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

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CARRIER CORPORATION, ET AL.,
Plaintiffs-Appellants,

v.

OUTOKUMPU OYJ, ET AL.,
Defendants-Appellees.

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

FINAL FOURTH BRIEF OF DEFENDANTS-APPELLEES CROSS-APPELLANTS OUTOKUMPU OYJ; OUTOKUMPU COPPER PRODUCTS OY; OUTOKUMPU COPPER FRANKLIN, INC.; AND OUTOKUMPU COPPER (U.S.A.), INC.

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INTRODUCTION

Carrier's Amended Complaint ("Complaint") asserts a Sherman Act Section 1 claim based principally—if not exclusively—on a European Commission ("EC") decision describing anticompetitive conduct by members of the Cuproclima Quality Association for ACR Tubes ("Cuproclima"). Cuproclima, as the EC Decision makes clear, was an exclusively European trade association found by the Commission to have been used by its members—all European producers of ACR tubing—to fix European prices and allocate European customers and European markets in violation of EC competition law. The EC Decision does not speak to anticompetitive conduct occurring in, aimed at, or affecting the United States, nor does it support any inference of such conduct.

Although now it is obvious, Carrier's original and amended complaints were less than candid about the extent of their reliance on the EC Decision and the extent to which Carrier had simply lifted language from that decision and inserted it into its Complaint, in the process deleting references to the exclusively European focus of the conduct reported by the EC and replacing them with conclusory statements claiming U.S. connections. *Compare, e.g.*, R. 56, EC Decision, Mueller Mot. to Dismiss, Ex. 2 to Wax Dec. ¶79, JA0296 ("EC") ("[i]mplementation was ensured through a market leader arrangement *for European territories* and key customers" (emphasis added)) *with* R.46, Amended Complaint ("Compl.") ¶72,

JA0044 ("[i]mplementation was ensured through a 'market leader' arrangement *for certain territories* and key customers" (emphasis added)).

As its opinion makes clear, the district court was disturbed by what it viewed as Carrier's illegitimate pleading tactics. The court found that the Carrier plaintiffs "relied entirely on facts from the EC decisions peppered with language from the Sherman and Clayton Acts and conclusory statements about a price-fixing conspiracy in the U.S.," R.93, Order of Dismissal 6, JA0926 ("Order"), and that they "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.'" *Id.* Accordingly, the district court dismissed Carrier's Complaint by invoking the "substantiality doctrine," which reflected its view that Carrier's Complaint "has no substance of its own but rather illegitimately borrows its substance entirely from elsewhere" and, as such, "is essentially a work of fiction." *Id.* at 9, JA0929.

While, as explained in Outokumpu's opening brief, the district court did not err in its application of the substantiality doctrine, it in some sense went further than necessary to address the shortcomings of Carrier's Complaint. It went further than necessary because—even putting aside the district court's view of Carrier's conduct and credibility in pleading its claims in this case—Carrier's Complaint simply fails to state a plausible Section 1 claim under Rule 12(b)(6) and, in

particular, under the Supreme Court's re-articulation of that standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

The EC Decision clearly provides the primary, if not exclusive, factual basis for Carrier's claim and, accordingly, is properly part of the pleadings in this case. As such, where Carrier's allegations contradict or are inconsistent with the EC Decision, that Decision controls and supersedes Carrier's allegations as a matter of law. Carrier's principal claim is that the Cuproclima cartel allocated Carrier's European business to KME and Wieland, in exchange for the allocation of Carrier's U.S. business to Outokumpu. That conclusory allegation is squarely inconsistent with the EC Decision's account of the Cuproclima cartel, and therefore should be rejected. Carrier's argument that the Court should ignore the absence of any mention of U.S. conduct or effects in the EC Decision because the U.S. market is beyond the Commission's interest and jurisdiction does not apply to this market allocation allegation at the center of Carrier's case. Indeed, if, as one of the largest worldwide purchasers of ACR tubing, Carrier's business—including its European business—had been allocated among members of the Cuproclima cartel, that aspect of the cartel would have been central to the EC Decision, and is simply not a subject that Carrier can shrug off as outside of the Commission's interest or jurisdiction.

But even accepting Carrier's position that, at least, "there is nothing in the E.C. Decision that undermines the plausibility of [Carrier's] allegations," Third Br. 13, that alone is not enough to sustain a Sherman Act claim. Instead, under *Twombly*, Carrier has the burden to allege facts which, taken as true, would affirmatively support its Section 1 claim, and which would make plausible the notion that the Cuproclima cartel extended to the United States in ways not recognized or identified by the European Commission. Carrier's efforts to meet this burden are exceedingly weak, consisting of just three arguments: *first*, Carrier claims that the ACR tubing market is a worldwide market; *second*, it claims that KME and Wieland's entry into the U.S. ACR market in 2003 somehow demonstrates that they previously had refrained from entry pursuant to the Cuproclima cartel; and, *third*, it claims that a redacted excerpt of a fax mentioned in the EC Decision that includes the words "Global Agreement" makes plausible, as opposed to merely conceivable, that the Cuproclima cartel extended to the United States.

These three slender reeds are far from sufficient to meet the pleading requirements of Rule 12(b)(6) and *Twombly*. The notion that there is a single worldwide market for ACR tubing is belied by Carrier's own allegations in its Complaint and submissions. The entry of KME and Wieland into the United States some two years after the EC's dawn raids—and two years after the complete

dissolution of Cuproclima—says nothing about whether their failure to enter earlier was part of a market allocation agreement. And a single, redacted excerpt from a fax hardly supplies the kind of factual "heft" that *Twombly* requires.

Accordingly, if this Court were to conclude that the district court erred in dismissing Carrier's Complaint for lack of subject matter jurisdiction, it should nevertheless dismiss that Complaint with prejudice for failure to state a claim under Rule 12(b)(6) and/or dismiss Carrier's claims against defendants Outokumpu Oy and Outokumpu Copper Products Oyj under Rule 12(b)(2) for lack of personal jurisdiction pursuant to this Cross-Appeal.

ARGUMENT

I. CARRIER'S COMPLAINT FAILS TO STATE A CLAIM UNDER THE SHERMAN ACT

While Carrier appears now to concede that the EC Decision does not *support* its allegations of a U.S. component to the Cuproclima cartel, it contends that the Commission's silence on the issue does not foreclose its own conclusions with respect to U.S. conduct. But Carrier's principal allegation—that the Cuproclima cartel allocated Carrier's European business to KME and Wieland in exchange for the allocation of Carrier's U.S. business to Outokumpu—falls squarely within the subject matter so comprehensively addressed in the EC's decision. Moreover, even if the EC Decision itself does not *require* dismissal, it certainly does not *support* Carrier's claim. Instead, Carrier must come forward with something more

in order to satisfy Rule 12(b)(6) and *Twombly*. Specifically, Carrier "must allege 'enough factual matter ... to suggest that an agreement was made,'" in this case, an agreement to allocate Carrier's U.S. business to Outokumpu in exchange for the allocation of Carrier's European business to KME and Wieland. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008) (citing *Twombly*, 550 U.S. at 556-557). Its failure to do so here is fatal to its claim.

A. The EC Decision Makes Clear That There Was No U.S. Component To The Cuproclima Cartel

1. Where Carrier's Complaint Is Inconsistent With The EC Decision, The EC Decision Controls

Carrier no longer disputes that "the Court may consider the E.C. Decision because it is referenced in Carrier's Complaint." Third Br. 10 n.3.[1] The EC Decision is thus part of the pleadings and squarely before this Court. *See Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997) ("[D]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.") (punctuation and citation omitted).

[1] This is a drastic reversal. Carrier previously insisted that the district court's consideration of the EC Decision was error and indeed premised its Rule 12(b)(1) position on that argument. *See* First Br. Section I.C.

Carrier also no longer disputes that the EC Decision fails to provide factual support for any assertion of anticompetitive conduct or effect in the United States. *See, e.g.*, Third Br. 13-14 (acknowledging "E.C. Decision's silence as to whether these European customers' U.S. business was also allocated"); *id*. at 13 (conceding that "the E.C. may not have spoken about the agreements related to U.S. sales activity"). But Carrier nevertheless contends that "[t]he EC Decision *does not preclude* Carrier from alleging the existence of a conspiracy broader than that reported by the E.C." *Id*. at 10 (emphasis added); *see also id*. at 10-11 ("there is nothing contained in the E.C. Decision that undermines Carrier's Section 1 claim").

Contrary to Carrier's assertions, however, the effect of the EC Decision on Carrier's Complaint is neither positive nor neutral. Instead, where Carrier's allegations contradict or are inconsistent with the EC Decision, that Decision controls and supersedes Carrier's allegations as a matter of law. This Court has held that documents that "are referred to in the plaintiff's complaint and are central to her claim" are "considered part of the pleadings" when a defendant attaches them to a motion to dismiss. *Weiner*, 108 F.3d at 89. "Otherwise, a plaintiff with a legally-deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document upon which it relied." *Id.* "[T]o the extent that [such] documents contradict the allegations in the complaint, the former controls."

Venture Assocs. Corp. v. Zenith Data Sys. Corp., 812 F. Supp. 788, 790 (N.D. Ill. 1992); *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454 (7th Cir. 1998) (noting "well-settled rule" that "the exhibit trumps the allegation" when contradictory).

In this case, the inconsistency of Carrier's allegations about a U.S. dimension to the Cuproclima cartel with the EC Decision is so fundamental as to require the rejection of those allegations and dismissal of the Complaint. In particular, the EC Decision repeatedly emphasizes that Cuproclima concerned only European customers and markets, and makes no mention at all of any U.S. component. *Compare, e.g.*, EC ¶79, JA0296 ("[i]mplementation was ensured through a market leader arrangement *for European territories*" (emphasis added)) *with* Compl. ¶72, JA0044 ("[i]mplementation was ensured through a 'market leader' arrangement *for certain territories*" (emphasis added)). *See* Second Br. 5-19, 27-32. The exclusively European focus of Cuproclima was confirmed in a letter submitted to the district court by the Director of the EC's Cartels Directorate, confirming that "[Cuproclima] concerns only an infringement of the European competition rules and ... its scope is limited to the European territory." R.76, Letter from Kirtikumar Mehta, Director, Directorate F: Cartels, Competition DG,

European Commission, JA0919 .[2]

Carrier asserts two arguments in response. *First*, it insists that the EC Decision's failure to mention any U.S. dimension to Cuproclima should not be construed against it because non-European conduct and effects "lie outside of the scope of [the EC] Decision." *See, e.g.*, Third Br. 10 (quoting EC ¶229, JA0332). However, the precise allegation at the core of Carrier's claim—that "[p]ursuant to the cartel's agreement, Carrier's business in the United States was allocated to the Outokumpu defendants [and that in] return, other co-conspirators ... were allocated Carrier business in Europe," Compl. ¶4, JA0021—is a *quid pro quo* allocation directly involving European commerce. Such an allocation agreement (had it existed) would have been central to the Commission's investigation and—as prior EC Decisions evince—would have been fully discussed. *See, e.g.*, EC Choline Chloride Decision, Exhibit 2 to Outokumpu's Reply, ¶68, JA0721 (detailing "agreement for the European producers not to export to the North American market and for the North American producers not to export to the European

[2] Carrier does not dispute the substance of the Mehta letter, but asks that this Court not consider it for procedural reasons. Although the letter was not necessary to the district court's ruling, and is not necessary on appeal, it is properly part of the record below, and this Court may consider its substance. *See In re Chocolate Confectionary Antitrust Litig.*, 2009 WL 560601, *21 (M.D. Pa. March 4, 2009) (court can "consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case") (punctuation and citation omitted).

market").

Second, Carrier contends that its bare allegations can overcome these inconsistencies, asserting that "while the EC may not have spoken about the agreements related to U.S. sales activity, Carrier has." Third Br. 13. Carrier, in fact, protests that requiring it to allege facts about "communications in which the U.S., as opposed to just Europe, was discussed" would amount to "impos[ing] a heightened pleading standard on Carrier." *Id*. at 14.

Carrier's argument betrays a deep misunderstanding of *Twombly*'s pleading requirements, and its assertion that it is entitled to proceed to discovery because nothing "precludes" its allegations should be rejected. The absence of a negative does not prove a positive, and silence cannot "nudge[a] claim[] across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Moreover, even if the EC Decision's treatment of U.S. conduct or effects could be construed as mere silence, Carrier's Complaint should still be dismissed because its U.S. allegations constitute unwarranted factual inferences. *See, e.g.*, *Total Benefits Planning Agency*, 552 F.3d at 434 ("court need not ... accept unwarranted factual inferences" and affirming 12(b)(6) dismissal). There simply is no factual basis for tacking "in the United States" onto the Commission's findings concerning an exclusively European cartel. *See* Order 6, JA0926. On Carrier's own terms, its Sherman Act claim remains but one of myriad "theoretical possibilities" and requires dismissal.

See In re Elevator Antitrust Litig., 502 F.3d 47, 50-51 (2d Cir. 2007); *see also Bishop v. Lucent Tech., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008) ("Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice.").

2. Those Cases In Which Courts Have Found Foreign Conduct To Support Allegations Of U.S. Conspiracy Are Distinguishable

Lacking factual support for a U.S. conspiracy, Carrier asks that its claim be "viewed in the context that Defendants have admitted that they engaged in market allocation in Europe." Third Br. 21. But this "if it happened there, it could have happened here" argument has been soundly rejected, *see Elevators*, 502 F.3d at 52, and Carrier's attempts to align this case with *Flat Glass* and *Chocolate Confectionary* are inapposite.

While plaintiffs in *Flat Glass* referenced an EC cartel decision that—like here—found no conspiratorial activities outside of Europe, they did not simply cut-and-paste from that decision and then baldly allege domestic effects. Instead, they carefully alleged an independent U.S. conspiracy with dozens of specific factual allegations of U.S. conduct affecting the U.S. market. *Flat Glass* Compl. A3-A4, A13-A15, A15-A28. As the district court there concluded, *Flat Glass* was "not a case where [p]laintiffs rely solely on the decision of the European Commission to assert a domestic conspiracy or a solely parallel conduct case." *In re Flat Glass Antitrust Litig.*, 2009 WL 331361, *2 (W.D. Pa. Feb. 11, 2009).

The *Flat Glass* plaintiffs alleged, for example, facts about individual defendants' behavior broken down by U.S. region, *Flat Glass* Compl. A16-A17; specific anticompetitive conduct through meetings of *American* trade associations, *id.* A18; and a domestic monitoring and implementation mechanism through the New York Mercantile Exchange (NYMEX), *id.* A16-A18. *See also id.* A13-A17 (explaining that U.S. market particularly conducive to collusion); *id.* A17-A20, (detailing defendants' agreements to reintroduce collusive surcharges in U.S.), *id.* A20-A23 (explaining how defendants imposed lockstep surcharges on U.S. customers).

In this context, the EC *Flat Glass* decision served only the limited purpose of suggesting that given (i) market similarities between Europe and the U.S., (ii) the overlap of participants in the two markets, and (iii) the success of the cartel in Europe, a similar cartel in the United States was also plausible. *Flat Glass* Compl. A32-A33. Here, Carrier alleges none of the U.S. conduct found in the *Flat Glass* complaint, and relies instead on the EC Decision for virtually *all* of its substantive allegations of unlawful conduct.

Carrier's reliance on *Chocolate Confectionary* is similarly misplaced. There, too, the plaintiffs alleged detailed facts concerning a *separate* U.S. conspiracy and asserted findings concerning a related Canadian conspiracy only as support for the plausibility of their U.S. claim. They did not—as Carrier must—

stake their claim on alleged spill-over effects from a distinct foreign conspiracy based on vague allegations of a global market. *See Chocolate Confectionary*, 2009 WL 560601, at *7.

The *Chocolate Confectionary* plaintiffs provided details and statistics about the alleged U.S. conspiracy, including "three contemporaneous and nearly identical price increases" in the U.S. market, *id.* at *4-5, *24 n.46, and described a U.S. market "ripe for collusion, punctuated by declining demand and product saturation," *id*. at *1-5, *24 n.46. They further alleged that the exact same players found guilty in Canada were the dominant players in the U.S. market, *id*. at *1-2, and that those defendants had, among other things: "created North American divisions that oversee [both] U.S. and Canadian operations," *id.*; "aggregate[d] operations in the United States [and] Canada," *id.* at *3; and "monitored pricing in both the United States and Canada," *id*. at *24 n.46. The *Chocolate Confectionary* plaintiffs further alleged that the U.S. and Canadian markets "are tightly interwoven and consist of homogeneous, interchangeable chocolate candy products," *id.* at *2, and offered trade statistics to demonstrate the substantial amount of commerce in chocolate between the two countries. *See id.* ("American manufacturers ... supply approximately 45% of Canada's chocolate candy imports" and much of chocolate imports into U.S. "originated in Canada").

In the context of such particularized pleadings of U.S. conduct, the court concluded that a price fixing conspiracy in Canada "enhances the plausibility of the alleged U.S. price-fixing conspiracy" because of the "operational and structural similarities" between the two chocolate candy markets. *Id*. at *23-24.

Carrier's case, then, remains most akin to *Elevators*. Like Carrier, plaintiffs in *Elevators* asserted a conspiracy in Europe that "is alleged to reflect the existence of a worldwide conspiracy." *Elevators*, 502 F.3d at 51. Like Carrier, they pled that "even if the misconduct took place only in Europe, the market in elevators is a 'global market, such that prices charged in the European market affect the prices in the United States and vice versa.'" *Id.* Like Carrier, they provided no statistics or meaningful support for allegations of a global market. And like Carrier, they advanced only conclusory allegations of U.S. conduct or effects. *See id*.

The Second Circuit affirmed dismissal, holding that plaintiffs had "provide[d] an insufficient factual basis for their assertions of a worldwide conspiracy affecting a global market." *Id*. at 52. "'Allegations of anticompetitive wrongdoing in Europe,' standing alone, are not sufficient to state a conspiracy involving the United States 'absent any evidence of linkage between such foreign conduct and conduct here.'" *Id*. The same result is appropriate here.

B. Those Few Allegations On Which Carrier Relies Outside Of The EC Decision Are Insufficient To Sustain Its Complaint

Even if not foreclosed by the EC Decision, Carrier still must come forward with additional factual allegations "plausibly suggesting (not merely consistent with)" an agreement with respect to the United States. *Twombly*, 550 U.S. at 558. Carrier offers only three allegations in its attempt to meet this burden: (i) the alleged global nature of the ACR tubing market and its participants, Compl. ¶101(a)-(d), JA0050; (ii) KME and Wieland's entry into the U.S. ACR market in 2003, *id.* ¶101(e)-(f), JA0050-0051; and (iii) an excerpt from a fax, *id.* ¶101(g), JA0051. None of these—either alone or taken together—amount to more than a theoretical "set of facts" under which Cuproclima's European activities *might* have also been aimed at U.S. commerce; *Twombly*, however, requires more.

1. Carrier Fails To Allege Facts Sufficient To Show A Worldwide Market For ACR Tubing

Carrier attempts to convert the exclusively European conduct set out in the EC Decision into a U.S. treble damages claim by contending that the geographic market for ACR tubing is worldwide in scope. Through this worldwide market definition, Carrier argues that "[p]rices in the United States had to be and were maintained at levels comparable to those fixed in other regions in order to maintain the price levels in Europe and elsewhere." Compl. ¶101(d), JA0050. In other words, if the conspiracy were not worldwide, Carrier would have been able to turn

to alternative, U.S. (or Asian) sources of supply in response to supracompetitive cartel prices in Europe. Carrier's worldwide market argument fails, however, both as a matter of law and because the facts alleged in Carrier's Complaint and in its submissions below suggest just the opposite, *i.e.*, that the U.S., Asian, and European ACR markets operated quite independently of one another.

First, as a matter of law, Carrier's conclusory allegation of a worldwide market cannot supply the U.S. connection it seeks. *See Elevators*, 502 F.3d at 52 ("Without an adequate allegation of facts linking transactions in Europe to transactions and effects here, plaintiffs' conclusory allegations do not 'nudge [their] claims across the line from conceivable to plausible.'"); *In re Graphite Electrodes Antitrust Litig.*, 2007 WL 137684, *4 (E.D. Pa. Jan. 16, 2007) ("Most courts addressing this issue have concluded that such allegations, describing a 'single, unified global [price-fixing] conspiracy' that could not be maintained without price-fixing in the United States market" do not supply sufficient U.S. domestic effects); *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1106-1107 (S.D.N.Y. 1984) (speculation about spillover effect on domestic commerce from a "worldwide cartel" does not supply sufficient U.S. domestic effects).

Second, Carrier's own submissions below provide industry views that the European and North American ACR tubing markets "operated 'self sufficiently,'"

with imports limited to "filling market shortfalls."[3] R.61, Exhibit 1 to Carrier's Response, JA0455. These views are supported further by the fact that most Cuproclima members had no presence in the United States during the relevant period, *see* EC ¶9, JA0284; Compl. ¶7, JA0022-0023, and there were several viable U.S. competitors who had no European presence. For example, another of Carrier's exhibits below states that Wolverine Tube, Inc. held a "40-percent market share in copper alloy tubing in the United States" in 1996, and that "several [U.S.] domestic tube manufacturers" were expanding. R.61, Exhibit 37 to Carrier's Response, JA0519. Wolverine is not mentioned in the EC Decision even once, and it is simply implausible that the major European ACR producers could cartelize the U.S. market without the participation of a player as significant as Wolverine, not to mention the other U.S. producers who were not part of Cuproclima. *Id.*

Third, Carrier's assertion of a worldwide market is further undermined by the existence of the Asian ACR producers, who according to Carrier, despite being "potential competitors," Compl. ¶5, JA0022, "did not supply customers outside of their region because demand in Asia was so high that they did not need to do so." Third Br. 18. If Carrier's allegation of a single worldwide market were plausible, it would have been able to turn to these Asian producers (or to U.S. producers like

[3] *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("such practical indicia as industry or public recognition" useful in defining market boundaries).

Wolverine) in response to supracompetitive prices in Europe. That it failed to do so, particularly in light of its ability to "collect data on sales prices being charged by suppliers throughout the world" to ensure it obtained "the best price possible," Compl. ¶60, JA0042, undermines entirely its alleged worldwide market definition.

Finally, the lack of an economic relationship between the U.S. and European ACR markets is shown vividly by the dearth of evidence Carrier provides concerning commerce between these markets. Carrier alleges it is "one of the largest purchasers—if not the single largest—of ACR Copper Tubing … in the United States, Europe, and elsewhere …." Compl. ¶1, JA0019. Yet, in a Complaint containing allegations beginning as early as May 1988 and continuing up to and through at least 2003, Carrier provides *only one* example of its having purchased ACR tubing from a European supplier for use in the United States, and that example is itself suspect: Carrier alleges that a European ACR producer—not one of the defendants in this case—sold an undisclosed amount of ACR tubing to a company called ICP at an undisclosed date. Compl. ¶51, JA0038. Carrier apparently acquired ICP in 1999, although it does not reveal whether ICP's European purchase took place before or after that date. *Id.* In any event, that the world's largest purchaser of ACR tubing can point to *only one* purchase of an *undisclosed* amount of ACR tubing at an *undisclosed* point in time over a period of

at least 15 years is simply insufficient to establish a U.S. dimension to the Cuproclima cartel, both before, and especially after, *Twombly*.

2. KME's And Wieland's 2003 Entry Into The U.S. Market Cannot Resurrect Carrier's Sherman Act Claim

In its Third Brief, Carrier still cannot explain why—if their prior failure to compete was due to Cuproclima—KME and Wieland would have waited *two years* after Cuproclima disbanded before entering the U.S. market to compete for Carrier's U.S. business. Compl. ¶69, JA0044. "*Res ipsa loquitur* is not a theory of antitrust injury, and it surely is not one after the Supreme Court's decision in *Bell Atlantic*, which set out to eliminate this kind of loose antitrust pleading." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 452 (6th Cir. 2007). *See also Twombly*, 550 U.S. at 569 ("Firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." (quoting Areeda & Hovenkamp ¶307d, at 155 (Supp. 2006))).[4]

Instead of responding, Carrier argues that, regardless of how likely alternative explanations may be, its "direct allegations that these market dynamics

[4] Carrier's reliance on *Flat Glass* is wholly misguided. *See* Third Br. 20-21. As even Carrier notes, the complaint in that case "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 EC investigation." *In re Flat Glass Antitrust Litig.*, 2009 WL 331361, *2 (W.D. Pa. Feb. 11, 2009). An end that is "contemporaneous" with the "commencement of an EC investigation" is a far cry from the two-year delay Carrier asserts here. *See* Compl. ¶7, JA0022-0023.

occurred *pursuant to* a cartel" ought to suffice. Third Br. 19-20. But *Twombly* addresses this issue head on, and makes clear that "direct allegations"—in other words, bare conclusions—will not suffice. The *Twombly* plaintiffs, too, alleged that the defendants in that case allocated markets. *See Twombly* Compl. A54-A61. Plaintiffs there detailed specific defendants' failure to compete in particular geographic areas, even when doing so would have been easy and profitable, *id*. A55-A56, and presented "especially attractive business opportunit[ies]," *id*. A55. The *Twombly* plaintiffs directly alleged that such failure to compete "would be anomalous in the absence of an agreement among [defendants] not to compete with one another," *id*.; and that "[i]n the absence of an agreement not to compete, it is especially unlikely that there would have been no efforts by surrounding and dominant [defendants] to compete in such surrounded territories," *id.* A55-A56.

The Supreme Court rejected the *Twombly* plaintiffs' complaint, noting that "the complaint itself gives reasons" to disbelieve the allegations and concluded that "antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim." *Twombly*, 550 U.S. at 568-569. Here, Carrier's attempt to rely on the failure of European-based ACR producers to enter the U.S. market is far weaker, and should be rejected for the same reasons.[5]

[5] In a half-hearted effort to overcome this point, Carrier suggests that any

3. An Excerpt Of A Redacted Fax Containing The Words "Global Agreement" Cannot Resurrect Carrier's Sherman Act Claim

Carrier's attempt to transform the 103-page EC Decision's single reference in a partially-redacted fax to an unidentified "Global Agreement" into what it now characterizes as "[d]ocumentary evidence reflect[ing] the existence of a global conspiracy" underscores the weakness of its claim. Compl. ¶101(g), JA0051. As an initial matter, those words are contained in an excerpt of a partially-redacted fax and—to achieve Carrier's desired meaning—must be plucked entirely out of context. *See* Second Br. 49-50. Lacking any other shred of evidence, however, *see* Third Br. 10 (acknowledging "absence of any additional evidence as to the cartel's activities outside of Europe"), Carrier now describes this excerpt as "evidence found by the EC ... as part of the cartel," *id*. at 10. But the redacted excerpt itself (as with the rest of the EC Decision) discusses only European markets and never suggests that the referenced "Global Agreement" either involved non-European territories or indeed even constituted an anticompetitive agreement. *See* EC ¶144, JA0312. Carrier's characterization of the fax is inconsistent not only with the EC Decision itself, which does not speak of any U.S. connection, but with the letter

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"anticompetitive landscape continued until at least near the time of the publication of the EC Decision," two years later. *See* Third Br. 20. But it is implausible that the Cuproclima cartel persisted for two years after the EC's dawn raids and the dissolution of Cuproclima in March 2001, and after both Mueller and Outokumpu had begun extensive cooperation with the Commission by April 2001. *See* EC ¶¶16, 56-59, JA0285, JA0293-0294.

submitted to the district court by Director Mehta, confirming that the EC's findings were "limited to the European territory."

But even if this stray reference had the significance that Carrier assigned to it, it still fails to satisfy *Twombly*. Plaintiffs in *Twombly* offered more—and indeed more particularized—factual allegations, and still the Supreme Court held that their complaint failed to state a Section 1 claim. For example, plaintiffs offered a quote from a defendant's CEO stating that "it would be fundamentally wrong to compete in [a co-defendant's] territory." *Twombly* Compl. A56. The CEO added that such competition "might be a good way to turn a quick dollar but that doesn't make it right." *Id.* Even this public communication of a CEO's view that the defendants in that case should not compete in one another's territories was held to be inadequate by the Supreme Court, because "[a]lthough in form a few stray statements speak directly of agreement," *Twombly*, 550 U.S. at 564, "plaintiffs had not "raise[d their] right to relief above the speculative level," *id.* at 556. Despite having alleged more than Carrier has here, the Supreme Court held that plaintiffs' "'plain statement' [did not] possess enough heft to show that [they were] entitled to relief," *id.* at 557, and ordered dismissal.

II. CARRIER'S CLAIM IS TIME-BARRED

It is unusual and extreme for a court to allow a plaintiff to litigate a claim that is barred by the statute of limitations. *See, e.g., Akron Presform Mold Co. v.*

McNeil Corp., 496 F.2d 230, 233 (6th Cir. 1974). A plaintiff seeking such relief through the fraudulent concealment doctrine must plead with particularity "the facts and circumstances surrounding his belated discovery[,] and the delay which has occurred must be shown to be consistent with the requisite diligence." *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (punctuation and citation omitted); *see also Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 850 (6th Cir. 2006) (affirming dismissal where plaintiff "failed to plead fraudulent concealment with particularity"); *Pinney Dock & Transport Co. v. Penn. Cent. Corp.*, 838 F.2d 1445, 1465 (6th Cir. 1988) (requiring "distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made").

The relevant circumstances here must include the fact that Carrier is one of the world's largest and most sophisticated purchasers of ACR tubing, Compl. ¶1, JA0019, with "plants throughout the world to ensure that Carrier was obtaining the best price possible for its purchases from wherever the product could be obtained," *id.* ¶60, JA0041-0042. Given its sophistication and wealth of resources, Carrier must provide a compelling explanation for why it failed to file a timely complaint.

A. Carrier Was On Inquiry Notice As Of March 2001

Carrier does not deny that it was aware of the Cuproclima cartel as early as March 2001, when newspaper articles reported that the EC had raided the headquarters of its chief suppliers of ACR tubing. *E.g.*, *European Copper Industry Investigated*, Exhibit 9 to Outokumpu's Motion, JA0426 (*New York Times* reported that EC investigating whether "there was evidence of a cartel and other illegal practices concerning price fixing and market sharing on copper tubes and fittings."). Indeed, one of Carrier's employees apparently knew enough about the Cuproclima cartel in 2001 to ask a representative of an (unnamed) defendant "whether there had in fact been any wrongdoing and what, if any, impact it had on Carrier." Compl. ¶108, JA0053. Accordingly, Carrier had an obligation to diligently investigate its potential claim in March 2001.[6]

B. Carrier Failed To Allege Reasonable Diligence

Carrier alleges only one act of investigation within the first few years of the limitations period, and that allegation—of an offhand question by a former Carrier employee to an unidentified employee of an unknown ACR supplier at some unspecified date prior to 2003—is not sufficiently detailed to satisfy either the pleading requirements of Rule 9(b) or the diligence requirements of *Dayco*.

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[6] This Circuit requires plaintiffs to plead diligence regardless of whether such diligence necessarily would have led to a successful claim at the time that the plaintiff was on inquiry notice. *See Dayco*, 523 F.2d at 394.

Moreover, the alleged refusal of the unnamed employee to respond to the inquiry should have generated more suspicion not less, yet Carrier alleges no follow-up. At a minimum, Carrier could have taken some or all of the steps that it allegedly took after the December 2003 EC Decision, *i.e.*, hired a law firm to investigate and an economist to review the relevant market data. Instead, it sat idly by and waited two years for an EC Decision, and then another four years after that before filing its claim. Had Carrier acted with reasonable diligence during the period following inquiry notice, it would have been easily able to file its claim within two years after the EC Decision and still been well within the four-year limitations period.

C. Carrier Has Failed To Allege Any Affirmative Acts Of Fraudulent Concealment

Carrier failed to plead a single affirmative act of fraudulent concealment with the particularity required by Rule 9(b), and the allegations that it did offer in no way prevented it from filing a timely claim. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-451 (7th Cir. 1990) (requiring "active steps" "beyond the wrongdoing upon which the plaintiff's claim is founded—to prevent the plaintiff from suing in time"); *Dry Cleaning & Laundry Inst. v. Flom's Corp.*, 841 F. Supp. 212, 218 (E.D. Mich. 1993) ("[C]landestine meetings and telephone conversations [are] not sufficient to establish requisite 'affirmative acts' of fraudulent concealment"). Carrier was required to allege more than just that the Cuproclima cartel operated in a manner designed to avoid detection; it was required to show

that defendants engaged in affirmative acts of concealment (fraud) that kept Carrier from filing its claim within the limitations period. *Pinney Dock*, 838 F.2d at 1471-1472.

Carrier offers no explanation of how efforts to conceal the conspiracy before it was disclosed in the media (*e.g.*, the use of code words and secret meetings) could possibly have prevented it from filing a timely claim within four years after Cuproclima very publicly disbanded in March 2001. And its only allegations of fraudulent concealment after March 2001—a defendant's boilerplate press statement denying wrongdoing and refusal to provide information regarding Cuproclima—do not satisfy its obligation to plead affirmative acts of fraud that prevented Carrier from filing a timely complaint, and cannot excuse a sophisticated multinational corporation from its failing to investigate a claim that is in its view potentially worth hundreds of millions of dollars.

III. THE OUTOKUMPU FINNISH ENTITIES LACK SUFFICIENT CONTACTS WITH THE UNITED STATES TO JUSTIFY EXERCISE OF PERSONAL JURISDICTION

The affidavits and other record material before the district court demonstrate that the Outokumpu Oyj (OTK) and Outokumpu Copper Products Oy (OCP) (together, the "Finnish Entities") are foreign corporations lacking any significant contacts with the United States. Carrier does not challenge this factual material. Instead, it exaggerates the significance of a handful of minor contacts in an attempt

to justify the exercise of specific jurisdiction. Carrier claims that it satisfied the purposeful availment prong of the specific jurisdiction test by alleging: (i) Over a period of at least eight years, OCP appointed to its internal management boards a handful of employees from the U.S. companies it acquired; (ii) a former Carrier employee said that a few unnamed employees from the Finnish entities attended one meeting with him "in the mid-1990s"; and (iii) a Finnish Outokumpu subsidiary that is not a defendant in this case exported copper *electrical* tubing to the United States in 1999. Third Br. 53-54. None of these allegations, considered together or separately, satisfy the purposeful availment requirement to establish personal jurisdiction.

Carrier has mined almost a decade's-worth of regulatory filings, press releases, website postings, and newspaper articles to try to show that OCP conducted business in the United States. The only allegation resulting from that search was that the Finnish Entities appointed eight U.S. employees to their international boards, and the majority of those employees were employees of recently-acquired U.S. subsidiaries. Appointing U.S. residents to a board of an international corporation does not constitute purposeful availment. Moreover, Carrier has failed to plead any facts showing that these employees played any role in causing the harm it allegedly suffered. *See Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1237 (6th Cir. 1981) (holding that jurisdictional contacts at issue in

a particular case must relate to events giving rise to litigation). Significantly, there is no mention of any U.S. employees in the EC Decision.

Similarly, Carrier's vague allegation that a few individuals from OCP met once with a Carrier employee in "the mid 1990s" does not demonstrate personal availment. Carrier did not allege that those individuals participated in the meeting in any significant way, or that they sought to supply Carrier's U.S. operations with ACR tubing from Finland. Without more, a single meeting in the forum state cannot constitute purposeful availment, particularly when unaccompanied by any sales from the Finnish Entities to Carrier's U.S. operations during the entire 15-plus year period covered by the Complaint. *See, e.g., Calphalon Corp. v. Rowlette*, 228 F.3d 718, 723 (6th Cir. 2000).

Finally, Carrier mischaracterizes the contents of an import report showing that one of OTK's European subsidiaries—Outokumpu Poricopper Oy, *not* a defendant in this case—shipped level-wound coil to a U.S. customer a total of three times in 1999. Outokumpu explained in the district court that these shipments were not ACR tubing, but oxygen-free copper tubing for use in the electronics industry. *See* Reply Decl. of Ulf Anvin, Exhibit 7 to Outokumpu's Reply ¶¶2-5, JA0912; R.79, Exhibit 8 to Outokumpu's Reply, "RFS – About Us," available at http://www.cablewave.com/index.php?p=5&l=1. The relevant customer, Cablewave, now known as Radio Frequency Systems, is a "global

designer and manufacturer of cable and antenna systems ... for wireless infrastructure," and has nothing to do with the ACR industry. *Id*. These few shipments of an unrelated product by an Outokumpu subsidiary not named in Carrier's Complaint are insufficient to establish specific jurisdiction over that subsidiary, let alone over its European parents.

In addition, the uncontroverted record proves that Outokumpu Copper Franklin, Inc. and Outokumpu Copper (USA) LLC are not alter-egos of either Finnish Entity. Carrier attempts to use the fact that a few directors and employees of these U.S. subsidiaries also performed functions for one or both of the Finnish Entities to justify personal jurisdiction over the Finnish entities. Absent other factors showing that the corporate distinction is being treated as a fiction, "'[i]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts.'" *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) (*quoting United States v. Bestfoods*, 524 U.S. 51, 69 (1998)).[7]

[7] Moreover, Carrier misreads its own exhibits and exaggerates the roles these U.S. employees performed for the Finnish Entities to support its claim that the Boards of the U.S. subsidiaries were "dominated" by OCP executives. *See* Third Br. 55. For example, Carrier claims that Ari Ingman was the only Director of Outokumpu Copper (U.S.A.), Inc. in 1999, whereas the cited exhibit shows that he was the only *outside* director. *See* Foreign Corp. Annual Report, Exhibit 23 to Carrier's Response, JA0492. The rest of the board consisted of inside directors who were identified as the company's President and Secretary. *See id*. Carrier also claims that Hannu Wahlroos was the sole director of Outokumpu Copper

Considering the size of the relevant entities and the length of time covered by Carrier's brief, this small number of overlapping employees and directors is insignificant.

CONCLUSION

Accordingly, for all of the foregoing reasons, those contained in Outokumpu's Principal Brief, and those incorporated from Mueller's Principal and Reply Briefs, the district court's judgment should be affirmed or Carrier's Complaint dismissed with prejudice.

Respectfully submitted,

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Dated: May 1, 2009
Washington, D.C.

Franklin, Inc. in 2000, when in reality, Geoff Palmer, Ed Rottman, and Martin Kroll served on the board as Director-Officers. *See* Annual Report, Exhibit 24 to Carrier's Response, JA0494.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation provided in Federal Rule of Appellate Procedure 32(a)(7)(B). The foregoing Brief contains 6,993 words of Times New Roman (14-point) proportional type. The word processing software used to prepare this Brief was Microsoft Word 2003, version 5.1.2600 Service Pack 2 Build 2600.

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ADDENDUM—DESIGNATION OF JOINT APPENDIX CONTENTS

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

Description of Entry	**Date**	**District Court Docket No.**
Amended Complaint	10/27/2006	46
New York Times Article, Exhibit 9 to Outokumpu's Motion to Dismiss	12/6/2006	57.11
EC Decision, Exhibit 1 to Outokumpu's Motion to Dismiss	12/06/2006	57.3
Exhibit 1 to Carrier's Response to Defendants' Motions to Dismiss	1/12/2007	61.4
Exhibit 37 to Carrier's Response to Defendants' Motions to Dismiss	1/12/2007	61.5
Foreign Corp. Annual Report, Exhibit 23 to Carrier's Response to Defendants' Motions to Dismiss	1/12/2007	61.5
Annual Report, Exhibit 24 to Carrier's Response to Defendants' Motions to Dismiss	1/12/2007	61.5
EC Choline Chloride Decision, Exhibit 2 to Outokumpu's Reply	2/9/2007	71.3
Reply Declaration of Ulf Anvin, Exhibit 7 to Outokumpu's Reply	2/9/2007	71.8
Letter from Kirtikumar Mehta, Director, Directorate F: Cartels, Competition DG, European Commission	3/7/2007	76

Description of Entry	**Date**	**District Court Docket No.**
Order of Dismissal	7/27/2007	93

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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