gallagher 787 Seventh Avenue New York, NY 10019-6099 wrooney@willkie.com

Dated: January 26, 2009
Washington, D.C.

/s/ Caroline T. Nguyen

Caroline T. Nguyen
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 663-6079
Facsimile: (202) 663-6363
Counsel for Defendants-Appellees Cross-Appellants Outokumpu Oyj; Outokumpu Copper Products Oy; Outokumpu Copper Franklin, Inc.; and Outokumpu Copper (U.S.A.), Inc.