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

In the United States Court of Appeals for the Sixth Circuit

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

v.

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

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

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

and

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

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

FINAL FOURTH BRIEF OF DEFENDANT-APPELLEE CROSS-APPELLANT MUELLER EUROPE LTD.

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ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT

Carrier's opposition to Mueller Europe's Second Brief[1] concedes that Mueller Europe itself does not have the requisite minimum contacts with the forum to establish personal jurisdiction. As confirmed through two uncontroverted affidavits, Mueller Europe, among other things:

- was never incorporated in or registered to do business in any state in the United States;
- never engaged in the production or sale of ACR tube in or into the United States;
- never maintained employees, assets, inventory, offices, facilities, or plants in the United States;
- never owned, used, or possessed any personal property, real property or bank accounts in the United States; and
- never paid (or was required to pay) taxes or franchise fees in the United States.

In the face of those undisputed facts, Carrier now relies exclusively on the argument that the contacts of Mueller Europe's parent, *MLI*, can be attributed

[1] The Proof Second Brief of Defendant-Appellee Cross-Appellant Mueller Europe Ltd. is referred to and cited to herein as Mueller Europe's "Second Brief" or "Mueller Europe Second Br." The Proof Third Brief of Plaintiffs-Appellants Carrier Corporation is referred to and cited to herein as Carrier's "Third Brief" or "Third Br." The Proof Fourth Brief of Defendant-Appellee Cross-Appellant Mueller Industries, Inc. is referred to and cited to herein as MLI's "Fourth Brief" or "MLI Fourth Br." Other capitalized terms have the same meaning as in Mueller Europe's Second Brief. Citations to "Apx. __" refer to the Joint Appendix.

to Mueller Europe to establish personal jurisdiction. Carrier's final effort to make a *prima facie* jurisdictional showing fails.

First, Carrier's attempt to impute MLI's contacts to Mueller Europe improperly reverses the traditional attribution of a *subsidiary's* contacts to its *parent*. Courts generally have rejected "reverse attribution" to establish personal jurisdiction and, even in those cases that have allowed it, courts have required a showing that the *subsidiary* dominated the *parent* – an argument that Carrier does not make.

Second, even if reverse attribution were permitted, Carrier has not made factual allegations sufficient to pierce the corporate veil and impute MLI's contacts to Mueller Europe. MLI submitted two affidavits to the district court below, which fully established that Mueller Europe is a corporate entity that is separate and distinct from its parent, MLI. Mueller Europe:

- is its own *bona-fide*, separately capitalized company, financially and operationally independent of all other Mueller entities;
- has its own work force, bank accounts, offices, production facility, and customer, product, and price lists;
- has a properly constituted board of directors that governs Mueller Europe as a stand-alone company, and appoints its own officers, who run Mueller Europe's day-to-day business as an entity distinct from MLI or other Mueller entities;
- since its inception, has made sales in excess of 722 million pounds sterling; and

- engages in business transactions with other Mueller entities on commercially reasonable terms that do not compromise the independence with which Mueller Europe conducts its business.

Carrier has offered *no* affidavit evidence to refute those facts. Rather, Carrier relies on a statement about the company's operations from a 1997 MLI 10-K filing; allegations of overlap between the companies' officers and directors; an intercompany investment and transfer of assets; and assertions regarding Mueller Europe's role in the separate plumbing-tubes conspiracy.

But courts have routinely found those types of general arguments insufficient, particularly where sworn testimony is submitted to support and confirm the presumption of corporate separateness to which these entities are entitled. General statements about corporate structure in securities filings carry little weight as evidence of corporate form. Overlap in officers and directors and intercompany transactions are an expected and accepted part of the parent/subsidiary relationship, and do not compromise the entities' corporate separateness. And, finally, Mueller Europe's alleged participation in a separate European conspiracy simply has no relevance to whether *personal jurisdiction* is appropriate in the Western District of Tennessee.

As Carrier has offered no meaningful factual allegations or evidence to establish personal jurisdiction over Mueller Europe through MLI or otherwise, the Court should reject Carrier's request for jurisdictional discovery and dismiss

the Amended Complaint as to Mueller Europe for lack of personal jurisdiction under Rule 12(b)(2).

Finally, even if Carrier could establish personal (and subject matter) jurisdiction, because Carrier has not pled any factual allegations whatsoever in support of its claim against Mueller Europe, the Amended Complaint fails to state a plausible entitlement to relief under *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). (Mueller Europe also adopts the arguments as to the insufficiency of the Amended Complaint in MLI's Fourth Brief and in Outokumpu's Fourth Brief.) Carrier's claim is also time-barred for the reasons stated in MLI's Fourth Brief and in Outokumpu's Fourth Brief. The Amended Complaint should therefore be dismissed as to Mueller Europe in its entirety under Rule 12(b)(6), with prejudice.

ARGUMENT

I. CARRIER DOES NOT DISPUTE ITS HEAVY BURDEN OF ESTABLISHING PERSONAL JURISDICTION OVER MUELLER EUROPE.

Mueller Europe established in its Second Brief that, because Mueller Europe is a foreign defendant and the assertion of personal jurisdiction over it implicates comity concerns, Carrier faces a heavier burden than if Mueller Europe were a U.S. entity. (Mueller Europe Second Br. at 20-22.) *See Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 115 (1987) (holding that courts must take "[g]reat care and reserve" in exercising personal jurisdiction over foreign entities);

Int'l Techs. Consultants, Inc. v. Euroglas, S.A., 107 F.3d 386, 388 (6th Cir. 1997) (affirming dismissal for lack of personal jurisdiction over non-U.S. corporate defendant, noting "the Supreme Court's admonition to exercise restraint in extending our notions of personal jurisdiction into the international field"). Carrier does not dispute that proposition.

A plaintiff "may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction." *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). Carrier expressly mischaracterizes the evidence that it has presented to meet its burden. Specifically, in its Third Brief, Carrier claims to have responded to defendants' detailed factual declarations "with affidavits and other evidence to support a finding of personal jurisdiction." (Third Br. at 45.) Carrier, however, has offered *no* affidavit evidence to counter Mueller Europe's two detailed factual submissions. As shown below, Carrier instead relies on random statements from SEC filings and an EC decision that come nowhere close to meeting Carrier's burden.

II. MLI'S CONTACTS WITH THE FORUM CANNOT SUPPORT PERSONAL JURISDICTION OVER MUELLER EUROPE.

Recognizing that personal jurisdiction cannot be established because of Mueller Europe's lack of contacts with the forum, Carrier attempts to base personal jurisdiction over Mueller Europe exclusively on the contacts of Mueller

Europe's indirect corporate parent, MLI.[2] Carrier argues that MLI's contacts are attributable to Mueller Europe because MLI "dominated" Mueller Europe, provided Mueller Europe with "capital funding," failed to observe the "corporate form" of Mueller Europe, and "viewed [Mueller Europe] as part of [its] operations." (Third Br. at 62-67.)

Carrier's effort fails. First, Carrier's attempt to reverse the traditional subsidiary-to-parent flow of contacts is fundamentally improper. Second, the purported connections between MLI and Mueller Europe that Carrier attempts to identify are insufficient as a matter of law to disregard the corporate integrity of Mueller Europe, particularly given the unrefuted affidavit evidence in the record below.

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[2] Carrier argues that Section 12 of the Clayton Act permits a district court to exercise jurisdiction based upon a defendant's contacts with the United States as a whole. (Third Br. at 46.) Nationwide contacts, however, are relevant only when a plaintiff has demonstrated that venue is proper under the Clayton Act. *See Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 424-25 (2d Cir. 2005); *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir. 2000). Carrier has not demonstrated that venue is proper with respect to Mueller Europe. Even if this Court were to consider national contacts, Mueller Europe lacks sufficient contacts with the United States to warrant the exercise of personal jurisdiction. (Mueller Europe Second Br. at 12-13, 23-25.) In any case, Carrier's argument for national contacts is irrelevant where, as here, Carrier has effectively conceded that Mueller Europe's own contacts with the United States as a whole are insufficient.

A. Carrier Cannot Base Personal Jurisdiction on "Reverse Attribution."

As Mueller Europe explained in its Second Brief, a plaintiff typically seeks to obtain personal jurisdiction over a *foreign parent* that controls and does business through its *domestic subsidiary* on the theory that the foreign parent has subjected itself to personal jurisdiction in the forum by its subsidiary's contacts. Carrier's theory is the reverse – that MLI's U.S. contacts can be imputed to its foreign indirect subsidiary – and it is a theory that courts have repeatedly rejected. (*See* Mueller Europe Second Br. at 26-27.) Carrier makes no effort to distinguish any of the cases that Mueller Europe cites in its Second Brief.

Nor does Carrier dispute the proposition that, even in the few cases where "reverse attribution" has been considered, courts generally have required allegations that the *subsidiary* controlled its *parent*. *See, e.g.*, *Digi-Tel Holdings, Inc. v. Proteq Telecomms., Ltd.*, 89 F.3d 519, 524 (8th Cir. 1996) (finding no jurisdiction over non-resident subsidiary because of inadequate evidence that in-forum corporate affiliate's activity was directed by or primarily for benefit of non-resident defendant); *Am. Copper & Brass, Inc. v. Mueller Europe, Ltd.*, 452 F. Supp. 2d 821, 829 (W.D. Tenn. 2006) (emphasizing, in dismissing Mueller Europe from the Plumbing Tube Litigation, that "[o]nly if a foreign subsidiary has acted through its U.S. parent, or was utilized by the parent in such a way as to establish

'sufficient minimum contacts' is the parent-subsidiary relationship of any relevance in evaluating jurisdiction over the subsidiary"); *Glud & Marstrand A/S v. Microsoft Corp.*, No. CO5-01563RSM, 2006 WL 2380717, at *9-10 (W.D. Wash. Aug. 15, 2006) (requiring control by subsidiary for reverse attribution theory).[3] Carrier has never alleged (and cannot allege) that Mueller Europe controlled MLI.

B. Carrier Cannot Pierce The Corporate Veil Under Tennessee Law.

Because Carrier cannot argue that Mueller Europe controlled MLI (even assuming this Court accepted reverse attribution), Carrier instead seeks to pierce the corporate veil by claiming that MLI "dominated" Mueller Europe. Without explanation, Carrier relies on the "mere department" test, which derives

[3] The authority Carrier cites that "reverse attribution" may be appropriate is inapposite. (Third Br. at 61.) Several of the cases involve a non-resident subsidiary that engaged in transactions with plaintiffs giving rise to the cause of action. *See, e.g., Simeone v. Bombardier-Rotax Gmbh*, 360 F. Supp. 2d 665, 668 (E.D. Pa. 2005) (non-resident defendant had manufactured the sole product at issue); *MM Global Servs. Inc. v. Dow Chem. Co.*, 404 F. Supp. 2d 425, 429 (D. Conn. 2005) (non-resident subsidiaries were created and used by in-forum parent corporation to "effectuate sales of [in-forum parent's] products *to the plaintiffs* and to further [in-forum parent's] relationship with the plaintiffs") (emphasis added); *Ionescu v. E. F. Hutton & Co.*, 434 F. Supp. 80, 81-82 (S.D.N.Y. 1977) ("More than half of [non-resident subsidiary's] gross income and all of its American business, is *done through [resident parent corporation]*" and one of the transactions giving rise to plaintiffs' cause of action was conducted by non-resident subsidiary) (emphasis added). Here, the Amended Complaint does not allege that Mueller Europe had any transactions with Carrier, on its own or through MLI.

from New York law, in support of this argument, although this Court has repeatedly applied the law of the state in which the district court is located (here, Tennessee). (*See* Third Br. at 62.)

Even the cases Carrier cites confirm the well-established rule that the law of the state in which the district court is located governs attempts to obtain jurisdiction by piercing the corporate veil. *See, e.g.*, *Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362-63 (6th Cir. 2008) (applying law of forum state and dismissing foreign defendant on personal jurisdiction grounds because plaintiffs' veil-piercing allegations were insufficient); *Volkswagenwerk Aktiengellschaft v. Beech Aircraft*, 751 F.2d 117, 120 (2d Cir. 1984) (determining personal jurisdiction based on "the law of the state in which the district court sits"); *Genesis Bio-Pharmaceuticals, Inc. v. Chiron Corp.*, 27 F. App'x 94, 98 (3d Cir. 2002) (applying New Jersey state law to determine whether to attribute corporation's contacts to related entity for personal jurisdiction).

Here, because the district court is located in Tennessee, the law of Tennessee governs. Under Tennessee law, Mueller Europe is entitled to a presumption of corporate separateness. *See Se. Tex. Inns, Inc. v. Prime Hospitality Corp.*, 462 F.3d 666, 675 (6th Cir. 2006) (holding that the "principle of piercing the fiction of the corporate veil is to be applied with great caution and not

precipitately, since there is a presumption of corporate regularity"); *Cont'l Bankers Life Ins. Co. of the S. v. Bank of Alamo*, 578 S.W.2d 625, 631 (Tenn. 1979) ("The general rule is that corporate entities will be recognized as separate and distinct . . . .").

Before the Court may disregard that presumption, Carrier must demonstrate that MLI exercised "complete dominion and control" over Mueller Europe and that any such dominion and control was used to commit a fraud or injustice that proximately caused Carrier's alleged injury. *See Southeast Texas Inns*, 462 F.3d at 675-76. Carrier cannot make a *prima facie* case to pierce the corporate veil under any aspect of Tennessee law.

1. Carrier Does Not Even Argue That MLI Controlled Mueller Europe's Alleged Conspiratorial Conduct.

Tennessee veil-piercing law requires that a plaintiff show that "[t]he parent corporation, at the time of the transaction complained of, exercises complete dominion over its subsidiary, not only of finances, but of policy and business practice in respect to the transaction under attack, so that the corporate entity, as to that transaction, had no separate mind, will or existence of its own." *IBC Mfg. Co. v. Velsicol Chem. Corp.*, No. 97-5340, 1999 WL 486615, at *4 (6th Cir. July 1, 1999) (quoting *Continental Bankers*, 578 S.W.2d at 632). The plaintiff must further demonstrate that the parent corporation, through its dominion and control

over the subsidiary, committed a "fraud or wrong" that "proximately cause[d] the injury or unjust loss complained of." *Id.*; *Southeast Texas Inns*, 462 F.3d at 672-75, 679 (requiring fraud or similar injustice in the abuse of the corporate structure, which must be pled with particularity under Rule 9(b)).

Carrier therefore must show (at least) that MLI directed and used Mueller Europe to participate in the ACR conspiracy. But Carrier does not, and cannot, argue that it satisfies that test. As Mueller Europe established in its Second Brief, Carrier's Amended Complaint does not contain a single allegation of conspiratorial conduct by Mueller Europe. (*See* Mueller Europe Second Br. at 8-10.)[4] Carrier's Third Brief does not even use the words "Mueller Europe" in attempting to defend subject matter jurisdiction or the sufficiency of the Amended Complaint under Rule 12(b)(6). But most critically, the Amended Complaint does not plead allegations of MLI's *use* of Mueller Europe in the alleged ACR conspiracy, as Tennessee law requires for veil-piercing.

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[4] The only conduct of any Mueller entity mentioned in the EC ACR Decision is that of Desnoyers, which MLI did not acquire until 1997 and which Carrier did not even sue. The EC ACR Decision expressly found that any involvement by Desnoyers ended before MLI's acquisition. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶¶ 91-92, Apx. 0298.) And, in any event, there are no allegations that would permit Carrier to attribute Desnoyers' conduct to Mueller Europe or MLI. (MLI Fourth Br. at 10-11).

2. Carrier Cannot Show That MLI Exercised Complete Dominion Over Mueller Europe.

Carrier also cannot show that MLI exercised "complete dominion" over Mueller Europe's finances, policy, and business practices. *See IBC Manufacturing*, 1999 WL 486615, at *4. Specifically, Mueller Europe has demonstrated through affidavit evidence that Mueller Europe is its own *bona-fide* company. (R. 69, Reply Br. in Support of Mot. to Dismiss, Ex. 3, Reply Donovan Dec. ¶ 5, Apx. 0556.) It is capitalized as a stand-alone entity separate and apart from all other Mueller entities and, since 2004, has purchased three U.K. companies on its own behalf. (*Id.* ¶ 6, Apx. 0556.) Mueller Europe has its own work force, bank accounts, offices, production facility, and customer and product lists. (*Id.* ¶¶ 9, 12, 13, 14, Apx. 0557.) Mueller Europe has a properly constituted board of directors that governs Mueller Europe as a stand-alone company, and appoints its own officers who run Mueller Europe's day-to-day business as an entity distinct from MLI or other Mueller entities. (*Id.* ¶¶ 10, 11, Apx. 0557.)

Additionally, since its inception, Mueller Europe has made sales in excess of 722 million pounds sterling. (*Id.* ¶ 14, Apx. 0557.) Mueller Europe does not rely in any way on MLI or any other Mueller affiliate for Mueller Europe's continuing production, sales, or other operations. (*Id.* ¶ 5, Apx. 0556.) It does not constitute, serve, or function as a department, regional office, or distributor for

MLI. (*Id.*, Apx. 0556.) When Mueller Europe engages in business transactions with other Mueller entities, such transactions are conducted on commercially reasonable terms and do not compromise the independence with which Mueller Europe conducts its business. (*Id.* ¶¶ 15, 16, Apx. 0558.)

Carrier's only rebuttal of this evidence consists of a 1997 MLI 10-K filing; allegations of overlap between the companies' officers and directors; an intercompany investment and transfer of assets; and assertions regarding Mueller Europe's role in the separate plumbing-tubes conspiracy. Those claims do not demonstrate that MLI exercised complete dominion over Mueller Europe's finances, policies, and business practices and cannot overcome the undisputed affidavit evidence submitted by Mueller Europe.

First, Carrier points to a single statement in MLI's 1997 10-K, claiming it is "evidence" that MLI "viewed" Mueller Europe as part of its operations. (Third Br. at 67.) Such statements, even if true, are insufficient as a matter of law to pierce the corporate veil. *See, e.g., Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001) (refusing to attribute contacts of subsidiaries to parent corporation, noting that "references in the parent's annual report to subsidiaries or chains of subsidiaries as divisions of the parent company do not establish the existence of an alter ego relationship"); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1460-61 (2d Cir. 1995) (financial literature describing subsidiary as division of company

was not evidence that two companies were single economic entity or that corporate formalities were ignored).

Second, Carrier alleges that MLI officers constituted the majority of Mueller Europe's Board of Directors. But overlapping officers and directors do not justify piercing the corporate veil. *See United States v. Bestfoods*, 524 U.S. 51, 69-70 (1998) (holding that it is entirely appropriate for officers and directors of a parent corporation to serve as directors of the corporation's subsidiary); *Continental Bankers*, 578 S.W.2d at 631 ("[T]o disregard the corporate entities requires, in the case of parent and subsidiary, more than a showing that they have similar corporate names and locations and the exercise of dominion through common officers and directors.").

Third, Carrier claims that Mueller Europe is financially dependent on MLI because MLI funded a capital improvement project at Mueller Europe. But Carrier cites no law establishing that an investment in a subsidiary is the equivalent of financial dependence. Indeed, intercompany loans and investments, even when made into the forum (unlike the single loan identified by Carrier), do not confer personal jurisdiction over a foreign affiliate. *See, e.g.*, *Doe*, 248 F.3d at 927-28 (finding no general jurisdiction over foreign parent notwithstanding loans and other types of financing to subsidiaries within the forum); *Great Lakes Overseas, Inc. v. Wah Kwong Shipping Group, Ltd.*, 990 F.2d 990, 997 (7th Cir. 1993)

(finding common directors and injection of funds by foreign company into affiliate that was subject to personal jurisdiction insufficient to establish personal jurisdiction over foreign company).

Nor does the liquidation of Desnoyers, to which Carrier also alludes, establish that Mueller Europe is financially dependent on MLI. Carrier, of course, can cite no law or argument supporting the proposition that a business decision by one corporate affiliate to liquidate demonstrates financial dependence by another affiliate on the parent.[5]

Likewise, Carrier attempts to justify a piercing of the corporate veil on the fact that, after the closing of Desnoyers' Laigneville, France plant in 1998, certain of Desnoyers' assets were acquired by Mueller Europe in Bilston, U.K. (Third Br. at 63-64.) But Carrier has not refuted Mr. Donovan's statement that any equipment Mueller Europe received from Desnoyers "was acquired at net book value" and "did not compromise the separateness of Mueller Europe and Desnoyers." (R. 69, Reply Br. in Support of Mot. to Dismiss, Ex. 3, Reply Donovan Dec. ¶ 16, Apx. 0558.) In any event, Carrier cites no case law supporting

[5] Like many of the claims in its Third Brief, Carrier provides no support for its statement that Desnoyers was liquidated to make the company "judgment-proof against antitrust claims by Desnoyers' victims." (Third Br. at 64.) That specious assertion is emblematic of Carrier's proclivity to argue, regardless of support or citation, that which serves its purpose.

the proposition that one company's business decision as to where to deploy its assets bears on whether another company's veil should be pierced.

Finally, Carrier argues that the EC Plumbing Tubes Decision supports that MLI and Mueller Europe functioned as a "common enterprise." (Third Br. at 64.) But that decision simply did not address the corporate separateness of MLI and Mueller Europe under any test for U.S. personal jurisdiction. In any event, the district court in *American Copper & Brass* had before it the EC Plumbing Tubes Decision and nevertheless concluded that there was no basis for exercising personal jurisdiction over Mueller Europe. 452 F. Supp. 2d at 828-32. The EC Plumbing Tubes Decision is even less relevant here, as Carrier alleges an *ACR conspiracy*, not one relating to plumbing tubes, and relies on the EC ACR Decision, which not only never mentions Mueller Europe, but fully exonerates MLI.

In sum, the connections between MLI and Mueller Europe upon which Carrier relies are typical of any corporate group. They provide no basis to disregard the presumption of Mueller Europe's independent corporate existence under Tennessee law and come nowhere close to satisfying Carrier's burden of a *prima facie* showing of jurisdiction over Mueller Europe, particularly in light of

the two unrefuted factual affidavits Mueller Europe submitted.[6] *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1997) (court "need not accept as true legal conclusions or unwarranted factual inferences"); *Negrón-Torres v. Verizon Commc'ns, Inc.*, 478 F.3d 19, 23 (1st Cir. 2007) (court is not required to "credit conclusory allegations or draw farfetched inferences" in assessing whether a plaintiff has made a *prima facie* case of personal jurisdiction) (internal quotation marks and citation omitted).

C. Carrier Cannot Pierce The Corporate Veil Under Its Erroneous Application of New York Law.

Unable to meet Tennessee's test, Carrier suggests that this Court apply the Second Circuit's "mere department" test (Third Br. at 62), derived from New York law. *See, e.g., Jazini v. Nissan Motor Co.*, 148 F.3d 181, 183-84 (2d Cir. 1998) (because district court was located in New York, court applied New York's "mere department" test to assess personal jurisdiction over defendant based on subsidiary's forum contacts). Under that test, courts consider four factors in determining whether one entity is the "mere department" of another: (1) common ownership; (2) financial dependency of the subsidiary on the parent; (3) the degree

[6] Carrier has abandoned, by failing to argue in its Third Brief, any claim that either the *Calder* effects test or the conspiracy theory establishes a basis for personal jurisdiction over Mueller Europe. Mueller Europe accordingly does not further address those theories, which it discussed in its Second Brief at 40-49.

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. *Id.* at 185.

Even under Carrier's erroneous application of New York law, Carrier's allegations are insufficient to establish that Mueller Europe was a "mere department" of MLI. For example, while Carrier cites to MLI's ownership of Mueller Europe, it is well-established that common ownership alone does not demonstrate that a subsidiary is the mere department of its parent. *Hvide Marine Int'l, Inc. v. Employers Ins. of Wausau*, 724 F. Supp. 180, 186 (S.D.N.Y. 1989) (holding that common ownership is a necessary but not sufficient condition for "mere department" status). Carrier also cannot establish financial dependence of Mueller Europe on MLI, as discussed in detail above. *See Reers v. Deutsche Bahn AG*, 320 F. Supp. 2d 140, 157 (S.D.N.Y. 2004) (holding that the financial dependence prong of the mere department test requires "that the subsidiary would not be able to function without the financial support of the parent").

Carrier similarly does not dispute that Mueller Europe appoints its own officers, who run the day-to-day business of Mueller Europe as a stand-alone entity. (R. 69, Reply Br. in Support of Mot. to Dismiss, Ex. 3, Reply Donovan Dec. ¶ 11, Apx. 0557.) Carrier's claim of overlapping officers and directors does

not establish that a subsidiary is the "mere department" of its parent. *Jazini*, 148 F.3d at 185. Indeed, courts have recognized that "it would be unusual for a parent not to control a subsidiary's board of directors." *Hvide Marine*, 724 F. Supp. at 187.

Carrier's reference to a single statement in MLI's 1997 10-K is also insufficient to eliminate Mueller Europe's corporate integrity. *Aerotel, Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 193 (S.D.N.Y. 2002) (holding that "statements [presenting multiple corporate entities as a single entity], intended to be read by the consuming public, cannot create a single entity structure given the sophistication and complexity of today's corporate world"). Finally, Carrier's conclusory assertion that Mueller Europe and MLI functioned as a "common enterprise" is not only unsupported by the facts, but is insufficient as a matter of law to justify a piercing of the corporate veil. *Tese-Milner v. De Beers Centenary A.G.*, No. 04 Civ. 5203, 2009 WL 186198, at *8 (S.D.N.Y. Jan. 23, 2009) (holding that "the Court has not encountered, and Plaintiff does not offer, any legal support for the contention that 'integrated enterprise' has any legal meaning for the purposes of the relevant personal jurisdiction law").

In sum, whether under New York law or Tennessee law, Carrier's Amended Complaint should be dismissed as Carrier cannot pierce the corporate

veil and cannot make the *prima facie* case of personal jurisdiction over Mueller Europe that the law requires.

III. JURISDICTIONAL DISCOVERY IS UNWARRANTED.

When a plaintiff, like Carrier, offers no meaningful substantiation of its claims, jurisdictional discovery should not be permitted. *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir. 1981); *see also Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000) ("Foreign nationals usually should not be subjected to extensive discovery in order to determine whether personal jurisdiction over them exists.").

Even the Second Circuit, the jurisdiction whose law Carrier claims should be applied in this case, has stated, in denying jurisdictional discovery:

> We recognize that without discovery it may be extremely difficult for plaintiffs . . . to make a prima facie showing of jurisdiction over a foreign corporation that they seek to sue . . . . That, however, is the consequence of the problems inherent in attempting to sue a foreign corporation that has carefully structured its business so as to separate itself from the operation of its wholly-owned subsidiaries in the United States – as it properly may do. The rules governing establishment of jurisdiction over such a foreign corporation are clear and settled, and it would be inappropriate for us to deviate from them or to create an exception to them because of the problems plaintiffs may have in meeting their somewhat strict standards.

Jazini, 148 F.3d at 186. The same outcome is warranted in this case.

IV. CARRIER'S SHERMAN ACT CLAIM DOES NOT WITHSTAND SCRUTINY UNDER *TWOMBLY*.

As discussed in the Fourth Brief of MLI, Carrier's pleading as to MLI is inadequate under the standards set forth by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). (*See* MLI Fourth Br. at 4-18.) Those arguments regarding the deficiency of Carrier's allegations apply with even more force to Mueller Europe. Specifically, Carrier does not dispute that the Amended Complaint contains no factual allegations supporting Mueller Europe's supposed ACR tube sales or production (there were none), or Mueller Europe's role in any purported allocation agreement (there was none). (*See* Mueller Europe Second Br. at 8-10.)

As shown, Carrier cannot pierce the corporate veil of MLI to reach Mueller Europe. Without specific factual allegations sufficient to support a claim against Mueller Europe, Carrier has therefore failed to state a plausible entitlement to relief against Mueller Europe under *Twombly*. For those reasons, as well as the absence of personal jurisdiction over Mueller Europe and the expiration of the statute of limitations, the Amended Complaint should be dismissed in its entirety, with prejudice, as to Mueller Europe.

CONCLUSION

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

Dated: New York, New York
May 1, 2009

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

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B) of 7,000 words for appellee's reply brief because this brief contains 5,014 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Sixth Circuit Rule 28(b).

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

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2009, pursuant to 6 Cir. R. 25, I caused one true and accurate copy of the foregoing brief to be served via first class mail, electronic mail, and/or the Court's Electronic Case Filing ("ECF") system upon the following:

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