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

IN THE 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
Western Division

FINAL THIRD BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF ARGUMENT

The central issue in this appeal is whether Carrier has plausibly alleged a conspiracy to fix the price of and allocate the market for ACR Copper Tubing sold in the U.S. If Carrier has plausibly alleged such a conspiracy, then not only has it satisfied the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), but it has also pled a "substantial" claim under Federal Rule of Civil Procedure ("Rule" or "Rules") 12(b)(1) and removed its claim from the scope of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2009) ("FTAIA").

Here, the existence of a conspiracy is undisputed by Defendants. Instead, their arguments for dismissal focus on confining their misdeeds to Europe. The question on appeal then is whether it is plausible that a cartel affecting Europe would also extend to the U.S.

The answer – based on the allegations in Carrier's Complaint – is yes. Carrier's Complaint pleads specific cartel meetings and communications that give ample notice of the who, what, where, when, and how of Defendants' conspiratorial conduct. It alleges a global market for ACR Copper Tubing dominated by European suppliers who could and did sell in the U.S. The complaint further alleges conspiratorial allocation of Carrier's business in which Carrier's U.S. business went to Outokumpu and its European purchases went to co-

conspirators. That allocation only changed near the time of the publication of the European Commission's ("E.C.") decision, when the European suppliers began to price competitively with Outokumpu in the U.S. to move Carrier's business from Outokumpu.

Because Carrier has plausibly alleged that Defendants' conspiracy to fix the price of and allocate the market for ACR Copper Tubing extended to sales of ACR Copper Tubing in the U.S., the District Court's decision must be reversed. Defendants' arguments to the contrary rely on cramped interpretations of Carrier's Complaint and/or misinterpretations of applicable law – similar to the reasoning of the District Court below.

First, the Defendants have failed to find any legal support for the District Court's dismissal under Rule 12(b)(1). The cases they cite only further demonstrate that Rule 12(b)(1) dismissal for lack of factual support is reserved only for extreme cases where the allegations are plainly delusional. Carrier's claims do not fit this mold because its allegations, if true, amount to violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (2009) ("Section 1").

Second, Defendants misapply *Twombly*, by failing to credit Carrier's direct allegations of a conspiracy, as supported by plausible allegations of the cartel's existence. *Twombly* requires, at most, that ambiguous allegations of an anticompetitive agreement – such as the existence of parallel conduct – be

supported with specific facts indicating conspiratorial meetings and/or other circumstances demonstrating anticompetitive effects. Carrier has alleged *both* here. It has pled specific anticompetitive agreements, meetings and communications among Defendants, including the formation of what Defendants themselves labeled a "global agreement." Defendants counter by arguing that because the E.C. only made findings regarding European sales, Carrier should be barred from pursuing any claims regarding U.S. sales. But the E.C.'s findings do not undermine Carrier's allegations, because the E.C. unequivocally chose not to address sales outside Europe.

Furthermore, Carrier has pled contextual facts that support the plausibility of its claims regarding a conspiracy affecting the U.S. Carrier's complaint contains allegations reflecting a global market in which prices moved together in Europe and the U.S., such that any conspiracy would plausibly affect prices in both Europe and the U.S. Carrier also alleges a lack of competition for Carrier's business in the U.S. while the conspiracy was operational, and a dramatic reversal of this conduct near the time of the public revelation of the conspiracy in 2003. This change in competitive behavior cannot be disregarded as merely "consistent with unilateral conduct" where it follows more than a decade of admitted cartel-based decision making. Taken together, these allegations plausibly suggest the existence of a conspiracy affecting sales in the U.S.

Third, Defendants cannot avoid reversal through the FTAIA. It does not impose any additional jurisdictional requirements for purchases (like Carrier's) made in the U.S. And even if the FTAIA did apply, dismissal would be improper because the factual issues in the jurisdictional inquiry are inextricably intertwined with the merits of Carrier's Section 1 claim.

Defendants' cross-appeal fares no better.

First, Carrier's Complaint was timely filed. Carrier adequately alleges that Defendants committed affirmative acts of fraudulent concealment, and therefore, equity requires tolling the limitations period until Carrier reasonably should have had "good grounds" to support a claim against Defendants. That time came with the publication of the E.C. ACR Decision in December 2003. Defendants' arguments that press reports announcing the initiation of the E.C. investigation two years earlier triggered the statute of limitations are without merit because they did not provide any meaningful information from which Carrier could legitimately base a claim for relief. Nor was such information available to Carrier from other sources.

Second, the District Court had personal jurisdiction over the foreign Defendants. An extensive network of U.S.-based executives support personal jurisdiction over Outokumpu Oyj ("OTO") and Outokumpu Copper Products Oy ("OCP"), as does their domination of their U.S. subsidiaries. The contacts are

further enhanced under the effects test of *Calder v. Jones*, 465 U.S. 783 (1984). The jurisdictional contacts of Mueller Industries, Inc. ("MLI") may be imputed to its subsidiary Mueller Europe, Ltd ("MEL") because the two functioned as a common enterprise in cheating consumers through cartel activity.

ARGUMENT

I. CARRIER'S APPEAL

A. The District Court's "Wholly Insubstantial" Ruling Was Erroneous.

A claim is "substantial" for purposes of federal subject matter jurisdiction so long as it is not frivolous. *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 n.1 (6th Cir. 1998). Here, Carrier has pled a conspiracy to fix the price of and allocate the market for ACR Copper Tubing sold to Carrier in the U.S., which if proved at trial, would undoubtedly establish a Sherman Act violation. This claim is thus far from frivolous. Where a plaintiff pleads a claim "that if well founded is within the jurisdiction of the court it is within that jurisdiction whether well founded or not." *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271, 273-274 (1923).

Rather than contend that Carrier's *claim* itself is frivolous, Defendants argue that Carrier has not pled sufficient facts to support it. (Outokumpu Br. 26; MLI Br. 21.) The argument misconstrues the "wholly insubstantial" standard underlying the District Court's decision. The quantum of a claim's factual support is not

relevant to the "substantiality" question, so long as the claim, if true, would entitle the plaintiff to relief. Thus, in *Wagenknecht v. United States*, 533 F.3d 412, 417-418 (6th Cir. 2008), this Court reversed the dismissal of a challenge to a tax penalty as wholly insubstantial where the plaintiff's complaint alleged only that "he has reason to believe" that penalties had already been paid. Plaintiffs' claim was not frivolous even though there was not "a single allegation to support his claim." *Id.* at 418.

Defendants also contend that Carrier's claim is insubstantial because Carrier has alleged frivolous facts. But the cases cited by Defendants suggest, at most, that claims may be dismissed as insubstantial only where they depend on "delusional" factual allegations. *See Neitzke v. Williams*, 490 U.S. 319, 327-328 (1989) (refusing to dismiss non-frivolous claim). The cases on which Defendants rely bear no resemblance to Carrier's claim. In *Clark v. United States*, No. 03-1343, 74 Fed. Appx. 561, 562 (6th Cir. Aug. 27, 2003), for example, the plaintiff alleged a claim based on agreements between the U.S. and other organizations "to use 'signals intelligence' and 'directed energies,' i.e., sound, gravity, and laser, to target him for radiation experiments on U.S. citizens with royal genes and 'social historical spiritual archetypes." In *Dekoven v. Bell*, No. 01-1676, 22 Fed. Appx. 496, 497-98 (6th Cir. Oct. 31, 2001), the plaintiff asserted a libel claim on the

grounds that "that he is the true messiah." Carrier's allegations regarding the U.S. effects of Defendants' conspiracy do not rise to such a level of fantasy.[1]

Without any support for the District Court's ruling, Outokumpu (Br. 27-32) resorts to suggesting that Carrier's use of the E.C.'s findings somehow renders Carrier's claim "wholly insubstantial." It provides no legal authority for this proposition, but simply compares portions of the E.C.'s findings to Carrier's allegations without explaining why their use makes Carrier's claim frivolous.

The argument is meritless. Nothing bars private litigants from making use of findings resulting from government investigations. And Carrier's claim cannot be dismissed as frivolous because Carrier has alleged a conspiracy broader in scope than the one described by the E.C. Courts have repeatedly upheld private damages claims broader in scope than the underlying government investigation

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[1] Outokumpu's argument (Br. 35 n.5) that the District Court could have looked outside the complaint to determine the truth of Carrier's allegations fails for a simple reason: if judging whether the factual allegations are frivolous requires analysis of evidence outside the complaint, then the allegations cannot be considered "delusional." Nor can Outokumpu find any support for this argument in *Davis v. Cluet, Peabody & Co.*, 667 F.2d 1371, 1372-73 (11th Cir. 1982). In *Davis*, the plaintiffs sought relief under the Fourteenth Amendment, but failed to allege any facts suggesting state action. The Eleventh Circuit suggested that it could look beyond the face of the complaint, but only in order to find some evidence of state action to support the plaintiffs' claim, not to resolve factual issues in the defendant's favor.

that brought the cartel to light. *See, e.g.*, *In re Vitamins Antitrust Litig.*, 320 F. Supp. 2d 1, 22 (D.D.C. 2004).

B. The District Court's *Twombly* Ruling Was Erroneous.

The proper vehicle by which to judge the sufficiency of Carrier's Complaint is therefore Rule 12(b)(6). Evaluated in light of *Twombly*, Carrier's Complaint adequately provides "'fair notice of what the . . . claim is and the grounds upon which it rests.'" 127 S. Ct. at 1964 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Carrier alleges a multi-year conspiracy to sell ACR Copper Tubing in the United States and Europe at supra-competitive prices, including specific meetings at which anticompetitive agreements were made. Despite these direct allegations, Defendants seek to cabin Carrier's Complaint by using the E.C. ACR Decision to define the outermost limit of the scope of their anticompetitive arrangements, and rejecting Carrier's other factual allegations as "conclusory" or not otherwise rising to the level required by *Twombly*.

The E.C. ACR Decision does not have the effect Defendants claim. It does not contain *any* findings that preclude Carrier's claim that the cartel's anticompetitive behavior extended to the U.S. Moreover, Carrier's allegations plausibly state that this cartel broadened its reach into the U.S. Under Rule 12(b)(6), these allegations must be assumed to be true. *See Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008).

Following *Twombly*, courts have limited dismissal of antitrust complaints only to those lacking *any* direct allegations of agreement and/or relying *entirely* on inferences from ambiguous circumstantial evidence such as mere parallel conduct without anything more. *See, e.g., Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 18 (D.C. Cir. 2008) ("*Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim."); *see also In re LTL Shipping Servs. Antitrust Litig.*, No. 08-1895, 2009 WL 323219, at *10-11 (N.D. Ga. Jan. 28, 2009) (collecting cases). In contrast, Carrier alleges specific meetings and other details as to how Defendants colluded, as well as a description of the marketplace that suggests the existence of the anticompetitive agreements alleged.[2]

[2] MLI's protests that dismissal is "particularly warranted" here in light of the "significant costs and burdens of discovery" should be ignored. (MLI Br. 42.) While the Supreme Court in *Twombly* observed that "proceeding to antitrust discovery can be expensive," it nonetheless required the pleading of only enough "factual matter (taken as true) to suggest that an agreement was made," and that a case should move forward even if "proof of those facts is improbable" and "recovery is very remote and unlikely." 127 S. Ct. at 1964-65. Because Carrier has satisfied the *Twombly* standard, any potential discovery burden is irrelevant to the issues before this Court. Nor should the pervasive nature of Defendants' cartel be held *against* victims such as Carrier.

1. The E.C. ACR Decision Supports Carrier's Allegations.

The E.C. ACR Decision does not preclude Carrier from alleging the existence of a conspiracy broader than that reported by the E.C., which specifically reserved this possibility when it said: "Insofar as the activities of the cartel related to sales in countries that are not members of the [European Union] . . . they lie outside of the scope of this Decision." (R. 55.4, E.C. Industrial Tubes Decision ¶ 229, Apx. p. 0332 ("E.C. ACR Decision").) This affirmation confirms Carrier's position here: the E.C. ACR Decision is a *starting* point for analysis of Carrier's claims, not the *end* point, as Defendants assert.[3] Defendants' position also neglects the import of the evidence found by the E.C. that specifically refers to a "global agreement" as part of the cartel. (*Id.* ¶ 144, Apx. pp. 0311-12.) The absence of any additional evidence as to the cartel's activities outside of Europe makes complete sense in light of the E.C.'s limited jurisdictional reach. Therefore, there

[3] While the Court may consider the E.C. ACR Decision because it is referenced in Carrier's Complaint, the same cannot be said for the letter from a third party – no matter its author's authority or knowledge – on which Defendants rely. (MLI Br. 44-45.) It is entirely inappropriate for this Court to consider such material at this stage in the litigation. *See Weiner v. Klais & Co.,* 108 F.3d 86, 89 (6th Cir. 1997). To credit such a letter is tantamount to allowing the admission of unsworn testimony at the pleading stage of the litigation without the benefit of cross-examination that could reveal the limitations of, or lack of support for, the author's opinions.

is nothing contained in the E.C. ACR Decision that undermines Carrier's Section 1 claim.[4]

Defendants' challenges to the E.C.'s evidence concerning the existence of a "global agreement" are without merit. Outokumpu (Br. 49-50) simply mischaracterizes the nature of the evidence. The reference in this internal Outokumpu fax to "price increase of ACR-tubes in Europe" to which Outokumpu points is part of a discussion of a different aspect of the cartel. The quotation of this document in the E.C. ACR Decision makes this point clear: it notes that point "1" concerned the European price increase agreement, and, later in the document, point "2" discussed a separate aspect of the cartel involving the "global agreement." (R. 55.4, E.C. ACR Decision ¶ 229, Apx. p. 0332.) MLI's attack (Br. 47) is similarly unconvincing. It contends that the existence of a "global agreement" is contradicted by an E.C. finding regarding a particular meeting where the co-conspirators assigned European "territorial responsibilities." But the E.C.'s findings do not connect the reference to the "global agreement" to that meeting,

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[4] Defendants' reference (MLI Br. 44 n.12; Outokumpu Br. 47-48) to other E.C. decisions describing U.S.-based conduct are irrelevant. There could be any number of reasons why a non-European finding would occur in one investigation but not in another. Defendants' speculation as to these reasons is particularly inappropriate here, where the E.C. ACR Decision itself says that "activities of the cartel related to sales in countries" outside the E.U. are "outside the scope of this Decision." (R. 55.4, E.C. ACR Decision ¶ 229, Apx. p. 0332.)

which occurred weeks later. (*See* R. 55.4, E.C. ACR Decision, ¶¶ 144-46, Apx. pp. 0311-12.) Thus, it is entirely plausible for Carrier to allege that the "global agreement" evidence supports the existence of a cartel extending beyond Europe. *See Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008) (finding that on a Rule 12(b)(6) motion, plaintiff is entitled to the benefit of all reasonable inferences).

MLI nonetheless takes the approach that the E.C. ACR Decision "generally is of no use to Carrier as it describes only a European conspiracy . . ." (MLI Br. 44.) MLI posits that Carrier's allegations of anticompetitive conduct fail to allege the requisite "'who, what, where, when, how or why'" because "every meeting or communication alleged is copied from the EC ACR Decision and relates only to Europe, and none involves the United States." (MLI Br. 43 (quoting *Total Benefits*, 552 F.3d at 437)).[5] But MLI fails to account for the well-established principle that "[a]ll factual allegations in the complaint must be presumed to be true, and reasonable inferences must be made in favor of the non-moving party."

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[5] The E.C. also details a number of meetings over a thirteen year period in which there is no specific mention of which countries the cartel discussed. (*See, e.g.,* R. 55.4, E.C. ACR Decision ¶¶ 130-134, 142-145, 173-175, Apx. pp. 0307-08, 0311-12, 0320-21.) And the fact that these meetings occurred in Europe is irrelevant; the scope of a cartel is judged not on the physical location of the meetings, but on the markets affected by the anticompetitive agreements. *See United States v. Nippon Paper Indus. Co., Ltd.,* 109 F.3d 1, 4 (1st Cir. 1997).

Total Benefits, 552 F.3d at 434. Thus, while the E.C. may not have spoken about the agreements related to U.S. sales activity, Carrier has. It alleges that, in the course of conspiratorial meetings and communications noted in the E.C. ACR Decision and elsewhere, Defendants and their co-conspirators agreed to anticompetitive conduct that involved the U.S., at least including unlawful agreements to allocate Carrier's business in both Europe and the U.S. (*See, e.g.,* R. 46, Am. Compl. ¶ 4, Apx. p. 0021.) These are *direct* allegations of the existence of an unlawful conspiracy involving the U.S. market, and they must be taken as true at this stage.

And, again, there is nothing in the E.C. ACR Decision that undermines the plausibility of these allegations. Outokumpu counters that there is a supposed conflict between Carrier's Complaint and of the E.C.'s finding that "[f]rom 1998 onwards, the [customer allocation] discussions concerned only the 70 largest European customers . . ." (Outokumpu Br. 44 (quoting R. 55.4, E.C. ACR Decision ¶ 116, Apx. p. 0304.)) But this finding does not undermine Carrier's Complaint. Rather, it confirms that Carrier, as one of the largest ACR Copper Tubing purchasers in Europe, was a victim of the cartel. There is nothing contradictory about the E.C. ACR Decision's silence as to whether these European customers'

U.S. business was also allocated, because that "lie[s] outside the scope of this Decision." (R. 55.4, E.C. ACR Decision ¶ 229, Apx. p. 0332.)[6]

Unsatisfied with these allegations, Defendants essentially ask this Court to impose a heightened pleading standard on Carrier, requiring it to quote specific communications in which the U.S., as opposed to just Europe, was discussed. But the Supreme Court in *Twombly* expressly declined to "require heightened fact pleading of specifics." 127 S. Ct. at 1974. *Cf. Hospital Bldg. Co. v. Trustees of*

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[6] Even if there were conflict between Carrier's Complaint and the E.C. ACR Decision, the law does not require the outright rejection of any of Carrier's allegations. The cases Defendants cite (Outokumpu Br. 36; MLI Br. 29-30 n.9) are distinguishable because they involved claims specifically arising from documents referenced in the complaint, such as a contract to which the plaintiff is a party or documents containing the supposedly fraudulent statement on which the plaintiff's fraud claim is based. *See, e.g., Northern Indiana Gun & Outdoor Shows, Inc., v. City of South Bend*, 163 F.3d 449, 455 (7th Cir. 1998) ("A blanket adoption rule makes sense in the context of an attached contract or loan agreement because the contract represents an agreement between two or more parties to which the law binds them."). "When the exhibit, however, is not the subject of the claim, Rule 10(c) does not require a plaintiff to adopt every word within the exhibits as true for purposes of pleading . . . ." *Pittsburgh League of Young Voters Education Fund v. Port Authority of Allegheny County*, No. 06-1064, 2007 WL 1007968, at *5 (W.D. Pa. Mar. 30, 2007); *see also Jones*, 521 F.3d at 561 (attached transcript of interview required court to assume as true that interviewee made such statements but not that such statements were accurate or true); *Rizzi v. Calumet City*, No. 06-1064, 183 F.R.D. 639, 641 (N.D. Ill. 1999) (finding that although letters attached to the complaint "directly conflict" with the plaintiff's allegations, "[i]t is too early in the proceedings for the court to define the proper weight and nature of these letters"). Here, the Court cannot simply negate Carrier's allegations that the cartel broadened its scope to the U.S. based on findings from a regulatory body that had no jurisdiction over that portion of Carrier's claim.

Rex Hosp., 425 U.S. 738, 746 (1976) (noting the problem with 12(b)(6) dismissal "'in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,'") (quoting *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962)). Thus, even post-*Twombly*, courts do not require the quotation of conspiratorial agreements or definitive proof of their existence in a complaint. *See, e.g.*, *Home Quarters Real Estate Group, LLC v. Mich. Data Exch., Inc.*, No. 07-12090, 2009 WL 276796, at *4 (E.D. Mich. Feb. 5, 2009) (rejecting defendants' arguments that the plaintiff must identify "a specific verbal or written agreement" concerning the alleged anti-competitive conduct at issue, and finding that "Plaintiff cannot be expected to make this showing at the pleading stage"); *In re Southeastern Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 948 n.7 (E.D. Tenn. 2008) (finding that "[t]he level of factual pleading" sought by defendant "could rarely, if ever, be met by a plaintiff in an antitrust case before discovery"). Rather, as with any Section 1 case, all Carrier must do is allege a cartel based on direct and inferential allegations plausibly suggesting its existence to provide Defendants with adequate notice of the basis for its claims. (*See* Carrier First Br. 53-56 (collecting cases).) That is precisely what Carrier has done here.

But this is not to say, as Defendants suggest, that Carrier simply relies on the E.C.'s findings and then brings a claim based on the "theoretical possibilit[y]" that Carrier has a claim under the Sherman Act. (Outokumpu Br. 60; *see also* MLI Br.

47-48.) There is nothing theoretical about Carrier's allegations – the Complaint directly alleges anticompetitive agreements involving the U.S. and Europe, and, as further described below, the plausibility and effect of these anticompetitive agreements are given additional context that negate any attempt to compare this case to *Twombly* or any other case in which a court has dismissed a Section 1 complaint.

2. Global Market Allegations Provide a Plausible Context for Carrier's Claim.

First, the existence of a global market is an important contextual fact in pleading an inter-continental cartel. While "[a]llegations of anticompetitive wrongdoing in Europe" cannot support a Section 1 claim "absent any evidence of linkage between such foreign conduct and conduct here," the Second Circuit has described circumstances (absent in the complaint before it) in which a plaintiff could plausibly establish this linkage – namely, where there exists (1) "global marketing or fungible products," (2) "participants monitor[ing] prices in other markets," or (3) "actual pricing . . . in the United States or changes therein attributable to defendants' alleged misconduct." *In re Elevator Antitrust Litigation*, 502 F.3d 47, 49-52 (2d Cir. 2007).

Carrier alleges all three of these "links." Though MLI (Br. 50-53) may be correct that courts have dismissed claims based on boilerplate allegations of a "global market," Carrier has alleged much more here. Carrier's Complaint

describes how Carrier had centralized, worldwide purchasing that managed its purchasing strategy on a global basis and how purchasers can practically turn to sources in both the U.S. and Europe to meet their ACR Copper Tubing needs. (R. 46, Am. Compl. ¶¶ 50-51, 59-61, Apx. pp. 0038, 0041-42.) Meanwhile, ACR Copper Tubing producers such as Defendants took a similar global view of the market, rotating their employees between Europe and the U.S., (*id.*¶¶ 27, 30, Apx. pp. 0029-31), and involving high-level executives of global companies in cartel meetings. (*Id.* ¶¶ 26-27, Apx. pp. 0029-30; R. 55.4, E.C. ACR Decision ¶¶ 40, 42, 243, Apx. pp. 0290, 0335.) Carrier provides further factual context for the existence of a global market with specific examples in which ACR Copper Tubing was imported from one continent into another. (R. 46, Am. Compl. ¶¶ 22, 51, Apx. pp. 0027-28, 0038.) Thus, Carrier is not simply relying on boilerplate allegations to conclude that a "global market" existed, as was at issue in the cases (including *Elevator*) that MLI cites (MLI Br. 52-53). Instead, Carrier has pled sufficient supporting facts and circumstances from which this Court can reach this same conclusion.

MLI's attempts (Br. 49-50) to use Carrier's allegations concerning the global market against it are to no avail. First, Carrier's allegations concerning MLI's decision to purchase European companies in the mid-1990s are not inconsistent with a global market. Rather, the Complaint describes that MLI had only a small

ACR Copper Tubing presence at the time, and its purchases were associated with (1) expanding its plumbing tube business into Europe where plumbing tubes are manufactured according to different specifications than in the U.S. (*i.e.*, metric rather than imperial); and (2) securing membership in the copper tubing cartel. (R. 46, Am. Compl. ¶ 35, Apx. pp. 0032-33.) Although MLI obtained significant ACR production facilities from its European purchase, pursuant to the cartel's plan, it shuttered those operations rather than compete. (*Id.*)

Second, MLI misinterprets Carrier's allegations concerning Asian suppliers. They did not supply customers outside of their region because demand in Asia was so high that they did not need to do so, not because Asia and other regions were not interrelated. (*Id.* ¶ 5, Apx. p. 0022.)

Finally, the Court should reject MLI's argument that Carrier's claim is undermined by the absence of any mention of supposed other ACR Copper Tubing manufacturers. This is precisely the type of evidence reserved for discovery, and Carrier's allegations of the market competitors (R. 46, Am. Compl. ¶ 5, Apx. p. 0022) cannot be controverted by Defendants' contrary assertions.

Accordingly, the existence of a global market is sufficiently pled, which renders plausible Carrier's allegations that the cartel affected the U.S.

3. Allegations of U.S. Market Allocation Give Further Plausibility to Carrier's Claim.

Second, as the District Court acknowledged, Carrier alleges additional facts concerning the nature and existence of the cartel that extend beyond the E.C.'s findings. (R. 93, Order at 6, Apx. p. 0926.) The Complaint directly alleges that Defendants and their co-conspirators agreed to allocate Carrier's business to Outokumpu in the U.S. and to others in Europe. (R. 46, Am. Compl. ¶¶ 4, 19, Apx. pp. 0021, 0026-27.)

MLI (Br. 46) challenges these allegations as demonstrating "nothing more than ordinary-course business." But this argument misstates the *Twombly* standard. As courts have determined:

> While an innocent explanation for defendants' behavior may exist, a complaint "need not be dismissed where it does not *exclude* the possibility of independent business action. . . . Such a requirement at this stage in the litigation would be counter to Rule 8's requirement of a short, plain statement with enough heft to 'sho[w] that the pleader is entitled to relief.'"

In re Rail Freight Fuel Surcharge Litig., 587 F. Supp. 2d 27, 336 (D.D.C. 2008) (quoting *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 5 (D.D.C. 2008)) (emphasis added). Thus, while Defendants might be able to proffer reasons why this conduct can be explained absent a conspiracy, Carrier's direct allegations that these market dynamics occurred *pursuant to* a cartel – which the E.C. ACR

Decision shows was in existence at the time – are adequate to allow discovery on its claims. *Id.*

Moreover, these direct allegations are supported by the change in the competitive landscape in the U.S. *after* revelation of the conspiracy to the E.C. (R. 46, Am. Compl. ¶ 7, Apx. pp. 0022-23.) MLI (Br. 46) again mischaracterizes these allegations as being consistent with "ordinary-course business." But it is inherently suspect that the first meaningful signs of competition in the U.S. from Wieland and KME – which, pursuant to the cartel, were allocated Carrier's business in Europe – corresponded approximately in time with the publication of the E.C. ACR Decision. *See In re Vitamins Antitrust Litig.*, 320 F. Supp. 2d at 14 ("[T]he inference against procompetitive effects in these situations is significantly stronger in light of the concession made by some defendants that a choline chloride conspiracy took place . . . . [T]he evidence as a whole – i.e., the backdrop of widespread, admitted, illegitimate behavior – cannot be ignored."). This conduct supports the conclusion that the allocation agreement did not stop at the European borders. *See In re Flat Glass Antitrust Litig.*, No. 08-180, 2009 WL 331361, at *2 (W.D. Pa. Feb. 22, 2009) (denying motion to dismiss when complaint alleged evidence of admitted conspiratorial conduct in Europe along with lockstep pricing patterns in the U.S. that ended contemporaneously with the commencement of an

E.C. investigation).[7] And these allegations must be further viewed in the context that Defendants have admitted that they engaged in market allocation in Europe. *See In re Chocolate Confectionary Antitrust Litig.*, ___ F. Supp. 2d ___, 2009 WL 56060, at *23 (M.D. Pa. Mar. 4, 2009) ("Defendants' alleged [anticompetitive] conduct in Canada enhances the plausibility of the alleged U.S. price fixing conspiracy.")

Accordingly, Defendants' attempt to have this Court look past Carrier's direct allegations concerning the existence of a conspiracy in violation of the Sherman Act is without merit. As demonstrated above, Carrier's factual allegations – put together with the knowledge gained from the E.C. ACR Decision and the global nature of the ACR Copper Tubing market – set forth sufficient facts

[7] *In re Flat Glass Antitrust Litigation* has many parallels to Carrier's Complaint in this case. In that case, the E.C. uncovered a conspiracy involving the European operations of several companies later sued in the U.S. for a related conspiracy in violation of the Sherman Act. The court properly analyzed the complaint under Rule 12(b)(6), and found that plaintiffs did not simply allege "since it happened there, it happened here" but adequately alleged facts and circumstances that rendered their complaint sufficient under *Twombly*. *In re Flat Glass Antitrust Litig.*, 2009 WL 331361, at *3. The E.C.'s decision in that case was similar to the E.C. Decision here, neglecting to mention any conspiratorial activity outside of the U.S., but making the same finding at issue here: "Insofar as the activities of the cartel related to sales in countries that are not members of the Community or the EEA, they lie outside the scope of this Decision." *Commission Decision No. COMP/39165 – Flat glass*, ¶ 349 (Nov. 28, 2007), *available at* http://ec.europa.eu/competition/antitrust/cases/decisions/39165/en.pdf.

that "nudged [its] claims across the line from conceivable to plausible," as required by *Twombly*. 127 S. Ct. at 1974.

4. The Arguments of Individual Defendants Do Not Support Dismissal.

Beyond Defendants' general arguments concerning the existence of a conspiracy involving the U.S. market, certain Defendants seek Rule 12(b)(6) dismissal on the grounds that the Complaint fails to adequately allege their specific involvement in the conspiracy. All of these arguments should be rejected.

a. The Complaint States a Claim Against Outokumpu's U.S. Subsidiaries.

Outokumpu (Br. 62-63) contends that the claims against its U.S. subsidiaries – Outokumpu Copper (U.S.A.), Inc. ("OUSA") and Outokumpu Copper Franklin, Inc. ("OCF") – should be dismissed because the Complaint fails to allege that they were involved in the "Cuproclima cartel," arguing that the E.C. ACR Decision names only OTO and OCP. This argument reflects the same fundamental misinterpretation of Carrier's Complaint and the E.C. ACR Decision as described above. *See In re Flat Glass Antitrust Litig.*, 2009 WL 331361, at *3 ("It is of no moment that [a defendant] did not participate in the European conspiracy.") The E.C. ACR Decision simply does not limit Carrier's allegations concerning the U.S. market, including Defendants' U.S. subsidiaries.

Furthermore, Carrier alleges that OTO and OCP had effective control over the business operations of *all* of their subsidiaries, including OCF and OUSA, and that OTO/OCP essentially conducted a single, global business plan through their network of subsidiaries, which included forging conspiratorial agreements. (R. 46, Am. Compl. ¶¶ 25-31, Apx. pp. 0028-31.) On a Rule 12(b)(6) motion, these allegations *must* be accepted as true. *See In re TFT-CD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184 (N.D. Cal Mar. 3, 2009) (denying motion to dismiss against certain related corporate entities because "[a]s described in the complaints, the alleged conspiracy was organized at the highest level of the defendant organizations and carried out by both executives and subordinate employees[,] . . . the conspiracy was implemented by subsidiaries and distributors within a corporate family, and that individual participants entered into an agreements on behalf of, and reported these meetings and discussions to, their respective corporate families.") (internal quotations omitted).

b. The Complaint States a Claim Against MLI.

MLI (Br. 35-41) also contends that it should not be a defendant. MLI is wrong for two reasons.

First, MLI is liable for the involvement of its subsidiary Desnoyers in the cartel. (R. 55.4, E.C. ACR Decision ¶ 90, Apx. p. 0298.) MLI (Br. 36-37) contends otherwise because the E.C. found that Desnoyers "withdrew voluntarily

from the cartel in 1996," and that the E.C. found "no evidence on Desnoyers' involvement in the infringement after May 1997, when Mueller acquired" Desnoyers. (R. 55.4, E.C. ACR Decision ¶¶ 91, 394, Apx. pp. 0298, 0366.)

However, the E.C. ACR Decision does not demonstrate that Desnoyers satisfied the standard for withdrawal from a cartel under U.S. law. It is MLI's burden, not Carrier's, to prove the affirmative defense of withdrawal. *United States v. Brown*, 332 F.3d 363, 374 (6th Cir. 2003). "Mere cessation of activity is not sufficient," and the only two ways for a cartel member to end its liability for participation in a conspiracy are by (1) reporting the cartel to authorities, or (2) announcing its withdrawal to its co-conspirators. *See id.; In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 616 (7th Cir. 1997).

At least prior to 2001, Desnoyers did not meet either standard for withdrawal. Although the E.C. ACR Decision uses the term "withdrew," the facts relied upon for this conclusion – "recitals (90) to (92)" – do not meet the rigorous standard for withdrawal under U.S. law. (R. 55.4, E.C. ACR Decision ¶ 394, Apx. p. 0366.) Instead, these findings reflect only that the cartel's "contacts with Desnoyers had been ceased." (*Id.* ¶¶ 91-92, Apx. p. 0298.) And "[m]ere cessation of activity" is "not sufficient" evidence of withdrawal. *Brown*, 332 F.3d at 374; *see also United States v. Swiss Valley Farms Co., Inc.,* 912 F. Supp. 401, 402 (C.D. Ill. 1995) (finding withdrawal from a bid rigging conspiracy ineffective despite the

resumption of competitive bidding when defendant "continues to receive benefits from the conspiracy's operations") (citations/internal quotations omitted)).

Furthermore, Carrier alleges that MLI was aware of the conspiracy after it acquired Desnoyers but did nothing to disclose it to authorities until 2001. Therefore, it continued to benefit from the conspiracy until at least that time. (R. 46, Am. Compl. ¶ 39, Apx. p. 0035.) MLI attempts to rebut this allegation by arguing that it is "contrary" to a statement in the E.C. ACR Decision that "Mueller cannot be held liable for the infringement, as it never *directly* participated in the cartel in question." (MLI Br. 36 (quoting R. 55.4, E.C. ACR Decision ¶ 394, Apx. p. 0366) (emphasis added).) But the statement does not contradict the allegation in Carrier's Complaint that after MLI's acquisition of Desnoyers, MLI learned of Desnoyers' participation in the cartel, chose not to disclose that participation until 2001, and benefited from the non-disclosure in the interim. (R. 46, Am. Compl. ¶¶ 36-39, Apx. pp. 0033-35.) While such conduct might not constitute "directly participat[ing]" in cartel meetings, it is at least a form of indirect benefit and participation for which MLI can be held liable based on Carrier's allegations concerning MLI's knowledge and complete control of its subsidiary Desnoyers. *See, e.g., In re Bulk Popcorn Antitrust Litig.*, 783 F. Supp. 1194, 1198 (D. Minn. 1991).

Second, Carrier sufficiently pleads MLI's direct involvement in the ACR Copper Tubing conspiracy. MLI was shoulder-deep in conspiratorial activity during this time period. As the Complaint alleges, MLI was at the time having price-fixing and business allocation meetings with Outokumpu, Wieland and KME. (R. 46, Am. Compl. ¶¶ 36-39, Apx. pp. 0033-35.) The E.C.'s Copper Plumbing Tubes Decision ("E.C. Plumbing Tubes Decision") evidences that such meetings occurred. They presented an opportunity to conspire with respect to ACR Copper Tubing, and Carrier alleges that such conspiratorial discussions occurred. (*Id.* ¶ 38, Apx. pp. 0034-35.)

MLI (Br. 39-41) contends that such a conclusion is contradicted by the E.C.'s statement in the Plumbing Tubes Decision that "the arrangements pertaining to plumbing tubes on the one hand and those relating to industrial tubes on the other hand involved different companies (and employees), and were organized in a different way." (R. 55.3, E.C. Plumbing Tubes Decision ¶ 5, Apx. p. 0073.) But this statement hardly exonerates MLI from complicity in the ACR Copper Tubing conspiracy. While the plumbing tube conspiracy may have involved additional companies and was therefore organized differently, it also involved the exact same companies conspiring with respect to ACR Copper Tubing. Both of these cartels were coordinated at the highest levels of these companies – *i.e.,* by individuals who had responsibility for both their ACR Copper Tubing and plumbing tube

businesses. (*See* R. 46, Am. Compl. ¶¶ 27, 35-38, Apx. pp. 0029-30, 0032-35.) Different conspiratorial organization does not mean that one of these high-level executives would never talk to its competitors or potential competitors in the ACR Copper Tubing market about that unlawful arrangement. Indeed, that is precisely what Carrier alleges. (*Id.* ¶ 35, Apx. pp. 0032-33.) And the fact that MLI is known to have been deeply enmeshed in the plumbing tube conspiracy, side-by-side with the other co-conspirators in the ACR Copper Tubing cartel, *supports* the plausibility of MLI's complicity as to the ACR Copper Tubing cartel. *See In re Static Random Access Memory Antitrust Litig.*, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008); *United States v. Andreas*, 23 F. Supp. 2d 835, 846 (N.D. Ill. 1998); *In re Vitamins Antitrust Litig.*, 320 F. Supp. 2d at 16.[8]

C. The FTAIA Is Not Grounds for Dismissal.

1. The FTAIA Does Not Apply to Claims Based on U.S. and Import Purchases.

The District Court's dismissal under 12(b)(1) cannot not be affirmed under the FTAIA, which has no application in this case. The FTAIA removes from the

[8] It is noteworthy that upon announcement of MLI's intended acquisition of European operations, the chairman of KME's board publicly fretted about a change in the competitive landscape: "It means perhaps that we have to be open for industrial activity in the States. . . . Now we have to be competitive." (R. 61.3-Ex. 1, *KM Europa Removes US Kid Gloves*, American Metals Market (Mar. 12, 1997), Apx. pp. 0455-56.) The competition, however, did not materialize, because Mueller soon joined the copper tubing cartel.

scope of the Sherman Act only "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." 15 U.S.C. §6a (emphasis added). Carrier's claims, in contrast, are based on conduct involving commerce within the U.S. and imports into the U.S.

The cases cited by Defendants demonstrate the FTAIA's inapplicability in this case. In each of the cases, the FTAIA has been applied to sales/purchases made outside the U.S. *E.g.*, *F. Hoffman-La Roche v. Empagran S.A.*, 542 U.S. 155, 160 (2004) ("Respondents have never asserted that they purchased any vitamins in the United States . . . ."); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 536 (8th Cir. 2007) (purchases of MSG outside the U.S.); *Sniado v. Bank Austria AG*, 378 F.3d 210, 212 (2d Cir. 2004) (suit to recover supra-competitive currency exchange fees paid in European countries based on conspiracy by European banks to fix exchange rate); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 332 F.3d 942, 945 (7th Cir. 2003) (Indian company prevented from selling products in India); *Turicentro v. American Airlines, Inc.*, 303 F.3d 293, 303 (3d Cir. 2002) (suit by Nicaraguan and Costa Rican travel agents for conspiracy to lower sales commissions paid to foreign travel agents); *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F. Supp. 1071, 1077-78 (S.D.N.Y.

1988) (baggage-check fees on flights from Hong Kong to Taipei); *Eurim-Pharm v. Pfizer Inc.*, 593 F. Supp. 1102, 1103 (S.D.N.Y. 1984) (pharmaceutical purchases in Europe).

In contrast, claims based on purchases in the U.S. affected by a price-fixing conspiracy do not involve foreign commerce and are not subject to the FTAIA, regardless of the location of the conspiratorial meetings or the nationality of the defendants. *See eMag Solutions, LLC v. Toda Kogyo Corp.*, 426 F. Supp. 2d 1050, 1058-59, n.6 (N.D. Cal. 2006). The Supreme Court made clear in *Empagran*, 542 U.S. at 161, that the FTAIA applied only to (1) export commerce, and (2) "commercial activity taking place abroad." Nowhere in *Empagran*, or any other case interpreting the FTAIA, does the Court hold that the FTAIA imposes an additional jurisdictional burden on plaintiffs seeking recovery for purchases of price-fixed goods in the U.S.[9] *See Goodyear Tire & Rubber Co. v. Dow*

[9] MLI (Br. 20, 21-22) argues that *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) imposes an additional pleading burden on a plaintiff bringing a Sherman Act claim against foreign companies that engaged in specific conspiratorial activities outside the United States. But Carrier's allegations more than satisfy whatever minimal pleading burden can be found in *Hartford Fire*. In *Hartford Fire*, the Supreme Court held that "the District Court undoubtedly had jurisdiction of these Sherman Act claims" where the plaintiffs alleged that London reinsurance companies collectively agreed to boycott certain primary insurance carriers in the U.S. 509 U.S. at 795. In resolving this question, the Supreme Court

(continued…)

Deutschland GmBH & Co., No. 08-1118, slip op. at 4 (N.D. Ohio Mar. 2, 2009) (attached hereto as Attachment 1) ("The allegation that the defendant Bayer negotiated in Akron and delivered to Goodyear in the United States the products at issue, and as an integral part of the alleged conspiracy between Bayer and the other defendants, is, in the Court's view, sufficient to remove at least that part of the conspiracy from the grasp of the strictures of the FTAIA and the teachings of *Empagran*.")

Here, Carrier alleges that Defendants sold ACR Copper Tubing directly to Carrier in the U.S. at conspiratorially inflated prices. Carrier purchased a large quantity of its ACR Copper Tubing from Outokumpu's U.S. operations, which participated in the Defendants' market allocation scheme. (R. 46, Am. Compl. ¶¶ 19, 28, Apx. pp. 0026-27, 0030.) Carrier also purchased ACR Copper Tubing from Outokumpu's European operations, which by definition constitutes "import commerce." (R. 46, Am. Compl. ¶¶ 21-22, Apx. pp. 0027-28.) The same holds true for the purchases from KME made by ICP, which became a Carrier subsidiary in 1999 but was not centralized with Carrier's purchasing operations until 2002. (R. 46, Am. Compl. ¶ 51, Apx. p. 0038.)

(continued)
did not delve into whether the facts pled by the plaintiffs were sufficient to support its allegation of a conspiracy to boycott the U.S. insurance carriers. *Id.* at 795-96.

Because Carrier's Sherman Act claim is based on purchases from Defendants in the U.S. and imports, not purchases outside the U.S., Carrier need not satisfy any additional jurisdictional requirements under the FTAIA. In order to plead jurisdiction, Carrier need only allege that defendants' conspiracy "as a matter of practical economics" has had an effect on interstate commerce. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 331 (1991) (internal citations omitted). Carrier's allegations that Defendants' conspiracy artificially inflated ACR Copper Tubing prices Carrier paid in the U.S. is more than sufficient to meet this standard. *See Hammes v. Aamco Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (in antitrust cases, "when the jurisdictional prerequisite is effect on interstate commerce, the pleading of a conclusion should be good enough").

Even if the FTAIA did apply here, Carrier has still sufficiently pled jurisdiction. Under the FTAIA, a plaintiff "need not allege all the facts necessary to prove its claim so long as it provides enough factual information to make clear the substance of that claim." *Caribbean Broadcasting System, Inc. v. Cable & Wireless PLC*, 148 F.3d 1080, 1086 (D.C. Cir. 1998). Although the FTAIA affects *what* a plaintiff must allege to plead subject matter jurisdiction, it does not affect *how much* must be alleged to put the defendant on notice of the basis for jurisdiction.

As explained in section I. B, *supra*, Carrier has alleged enough facts that, if proven, would show that the conspiracy affected sales of ACR Copper Tubing to Carrier and others in the U.S. These facts establish a plausible link between Defendants' anticompetitive agreements and an effect on competition and prices in the U.S. Carrier's claims are thus unlike those dismissed in *Commercial Street Express, LLC v. Sara Lee Corp.*, where the plaintiffs alleged nothing to suggest that a cartel uncovered by German authorities affected prices of products sold in the U.S. No. 08-1179, 2008 WL 5377815 (N.D. Ill. Dec. 18, 2008).

2. A Factual 12(b)(1) Dismissal Is Improper Where the Jurisdictional Inquiry Is Intertwined with the Merits

Even if the FTAIA applied, the District Court's decision could not be affirmed, as Defendants argue, on the basis of a factual attack under the FTAIA. Where the merits and the FTAIA inquiry depend on the same set of facts, a factual inquiry into jurisdiction is improper. *Gentek Building Products, Inc. v. Steel Peel Litigation Trust*, 491 F.3d 320, 330-31 (6th Cir. 2007). Here, proof of the merits of Carrier's claim and the "direct and substantial effect on U.S. commerce" required by the FTAIA involves the same set of facts: whether Defendants' conspiracy included an agreement to fix the price of ACR Copper Tubing sold in the U.S.

The Third Circuit observed in *Mortensen v. First Federal Savings & Loan Ass'n* that allowing a defendant to factually challenge jurisdiction under the Sherman Act is "disturbing." 549 F.2d 884, 891-92 (3d Cir. 1977). Because

merits and jurisdictional issues under the Sherman Act so often involve the same set of facts, allowing a factual challenge to jurisdiction before any meaningful opportunity for discovery would effectively require a plaintiff to prove the truth of its claims at too early a stage in the litigation. *Id.*

In addition, whenever the FTAIA is applied to a claim for recovery for purchases made in the U.S., the merits and the jurisdictional inquiry become inextricably intertwined, and "the district court should find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's claim." *Gentek*, 491 F.3d at 331. (internal citation omitted). Because the merits of Carrier's claim and the FTAIA inquiry are intertwined, the Court must address Carrier's claim on the merits, and the FTAIA cannot be an alternative ground for the District Court's dismissal.

Defendants' attempt to salvage the District Court's ruling through a factual analysis of FTAIA jurisdiction founders for two additional reasons. First, the District Court did not make any findings of fact on the issue of whether Carrier has shown that the conspiracy affected U.S. commerce, aside from its cursory statement that it simply did not believe Carrier's allegations. Where a district court does not make a factual finding on an issue, this Court cannot affirm its decision. *See Woosely v. Avco Corp.*, 944 F.2d 313, 319 (6th Cir. 1991).

Second, although a court ruling on a motion to dismiss for lack of subject matter jurisdiction may resolve issues of disputed fact on the basis of materials outside the complaint, "the court must make appropriate inquiry," and "it must do so in a manner that is fair to the non-moving party." *Rogers v. Stratton Industries*, 798 F.2d 913, 918 (6th Cir. 1986). The court must, at a minimum, provide the non-moving party with an opportunity to obtain and develop the evidence needed to withstand the factual challenge. *Berardi v. Swanson Memorial Lodge*, 920 F.2d 128, 200-201 (3d Cir. 1990).[10]

Here, the District Court did not give Carrier any opportunity to develop and introduce facts that the Court could then appropriately weigh in resolving any disputed issues of fact. Carrier had no opportunity to cross-examine either Outokumpu's affiants or the participants in the conspiracy, or obtain documents relating to the conspiratorial activities beyond what the E.C. referred to in redacted form. Given that much of the factual support Defendants claim is lacking from Carrier's allegations lies with Defendants and their co-conspirators, it would be unfair to throw Carrier out of court at this early stage merely because Defendants

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[10] *Commercial Street Express* does not stand for the proposition that a court may dismiss a claim under the FTAIA under the factual approach without granting the plaintiff jurisdictional discovery, because the Rule 12(b)(1) dismissal in *Commercial Street Express* was based on a facial analysis of the complaint. 2008 WL 5377815, at *4.

have asserted a factual challenge to jurisdiction and the District Court gave Carrier no opportunity to respond.

II. DEFENDANTS' CROSS-APPEAL

A. Carrier's Action Is Not Time Barred.

According to Defendants, general public reports in March 2001 about a copper tubing investigation by the E.C. should negate any attempt to equitably toll the statute of limitations beyond that date. However, all Carrier knew – or reasonably could know – from March 2001 until the E.C. ACR Decision was issued in December 2003 was the fact that the E.C. had initiated an investigation into allegations of a possible copper tubing conspiracy. This information alone could not permit Carrier to bring a claim for damages because any information about the nature, scope, or even existence of the alleged cartel was exclusively within the province of the cartel members and eventually the E.C.

The Clayton Act provides a four-year limitations period, 15 U.S.C. §15b (2009); however, "[t]he general rule is well established in antitrust cases that fraudulent concealment will toll the statute of limitations. '[W]hen the defendant fraudulently conceals an antitrust violation, the period of limitations does not begin to run until the violation is discovered or should have been discovered.'" *Norton-Children's Hosps., Inc. v. James E. Smith & Sons, Inc.*, 658 F.2d 440, 443 (6th Cir. 1981) (quoting *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 52 (5th Cir.

1974)). While that does not mean that tolling in an antitrust case "must continue unless or until proof positive existed of a wrong", *Pinney Dock & Transp. Co. v. Penn Cent. Corp.,* 838 F.2d 1445, 1478 (6th Cir. 1988), general suspicions will not begin the limitations period unless it can be shown that a reasonable investigation would have revealed "sufficient operative facts for properly filing an anti-trust claim." *State of Mich. ex rel. Kelley v. McDonald Dairy Co.*, 905 F. Supp. 447, 453 (W.D. Mich. 1995).

As demonstrated below, Carrier has adequately alleged a fraudulent concealment claim such that its Complaint was timely filed.

1. Affirmative Acts of Concealment Are Adequately Alleged.

Fraudulent concealment first requires that the Defendants committed "affirmative acts" of concealment – *i.e.*, a "trick or contrivance intended to exclude suspicion and prevent inquiry." *Pinney Dock & Transp. Co.,* 838 F.2d at 1467. The Complaint – as supported by the E.C.'s findings – enumerates a litany of specific affirmative acts of concealment such as document destruction, the use of secret coding systems, and the establishment of security rules to prevent a paper trail. (R. 46, Am. Compl. ¶ 105, Apx. p. 0052.) Affirmative acts such as these are precisely the type that serve no purpose other than to prevent detection of facts by third parties. *See, e.g., State of New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1084 (2d Cir. 1988) (destroying and hiding documents); *State of Mich. ex*

rel. Kelley, 905 F. Supp. at 452 (destroying documents and instructing co-conspirators not to divulge the cartel).

Defendants attempt to avoid these allegations by application of Rule 9(b). (MLI Br. 56-57.) However, the Sixth Circuit "has rejected a strict reading of Rule 9(b)," requiring only the provision of "fair notice of the substance of a plaintiff's claim in order that the defendant may prepare a responsive pleading." *State of Mich. ex rel. Kelley*, 905 F. Supp. at 450 (quoting *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir. 1988)). This is particularly true in antitrust cases where "a substantial portion of any incriminating evidence lies in the sole control of the defendants." *Id.* at 454. That point is well illustrated here; it is practically impossible for Carrier to allege such minute details about information that is exclusively in Defendants' possession.

Nor must Carrier plead acts of concealment by each individual Defendant, as Defendants contend. (MLI Br. 56-57; Outokumpu Br. 66-67.) In antitrust conspiracy cases, where the concealment was essential to and in furtherance of the operation of the conspiracy, the acts of one conspirator are attributable to *all* conspirators because they all receive the benefits of the concealment. *See In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 538 (6th Cir. 2008). In any event, Carrier alleges that the conspiracy involved agreements among all Defendants and their co-conspirators to affirmatively conceal the conspiracy. (R. 46, Am. Compl.

¶¶ 104-05, Apx. pp. 0051-52.) For these reasons, the cases cited by Defendants are inapposite here.

Similarly without merit are MLI's attempts (Br. 57-58) to distance itself from these affirmative acts by touting its disclosure of the cartel to the E.C. in 2001 as the "antithesis of concealment." Such actions do not absolve MLI from complicity in the previous years of engaging in a conspiracy furthered by affirmative acts of concealment. *See Morton's Market, Inc. v. Gustafson's Dairy, Inc.,* 198 F.3d 823, 837 n.24 (11th Cir. 1999); *State of Mich. ex rel. Kelley*, 905 F. Supp. at 452 n.4. The cases relied upon by MLI for the contrary position are irrelevant here because none involved equitable tolling based on the defendant's fraudulent concealment. Therefore, the only legal effect of MLI's reporting of the conspiracy is to end the damages period of that co-conspirator's liability for the continuing conspiracy. *See In re Brand Name Prescription Drugs*, 123 F.3d at 616.

Contrary to Outokumpu's assertions (Br. 66-67), it is also immaterial *when* the affirmative acts occurred, and they do not, therefore, have to occur within the limitations period. *See State of Mich. ex rel. Kelley*, 905 F. Supp. at 451 (citing, *inter alia*, *Pinney Dock & Transp. Co.*, 838 F2d at 1471-76). Nevertheless, Carrier has alleged fraudulent concealment after the E.C.'s investigation was revealed in March 2001 when Outokumpu fraudulently denied its involvement in the cartel.

(R. 46, Am. Compl. ¶¶ 110-111, Apx. pp. 0054-55.) Outokumpu stated in press releases after announcement of the E.C. investigation that it "denied any involvement in a cartel" and did "not have any information that would support the said allegations." (*Id.*) The E.C. ACR Decision later revealed that Outokumpu was lying.

Outokumpu attempts to downplay its public misrepresentations, on the ground that "[s]ilence and general denials of wrongdoing do not constitute fraudulent acts of concealment." (Outokumpu Br. 67.) But the law does not establish such a bright-line rule. While a denial of wrongdoing may not constitute concealment if reliance on that denial is unreasonable, *see, e.g., Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858 F.2d 499, 505 (9th Cir. 1988), here reliance *was* reasonable because of the absence of meaningful facts to question the validity of Outokumpu's denials.

2. Carrier Has Adequately Alleged Tolling Until the E.C. ACR Decision Was Issued.

Because of Defendants' affirmative acts of concealment, the Complaint further alleges that Carrier could not have reasonably learned of the basis for its claims until December 16, 2003, the date the E.C. ACR Decision was issued. (R. 46, Am. Compl. ¶ 103, Apx. p. 0051.) Carrier learned of the E.C. investigation some time after 2001 and made reasonable efforts to gain information from companies under investigation, but it was not given any meaningful information.

(*Id.* ¶ 108, Apx. pp. 0053-54.) The news reports regarding the investigation similarly failed to provide any meaningful facts as to the scope, nature, duration, or effect of the conspiracy – let alone whether a conspiracy actually existed. (*Id.* ¶ 109, Apx. p. 0054.) No meaningful details were available until the E.C. announced its decision in December 2003. (*Id.* ¶ 110, Apx. pp. 0054-55.) The E.C. ACR Decision provided Carrier with a wealth of information about the cartel that enabled a reasonable investigation that made this lawsuit possible. (*Id.* ¶¶ 111-113, Apx. pp. 0055-56.) Among other things, Carrier sought the assistance of counsel and economic experts to investigate the basis for Carrier's claims. (*Id.*) Carrier then brought the instant suit on March 29, 2006, well within four years of the issuance of the E.C. ACR Decision.

These particular facts and circumstances are more than sufficient to satisfy the elements of a fraudulent concealment claim. In fact, many courts have held that a plaintiff need not allege *any* acts of due diligence where a reasonable investigation would not have revealed the basis for its claims. *See Hazel v. Gen. Motors Corp.*, No. 97-5086, 142 F.3d 434, at *3 n.6 (6th Cir. Apr. 8, 1998) (Table) (finding that for fraudulent concealment claims, "failure to exercise due diligence traditionally does not defeat a claim of fraud based on active concealment"); *Morton's Market, Inc.*, 198 F.3d at 835-36 (collecting cases). Moreover, ultimate resolution of this question is typically reserved for trial, not

pre-trial dispositive motions. *Morton's Market, Inc.*, 198 F.3d at 832 ("we have held, along with the majority of the circuits, that the issue of when a plaintiff is on 'notice' of his claim is a question of fact for the jury"); *Mullinax v. Radian Guar. Inc*, 199 F. Supp. 2d 311, 332 (M.D.N.C. 2002) (whether the "mere existence" of government investigations put plaintiffs on constructive notice of their claims is a "factual determination . . . inappropriate when deciding a motion to dismiss").

Nonetheless, Defendants argue that a series of news reports announcing the E.C. investigation around March 2001 put Carrier on "inquiry notice" of its claims. Defendants essentially argue for a *per se* rule that knowledge of a government investigation begins the limitations period. But the overwhelming majority of courts have found that mere initiation of a government investigation is not sufficient to trigger the statute of limitations. *See, e.g., E.W. French & Sons, Inc. v. General Portland Inc.*, 885 F.2d 1392, 1400 (9th Cir. 1989) (finding in a Section 1 case, that the "existence of [a related] lawsuit and [plaintiff's] knowledge of it . . . are not tantamount to actual or constructive knowledge of the price-fixing claim"); *Mullinax,* 199 F. Supp. 2d at 331-32; *State of Mich. ex rel. Kelley,* 905 F. Supp. at 453; *City of Chicago Heights v. LoBue,* 841 F. Supp. 819, 824 (N.D. Ill. 1994); *United Nat'l Records, Inc. v. MCA, Inc.*, 609 F. Supp. 33, 38 (N.D. Ill. 1984). The reasoning for this rule is sound. As the Fifth Circuit explained in *In re Beef Industries Antitrust Litig.*, the allegations in the related proceeding "might

well be frivolous or baseless," and, therefore, to require a plaintiff to bring his own suit once he learns of allegations in a related action "is to compel . . . plaintiffs to file suit, on the pain of forfeiting his rights, regardless of whether his attorney believes that there is 'good grounds to support it.'" 600 F.2d 1148, 1171 (5th Cir. 1979) (citing Fed. R. Civ. P. 11). The Fifth Circuit, therefore, held that mere knowledge of a pending investigation is insufficient grounds for dismissal; instead, defendants must also show that the plaintiffs could have reasonably discovered "evidence tending to support" their claims. *Id.*; *see also Morton's Market*, 198 F.3d at 833-36; *F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. 422, 430 (N.D. Ohio 1984).

Consequently, to prevail in their motion to dismiss, Defendants must be able to demonstrate that, as a matter of law, a reasonable investigation prior to December 2003 would have revealed "good grounds" to support Carrier's claims. *See Jones v. Gen. Motors Corp.*, 939 F.2d 380, 385 (6th Cir. 1991) (finding that fraudulent concealment of "critical facts" permits extension of the statute of limitations). In other words, knowledge of an investigation would "merely trigger[] a duty to investigate, and the limitation period begins to run only when a reasonably diligent investigation would have discovered" the conspiracy. *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003); *see also State of Texas v. Allan Constr. Co.*, 851 F.2d

1526, 1533 (5th Cir. 1988); *In re Copper Antitrust Litig.*, 436 F.3d 782, 790 (7th Cir. 2006).[11]

Here, Carrier's allegations provide no grounds to dismiss its fraudulent concealment claim. Because "in antitrust cases . . .'the proof is largely in the hands of the alleged conspirators,'" *Hospital Bldg. Co.*, 425 U.S. at 746 (quoting *Poller*, 368 U.S. at 473), it was impossible for Carrier to know whether there were "good grounds" to support an antitrust claim unless (1) the E.C. released information to Carrier concerning the Defendants' unlawful conduct; or (2) the Defendants gave Carrier information regarding their secret cartel. Because of the E.C.'s strict confidentiality policy, Carrier was prohibited from pursuing the first option. *See* Case T-17/93, *Matra-Hachette SA v. Commission*, 1994 E.C.R. II-595, at ¶ 34. And Carrier tried the second avenue but was rejected. (R. 46, Am. Compl. ¶ 108, Apx. pp. 0053-54.) Defendants dispute the "reasonableness" of this inquiry, again relying on the proposition that mere "silence" on Defendants' part is not

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[11] None of the cases relied upon by Defendants are to the contrary. The only antitrust case – *Dayco Corp. v. Goodyear Tire & Rubber Co.,* 523 F.2d 389 (6th Cir. 1975) – is easily distinguishable. In *Dayco*, this Court found the statute of limitations triggered not by the mere initiation of a government investigation, but by public Congressional hearings and a related FTC suit that resulted in a cease and desist order relating to the plaintiff's claims. *Id.* at 394; *see also United Nat'l Records, Inc.,* 609 F. Supp. at 38 (similarly distinguishing *Dayco*). In addition, the appeal involved a summary judgment decision, not a motion to dismiss.

enough (MLI Br. 65), but, in fact, the silence speaks volumes in this context because it demonstrates the futility of gaining any meaningful information about the operative facts for a claim until the E.C. ACR Decision was issued.[12]

Defendants essentially seek to put Carrier in a Catch-22. On the statute-of-limitations issue, they argue that the mere knowledge of the E.C.'s investigation should have triggered a duty for Carrier to investigate and bring a claim, yet at the same time, they claim that the Complaint fails to state a Section 1 claim even *after* Carrier gained the added benefit of voluminous findings of guilt by the E.C. This attempt should be rejected because it puts Carrier in an impossible situation to bring a claim for its injuries, and such an impossible standard prior to discovery would, as courts in this Circuit have cautioned against, "permit sophisticated defrauders to successfully conceal the details of their fraud," and thereby forever insulate themselves from claims by their victims. *State of Mich. ex rel. Kelley*, 905

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[12] Nor does MLI's (Br. 63) reliance on Carrier's allegations regarding the change in the level of competition in the global market for ACR Copper Tubing alter this conclusion. Assuming that Defendants did end their anti-competitive conduct in March 2001, the competitive climate would be unlikely to change overnight, but rather would take time to undo the lingering effects of a cartel that disciplined the market for over a dozen years – a fact that the Complaint makes clear. (R. 46, Am. Compl. ¶ 7, Apx. pp. 0022-23.) This Court cannot resolve these issues as a matter of law prior to discovery.

F. Supp. at 451. Indeed, the result Defendants seek would undermine the very equitable principles from which the fraudulent concealment doctrine was created.

Ultimately, whether Carrier's investigation was reasonable in light of the circumstances is a question for the trier of fact. At this stage, however, the issue is whether Carrier's Complaint alleges sufficient facts that could entitle it to relief. As demonstrated above, it has. *See In re Elec. Carbon Prods. Antitrust Litig.*, 333 F. Supp. 2d 303, 316-18 (D.N.J. 2004) (finding that the operative date for triggering the statute of limitations was the issuance of findings of guilt by the E.C. and the U.S. Department of Justice).

B. The District Court Had Personal Jurisdiction Over the Foreign Defendants.

The foreign Defendants – OTO, OCP and MEL – seek dismissal for a lack of personal jurisdiction. The District Court did not rule on the motions. This Court should deny them.

The Defendants submitted affidavits to support their motions. Carrier responded with affidavits and other evidence to support a finding of personal jurisdiction. The District Court, however, did not rule on the motions. Nor did it conduct an evidentiary hearing on jurisdiction or order jurisdictional discovery. Accordingly, Carrier is required "only to make a prima facie case of jurisdiction." *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1168-1169 (6th Cir. 1988) (observing that plaintiff's burden is "relatively slight").

To determine whether Carrier has met its burden, the Court must consider the pleadings, affidavits and other submissions in the light most favorable to Carrier. *Id.* It may not consider any controverting facts from the moving party. *Id.* Where disputed jurisdictional facts are intertwined with a dispute on the merits, a court should not require the plaintiff to mount proof to establish the validity of their claims. *Serras v. First Tennessee Bank Nat'l Ass'n,* 875 F.2d 1212, 1215 (6th Cir. 1989).

Due process requires that the defendant have certain "minimum contacts" with the forum such that the exercise of personal jurisdiction "does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted). Here, the Court assesses Defendants' contacts with the entire United States because the basis for service – Clayton Act § 12 (15 U.S.C. § 22 (2009)) – provides for worldwide service of process. *In re Automotive Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 299 (3d Cir. 2004); *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1415 (9th Cir. 1989). *Cf. United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993) (holding same in securities case where service was made pursuant to § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (2009), which provides for nationwide service of process in language similar to that in § 12 of the Clayton Act); *Medical Mutual of Ohio v. DeSoto*, 245 F.3d 561, 567-68 (6th

Cir. 2001) (holding in an ERISA case that "when a federal court exercises jurisdiction pursuant to a national service of process provision, it is exercising jurisdiction for the territory of the United States and the individual liberty concern is whether the individual over which the court is exercising jurisdiction has sufficient minimum contacts with the United States").

1. Specific Jurisdiction Existed Over OCP.

During the cartel, Outokumpu was a highly integrated and global organization functioning as a single economic unit. OTO was the parent company, dividing its business into different divisions. Its Copper Products Division was responsible for Outokumpu's worldwide copper products business. (R. 61.3-Ex. 9, 1995 Outokumpu Annual Report at 8, Apx. p. 0458.) It was run by OCP. (*Id.*) OCP owned and controlled various subsidiaries throughout the world, including Defendants OUSA and OCF. (*Id.* at 59-60, Apx. pp. 0459-60.)

Outokumpu "strove to create an image of a single entity with numerous offices around the world to facilitate international operations." *See Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co.*, 499 F. Supp. 829, 838-40 (D. Or. 1980) (finding personal jurisdiction over Japanese companies in an antitrust case). It held itself out as a global company seeking "to serve its international customers on a global basis." (R. 61.3-Ex. 13, 1997 Outokumpu Annual Report at 26, Apx. p. 0469; *see also* R. 61.4-Ex. 26, 2000 Outokumpu Annual Report at 5, Apx. p. 0497

(touting "worldwide customer-focused production and service network"); R. 61.4-Ex. 27, Website, *Luvata Locations*, Apx. p. 0498 ("[Y]ou're also getting the support and resources of a globally successful company. . . . [O]ur global presence supports partnerships beyond metals with customers all over the world.").)

Through OCP, Outokumpu's global presence extended to the U.S. such that OCP is subject to specific jurisdiction under the three-part test of *Southern Machine Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968). In accordance with this test, (1) OCP purposely availed itself of the privilege of acting or causing a consequence in the forum; (2) Carrier's cause of action arises from the defendant's activities in the forum; and (3) the acts of or consequences caused by OCP had a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable. *Id.*

a. OCP Purposely Availed Itself of the Privilege of Conducting Business in the U.S.

The "purposeful availment" prong of the *Southern Machine* test requires "some overt actions connecting the defendant with the forum." *See Bridgeport Music, Inc. v. Still N the Water Publ'g,* 327 F.3d 472, 478-80 (6th Cir. 2003). OCP's U.S. contacts satisfy this prong.

(1) OCP Itself Conducted Business in the U.S.

OCP boldly declares that is has "no significant contacts with the United States." (Outokumpu Br. 68.) But evidence of its U.S.-based officers, its use of Finnish executives to work the Carrier account in the U.S., and its importation of ACR Copper Tubing into the U.S. all show otherwise.

OCP asserts that it has never "maintained an office" in the U.S. (*Id.* 16) That assertion, however, fails to acknowledge that OCP stationed numerous officers in the U.S. These officers had responsibility for OCP's global operations, including the sale of ACR Copper Tubing in the U.S. and Europe. Together, their presence made personal jurisdiction over OCP proper. *See, e.g., Cascade Steel Rolling Mills, Inc.*, 499 F. Supp. at 838-40 (finding personal jurisdiction over Japanese companies in an antitrust case where "there was considerable interlocking personnel, from directors to officers and employees" with the U.S.-based subsidiaries.)

For example, Joseph Goodell was based in the U.S. where he served as President of the Outokumpu subsidiary American Brass.[13] There he was

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[13] As part of its 1990 acquisition of U.S. manufacturer American Brass, Outokumpu acquired American Brass' welded copper tube operation in Franklin, Kentucky, which became OCF in 1993. (R.61.4-Ex. 34, *Outokumpu, American*

(continued…)

"responsible for the manufacturing and marketing of all Outokumpu Copper's flatrolled products on a *worldwide* basis." (R. 61.4-Ex. 34, *Outokumpu, American Brass: Still in Love*, Metal Center News (Mar. 1, 1993), at 3, Apx. p. 0513.) (emphasis added). Mr. Goodell used a U.S.-based sales force to conduct business on behalf of OCP elsewhere in the world, including Europe. (*See id.*) His publicly reported comments evidence this fact:

> Claiming that American marketing and sales techniques are much more sophisticated than those of the European divisions, Goodell elaborates: "For one thing, we have better data on the marketplace, and our sales managers are more adept at analysis. Our sales people are closer to manufacturing and management. It's a more tightly knit system than is typical in Europe."

(*Id.*) Hence, the sales force acting at Mr. Goodell's direction were among those engaged in the collusive activities that were the subject of the E.C. ACR Decision.

(continued)
Brass: Still in Love, Metal Center News (Mar. 1, 1993), Apx. p. 0512; R. 61.4-Ex. 35, State of Delaware 1999 Annual Franchise Tax Report OCF, Apx. pp. 0515-16.)

Various other high-ranking OCP officers who conducted OCP's business were also based in the U.S. For example, between 1998 and April 2000, Geoffrey Palmer was OCP's Deputy President in charge of OCP's Global Business Lines division, which "serv[ed] internationally operating customers" like Carrier with needs for "welded tubes used in air-conditioning and refrigeration systems."[14] Mr. Palmer ran OCP's Global Business Lines division from the Chicago area where he lived and worked. (R. 61.4-Ex. 31, ChoicePoint Background Report, Apx. pp. 0506-07.) At the time, Outokumpu maintained offices in the Chicago suburb of Bloomingdale, Illinois, where OUSA was located. (R. 61.4-Ex. 20, 1996 Outokumpu Annual Report at 78, Apx. p. 0488).[15]

Besides Messrs. Goodell and Palmer, there were numerous other OCP officers based in the U.S., where they often also exercised executive responsibility for a U.S. subsidiary. Examples include:

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[14] (*See* R. 61.4-Ex. 29, 1998 Outokumpu Annual Report at 79, Apx. p. 0503; R. 61.4-Ex. 30, Outokumpu Press Release (Aug. 24, 1998), Apx. pp. 0504-05; R. 61.3-Ex. 17, 1999 Outokumpu Annual Report at 16, Apx. p. 0480; R. 61.4-Ex. 29, 1998 Outokumpu Annual Report at 16-17, Apx. pp. 0501-02.)

[15] In 2000, Mr. Palmer became OCP's Vice President-Business Strategy for OCP's Appliance Heat Exchangers & Asia Division, responsible for ACR Copper Tubing. Mr. Palmer worked in Kentucky, where he simultaneously served as OCF's President. (R. 61.3-Ex. 16, Outokumpu Press Release (Apr. 13, 2000), Apx. p. 0478; R. 61.4-Ex. 32, 2002 Outokumpu Annual Report at 26, Apx. p. 0509).

Name (Location)	OCP Position/Responsibility	U.S. Subsidiary Position	Apx.
Eugene Drape (Kentucky)	Vice President of Global Operations for Appliance Heat Exchangers Business Lines – Responsible for worldwide operations, including Europe	President, OCF	(R. 61.3-Ex. 18, 1999 OCF Annual Report, Apx. p. 0482; R. 61.3-Ex. 19, Outokumpu Press Release (Jan. 20, 1999), Apx. p. 0483; R. 61.4-Ex. 22, Outokumpu Press Release (Feb. 1, 1999), Apx. p. 0490.)
Bruce Wegner (Kentucky)	Vice President of Market Development for Appliance Heat Exchangers – Americas Responsible for "global coordination of international sales and marketing efforts"		(R. 61.4-Ex. 22, Outokumpu Press Release (Feb. 1, 1999), Apx. p. 0490.)
Ed Rottman (Kentucky)	Vice President and General Manager for Appliance Heat Exchangers – Americas Division Vice President – Technology for Appliance Heat Exchangers Business Lines	Vice President, OCF	(*Id,*; R. 61.3-Ex. 16, Outokumpu Press Release (Apr. 13, 2000), Apx. p. 0478; R. 61.3-Ex. 18, 1999 OCF Annual Report, Apx. p. 0482.)
Warren Bartel (New York)	Manager, Copper Products-Americas	President, Outokumpu American Brass	(R. 61.3-Ex. 14, 2001 Outokumpu Annual Report at 97, Apx. p. 0475; R.61.3-Ex. 15, State of Delaware 2001 Annual Franchise Tax Report for Outokumpu American Brass, Inc., Apx. p. 0477.)

Name (Location)	OCP Position/Responsibility	U.S. Subsidiary Position	Apx.
Frank Wilson (Kentucky)	Director of Sales of Appliance Heat Exchangers – Americas		(R. 61.4-Ex. 22, Outokumpu Press Release (Feb. 1, 1999), Apx. p. 0490.)
Ulla Laalo (Illinois)	Controller for Special Products Division		(R. 61.4-Ex. 33, Outokumpu Press Release (Aug. 12, 1999), Apx. p. 0510.)

In addition to relying on U.S.-based management, OCP sent personnel from Finland to the U.S. to work the Carrier account for OCP. (R. 46, Am. Compl. ¶ 30, Apx. p. 0031.) OCP claims that "at least since 1988" it has not marketed or negotiated the sale of ACR copper tubing in the U.S. (Outokumpu Br. 16.) That is incorrect. In the mid-1990's, Carrier executives attended a meeting at OCF's facilities in Kentucky where they received a marketing presentation from a team of OCP executives from Finland and the U.S. Among the OCP attendees were OCP's managing director from Finland and OCP executives from Finland in charge of research and finance, as well as OCP's U.S.-based executive, Eugene Drape. (R. 61.4-Ex. 36, Declaration of Robert Johnson ¶ 3, Apx. pp. 0517-18.)

Finally, OCP also produced copper tubing product for import into and sale in the U.S. Although Outokumpu (Br. 16) claims that it did not import ACR Copper Tubing into the U.S., news accounts and data for 1999 from the Port Import Export

Reporting Service ("PIERS")[16] show that various copper tubes were imported from OCP's production facility in Finland into the United States, including a type of ACR Copper Tubing called level wound coil ("LWC"). (R. 61.4-Ex. 41, *Outokumpu US Copper Valued at Comex Base,* American Metal Market (Aug. 18, 1993), Apx. pp. 0522-23; R. 61.4-Ex. 42, PIERS Data, Apx. pp. 0524-29.)[17]

(2) The Contacts of OCP's U.S. Subsidiaries Are Attributable to OCP.

Carrier has also established the first *Southern Machine* prong by demonstrating that the contacts of the U.S. subsidiaries may be attributed to OCP. *See, e.g., Third Nat'l Bank v. WEDGE Group, Inc.*, 1087, 1090-91 (6th Cir. 1989). As discussed above, high-ranking OCP executives held day-to-day managerial positions in the U.S. subsidiaries. This ensured a level of control and domination permitting the Court to impute OCF's and OUSA's contacts to OCP. *Id*.

OCP (Br. 17, 68) says that it "operate[s] separately from Outokumpu's U.S. subsidiaries" and notes that "the officers of the U.S. entities are responsible for the

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[16] PIERS is a company maintaining a comprehensive database of import and export information compiled from bills of lading regarding cargoes moving through the ports in the United States. (R. 61.2, Declaration of Matthew F. Scarlato ¶ 43, Apx. p. 0452) PIERS data can underreport company shipments because many companies use third parties, whose names appear on the bills of lading, to ship their products. (*Id.*)

[17] Outokumpu Poricopper Oy is OCP's manufacturing facility in Pori, Finland. (R. 61.3-Ex. 13, 1997 Outokumpu Annual Report at 30, Apx. p. 0470.)

day-to-day management of their companies", but it neglects to mention that their officers report to Boards dominated by OCP executives.[18] In 1995, for example, OCF had two directors. Both worked at OCP in Finland. (R. 61.4-Ex. 21, 1996 OCF Annual Report, Apx. p. 0489; R. 61.4-Ex. 20, 1996 Outokumpu Annual Report at 73, Apx. p. 0485.) A 1999 filing shows that at least two of the three OCF directors at the time – Ari Ingman and Eugene Drape – were OCP executives. (R. 61.3-Ex. 18, 1999 OCF Annual Report, Apx. p. 0482; R. 61.3-Ex. 17, 1999 Annual Outokumpu Report at 79, Apx. p. 0481; R. 61.3-Ex. 19, Outokumpu Press Release (Jan. 20, 1999), Apx. p. 0483.) Another 1999 filing lists Ari Ingman as the only director of OUSA. (R. 61.4-Ex. 23, 1999 OUSA Annual Report, Apx. pp. 0492-93.) In 2000, Hannu Wahlroos, an OCP executive, became OCF's sole director. (R. 61.4-Ex. 24, 2000 OCF Annual Report, Apx. p. 0494; R. 61.3-Ex. 16, Outokumpu Press Release (Apr. 13, 2000), Apx. p. 0478.)

OCP used its U.S. subsidiaries as agents to forward copper tubing imports to U.S. customers. The 1999 PIERS data shows OCP shipments to OUSA as consignee. (R. 61.4-Ex. 42, PIERS Data, at lines 3, 27 and 30 and columns B, D-G and AH-AI, Apx. pp. 0524-25, 0528-29.) In this capacity, OUSA acted as OCP's

[18] OCP also neglects to mention that many of those officers, as demonstrated above, are OCP executives as well.

agent in the U.S. *See Simpson v. Union Oil Co.*, 377 U.S. 13, 26 n.1 (1964) (Stewart, J., dissenting) ("A consignee is commonly defined as one who in the pursuit of an independent calling, is engaged by another as his agent to sell property.") (internal quotations omitted).

(3) OCP's U.S. Contacts Are Enhanced Under *Calder v. Jones*.

In *Calder v. Jones*, the Supreme Court held that due process permits jurisdiction over a defendant when it intentionally aims it tortious conduct at the plaintiff, knowing the conduct would harm the plaintiff in the forum. 465 U.S. 783, 789-90 (1984). This Court has applied *Calder* to enhance a defendant's contacts with the forum. *See Air Products & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.2d 544, 553 (6th Cir. 2007).

Here, the Complaint alleges that the OCP purposefully directed its intentional torts at Carrier, knowing it would cause Carrier harm in the U.S. OCP's price-fixing and market allocation deprived Carrier of the benefits of competition in the U.S. and caused it to pay inflated prices there. (R. 46, Am. Compl. ¶¶ 55-57, 65-66, 70, 71, 89-92, Apx. pp. 0039-40, 0043, 0044, 0047.)

Just as in *Air Products*, OCP "undoubtedly knew that [Carrier] had its principal place of business in [the U.S.] and that the focal point of [its] action and the brunt of the harm would be in" the U.S. 503 F.3d at 553. Indeed, the District Court reached this conclusion with respect to Outokumpu in litigation relating to

the plumbing tube cartel. *See American Copper & Brass, Inc. v. Donald Boliden AB*, No. 04-2771, slip op. (W.D. Tenn. June 1, 2006) (attached hereto as Attachment 2); *see also In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 208 (2d Cir. 2003).

b. The Cause of Action Arose from OCP's Activities in the U.S.

The second prong of the *Southern Machine* test applies a "lenient standard." *Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002). To satisfy the second prong, a plaintiff must show some connection between the cause of action and defendant's contacts. *See id.* (finding the standard satisfied where the operative facts are "at least marginally related to" the alleged forum contacts); *Third Nat'l Bank*, 882 F.2d at 1091 n.2.

The cause of action here relates to a cartel in which OCP conspired to allocate Carrier's business in the U.S. to Outokumpu. As detailed above, OCP officers in the U.S. were part of OCP's executive management during the cartel. OCP sales management in the U.S. were responsible for global and U.S. sales decisions relating to ACR Copper Tubing. OCP representatives from Finland serviced Carrier in the U.S. OCP also imported ACR Copper Tubing into the U.S. for sale to U.S. customers. OCP was structured to facilitate OCP's domination and control over the subsidiaries in the implementation of the cartel's objectives.

These facts, detailed above, have a sufficient enough relation to the U.S. to satisfy the second prong of the *Southern Machine* test.

c. The Exercise of Jurisdiction Over OCP Is Reasonable.

The third prong of the *Southern Machine* test requires that the acts or consequences caused by defendant had a substantial enough connection with the forum to make the exercise of jurisdiction reasonable. 401 F.2d at 381. If the plaintiff satisfies the test's first two prongs, "an inference of reasonableness arises" and "only the unusual case will not meet this [third prong]." *Theunissen v. Matthews*, 935 F.2d 1454, 1461 (6th Cir. 1991); *see also The Scotts Co. v. Aventis S.A.*, No. 04-3569, 145 Fed. Appx. 109, 115 (6th Cir. August 4, 2005) (holding that "a presumption arises" as to reasonableness when the first two prongs are satisfied). To determine whether jurisdiction is reasonable, this Court has evaluated several factors, including the (1) burden on the defendants, (2) the interest of the forum, (3) the plaintiff's interest in obtaining relief, and (4) other forums' interest in an efficient resolution of the controversy. *See Theunissen*, 935 F.2d at 1461.

By satisfying the first two *Southern Machine* prongs, Carrier is entitled to the presumption of reasonableness. Moreover, all of the factors this Court has evaluated in the past weigh in Carrier's favor. Outokumpu's activities in the U.S. show that the burden of defending this case in the U.S. will not be onerous. Its

executives and other relevant witnesses routinely work in and travel to the U.S. The U.S. certainly has an interest in adjudicating antitrust violations aimed at American businesses. *See Air Products*, 503 F.3d at 555 (noting Michigan's interest in protecting Michigan companies).

Thus, through its Complaint and subsequent evidence, Carrier has a made a prima facie showing of specific jurisdiction over OCP.

2. OCP's Jurisdictional Contacts Are Attributable to OTO.

Personal jurisdiction existed over OTO because all OCP's contacts with the U.S. are attributable to OTO, in light of the control OTO exercised over OCP.

OTO incorporated OCP to run its copper products division in 1988, in the wake of OTO's commencement of the Cuproclima trade association conspiracy. (R. 55.4, E.C. ACR Decision ¶ 17, Apx. pp. 0285-86.) In announcing OCP's formation, OTO stated that it would "retain full control of operations" of OCP. (R. 61.3-Ex. 10, *Copper Outokumpu Forms Separate Copper Subsidiary*, Metals Week (Oct. 10, 1988), Apx. p. 0462.)

OTO organized a management structure that ensured that control. OCP was managed by an Executive Board that was composed of nearly all of the members of OTO's executive management. Thus, Outokumpu's 1992 Annual Report shows that all four members of OTO's four member Executive Board served on – and dominated – OCP's five member Executive Board. (R. 61.3-Ex. 11, 1992

Outokumpu Annual Report at 58-59, Apx. pp. 0465-66.). The purpose of OTO's dominance was "closer control" of OCP, as explained to the press:

> In an attempt to *maintain closer control* of its loss-making copper business, Finland's Outokumpu Oy earlier this week said its executive board will assume responsibility for its Outokumpu Copper Oy unit.

(R. 61.3-Ex. 12, *Outokumpu Board to Control Division*, American Metal Market (Feb. 26, 1992), Apx. p. 0467.) (emphasis added).

OTO's control over OCP's operations was readily apparent to the E.C, which found the two "jointly and severally liable" for the ACR Copper Tubing cartel. (R. 55.4, E.C. ACR Decision ¶ 244, Apx. p. 0335.) The E.C. found no evidence "showing real business autonomy of OCP." (*Id.* ¶ 243, Apx. p. 0335.) Indeed, the evidence showed that OTO "intervened" in OCP's business operations "to suggest meetings between OCP's and Europa Metalli's management." (*Id.*)

OTO was itself an active participant in the cartel. It was one of the "founding members of the [Cuproclima] Association." (R. 55.4, E.C. ACR Decision ¶ 17, Apx. pp. 0285-86.) Thereafter, the CEO of OTO had meetings and contacts with executive officers of co-conspirators "to discuss the market situation in copper and copper alloy semis." (*Id.* ¶ 243, Apx. p. 0335.)

Given the heavy involvement of OTO in the management and control of OCP and its active participation in the cartel, it is reasonable to attribute OCP's jurisdictional contacts with the U.S. to OTO. The District Court reached this same

conclusion in the plumbing tube litigation. *See American Copper & Brass, Inc.*, No. 04-2771, slip op. at 9 (finding that OTO's "central management of its European and American subsidiaries and plants is sufficient to establish personal jurisdiction in the United States").

3. Personal Jurisdiction Existed Over MEL.

Jurisdiction unquestionably exists over MLI, given its U.S. headquarters. MLI's jurisdictional contacts can also be attributed to MEL, which served as MLI's agent in the cartel. Attributing a parent corporation's forum contacts to a foreign subsidiary is constitutionally permissible, where the parent dominates the subsidiary such that the entities function as a common enterprise.[19] *See Ionescu v. E.F. Hutton & Co.*, 434 F. Supp. 80, 82 (S.D.N.Y. 1977) (finding personal jurisdiction over foreign subsidiary because "although two separate corporate entities have been established . . ., only one commonly-owned enterprise exists

---

[19] Many courts have found jurisdiction over a foreign subsidiary through the forum contacts of its parent. *See, e.g.*, *Simeone v. Bombardier-Rotax GMBH*, 360 F. Supp. 2d 665, 675 (E.D. Pa. 2005); *MM Global Servs. Inc. v. The Dow Chemical Co.*, 404 F. Supp. 2d 425, 435 (D. Conn. 2005); *Genesis Biopharmaceuticals, Inc. v. Chiron Corp.*, No. 00-2981, 27 Fed. Appx. 94 (3d Cir. Jan. 10, 2002) (finding jurisdiction under "single entity" test). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52 cmt. b (2008) ("[J]udicial jurisdiction over the parent corporation will give the state judicial jurisdiction over the subsidiary corporation if the parent so controls and dominates the subsidiary so as in effect to disregard the latter's independent corporate existence.")

which relies on the joint endeavors of each constituent part and each corporation functions as an integral part of a united endeavor"); *United States v. Watchmakers of Switzerland Info. Ctr.*, 134 F. Supp. 710, 712 (S.D.N.Y. 1955) (finding in an antitrust case that "[w]here two corporations under common ownership are used as interlocking facilities to execute a common design, the self-serving niceties of inter-corporate housekeeping are of minor significance").

The Second Circuit has developed a "mere department" test to determine whether a parent dominates a subsidiary such that the two function as a common enterprise. The factors considered include:

> (1) common ownership; (2) financial dependency of the subsidiary on the parent; (3) the degree to which the parent interferes in the selection of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of the parent's control over the subsidiary's marketing and operational policies.

Aboud v. Rapid Rentals, Inc., No. 97-1742, 1998 WL 132790, at *1 (S.D.N.Y. Mar. 24, 1998) (citing *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120-122 (2d Cir. 1984)). Common ownership is the essential factor. The remaining three factors are balanced and need not all weigh in plaintiff's favor to find personal jurisdiction over a foreign subsidiary. *Aboud*, 1998 WL 132790, at * 1. Applying these factors reveals that MLI dominated MEL, and together they functioned as a common enterprise.

The first and most important prong of the "mere department" test – common ownership – is readily satisfied. MLI acquired MEL (at that time, named Wednesbury Tube) in 1997 to "establish a significant manufacturing and sales presence in Europe for the Company's [*i.e.*, MLI's] manufacturing operations." (R. 61.4-Ex. 43, 1997 MLI Form 10-K at 3, Apx. p. 0531.)

MEL's financial dependency on MLI, as evidenced by MLI's capital funding strategy, satisfies the second prong of the "mere department" test. As the E.C. found in its Plumbing Tubes Decision, "Mueller Industries Inc. controlled the entire capital of Wednesbury Tube & Fittings Co. Ltd./Mueller Europe Ltd. and Desnoyers S.A./Mueller S.A. throughout the duration of the infringement." (R. 55.3, E.C. Plumbing Tubes Decision ¶ 569, Apx. p. 0206.) MLI funneled $40 million to MEL in capital funding, while at the same time depleting Desnoyers' assets. MLI closed Desnoyers' Laigneville, France factory in 1998, transferring its entire production to MEL's plant in Bilston, UK. (R. 61.4-Ex. 53, *Desnoyers Closes its Plaint in Oise*, Les Echos (Dec. 29, 1998), Apx. pp. 0551-53.) Then, MEL put Desnoyers into liquidation in 2002, consolidating all of its European operations at the MEL plant. (R. 61.4-Ex. 50, *Mueller Plans to End Operations in France*, Memphis Commercial Appeal (Jan. 3, 2003), Apx. p. 0550.) It did so despite its previous public commitment to "substantially improve the operating results" of Desnoyers "[t]hrough appropriate capital investments." (R. 61.4-Ex.

54, *Mueller Industries, Inc. Completes Acquisition of Desnoyers S.A.*, PR Newswire (May 20, 1997), Apx. p. 0554.) Thus, before the E.C. released its ACR decision, MLI conveniently made Desnoyers judgment-proof against antitrust claims by Desnoyers' victims.

The shift of Desnoyers assets from Laigneville to MEL demonstrates more than just MLI's attempt to protect itself from liability. It also satisfies the third "mere department" prong by revealing MLI's failure to observe the corporate form of its subsidiaries. Had MLI viewed its subsidiaries as truly independent of MLI and each other, the logical allocation of the Laigneville plant's assets would have been to the Longueville plant – the other Desnoyers facility. In practice, MLI treated Desnoyers and MEL as one department – MLI's "European Operations" – with one set of assets to be rearranged at MLI's direction.

Furthermore, the E.C. Plumbing Tubes decision further reveals how MLI and MEL functioned as a common enterprise. MEL actively managed cartel activity on Mueller's behalf. It was a regular attendee at cartel meetings and an agent for both its parent, MLI, and its affiliate, Desnoyers (later named Mueller S.A.). (R. 55.3, E.C. Plumbing Tubes Decision ¶ 572, Apx. p. 0207.) The E.C. found MLI jointly liable for its subsidiaries' cartel activities. (*Id.* ¶ 573, Apx. p. 0207.) MLI confirmed "its control over Mueller Europe Ltd. and Mueller S.A. . . .

during the whole period of the infringement from October 1997." (*Id.* ¶ 571, Apx. p. 0207.)

MEL contends that the E.C. Plumbing Tubes Decision has no bearing on the jurisdictional question because the decision is not about ACR Copper Tubing. The argument misses the mark. The decision reveals the loose corporate structure of Mueller affiliates and MLI's control of the European subsidiaries. Thus, the E.C. Plumbing Tubes Decision is *prima facie* evidence that MEL was a mere department of MLI.

Evidence satisfying the fourth prong of the "mere department" test lies in the composition of MEL's Board of Directors. Publicly available documents show that MLI controlled MEL's marketing and operational policy by dominating the latter's Board of Directors. From acquisition in 1997 up to the amnesty application in early 2001, MLI officers – many based in Tennessee – constituted the majority (sometimes the entirety) of MEL's Board. The following chart reflects all the MEL Board members during 1997-2000, their tenure on the MEL Board in that period, their positions as MLI officers, and their location. [20]

[20] (*See* R. 61.4-Ex. 47, MEL Profile, Apx. pp. 0538-42; R. 61.4-Ex. 45, 1997 MLI Annual Report, Apx. pp. 0532-34; R. 61.4-Ex. 46, 1998 MLI Annual Report, Apx. pp. 0535-37; R. 61.4-Ex. 48, 1999 MLI Annual Report, Apx. pp. 0543-44; R. 61.4-Ex. 49, 2000 MLI Form 10-K, Apx. pp. 0545-49.)

Member	MEL Board Tenure	MLI Position	Location
William O'Hagan	1997-2000	President & CEO (1997 - 2000)	Tennessee
Kent McKee	1997-2000	Treasurer (1997 – March 1999) Exec. VP & CFO (April 1999 – 2000)	Tennessee
Robert Fleeman	1997-2000	VP – Int'l Sales (1997-98, 2000) VP & General Manager European Operations (1999)	Tennessee
Lee Nyman	1997-2000	VP – Manufg/ Mgmt Eng'g (1997-98) Sr. VP – Manufg/Eng'g (1999-2000)	Tennessee
Earl Bunkers	1997-1999	Executive VP & CFO VP Business Development (1997-1999)	Tennessee
Richard Miller	1999-2000	VP & Chief Information Officer (1997-98) VP Business Development (1999)	Tennessee
Peter Marsh	1997-2000	Sales Director – UK Operations (1997-99)	England
Peter Brookes	1997-2000	Finance Director European Operations (1997 – 1999)	England

Member	MEL Board Tenure	MLI Position	Location
Bryan Evans	1997-1998	Director of Manufg/UK (1997)	England
Robert Gillespie	1997-1998	Managing Director – European Operations (1997)	France

Finally, MLI's 1997 Form 10-K underscores how MLI viewed MEL as part of the former's operations, and not as a separate and distinct subsidiary. The 10-K contrasts MLI's operation of factories in the United Kingdom and France with other operations conducted through wholly-owned subsidiaries:

> Mueller operates eighteen factories in the United States, Canada, the United Kingdom, and France and has distribution facilities in each of these countries and sales representation worldwide.
>
> The Company also has operations which are conducted through its wholly-owned subsidiaries Arava Natural Resources Company, Inc. ("Arava") and Alaska Gold Company ("Alaska Gold").

(R. 61.4-Ex. 43, 1997 MLI 10-K at 3, Apx. p. 0531.) This demonstrates that MLI conflates its own operations with MEL's, but credits the operations of Arava and Alaska Gold as being conducted separately "through its wholly-owned subsidiaries." MEL is therefore considered a "mere department" of MLI.

Because MLI and MEL shared common ownership, MLI controlled MEL's finances, MEL disregarded MEL'S corporate independence, and MLI controlled MEL's operations by dominating MEL's Board of Directors, the two entities

functioned as a common enterprise. Therefore, MLI's contacts are attributable to MEL, permitting personal jurisdiction over MEL.[21]

4. Alternatively, Carrier Should Be Afforded Jurisdictional Discovery.

The pleadings and evidence before the District Court established a *prima facie* showing of personal jurisdiction over the Defendants. If this Court should determine otherwise, however, Carrier respectfully requests a remand to permit jurisdictional discovery. This same request was made to the District Court. (R. 61, Opp. to Mot. to Dismiss at 93.) Such discovery can properly aid a court's decision. *See Theunissen*, 935 F.2d at 1458. Here, jurisdictional discovery is particularly appropriate because the Defendants control the relevant evidence.

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[21] Despite these facts, MEL (Br. 8-9) contends that it should not be part of this case because it does not manufacture LWC. That is irrelevant because the allegation here is that MLI, MEL and Desnoyers, with the joint ability to produce and sell ACR Copper Tubing, agreed with their competitors not to do so. Moreover, MEL errs in trying to limit this case to LWC, which is just one type of ACR Copper Tubing. (R. 46, Am. Compl. ¶ 12, Apx. p. 0024.) In fact, MEL's Bilston factory produces refrigeration tubing, which is a type of ACR Copper Tubing. (R. 61.4-Ex. 46, 1998 MLI Annual Report, Apx. pp. 0535-37.)

CONCLUSION

For the foregoing reasons, the District Court's judgment should be reversed, and the cross-appeals should be denied.

Dated: May 1, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)(C)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 16,047 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Sixth Circuit Rule 28(b), in accordance with the Court's Order of February 23, 2009, granting Plaintiffs-Appellants up to 16,500 words for their brief.

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

/s/ David M. Schnorrenberg
David M. Schnorrenberg

ADDENDUM – COUNTER-DESIGNATION OF JOINT APPENDIX CONTENTS

Plaintiffs-Appellees hereby counter-designate the following portions of the district court record for inclusion in the Joint Appendix:

Description of Entry	Date	Record Entry No.
E.C. Copper Plumbing Tubes Decision	12/6/2006	55.3
Declaration of Matthew F. Scarlato	01/12/2007	61.2
Ex. 1 - *KM Europa Removes US Kid Gloves*, American Metals Market (Mar. 12, 1997)	01/12/2007	61.3
Ex. 9 - 1995 Outokumpu Annual Report	01/12/2007	61.3
Ex. 10 - *Copper Outokumpu Forms Separate Copper Subsidiary*, Metals Week (Oct. 10, 1988)	01/12/2007	61.3
Ex. 11 - 1992 Outokumpu Annual Report	01/12/2007	61.3
Ex. 12 - *Outokumpu Board to Control Division*, American Metal Market (Feb. 26, 1992)	01/12/2007	61.3
Ex. 13 - 1997 Outokumpu Annual Report	01/12/2007	61.3
Ex. 14 - 2001 Outokumpu Annual Report	01/12/2007	61.3
Ex. 15 - State of Delaware 2001 Annual Franchise Tax Report for Outokumpu American Brass, Inc.	01/12/2007	61.3
Ex. 16 - Outokumpu Press Release (Apr. 13, 2000)	01/12/2007	61.3
Ex. 17 - 1999 Outokumpu Annual Report	01/12/2007	61.3
Ex. 18 - 1999 OCF Annual Report	01/12/2007	61.3
Ex. 19 - Outokumpu Press Release (Jan. 20, 1999)	01/12/2007	61.3
Ex. 20 - 1996 Outokumpu Annual Report	01/12/2007	61.4
Ex. 21 - 1996 OCF Annual Report	01/12/2007	61.4
Ex. 22 - Outokumpu Press Release (Feb. 1, 1999)	01/12/2007	61.4
Ex. 23 - 1999 OUSA Annual Report	01/12/2007	61.4
Ex. 24 - 2000 OCF Annual Report	01/12/2007	61.4

Description of Entry	Date	Record Entry No.
Ex. 26 - 2000 Outokumpu Annual Report	01/12/2007	61.4
Ex. 27 – Website, *Luvata Locations*	01/12/2007	61.4
Ex. 29 - 1998 Outokumpu Annual Report	01/12/2007	61.4
Ex. 30 - Outokumpu Press Release (Aug. 24, 1998)	01/12/2007	61.4
Ex. 31 - ChoicePoint Background Report	01/12/2007	61.4
Ex. 32 - 2002 Outokumpu Annual Report	01/12/2007	61.4
Ex. 33 - Outokumpu Press Release (Aug. 12, 1999)	01/12/2007	61.4
Ex. 34 - *Outokumpu, American Brass: Still in Love*, Metal Center News (Mar. 1, 1993)	01/12/2007	61.4
Ex. 35 – State of Delaware 1999 Annual Franchise Tax Report for OCF	01/12/2007	61.4
Ex. 36 - Declaration of Robert Johnson	01/12/2007	61.4
Ex. 41 - *Outokumpu US Copper Valued at Comex Base,* American Metal Market (Aug. 18, 1993)	01/12/2007	61.4
Ex. 42 - Port Import Export Reporting Service ("PIERS") Data	01/12/2007	61.4
Ex. 43 - 1997 MLI Form 10-K	01/12/2007	61.4
Ex. 45 - 1997 MLI Annual Report	01/12/2007	61.4
Ex. 46 - 1998 MLI Annual Report	01/12/2007	61.4
Ex. 47 - MEL Profile	01/12/2007	61.4
Ex. 48 - 1999 MLI Annual Report	01/12/2007	61.4
Ex. 49 - 2000 MLI Form 10-K	01/12/2007	61.4
Ex. 50 - *Mueller Plans to End Operations in France*, Memphis Commercial Appeal (Jan. 3, 2003)	01/12/2007	61.4
Ex. 53 - *Desnoyers Closes its Plaint in Oise*, Les Echos (Dec. 29, 1998)	01/12/2007	61.4
Ex. 54 - *Mueller Industries, Inc. Completes Acquisition of Desnoyers S.A.*, PR Newswire (May 20, 1997)	01/12/2007	61.4

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May 2009, I caused a copy of the foregoing Third Brief of Plaintiffs-Appellants to be served via first class mail (two copies), electronic mail and/or the Court's Electronic Case Filing ("ECF") system upon the following attorneys:

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ATTACHMENT 1

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Goodyear Tire and Rubber Company, Plaintiff, v. Dow Deutschland GmbH & Co., OHG, et al., Defendants.	)	CASE NO. 5:08 CV 1118 O R D E R (Resolving Docket Nos. 74/75, 85 and 99)

I. Introduction

This anti-trust case brought by the plaintiff, Goodyear, against the defendants, Bayer AG, Bayer Material Science L.L.C. f/k/a Bayer Polymers L.L.C., Bayer Corporation, Dow Chemical Company, Dow Deutschland Inc., Dow Deutschland GmbH & Co. OHG, Dow Europe GmbH, Eni S.p.A., Syndial S.p.A., Polimeri Europa Americas, Inc. and Polimeri Europa S.p.A., alleged to be producers and sellers of synthetic rubber products identified as Butadiene Rubber ("BR") and Styrene Butadiene Rubber ("SBR"), apparently has its origin in a decision against the defendants by the EC which found that the defendants were engaged in anti-trust behavior on the continent of Europe. In its amended complaint numbering 94 paragraphs on 44 pages, Docket No. 49 , Goodyear alleges a conspiracy by the defendants to agree to sell the products, "BR" and "SBR" to Goodyear at agreed-on inflated prices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Goodyear seeks treble damages pursuant to the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15 (a).

The initial complaint was filed on May 2, 2008. The complaint joined, in addition to the above-named defendants, a series of Shell companies. The Shell companies were omitted in the amended complaint filed on August 8, 2008.

The Court conducted what it described as a pre-case management conference on July 25, 2008. A transcript of those proceedings was published. (Docket No. 58) The pre-case management was used by the Court to obtain in an informal, non-binding discussion, a better understanding of the case. As a consequence of that conference conducted on July 25, 2008, the Court granted the plaintiff leave to August 8, 2008 to file an amended complaint and indicated an anticipation that the defendants would be filing motions to dismiss. (*See* Docket No. 48).

The defendants have moved for an order of dismissal prior to any discovery.[1] The defendants advance three separate propositions in support of the joint motions to dismiss. First, the defendants claim that the amended complaint should be dismissed because the complaint in this case alleges a conspiracy beyond the four year statute of limitations. Second, defendants allege that the amended complaint fails to pass the fairly new *Twombly* pleading requirements. Finally, the defendants contend that the alleged conspiracy is, in fact, a foreign anti-trust case as opposed to a domestic anti-trust case, and must be dismissed pursuant to the strictures of the FTAIA pronouncements of the Congress and as interpreted by the Supreme Court in the *Empagran* decision.

[1] See Docket Nos. 74/75 and 85. Eni S.p.A. filed a separate motion to dismiss for lack of personal jurisdiction, Docket No. 77.

The briefing in this case is voluminous. The cases cited by the parties number well in excess of one hundred cases. In addition, the Court entertained a lengthy oral arguments regarding the pending motions on December 4, 2008. The transcript for this hearing, numbering 106 pages in length, was filed at Docket No. 96. In addition, a post hearing brief was filed by all defendants, to which plaintiff responded. Docket Nos. 97 and 98, respectively.

But to cut to the chase, several allegations appear dispositive as to the pending motions. The findings of the EC were published and allege anti-competitive behavior on the part of the defendants in Europe. The defendants sold the products "BR" and "SBR" to Goodyear. Bayer sold and delivered to Goodyear in the United States the products "BR" and "SBR" Goodyear alleges that the defendants, by way of named individuals, came to Goodyear's headquarters in Akron, Ohio, and as a part of the conspiracy with respect to the products "BR" and "SBR," agreed to control the prices for the products to be sold to Goodyear in both the United States and in Europe to their mutual advantage and to the detriment of Goodyear.

II. The Statute of Limitations

The issue of whether Goodyear's complaint falls victim to the four year statute of limitations will be a subject for summary judgment. However, it is premature to rule on that issue at the pleading stage.

III. The *Twombly* Pleading Issue

The oral arguments presented on December 4, 2008 by the defendants argued that the amended complaint failed to contain the necessary "heft" to survive a *Twombly* challenge.[2] After a careful examination of the lengthy amended complaint, the teachings of *Twombly* and its progeny, the Court disagrees. The combined motions to dismiss with reliance on *Twombly* are denied.

IV. The FTAIA Issue as Supplemented by the *Empragran*[3] Decision and Its Progeny

The allegation that the defendant Bayer negotiated in Akron and delivered to Goodyear in the United States the products at issue, and as an integral part of the alleged conspiracy between Bayer and the other defendants, is, in the Court's view, sufficient to remove at least that part of the conspiracy from the grasp of the strictures of the FTAIA and the teachings of *Empragran.* Co-conspirator liability, as discussed by Judge Easterbrook in the recent decision of *Paper Systems Incorporated v. Nippon Paper Industries Co. Ltd.*, 281 F.3d 629 (7th Cir. 2002), supports, in the Court's view, a judgment against conspiring defendants for damages, a least to the extent that the plaintiff is able to prove to the fact finder's satisfaction that the conspiring defendant was a part of the alleged conspiracy, planned and implemented in the United States, and to the extent the product was delivered to Goodyear in the United States. However, the Court defers a ruling on whether Goodyear is entitled to recover anti-trust damages

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[2] *Bell Atlantic Corp. v. Tombly, et al.*, 550 U.S. 544, 127 S.Ct. 1955 (2007). After this Order was prepared, defendants file a motion for leave to file supplemental authority (Docket No. 99). The supplemental authority filed by defendants does not alter the Court's ruling on the motions.

[3] *Empagran S.A. v. Hofmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005).

as to product manufactured and delivered to Goodyear outside the United States, assuming Goodyear is able to prove the alleged conspiracy.

V. Conclusion

The motions to dismiss on the separate grounds of the statute of limitations, the failure to comply with *Twombly*, and on the basis of the application of *Empagran* are denied. The Court will publish a separate Case Management Order.

IT IS SO ORDERED.

March 2, 2009
Date

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

ATTACHMENT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

AMERICAN COPPER & BRASS, INC. and THE BANKRUPT ESTATE OF SMITH AND WOFFORD PLUMBING AND INDUSTRIAL SUPPLY, INC., on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 04-2771-DV
DONALD BOLIDEN AB, et al.,	)	
Defendants.	)	

ORDER DENYING DEFENDANTS OUTOKUMPU OYJ'S AND OUTOKUMPU COPPER PRODUCTS OY'S MOTION (DKT. # 109) TO DISMISS

This matter is before the Court on the motion of Defendants Outokumpu Oyj ("Outokumpu") and Outokumpu Copper Products Oy ("Outokumpu Copper") (collectively "Defendants") to dismiss in its entirety the class action complaint of American Copper & Brass, Inc. ("American Copper") and The Bankrupt Estate of Smith and Wofford Plumbing and Industrial Supply, Inc. ("Smith Estate") (collectively "Plaintiffs").

Defendants move to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). Defendants also argue that Plaintiffs fail to state a cognizable claim under the Sherman Act § 1, 15 U.S.C. § 1 (2000), pursuant to Fed. R. Civ. P. 12(b)(6) because Plaintiffs' cause of action is barred by the statute of limitations under § 4B of the Clayton Act, 15 U.S.C. § 15(b) (2000). In response, Plaintiffs argue that *in personam* jurisdiction over Defendants comports with

Due Process, 15 U.S.C. § 22, and Fed. R. Civ. P. 4(k)(2). Plaintiffs further argue that a determination of Defendants' liability for anticompetitive acts by the European Commission ("EC") is sufficient to meet the pleading requirements set forth in Fed. R. Civ. P. 9(b).

For the following reasons, the Court **DENIES** Defendants' Motion to Dismiss.

I. BACKGROUND

A. Procedural Background[1]

On September 24, 2004, American Copper invoked this Court's jurisdiction pursuant to the provisions of sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (2000). American Copper sought to recover, *inter alia*, treble damages for, and to obtain injunctive relief from, Defendants' alleged violations of section 1 of the Sherman Act, 15 U.S.C. § 1 (2000). On March 9, 2005, Plaintiffs[2] filed a Consolidated Amended Class Action Complaint[3] (hereinafter, "complaint") with this Court. On September 14, 2005, the moving Defendants sought dismissal of Plaintiffs' complaint in its entirety.

B. Factual Background[4]

American Copper is a Michigan corporation. The Smith Estate is an entity in the State of Tennessee. There are twenty-one (21) defendants in this case. Moving Defendant, Outokumpu, is a company organized under the laws of Finland with its principal place of business in Espoo, Finland. Outokumpu Copper is also a company organized under the laws of Finland with its principal place of business in Espoo, Finland. Plaintiffs allege that Outokumpu and Outokumpu

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[1] The Court received a letter from Plaintiffs' counsel dated June 30, 2005. The Court did not consider this letter in deciding this motion because the communication did not constitute a proper pleading.

[2] The Smith Estate was Plaintiff in Civil Action No. 04-2930-DV prior to consolidation.

[3] Each plaintiff filed individually and on behalf of a class pursuant to Fed. R. Civ. P. 23(a),(b)(2)-(3).

[4] The facts are taken from the complaint and presumed to be true for the instant motion only.

Copper directly or through their affiliates and/or subsidiaries produced and sold copper tubing in the United States. Defendants are affiliated with or subsidiaries of another named defendant Outokumpu Copper U.S.A., Inc. ("Outokumpu USA") a Delaware corporation with its principal place of business in Bloomingdale, Illinois. On July 6, 2005, this Court denied, *inter alia*, Outokumpu USA's motion to dismiss for failing to state a claim under the Sherman Act.

Plaintiffs allege that between June 1, 1988, and March 31, 2001, ("Class Period"), the moving Defendants, directly or through their subsidiaries and/or affiliates, produced Copper Plumbing Tubes (hereinafter, "copper tubing") and sold them throughout the United States. Copper tubing includes both plain copper plumbing tubes and plastic-coated copper tubal fixtures used in dwelling structures to transfer water, heat, and gas. Copper tubing is used in residential and office buildings and throughout the transportation industry.

Plaintiffs rely, to a great extent, on a September 3, 2004 EC press release for its facts. This press release detailed the EC's imposition of fines against named European copper tubing manufacturers, some of whom are moving Defendants. EC fines were levied against Boliden Group (Sweden), Halcor S.A. (Greece), HME Nederland BV (The Netherlands), the IMI Group (United Kingdom), the KME Group (Germany, Italy, and France), Mueller Industries, Inc. (U.S., United Kingdom, and France), Outokumpu Industries, Inc., (Finland), Wieland Werke AG (Germany), and moving Defendants. The EC investigation uncovered a European cartel that fixed prices of copper tubing between June, 1988, and March, 2001 "throughout most of the European Economic Area . . . in violation of EU Treaty 81 and EEA Agreement Article 53." Compl ¶ 13.

Plaintiffs aver that on September 29, 1989, European manufacturers, including several of the named Defendants, met in Zurich, Switzerland (dubbed the "Airport Forum") and made statements expressing an intent to keep the price of copper tubing high in "high price level countries."

Plaintiffs assert that the cartel grew into "a 'group of five'[of the] largest European producers of copper plumbing tubes" and that this cartel intended to fix prices in the global copper tubing market.

The EC decision states that the companies participated in an "integrated scheme constituting a single infringement, which manifested itself in both unlawful agreements and unlawful concerted practices." Pl.'s Notice of Supplemental Authority, Ex. A ¶ 117. The EC decision further states that the activities of said companies centered around production and sale three brands of copper tubing: "SANCO," "WICU," and "Cuprotherm." Pl.'s Notice of Supplemental Authority, Ex. A ¶ 13. The infringing arrangements for these three brands consisted of essentially the same product group of copper tubing and involved virtually the same companies and employees. Id.

II. 12(b)(2) STANDARD

In a challenge to personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), the plaintiff has the burden to establish that such jurisdiction exists. S. Sys., Inc. v. Torrid Oven Ltd., 58 F. Supp. 2d 843, 846 (W.D. Tenn. 1999) (quoting Am. Greetings Corp. v. Cohn, 839 F.2d 1164, 1168 (6th Cir. 1988)). A court has three procedural alternatives for determining whether the plaintiff has met this burden: 1) it may decide upon affidavits alone; 2) it may permit discovery to aid the decision making process; or 3) it may conduct an evidentiary hearing to resolve any apparent questions of fact. Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991) (citing Serras v. First Tenn. Nat'l Bank Ass'n, 875 F.2d 1212, 1214 (6th Cir. 1989)). The plaintiff may not stand on his pleadings, but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction. Id. (citations omitted). The district court must consider the pleadings and affidavits in the light most favorable to the plaintiff. Welsh v. Gibbs, 631 F.2d 436, 439 (6th Cir. 1980) (citations omitted). "Thus, [the plaintiff's] burden is merely that of making a *prima facie* showing

that personal jurisdiction exists." Serras, 875 F.2d at 1214.

In diversity cases, federal courts apply law of the forum state, subject to constitutional limits of Due Process to determine whether personal jurisdiction exists over a nonresident defendant. Cole v. Mileti, 133 F.3d 433 (6th Cir. 1998). Tennessee law states that courts sitting in its territory may exercise personal jurisdiction over a defendant to the fullest extent allowed by the Constitution. S. Sys., Inc., 58 F. Supp. 2d at 847. Pursuant to the Constitution, personal jurisdiction over a defendant stems from certain "minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Cole, 133 F.3d at 436 (quoting Int'l Shoe Co. v. Washington, 326 U.S. at 316 (1945)).

In cases that present a federal question and where service of process can be made nationally, the court's evaluation of *in personam* jurisdiction is based on whether the defendant has sufficient contacts with the United States and not any particular state. A+ Network, Inc. v. Shapiro, 960 F. Supp. 123 (Tenn. M.D. 1997). The sovereign exercising jurisdiction over such cases is the United States. Med. Mut. of Ohio v. Denise Desoto, 245 F.3d 561, 567 (6th Cir. 2001). In these cases, Due Process protects a defendant's individual liberty interest by ensuring that the plaintiff will not be subject to a binding judgment where he has established no meaningful contacts. Id. at 568 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1984)).

A. Personal Jurisdiction

Where a federal court's subject matter jurisdiction depends on the existence of a federal question, personal jurisdiction over the defendant generally exists if the defendant is amenable to service of process under the forum state's long-arm statute, and if the exercise of personal jurisdiction would not deny the defendant due process. Bird v. Parsons, 289 F.3d 865, 871 (6th Cir. 2002)(citations omitted); Reynolds v. Int'l Amateur Athletic Fed'n, 23 F.3d 1110, 1115 (6th Cir.

1994). The Tennessee long-arm statute extends the personal jurisdiction of Tennessee courts to the limits of the Due Process Clause. See Tenn. Code Ann. § 20-2-214(a)(6) (2004); see also, Chenault v. Walker, 36 S.W.3d 45 (Tenn. 2001) (extending "conspiracy theory" jurisdiction to out-of-state defendants whose conduct as a part of a civil conspiracy may be attributed to a defendant found in the forum state). Consistent with the Due Process Clause, a court may exercise personal jurisdiction over a defendant so long as that defendant has "certain minimum contacts" with the forum such that the exercise of personal jurisdiction "does not offend traditional notions of fair play and substantial justice." Int'l Shoe, 326 U.S. at 316. Therefore, the Court need only determine whether Defendants have made "minimum contacts" with the United States.

Defendants allege that, because they are organized in and doing business under the laws of Finland, they have not availed themselves of doing business in the United States and, accordingly, that personal jurisdiction fails. Def.'s Mot. to Dismiss ¶ 9. Yet, when authorized by federal statute, Fed. R. Civ. P. 4(k)(2) allows the court to exercise jurisdiction over a defendant who has not established general jurisdiction in any state. Fed. R. Civ. P. 4(k)(1)(D), (2). Therefore, in considering jurisdiction pursuant to a federal statute that provides for nationwide service of process, the court must assess the defendant's contacts with the United States as a whole. See In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 298-99 (3d Cir. 2004) (assessing personal jurisdiction in federal antitrust litigation on the basis of the defendant's aggregate contacts with the United States as a whole); United Liberty Life Ins. v. Ryan, 985 F.2d 1320, 1331 (6th Cir. 1993) (assessing the defendant's contacts with the United States under nationwide service of process provision in Securities Exchange Act); Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1239 (6th Cir. 1981) (noting in dicta in federal antitrust case that, for personal jurisdiction, court would assess defendant's contacts with United States as a whole). The Clayton Act provides for such nationwide

service of process. See 15 U.S.C. § 22 (2000).

Personal jurisdiction may be either general or specific, depending on the nature of the defendant's contacts with the forum. Conti v. Pneumatic Prods. Corp., 977 F.2d 978, 981 (6th Cir. 1992). General jurisdiction arises when a defendant's contacts with the forum are of such a "continuous and systematic nature" that the court may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the forum. Third Nat'l Bank v. WEDGE Group, Inc., 882 F.2d 1087, 1089 (6th Cir. 1989).

Specific jurisdiction arises when the defendant has sufficient minimum contacts that arise from or are related to the cause of action. Int'l Shoe, 326 U.S. at 316. The plaintiff must establish that (1) the defendant purposefully availed himself of the privilege of acting in the forum or intentionally caused a consequence in the forum, (2) the cause of action arose from the defendant's activities in the forum, and (3) the acts of the defendant or consequences caused by the defendant have a substantial enough connection with the forum to make the exercise of jurisdiction reasonable. See Aristech Chem. Int'l Ltd. v. Acrylic Fabricators Ltd., 138 F.3d 624, 628 (6th Cir. 1998); S. Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968). In applying these elements, the contacts of each defendant must be assessed individually. See Rush v. Savchuk, 444 U.S. 320, 332 (1980). Purposeful availment is the most important criterion. See Kerry, 106 F.3d at 150. The significance of purposeful availment is that it "allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Purposeful availment further "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." Burger King, 471 U.S. at 475.

There is sufficient evidence to show that Defendants' price fixing activities in Europe

establish specific jurisdiction through their affiliation with Outokumpu USA. Outokumpu used copper production facilities in the United States for distribution in the European market. Pl.'s Mot. in Opp'n to Def.'s Mot. to Dismiss, Ex. D. While corporate relationships may be a factor in assessing forum contacts, a company does not purposefully avail itself of the forum merely by owning some or all of a corporation subject to jurisdiction in the forum. See Dean v. Motel 6 Operating L.P., 134 F.3d 1269, 1273-74 (6th Cir. 1998). Personal jurisdiction must be based on something that the defendant itself has done involving the forum, or on evidence that the presumed corporate separation between parent and subsidiary is a fiction, such as when the parent exercises actual control over the subsidiary, or the parent holds the subsidiary out as its agent in the forum. See id. at 1274-75. For example, in Third Nat'l Bank, 882 F.2d 1087, the Sixth Circuit found personal jurisdiction over the parent corporation where the parent owned 100% of a subsidiary that conducted business in the forum state; the parent company's officers served as the subsidiary's directors and met regularly in the forum state; the parent company shared income tax liability with the subsidiary and the subsidiary's subsidiaries; and the parent company's officers participated in negotiations of loan agreements between the subsidiary and the plaintiff.

In the instant case, the EC found that Outokumpu had 100% control of the capital of Outokumpu Copper from 1989 until 2001, almost the entire duration of the Class Period. Pl.'s Notice of Supplemental Authority, Ex. A ¶ 145. In making its determination that Outokumpu had effective control and decisive influence over Outokumpu Copper's commercial policy, the EC refers to letters in which Outokumpu management met with at least one other member of the price-fixing conspiracy to discuss the copper market on Outokumpu Copper's behalf. Pl.'s Notice of Supplemental Authority, Ex. A ¶¶ 145, 146. In addition the companies held themselves out as one entity to a third party. In fact, the EC found that there was *no* evidence showing Outokumpu

Copper's autonomy separate from Outokumpu and, accordingly, found Outokumpu and Outokumpu Copper jointly and severally liable. Id. at ¶¶ 146, 183.

As to Outokumpu's operations in the United States, the company's website represents to the public that it is centrally managed in Europe with copper production facilities that supply its European division located both in Europe and in the United States. Pl.'s Opposition to Def.'s Mot. to Dismiss, Ex. D. On July 6, 2005, this Court held, *inter alia*, that the link between Outokumpu's business entities in Europe that were sanctioned as parties to the EC horizontal price fixing conspiracy and Outokumpu USA's activities in the United States were sufficient to withstand its Rule 12(b)(6) motion for failure to state a claim under § 1 of the Sherman Act. American Copper & Brass, Inc.v. Donald Boliden AB, No. 04-2771, 2005 WL 1631034 at * 5 (W.D. Tenn. 2005)(unpublished opinion). Therefore, Outokumpu's central management of its European and American subsidiaries and plants is sufficient to establish personal jurisdiction in the United States through Outokumpu USA.

Defendants contend that neither company has ever availed itself of the privilege of conducting business in the United States and as a result personal jurisdiction fails. Outokumpu avers that it is not a resident of or qualified to do business in the United States. Luoto Decl. ¶ 2. It does not own or maintain real or personal property, inventory, or pay corporate taxes in the United States. Id. at ¶ 2. Additionally, it has never manufactured, marketed, sold, or imported copper tubing in this country. Id.

In support of its 12(b)(2) motion, Outokumpu Copper as a wholly owned subsidiary of Outokumpu also avers that it is not a resident of or qualified to do business in the United States. Siltala Decl. ¶ 1. It does not own or maintain a place of business, real property or personal property, inventory or pay corporate taxes in the United States. Siltala Decl. ¶ 2. Nor has Outokumpu Copper

ever manufactured, marketed, sold or imported copper tubing in the United States. Id. Although Defendants maintain that they have not purposely availed themselves of conducting business in the United States, Outokumpu's subsidiary operations in the United States establish minimum contacts.

The inquiry into purposeful availment extends to foreseeability on the part of the defendant, that is, whether a "defendant's conduct and connection with the forum... are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen, 444 U.S. at 298. Although Defendants' activities are principally located in Finland, the evidence establishes that both companies' involvement in a multinational horizontal price fixing agreement would intentionally and knowingly cause injury to any foreign markets in which Outokumpu had a presence, including the United States. See Calder v. Jones, 465 U.S. 783, 789-90 (1984).

In Calder the Supreme Court exercised personal jurisdiction over Florida residents in a cause of action for libel brought by a California resident. The California resident was the subject of a newspaper article published by the Floridians. The Court held that the defendants' intentional and tortious actions were "expressly aimed" at California despite defendants lack of relevant minimum contacts with the forum. Id. While Defendants aver that they are not residents of the United States, and that they do not regularly conduct business in the United States, Outokumpu Copper's joint and several liability with Outokumpu establishes that any injury sustained in the United States through Outokumpu USA can be attributed to Defendants' price-fixing conduct in Europe. Defendants' knowingly and intentionally engaged in anti-competitive activity that they should reasonably have expected to reach the United States' market through Outokumpu's corporate relationship with Outokumpu USA and Outokumpu's exercise of control over Outokumpu Copper. As a result, it is foreseeable that each company would have to defend a suit in the United States.

In establishing specific jurisdiction, a court must also determine whether the cause of action

arises from Defendants' activities in the forum. Plaintiffs allege that Defendants engaged in a world-wide price-fixing conspiracy in violation of § 1 of the Sherman Act. Where a defendant's activities supporting personal jurisdiction are unrelated to the events giving rise to the litigation, acts of the defendant's alleged coconspirators, though performed in the forum state, are not sufficient to support maintenance of the suit against the defendant. Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1238 (6th Cir. 1981).

In Chrysler, the extraterritorial defendant moving for lack of personal jurisdiction submitted affidavits disavowing any contractual relationship or knowledge of the activities of its alleged conspirators. Id. at 1237. As a result, the Sixth Circuit found that the defendant's purchase and use of American parts and technology did not establish jurisdiction over the defendant in an anti-trust injury suit. Id. at 1239. Chrysler based its reasoning upon the Supreme Court's test for sufficiency of the nexus between the forum and the defendant,

> Unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum... The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum.

Id. (citing Hanson v.Denckla, 357 U.S. 235, 253 (1958)).

The EC's finding of liability as to Outokumpu and Outokumpu Copper distinguishes the instant case from Chrysler and Hanson. Plaintiffs' cause of action arises from, *inter alia*, the combination of the defendants' manufacturing and sales activities to effectuate horizontal price-fixing in the copper tubing industry. As opposed to mere allegations proffered in Chrysler, evidence of the deliberateness of Defendants' conduct in Europe suffices for a *prima facie* showing that it purposely availed itself of the privilege of conducting business in the United States during the class period. Thus, attributing Outokumpu's exercise of control over Outokumpu Copper combined

with its copper tubing operations in the United States establishes a nexus between the cause of action and Defendants' contact with the forum.

Lastly, Defendants' concerted activities establish a connection with the forum substantial enough to make the exercise of jurisdiction reasonable. A forum's interest in resolving the cause of action e.g., a state's interest in remedying the tortious actions of a defendant that has availed itself of significant profits within the forum, outlines the contours of a substantial connection. S. Mach. Co., 401 F.2d at 384-86. In the instant case, Plaintiffs' cause of action under the Sherman Act permits an exercise of personal jurisdiction that comports with Due Process. In this Court's July 6th, 2005 Order that, *inter alia*, denied Outokumpu USA's motion to dismiss for failure to state a claim under the Sherman Act, a showing of the relevant product and geographic markets or injury to competition was not necessary for a *per se* violation under the Act. Am. Copper & Brass, 2005 WL 1631034 at * 5. This Court reasoned that "the strict *per se* rules of modern antitrust law establish a conclusive presumption that a particular kind of action has improper anti-competitive effects, and this presumption governs regardless of whether the particular conduct in its actual context has been proved to have those consequences." Id. (citing State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)).

Federal law establishes that the United States has substantial interest in remedying anti-competitive activities that have an effect on the domestic market. The substantial interest the United States of litigating a world-wide conspiracy that effects a *per se* violation of the Sherman Act supports the reasonableness of exercising personal jurisdiction over Defendants in the United States. Asahi Metal Indus. v. Super. Ct. of Cal., 480 U.S. 102, 106 (1987). The EC's determination of Defendants' joint and several liability establishes specific jurisdiction because Outokumpu purposely availed itself of the United States market through Outokumpu USA. Plaintiffs' cause of action arises from this purposeful availment; the United States has a substantial interest in

remedying this conduct. Accordingly, Defendants' 12(b)(2) motion for lack of personal jurisdiction is **DENIED**.

III. 12(b)(6) STANDARD

A 12(b)(6) motion tests whether a plaintiff has pleaded a cognizable claim. Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). It allows the court to dismiss meritless cases and claims which would otherwise waste judicial resources and result in unnecessary discovery. See, e.g., Nietzke v. Williams, 490 U.S. 319, 326-27 (1989). A court, however, is to presume that well pleaded allegations are true, resolve all doubts and inferences in favor of the pleader, and view the pleading in the light most favorable to the non-moving party. Re/Max Int'l, Inc. v. Smythe, Cramer, Co., 265 F. Supp. 2d 882, 886 (6th Cir. 2003). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also, Nietzke, 490 U.S. at 326-27; Lewis v. ACB Bus. Serv., Inc., 135 F.3d 389, 405 (6th Cir. 1997). The standard to be applied when evaluating a motion to dismiss for failure to state a claim is very liberal in favor of the party opposing the motion. Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976). Even if the plaintiff's chances of success are remote or unlikely, a motion to dismiss should be denied.

Before deciding to grant a motion to dismiss, the court must first examine the complaint. The complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The complaint must provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley, 355 U.S. at 47; Westlake, 537 F.2d at 858. The plaintiff must allege the essential material facts of the case. Scheid, 859 F.2d at 436-37. Where there are conflicting interpretations of the facts, they must be construed

in the plaintiff's favor. Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1039-40 (6th Cir. 1991). However, in considering a 12(b)(6) motion, the court must not accept plaintiff's legal conclusions or unwarranted factual inferences as true. Lewis,135 F.3d at 405-06.

A. SHERMAN ACT STATUTE OF LIMITATIONS

The moving Defendants argue that Plaintiffs' complaint for damages for acts that occurred more than four years from the time the Sherman Act claim accrued is defeated by the statute of limitations. The Sherman Act's limitation of action establishes that:

> [a]ny action to enforce any cause of action under Section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

15 U.S.C. § 15b.

A Sherman Act claim accrues when the defendant commits an act that injures the plaintiffs' business. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971) ("each time a plaintiff is injured by an act of the defendant a cause of action accrues to him to recover the damages caused by that act and, as to those damages, the statute of limitations runs from the commission of the act"). Plaintiffs allege that the moving Defendants' violation of the Sherman Act began at least as early as June 1, 1988, and continu[ed] until no earlier than March 31, 2001. Defendants assert that, to the extent Plaintiffs seek to recover damages for injuries that occurred more than four years preceding the commencement of this action (i.e., September 24, 2000), Plaintiffs' claim is time-barred and should be dismissed. Plaintiffs argue that the statute of limitations is tolled by Defendants' acts of fraudulent concealment. To establish fraudulent concealment, a plaintiff must allege:

> (1) wrongful concealment of their actions by the

> defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts.

Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975).

Additionally, Fed. R. Civ. P. 9(b) requires that a party alleging fraudulent concealment "plead the circumstances giving rise to it with particularity." Dayco Corp., 523 F.2d at 394; see also, Campbell v. Upjohn Co., 676 F.2d 1122, 1126 (6th Cir. 1982). Plaintiffs in the case at bar allege that the conspiracy "was inherently self-concealing." Compl. ¶71. See Dry Cleaning & Laundry Inst. of Detroit, Inc. v. Flom's Corp., 841 F. Supp. 212, 217 (E.D. Mich. 1993) (citing Pinney Dock & Transp. Co. v. Penn. Cent. Corp., 838 F.2d 1445, 1467-72 (6th Cir. 1988)) (rejecting the contention that because the price-fixing conspiracy was inherently "self-concealing," plaintiffs do not need to prove affirmative acts of concealment").

In Dayco Corp., the Sixth Circuit held that affirmative acts of concealment by the defendant beyond the original fraud do not relieve the plaintiff of the requirement of due diligence. 523 F.2d at 394. The Supreme Court in Wood v. Carpenter, 101 U.S. (11 Otto) 135 (1879), stated that "concealment by mere silence is not enough." Wood, 101 U.S. (11 Otto) at 143 (the circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence). At this stage, it is not appropriate to determine whether their diligence was sufficient. This will be measured at the evidentiary stage.

For purposes of this motion, the Court finds that Plaintiffs have averred affirmative acts and shown diligence. Plaintiffs have averred that the means by which they discovered the alleged conspiracy was the EC press release of September 3, 2004, which sets forth the concerted conspiratorial acts. On September 24, 2004, Plaintiffs filed their original complaint in this matter.

Furthermore, in spite of the fact that the only known concerted acts of conspiracy occurred in Europe, the Court finds that Plaintiffs' averment sufficiently meets the particularity requirement for fraudulent concealment when it avers that the first Europe-wide meeting was held on September 29, 1989 at the "Airport Forum" in Zurich, Switzerland. See Fed. R. Civ. P. 9(b). Plaintiffs further aver that, at this meeting, Defendants agreed to meet again less than a month later in the negotiation room of the Amsterdam airport to continue their plan to fix prices. Accordingly, Plaintiffs should be allowed to proceed as to all claims against Outokumpu and Outokumpu Copper for purposes of a 12(b)(6) motion. Plaintiffs have alleged wrongful concealment and Plaintiffs could not have discovered the concealment. Further, Plaintiffs' discovery of the EC press release goes to their diligence in discovering the alleged conspiracy. For the reasons stated above, Defendants' motion to dismiss based on the statute of limitations is **DENIED**.

IV. CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss is **DENIED**.

IT IS SO ORDERED on this 1st day of June 2006.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE