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 INDUSTRIES, INC.

Robert L. Crawford
WYATT, TARRANT & COMBS, LLP
1715 Aaron Brenner Drive
Suite 800
Memphis, Tennessee 38120
(901) 537-1052

William H. Rooney
Kelly M. Hnatt
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

*Counsel for Defendant-Appellee Cross-Appellant Mueller Industries, Inc.*

**ORAL ARGUMENT REQUESTED**

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**OTHER AUTHORITIES**

## SUMMARY OF ARGUMENT

### Twombly *Requires Dismissal Of Carrier's Claim Against Mueller.*

Carrier's claim against Mueller fails because it has pled no connection whatsoever between Mueller and the alleged U.S. conspiracy. That conclusion follows from these *undisputed* propositions:

- Carrier seeks relief against Mueller *only* for supposedly agreeing to allocate Carrier's U.S. ACR purchases to Outokumpu.
- Mueller did *not* participate in the European Cuproclima conspiracy upon which Carrier bases its claim.
- Carrier pleads *no* ACR conspiratorial conduct *anywhere in the world* involving Mueller.
- Carrier's few allegations regarding Mueller are *all* consistent with rational and competitive business conduct.

In its Third Brief, Carrier attempts to sweep Mueller into the alleged U.S. allocation conspiracy, not through Mueller's own conduct, but through the pre-acquisition conduct of a French subsidiary (Desnoyers), a supposed "opportunity" to conspire arising from the separate plumbing-tubes cartel, and more argument of a global market.[1] (Third Br. at 16-17, 25, 26.) Carrier's effort fails.

---

[1] The Proof Third Brief of Plaintiffs-Appellants Carrier Corporation is referred to and cited herein as "Third Brief" or "Third Br." The Proof Second Brief of Defendant-Appellee Cross-Appellant Mueller Industries, Inc. is referred to and cited to herein as Mueller's "Second Brief" or "Mueller Second Br." Other capitalized terms herein have the same

Carrier argues essentially that Desnoyers, before being acquired by Mueller in 1997, conspired to allocate Carrier's *U.S.* ACR tube business to Outokumpu and that Mueller joined that allocation. (Third Br. at 23-25.) But the Amended Complaint alleges no facts to show that Desnoyers so conspired, that Mueller is responsible for Desnoyers' pre-acquisition (or post-acquisition) conduct, or that Mueller itself "consciously committed" to allocate Carrier's U.S. purchases. Indeed, Carrier acknowledges that Cuproclima was limited to Europe, that Desnoyers engaged in no conspiratorial activities after Mueller acquired it, and that Mueller did not participate in the Cuproclima conspiracy at all. (*Id*.)

Carrier also argues that Mueller had the opportunity to join the alleged U.S. conspiracy through the separate European plumbing-tubes conspiracy. (Third Br. at 26.) But "opportunity" is insufficient as a matter of law to support allegations of agreement. And Carrier has provided no authority or factual allegations to support its effort to extend the European conspiracy to the United States with more assertions of a "global market." (Third Br. at 16-18.)

***Carrier's Claim Against Mueller Is Time-Barred.***

Carrier also does not dispute that its claim is time-barred on the face of the Amended Complaint, but seeks refuge in the doctrine of fraudulent

---

meaning as was attributed to them in Mueller's Second Brief. Citations to "Apx. __" refer to the Joint Appendix.

concealment, though subject to the pleading strictures of Fed R. Civ. P. 9(b) ("Rule 9(b)"). Carrier does not dispute that it learned of the widespread 2001 press reports of suspected ACR cartel conduct more than four years before bringing suit, that Mueller caused such reports through its *disclosures* to the EC, and that Carrier's "investigation" of the press reports consisted of a single oral inquiry. (Third Br. at 35, 38, 39-40.)

In defense, Carrier says implausibly that it could not have learned enough about the *European* cartel to assert its *U.S.* allocation claim until the EC published the EC ACR Decision in December 2003. (*Id*. at 39-40.) Carrier has pled no basis for that assertion and has effectively conceded that the EC ACR Decision simply confirmed the suspected European cartel that was reported in 2001. (*Id.*) Particularly given this Court's strong policy favoring limitations and Carrier's self-proclaimed sophistication, Carrier's conclusory allegations of fraudulent concealment, as a pleading matter, do not save its time-barred claim.

For the reasons set forth herein, and for those in Outokumpu's Fourth Brief (which Mueller hereby adopts in all applicable respects), the Amended Complaint should be dismissed with prejudice as to Mueller and in its entirety under Rule 12(b)(6).[2]

---

[2] Whether the Amended Complaint should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) is a proper subject of Mueller's cross-appeal. (*See* December 3, 2007 Order ("A notice of cross-appeal must be

## ARGUMENT

### I. *TWOMBLY* REQUIRES DISMISSAL OF CARRIER'S CLAIM AGAINST MUELLER.

#### A. *Twombly* Requires The Amended Complaint To Allege A Plausible, Factual Basis That Mueller Joined The Alleged U.S. Conspiracy.

Carrier first argues that *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), does not apply to the Amended Complaint because it contains "direct" allegations of conspiratorial conduct. (Third Br. at 8, 13, 16.) But *Twombly* does not limit its plausibility requirement to cases alleging only parallel conduct, and this Court has not read *Twombly* so narrowly. *See, e.g.*, *NicSand Inc. v. 3M Co.*, 507 F.3d 442, 450-59 (6th Cir. 2007) (assessing plaintiff's allegations of monopolization and antitrust injury under *Twombly*).

In any event, Carrier's so-called "direct" allegations of conspiracy – its allegations of "specific meetings at which anticompetitive agreements were made" (Third Br. at 8) – consist solely of meetings of the *European* Cuproclima association, all of which occurred in *Europe* and related to the *European* conspiracy reported in the EC ACR Decision. (*See* Mueller Second Br. at 43-44.) Carrier has no "direct" allegations of a *U.S.* conspiracy, and supports that claim

---

filed 'where an appellee wishes to . . . enlarge his rights or to reduce those of his adversary.' *Francis v. Clark Equip. Co.*, 993 F.2d 545, 552 (6th Cir. 1993).").)

only with such contextual allegations as "a description of the marketplace that suggests the existence of the anticompetitive agreements alleged." (Third Br. at 9.)

This Court applies *Twombly* to antitrust complaints based on contextual allegations and dismisses them for failure to allege a plausible entitlement to relief. *See Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008) (requiring "factual allegations plausibly suggesting, not merely consistent with, such a [conspiracy] claim."); *NicSand*, 507 F.3d at 458 ("[Plaintiff]'s speculations show at most the possibility of an entitlement to relief, which is just what [*Twombly*] said would not suffice at the pleading stage.") (internal citations and quotation marks omitted).

Under *Twombly*, the Amended Complaint cannot rely on conclusory, factually neutral, or generic allegations to state a claim against Mueller. Bare allegations of conspiracy are legal conclusions and do not satisfy the plausibility requirement. *See Twombly*, 127 S. Ct. at 1970 & n.9 (allegations that "ILECs engaged in a 'contract, combination or conspiracy' and agreed not to compete with one another" amounted to "a few stray statements speak[ing] directly of agreement," but "on fair reading these are merely legal conclusions resting on prior allegations"); *Bishop v. Lucent Techs., Inc.*, 520 F. 3d 516, 519 (6th Cir. 2008) ("Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice.").

*Twombly* also required "allegations suggesting (not merely consistent with) agreement," and rejected assertions that accord with rational business conduct and do not raise the necessary inference of conspiracy when viewed "in light of common economic experience." *Twombly*, 127 S. Ct at 1966, 1971. *Twombly*, *id*. at 1964, 1968 & n.7, relied on *Monsanto*, which required facts "tending to exclude the possibility of independent action" and defined agreement as "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

Importantly, *Twombly* further required plausible factual allegations as to *each defendant*, a point that Carrier accepts. (*See* Third Br. at 22-27.) The Supreme Court observed that "the complaint furnished no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place." *Twombly*, 127 S. Ct at 1971 n.10. This Court has underscored the importance of allegations as to each defendant: "Generic pleading, alleging misconduct against defendants *without specifics as to the role each played* in the alleged conspiracy, was specifically rejected by *Twombly*." *Total Benefits*, 552 F.3d at 436 (emphasis added).[3]

---

[3] *See also In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 541 F. Supp. 2d 487, 491-92 (D. Conn. 2008) (dismissing complaint containing no "reference to specific actions by a particular defendant at a particular time" or "specific wrongful acts of specific defendants").

In short, *Twombly* recognized two "borders" – one "between the conclusory and the factual" and another "between the factually neutral and the factually suggestive" – and required Section 1 allegations to cross *both* borders as to *each* defendant. *Twombly*, 127 S. Ct. at 1966 n.5, 1971 n.10. As discussed below, the Amended Complaint crosses neither as to Mueller.

### B. Carrier Has Not Pled That Mueller Itself Agreed to Join The Alleged U.S. Conspiracy.

Carrier baldly asserts that Mueller agreed not to compete with Outokumpu for Carrier's U.S. ACR business. (Am. Cplt. ¶ 6, Apx. 0022; Third Br. at 19.) Entirely absent from the Amended Complaint and Carrier's papers are facts concerning the "who, what, where, when, how and why" of Mueller's supposed agreement to join the claimed U.S. allocation conspiracy. *Total Benefits*, 552 F.3d at 437. Carrier thus has not moved from the conclusory to the factual.

Nor has Carrier alleged, as required by *Twombly*, that Mueller has engaged in anything but rational business conduct in not selling ACR tube to Carrier in the United States. Most basically, Carrier has not alleged even that Mueller was substantially in the business of supplying ACR tube, much less in the United States and in quantities or of a quality of interest to Carrier. Indeed, Carrier has alleged that only suppliers *other than Mueller* could meet its large capacity needs. (Am. Cplt. ¶ 5, Apx. 0022; Carrier Br. 4-5.) The Amended Complaint also

does not aver that Carrier requested Mueller to supply ACR tube or any reason that Carrier would have expected Mueller to supply its ACR needs.

Indeed, Carrier concedes that Mueller itself had no direct participation in any ACR cartel, including any U.S. cartel, when it resorts to three indirect "links" that supposedly connect Mueller to the alleged U.S. conspiracy. (Third Br. at 16-27.) Although those supposed links (Desnoyers' pre-acquisition conduct, an "opportunity" to conspire, and global-market allegations) are shown in Points II.C and D below to fall well short of plausibility, they also underscore the poverty of the Amended Complaint as to Mueller itself. Not a single fact is averred or argued that places Mueller even close to a U.S. ACR conspiracy.

### C. Mueller Cannot Be Liable For The Alleged U.S. Conspiracy Through Desnoyers.

#### 1. Allegations Relating to Desnoyers' Pre-Acquisition Conduct Cannot Support Liability Against Mueller For The Alleged U.S. Conspiracy.

Carrier claims that "[Mueller] is liable for the involvement of its subsidiary Desnoyers in the cartel." (Third Br. at 23.) Carrier is wrong. As an initial matter, Desnoyers is not a defendant in the action, and the claimed conduct for which Carrier asserts relief is limited to the supposed agreement by *Mueller* not to compete for Carrier's *U.S.* business. The Amended Complaint alleges no fact tying Desnoyers (or Mueller) to a conspiracy aimed at the United States, and the EC ACR Decision supplies none.

Next, Carrier alleges no conspiratorial activity by Desnoyers after its acquisition by Mueller. That is not surprising, as the EC ACR Decision found that Desnoyers' only alleged participation in the supposed conspiracy was prior to Mueller's acquisition in 1997 and that Desnoyers last attended a Cuproclima meeting in 1996.[4] (R. 56, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶¶ 91, 394, Apx. 0298, 0366.)

In addition, a parent can be imputed with liability for a subsidiary only where the parent exercises complete dominion and control over the subsidiary *at the time of the conduct in question*. Any imputation of liability to a parent from a subsidiary thus requires that (a) the parent exercise that control at the time of the conduct at issue, (b) the parent's control was used to commit the alleged wrong, and (c) the parent's control caused the injury at issue. *See IBC Mfg. Co. v. Velsicol Chem. Corp.*, No. 97-5340, 1999 WL 486615, at *4 (6th Cir. July 1, 1999); *see also Morgan v. Powe Timber Co.*, 367 F. Supp. 2d 1032, 1035-

[4] In its Second Brief, Mueller established that, where the EC ACR Decision conflicts with the Amended Complaint, the EC ACR Decision controls. (Second Br. at 29 n.9.) Carrier does not dispute that point, but argues only that the EC ACR Decision does not negate its claim that the Cuproclima conspiracy extended to the United States. (Third Br. at 14 n.6.) Thus left uncontested are Mueller's point and authorities that the EC's specific findings exonerating Mueller from the conspiracy found in the EC ACR Decision must defeat any allegation to the contrary in the Amended Complaint.

36 (S.D. Miss. 2005) (parent corporation not responsible for pre-acquisition conduct of subsidiary regardless of subsequent parent-subsidiary relationship).[5]

Of course, Mueller did not own Desnoyers at the time Desnoyers supposedly participated in Cuproclima, and therefore could not have exercised dominion or control over Desnoyers with respect to such conduct. Nor, then, could Mueller be liable for Desnoyers' conduct, even if the Amended Complaint plausibly alleged that such conduct was aimed at an allocation of Carrier's U.S. purchases.

In any event, liability could not be imputed to Mueller because Carrier has not alleged facts that would permit piercing Desnoyers' corporate veil. As this Court has noted, plaintiffs who seek to pierce the corporate veil face a daunting task because "the principle of piercing the fiction of the corporate veil is to be applied with great caution and not precipitately, since there is a presumption of corporate regularity. . . ." *Se. Tex. Inns, Inc. v. Prime Hospitality Corp.*, 462 F.3d 666, 675 (6th Cir. 2006) (internal quotation marks and citation omitted); *id.* 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)).

---

[5] Mueller hereby adopts the points and authorities in Mueller Europe's Fourth Brief that refute Carrier's effort to pierce Desnoyers' (and Mueller Europe's) corporate veil.

Carrier's Amended Complaint does not approach that strict standard. It conclusorily asserts that Mueller "controlled and directed the activities of Mueller Europe and Desnoyers after their acquisition to ensure [Mueller's] place at the table in the European meetings of the co-conspirators regarding the conspiracy." (Am. Cplt. ¶ 37, Apx. 0034.) That allegation speaks only to the separate plumbing-tubes conspiracy and says nothing of the corporate relationship between parent and subsidiary that is central to a veil-piercing claim.[6] *See, e.g.*, *Premier Pork L.L.C. v. Westin, Inc.*, No. 07-1661, 2008 WL 724352, at *7 (D.N.J. Mar. 17, 2008) (dismissing claim because plaintiff "failed to raise his right to pierce [subsidiary's] corporate veil above the speculative level" (citing *Twombly*, 127 S. Ct. at 1965); among the missing allegations were any concerning "which, if any, corporate formalities were disregarded.").[7]

---

[6] Nor can Mueller be responsible for Desnoyers' pre-acquisition conduct as a successor. The EC ACR Decision found, "Desnoyers was acquired by [Mueller] in May 1997 . . . without changing Desnoyers' corporate form." (R. 56, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 46, Apx. 0291.) Where the "[target] will become a wholly owned subsidiary of [acquirer] without any change in its corporate existence[,]. . . the rights and obligations of [target], the acquired corporation, are not transferred, assumed, or affected." Balotti & Finkelstein, *Del. Law of Corps. and Bus. Orgs.*, § 9.8 (3d ed. 1998).

[7] *In re Bulk Popcorn Antitrust Litigation*, 783 F. Supp. 1194 (D. Minn. 1991) (cited in Third Br. at 25), does not warrant a different result. There, the court denied defendant's motion for summary judgment because the acquiring company admitted it had "full operating control" over its newly acquired subsidiary and the court found sufficient evidence that the parent

### 2. Allegations Of An "Indirect Benefit" Cannot Support Liability Against Mueller For The Alleged U.S. Conspiracy.

Carrier further argues, with no authority, that Mueller's participation in the alleged conspiracy can be assumed because Mueller supposedly knew of, and received "at least a form of indirect benefit" from, Desnoyers' prior conduct, even though that conduct "might not constitute 'direct[] participat[ion]' in cartel meetings" by Mueller. (Third Br. at 25.) Under *Monsanto*, Carrier must allege that *Mueller* had "[a] conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764.

Supposed knowledge or "indirect" benefit does not meet the conscious-commitment standard. *See In re Welding Fume Prods. Liab. Litig.*, 526 F. Supp. 2d 775, 803, 805 (N.D. Ohio 2007) (". . . mere presence at the commission of a wrong, or failure to object to it, is not enough to charge one with responsibility for conspiring to commit the tortious act") (internal quotations omitted); 15A *CJS Conspiracy* § 17 (June 2008) ("mere knowledge, acquiescence or approval of a plan, without cooperation or agreement to cooperate, is not enough to make a person a party to a conspiracy; there must be intentional participation in transaction with a view to the furtherance of a common design.").

---

company itself had participated in the alleged conspiracy. *Id.* at 1198. Here, Carrier has conceded that Mueller had no participation in the alleged conspiracy, and any contention that Mueller had complete control of Desnoyers prior to its acquisition would be nonsensical.

In sum, Carrier cannot sustain its U.S. conspiracy claim against Mueller based upon Mueller's acquisition of Desnoyers.

### D. Neither The Plumbing-Tubes Conspiracy Nor Global-Market Allegations Can Tie Mueller To The Alleged U.S. Conspiracy.

#### 1. An "Opportunity" To Conspire Cannot Support Liability Against Mueller For The Alleged U.S. Conspiracy.

Carrier has repeated its effort to ground Mueller's participation in a supposed U.S. ACR allocation in the European plumbing-tubes conspiracy. (Third Br. at 26-27.) That effort fails as a matter of fact and law.

First, the EC identified no U.S. component to the European plumbing-tubes conspiracy and the Amended Complaint contains no such factual allegation. Indeed, the district court previously concluded that copying and pasting findings from the EC Plumbing Tubes Decision was not sufficient to support a U.S. conspiracy. *Am. Copper & Brass, Inc. v. Halcor, S.A.*, 494 F. Supp. 2d 873, 877 (W.D. Tenn. 2007) (affirming dismissal of U.S. Sherman Act claim on ground that "Plaintiffs have simply 'cut-and-pasted' into their complaint the collusive activities found by the E.C. to have taken place in Europe and tacked on 'in the United States and elsewhere'.").

Second, alleging an "opportunity" to conspire, as a matter of law, is not sufficient to sustain a claim of actual conspiracy. In *Twombly*, the Supreme Court refused to infer a conspiracy "[f]rom the allegation that the ILECs belong to

various trade associations." 127 S. Ct. at 1971 n.12. To do otherwise would be to require one "to devote financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy . . . just because he belonged to the same trade guild as one of his competitors when their [products] carried the same price tag." *Id.* *Twombly*'s observations flow directly from *Monsanto*'s teaching that agreement requires a "conscious commitment" to a common scheme, not simply an opportunity to agree. *See id.* at 1966, 1968 n.7; *Monsanto*, 465 U.S. at 764.[8]

Given the weakness of the supposed Desnoyers and plumbing-tube "links" to the U.S. conspiracy, Carrier reaches again for generalized global-market assertions to sweep Mueller into its U.S. conspiracy theory. As described below, that, too, is in vain.

**2. The Global-Market Allegations Cannot Support Liability Against Mueller For The Alleged U.S. Conspiracy.**

Mueller argued, with numerous supporting authorities, that Carrier's allegations of a global market were insufficient as a matter of law and fact to state a U.S. conspiracy against Mueller. (Mueller Second Br. at 48-53.) Carrier still cites no case that extended a European conspiracy to the United States based on a

[8] *See also Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 53 (3d Cir. 2007) ("[P]roof of opportunity alone is insufficient to sustain an inference of conspiracy."); *In re Travel Agent Comm'n Antitrust Litig.*, No. 1:03 CV 30000, 2007 WL 3171675, at *9 (N.D. Ohio Oct. 29, 2007) (same).

global market, thereby confirming the legal insufficiency of those allegations. Nor did Carrier, as a factual matter, plausibly rebut its own averments that Mueller purchased two companies located in Europe to expand operations into Europe and that potentially competing Asian manufacturers were absent from both Europe and the United States.

Lacking any supportive authority, Carrier persists in citing *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007) (Third Br. at 16-17), which affirmed the *dismissal* of a complaint much like Carrier's that attempted to allege a U.S. conspiracy based on a European conspiracy found by European authorities. Indeed, *Elevator* rejected the very pleading approach that Carrier employs here: "If it happened there, it could have happened here." 502 F.3d at 52.

Carrier nonetheless argues that its pleading supplies the allegations that were missing in *Elevator*. (Third Br. at 16-17.) Even assuming that supplying such allegations would suffice (which is contrary to a proper reading of *Elevator*[9]),

---

[9] The *Elevator dicta* did not constitute a holding that providing the missing allegations would suffice under *Twombly*. Indeed, the two cases cited in *Elevators* that included allegations of global marketing, fungible products, or price-monitoring did not contain sufficient U.S. contacts under the Sherman Act. *See Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267, 1270-71 (D.C. Cir. 2005) (failure to allege necessary proximate-cause relationship between domestic and foreign effects); *Dee-K Enters., Inc. v. Heveafil Sendirian Berhad*, 299 F.3d 281, 295 (4th Cir. 2002) (affirming verdict for defendants where conspiracy was targeted at a global market, but the "links to the United States [were] mere drops in the sea of conduct that occurred in Southeast Asia (and around the world).").

the Amended Complaint says nothing of the fungible products, intercontinental price-monitoring by defendants, or actual price movements in the United States that were referenced in the *Elevator dicta*. *Elevator*, 502 F.3d at 52.

Specifically, Carrier does not dispute that ACR tube is made to customer specifications and therefore is not fungible. Carrier also alleges nothing as to Mueller's (or Outokumpu's) monitoring of prices or actual price levels in the United States or elsewhere. Alleging that *Carrier* had a global purchasing strategy, that Outokumpu had a "global view of the market," or that defendants moved their employees from one location to another does not extend the Cuproclima conspiracy to the United States under *Elevator* or any other authority. (Third Br. at 17.)[10]

In addition, Carrier itself averred that Mueller purchased two European companies in 1997 to expand activities into the European marketplace. (Am. Cplt. ¶ 35, Apx. 0032-33.) Carrier also concedes that Asian manufacturers were not participating in Europe or the United States, despite the supposed

[10] Nor are Carrier's references to periodic instances of unspecified amounts of ACR tubing moving from one continent to another sufficient to allege a global market. *See generally Lantec, Inc. v. Novell, Inc.*, 306 F. 3d 1003, 1026-27 (10th Cir. 2002) (rejecting worldwide market where plaintiff did not "specifically address price data, the location and facilities of other producers, or any of the other factors cited by courts as relevant to determining the relevant geographic market," such as transportation costs, delivery limitations, and customer convenience and preference).

availability of inflated profits from the alleged cartel covering both continents. (*See* Third Br. at 18.) Those admissions – indeed affirmative allegations (Am. Cplt. ¶¶ 5, 35, Apx. 0022, 0032-33.) – defeat Carrier's assertion that all suppliers operated in a single, worldwide, integrated, seamless market. And even if, implausibly, that were so, Carrier's argument proves too much – even the Amended Complaint does not claim that every supplier in the world joined the supposed conspiracy.

More generally, Carrier avoids post-*Twombly* precedents from this Court (*see* Third Br. at 9, 19-21) and instead relies on out-of-circuit authorities. Even so, Carrier fails to liken its pleading to those that have survived motions to dismiss. For example, in *In re Flat Glass Antitrust Litigation*, No. 08-180, 2009 WL 331361 (W.D. Pa. Feb. 11, 2009), plaintiffs alleged that a conspiracy was carried out through a U.S. trade association and averred specific U.S. surcharges and price increases. *Id.* at *2-3; *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 34 (D.D.C. 2008) (complaint pled "who initiated the discussions . . . , what they proposed, the object of the alleged conspiracy, the fact that an agreement was reached among all four defendants, and where and when the agreement was reached."). The pleadings in those cases, and others like them, differ from Amended Complaint, which contains only conclusory, factually neutral allegations.

In short, Carrier has failed to tie Mueller to the U.S. conspiracy through its own conduct, Desnoyers' conduct, the plumbing-tubes conspiracy, or global-market allegations. The Amended Complaint should thus be dismissed with prejudice as to Mueller.

## II. CARRIER'S CLAIM AGAINST MUELLER IS TIME-BARRED.

Carrier concedes that its Amended Complaint is time-barred unless it "adequately alleged a fraudulent concealment claim." (Third Br. at 36.) As a matter of pleading law, the Amended Complaint is untimely as to Mueller because it has not alleged with particularity that: (1) Mueller affirmatively concealed *anything*, (2) Mueller's concealment prevented Carrier from discovering its purported claim until four years before Carrier filed this action, and (3) Carrier diligently investigated the possible existence of its purported claim through the time of discovery.

In short, Carrier has not pled why Mueller, through fraud, prevented it from filing its claim by March 2005 instead of March 2006.

### A. Carrier Must Plead Each Element Of Fraudulent Concealment With Particularity.

Carrier does not argue that it has alleged particularized facts of fraudulent concealment, but incorrectly asserts that generic allegations are

sufficient because this Court applies a lenient interpretation of Rule 9(b).[11] (Third Br. at 37.)

This Court consistently has required particularized factual allegations as to each element of fraudulent concealment. *See Gumbus v. United Food & Commercial Workers Int'l Union*, Nos. 93-5113, 93-5253, 1995 WL 5935, at *3 (6th Cir. Jan. 6, 1995) (emphasis in original) ("For tolling to be found, the plaintiffs must plead with particularity all the facts surrounding the fraudulent concealment of their claim. . . . It is important to note that *all* facts [as to fraudulent concealment] must be pleaded with particularity."); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) ("Under [Rule] 9(b), the party alleging fraudulent concealment must plead the circumstances giving rise to it with particularity.").

The heightened pleading standard underscores this Court's longstanding policy supporting the statute of limitations. *See, e.g., Hill v. U.S. Dep't of Labor*, 65 F.3d 1331, 1336 (6th Cir. 1995) ("It is . . . settled that equitable

---

[11] In support of its assertion that the Sixth Circuit "has rejected a strict reading of Rule 9(b)," Carrier cites to *Michaels Building Co. v. Ameritrust Co.*, 848 F.2d 674 (6th Cir. 1988), which does not contain the quoted language. In any event, this Court's analysis in *Michaels* was directed not toward a claim of fraudulent concealment but to a RICO claim based on mail fraud. *Id*. at 677. The *Michaels* Court noted that "it is important to stress that the information 'missing' from [the allegations of fraud in *Michaels*] is far outweighed by the sufficiency of the description of the [fraud] claim against the defendants." *Id.* at 680. That is not so here.

tolling based on fraudulent concealment is to be narrowly applied since statutes of limitation are vital to the welfare of society and are favored in the law.") (internal quotation marks omitted). That policy applies with particular force to such sophisticated parties as Carrier.

**B. Carrier Has Pled No Wrongful Concealment By Mueller.**

Unable to identify a single affirmative act of concealment by Mueller, Carrier attempts to attribute to Mueller the supposedly concealing acts undertaken during Desnoyers' purported pre-acquisition involvement in the European ACR conspiracy. (Third Br. at 38.) For the reasons discussed above, Carrier cannot attribute to Mueller responsibility for Desnoyers' alleged pre-acquisition conduct.[12]

In any event, Mueller *negated* any such concealment by notifying the EC in 2001 of a possible ACR conspiracy in Europe. Indeed, Mueller's cooperation with the EC *caused* the dawn raids and *alerted Carrier* to the probable existence of the European conspiracy on which Carrier based its complaint.

[12] Carrier's citation to *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517 (6th Cir. 2007), is of no assistance. *Scrap Metal* addressed not pleading requirements but a jury instruction that permitted the acts of co-conspirators to be imputed to the subject defendant. *Id.* at 538. Carrier's conspiracy allegations are conclusory, do not relate to Mueller, and cannot provide the bootstrap that Carrier seeks.

### C. Carrier Concedes That It Learned Of The Widespread Press Reports Of Possible ACR Cartel Conduct More Than Four Years Before Filing Suit.

Carrier does not deny that it learned of the widespread 2001 dawn-raid press reports more than four years before filing its claim, but asserts that the limitations period did not begin to run until December 2003. (Third Br. at 39-40.) Then, Carrier argues, the EC ACR Decision "provided Carrier with a wealth of information about the cartel that enabled a reasonable investigation that made this lawsuit possible." (*Id*. at 40) Carrier complains the 2001 press reports did not say "whether a conspiracy actually existed." (*Id*. at 40.)

Carrier's arguments betray a fatal misunderstanding of the law of inquiry notice. This Court has recently adopted a decision describing inquiry notice as occurring upon the arrival of only storm warnings, not thunder and lightning:

> inquiry notice is triggered by evidence of the *possibility of [a wrong], not full exposition of the scam itself*. . . . The plaintiff need only possess a low level of awareness; he need not fully learn of the alleged wrongdoing . . . the clock begins to tick when a plaintiff senses 'storm warnings,' not when he hears thunder and sees lightning.

*Greenburg v. Hiner*, 359 F. Supp. 2d 675, 682 (N.D. Ohio 2005) (internal quotation marks and footnote omitted) (emphasis added), *aff'd*, No. 3:03 CV 7036, 2006 U.S. App. LEXIS 6881, at *9 (6th Cir. Feb. 24, 2006) (adopting the district court opinion as the opinion of this Court).

Carrier's argument that it could not know whether a conspiracy actually existed until the publication of the EC ACR Decision asks not only for the arrival of thunder and lightning, but of a windswept rain as well. The law is not so indulgent and requires an affirmative response to storm warnings that Carrier has not pled.[13]

In addition, the EC ACR Decision did nothing more than confirm the cartel activity that was suspected in the dawn 2001 raids and press reports. Despite Carrier's reference to the "wealth of information" in the EC ACR Decision (Third Br. at 40), Carrier does not identify a single statement in that Decision that supports allegations of a U.S. allocation conspiracy. To the extent that Carrier concedes that the EC ACR Decision placed it on inquiry notice (*see id.*), so too must have the dawn-raid reports. *See Friedman v. Estate of Presser*, 929 F.2d 1151, 1159-60 (6th Cir. 1991) (knowledge of claim allegedly obtained from later event was no different from knowledge provided by earlier event).

Inquiry notice raises a duty to investigate a possible claim. *Greenburg*, 359 F. Supp. at 682. As discussed in Mueller's Second Brief (Mueller

---

[13] Carrier's supposed concern about "a *per se* rule that knowledge of a government investigation begins the limitations period" (Third Br. at 41) is unfounded. Here, the press reports were widespread and identified the possible cartel conduct on which Carrier bases its claim. They permitted Carrier to investigate its supposed claim to the same extent that Carrier purports to have investigated such claim after the EC ACR Decision was published in December 2003.

Second Br. at 64-65) and reviewed in Point II.D below, the Amended Complaint has not pled any such investigation following the 2001 dawn-raid reports. In the absence of such an investigation, the limitations period begins upon the receipt of inquiry notice. *Greenburg*, 359 F. Supp. at 682; *see also Hamilton County Bd. of Comm'rs v. Nat'l Football League*, 491 F.3d 310, 318 (6th Cir. 2007) ("With red flags flying," raised in part by press articles, plaintiff's failure to investigate defeated toll); *Friedman*, 929 F.2d at 1160 (failure to investigate suspicion or allege relevant circumstances defeated toll) (citing *Wood v. Carpenter*, 101 U.S. 135 (1879)); *Dayco*, 523 F.2d at 394 ("*Any fact that should excite his suspicion is the same as actual knowledge of his entire claim.* Indeed, the means of knowledge are the same thing . . . as knowledge itself.") (emphasis added) (internal citation and quotation marks omitted).

As pled by Carrier, the limitations period thus expired no later than March 2005, four years after the dawn-raid press reports alerted Carrier to the possibility of European ACR cartel conduct and one year before the filing of this action.

### D. Carrier Failed To Plead That It Diligently Investigated Its Purported Claim.

Finally, Carrier failed to plead facts, *all of which would be in its possession*, establishing its own diligent investigation before discovering its purported claim. Carrier admits that a single oral inquiry constituted the entirety of

its response to the dawn-raid reports. As perhaps "the single largest" purchaser of ACR tube in the world (Am. Cplt. ¶1, Apx. 0019-20.), Carrier claims that it was relieved of further inquiry because additional efforts supposedly would have been futile.[14] (Third Br. at 43-44.)

As a matter of pleading law, this Court does not permit the omission of diligence allegations.[15] Rather, a plaintiff must plead with particularity both its diligence and the circumstances explaining "*why [it] did not discover the alleged [illegality] earlier*":

> Plaintiffs [have] a duty to begin investigating the possibility of [illegality] when they bec[o]me aware of suspicious facts. . . . If plaintiffs conducted no inquiry[,] . . . knowledge of the [illegality] will be imputed as of the date the duty arose. Because Plaintiffs brought their suit [after the expiration of the limitations

---

[14] Carrier's repeated citation to the district court opinion in *State ex rel. Kelley v. McDonald Dairy Co.*, 905 F. Supp. 447 (W.D. Mich. 1995) is to no avail. The plaintiff in *Kelley* filed suit within three years of learning of the government investigation, not five as did Carrier, and thereby did not present an issue under the Clayton Act's four-year limitations period. *Id.* at 453.

[15] The authorities that Carrier cites are not to the contrary. In *Hazel v. General Motors Corp.*, No. 97-5086, 142 F.3d 434, 1998 WL 180522, at *3 n.6 (6th Cir. Apr. 8, 1998), for example, this Court noted that the claim for tolling based on fraudulent concealment had been *rejected* because "the defense of equitable tolling for fraudulent concealment may not be available where the plaintiff fails to exercise due diligence." And *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, an Eleventh Circuit case, decided a motion for summary judgment and did not address the pleading requirements for fraudulent concealment that are at issue here. 198 F.3d 823, 832 (11th Cir. 1999).

> period], *they must affirmatively plead circumstances indicating why they did not discover the alleged [illegality] earlier* and why the statute of limitations should be tolled. That is to say, Plaintiffs are not permitted to merely bring suit after the scheme has been laid bare through the efforts of others.

*Greenburg*, 359 F. Supp. 2d at 682 (internal citations and quotation marks omitted) (emphasis added), *aff'd*, 2006 U.S. App. LEXIS 6881, at *9.

To the same effect, this Court has stated that "[a plaintiff asserting a claim of fraudulent concealment] asks [the] court to override the important public policies behind statutes of limitations. . . . A plaintiff who requests the avoidance of these important objectives owes the courts, the public and his adversaries a duty of diligence in discovering and filing his lawsuit." *Campbell v. Upjohn Co.*, 676 F.2d 1122, 1128 (6th Cir. 1982).

The Amended Complaint does not plead facts sufficient to meet Carrier's "duty of diligence." *Id.* Nor does that point raise a fact issue, as Mueller has challenged the sufficiency of Carrier's *allegations*. Despite Carrier's self-proclaimed sophistication and worldwide presence (Am. Cplt. ¶ 18, Apx. 0026), the Amended Complaint is essentially silent as to Carrier's required acts of diligence or the reason that its claim is late.

For example, the Amended Complaint does not explain why Carrier did not use its central purchasing department and hire the same lawyers and economists in 2001 to investigate a possible U.S. allocation claim that it

supposedly did in 2004. Nor does the Amended Complaint say why, given its acknowledgement that the alleged conspiracy ended in 2001 (Am. Cplt. ¶ 2, Apx. 0020), an investigation begun in 2001 would not have yielded the same results as those purportedly produced by the investigation begun in 2004, or why Carrier could not have asserted the same claim *by 2005* that it asserted *in 2006*.

The Amended Complaint does not allege even why Carrier, before or after the dawn-raid reports, never asked KME, Wieland, Mueller, any Asian supplier, or other North American supplier (such as Wolverine) to bid on its U.S. business. Surely, Carrier's central purchasing department, upon learning of the ACR dawn raids, at least could have sought supply from another manufacturer, especially given Carrier's supposedly abiding concern that its European suppliers (KME and Wieland) were not bidding on its U.S. business. That step alone may have been more informative as to its claim of a purported U.S. conspiracy than was the entirety of the EC ACR Decision. (*See* Am. Cplt. ¶ 60, Apx. 0041-42 (Carrier's "centralized purchasing operations . . . would . . . ensure that Carrier . . . obtain[ed] the best price possible for its purchases from wherever the product could be obtained . . . [and] would collect data on sales prices being charged by suppliers throughout the world for use in negotiating supply contracts.").)

In *Dayco*, this Court emphasized that "[a]n injured party has a positive duty to use diligence in discovering his cause of action within the limitations

period. . . . If the plaintiff has delayed beyond the limitations period, he must *fully* plead the facts and circumstances surrounding his belated discovery." 523 F.2d at 394 (emphasis added). And this Court has quoted the Supreme Court's teaching of 130 years ago in *Wood*, 101 U.S. at 143, that "the delay which has occurred must be shown to be consistent with the requisite diligence." *Friedman*, 929 F.2d at 1160. That rule has particular force here, where a sophisticated plaintiff was alerted more than four years before filing suit to the very conduct on which it now bases its late claim. *Wood*'s description of the pleading there at issue fully applies to the Amended Complaint: "wanting in the averment of facts, which are indispensable to . . . sufficiency." *Wood*, 101 U.S. at 143.

Carrier cites no case in which this Court has allowed an unsubstantiated cry of futility to sustain a time-barred complaint that lacks allegations of diligence. Rule 9(b) and this Court's long and strong policy in favor of limitations makes such a pleading insufficient as a matter of law and subject to dismissal under the Rule 12(b)(6). *See, e.g.*, *Gumbus*, 1995 WL 5935, at *3-4.

## CONCLUSION

For the reasons set forth herein, in Mueller's Second Brief, in the Second and Fourth Briefs of Outokumpu, and the Fourth Brief of Mueller Europe (as applicable), the Judgment of the district court should be affirmed with prejudice due to Carrier's failure to state a plausible entitlement to relief under *Twombly* and

failure to allege fraudulent concealment with particularity as to a claim that is time-barred on its face.

Dated: New York, New York
May 1, 2009

WILLKIE FARR & GALLAGHER LLP

By: /s/ William H. Rooney
William H. Rooney
Kelly M. Hnatt

787 Seventh Avenue
New York, New York 10019
(212) 728-8000
wrooney@willkie.com
khnatt@willkie.com

WYATT, TARRANT & COMBS, LLP

Robert L. Crawford
1715 Aaron Brenner Drive, Suite 800
Memphis, Tennessee 38120
(901) 537-1052
lcrawford@wyattfirm.com

*Attorneys for Defendant-Appellee and Cross-Appellant Mueller Industries, Inc.*

**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 principal and response brief because this brief contains 6,654 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.

/s/ William H. Rooney
William H. Rooney
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8000
wrooney@willkie.com

Dated: May 1, 2009
New York, New York

## 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:

| | |
|---|---|
| Tim Wade Hellen [email]<br>[2 hard copies]<br>Farris, Mathews, Branan, Bobango, Hellen & Dunlap<br>One Commerce Square, Suite 2000<br>Memphis, TN 38103<br>twh@farris-law.com | David M. Schnorrenberg [ECF]<br>[2 hard copies]<br>Matthew F. Scarlato [email]<br>Crowell & Moring LLP<br>1001 Pennsylvania Avenue, N.W.<br>Washington, DC 20004<br>dshnorrenberg@crowell.com<br>mscarlato@crowell.com |
| Robert L. Crawford [ECF]<br>Wyatt, Tarrant & Combs, LLP<br>1715 Aaron Brenner Drive,<br>Suite 800<br>Memphis, TN 38120<br>lcrawford@wyattfirm.com | Eric Mahr [1 hard copy]<br>Caroline T. Nguyen [ECF]<br>Todd Hettenbach [1 hard copy]<br>David Olsky [email]<br>Wilmer Cutler Pickering Hale & Dorr LLP<br>1875 Pennsylvania Avenue, NW<br>Washington, DC 20006<br>eric.mahr@wilmerhale.com<br>david.olsky@wilmerhale.com<br>todd.hettenbach@wilmerhale.com<br>caroline.nguyen@wilmerhale.com |
| Jerome A. Broadhurst [ECF]<br>Apperson, Crump & Maxwell, PLC<br>6000 Poplar Avenue, Suite 400<br>Memphis, TN 38119<br>jbroadhurst@appersoncrump.com | Michelle D. Miller [email]<br>Wilmer Cutler Pickering Hale & Dorr LLP<br>60 State Street<br>Boston, MA 02109<br>michelle.miller@wilmerhale.com |

/s/ William H. Rooney
William H. Rooney
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8000
wrooney@willkie.com

Dated: May 1, 2009
New York, New York