

No. 14-1746

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

SD3, LLC and SawStop, LLC,
Plaintiffs-Appellants,

v.

BLACK & DECKER (U.S.), INC., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia
Case No. 14-cv-00191-CMH-IDD
The Honorable Claude M. Hilton, United States District Judge

THE PENTAIR DEFENDANTS' RESPONSE BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 14-1746 Caption: SD3, LLC and SawStop, LLC v. Black & Decker (U.S.) Inc., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Pentair, Inc.
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO


2. Does party/amicus have any parent corporations? YES NO
 If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
 Pentair, Inc. is a wholly-owned subsidiary of Pentair Ltd.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
 If yes, identify all such owners:
 Pentair Ltd.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: 
Counsel for: Pentair, Inc.

Date: August 6, 2014

CERTIFICATE OF SERVICE

I certify that on August 6, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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August 6, 2014
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 14-1746 Caption: SD3, LLC and SawStop, LLC v. Black & Decker (U.S.) Inc., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Pentair Water Group, Inc.
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

Pentair Water Group, Inc. is a wholly-owned subsidiary of Pentair Ltd.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO

If yes, identify all such owners:

Pentair Ltd.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: 
Counsel for: Pentair Water Group, Inc.

Date: August 6, 2014

CERTIFICATE OF SERVICE

I certify that on August 6, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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August 6, 2014
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TABLE OF CONTENTS

I. Jurisdictional Statement.....1

II. Statement of the Case2

III. Standard of Review.....6

IV. Statement of Issues for Review7

V. Summary of Argument7

VI. Argument8

 A. The Amended Complaint Contains No Factual Allegations that
 PWG “Conspired” with Any of the Other Defendants.8

 B. SawStop’s Factual Allegations Are Insufficient to Pierce the
 Corporate Veil or Otherwise State a Claim Against Pentair.....9

 C. It Would Be Improper to Pierce the Corporate Veil Between the
 Pentair Defendants and Their Former Subsidiaries.13

 D. SawStop’s Amended Complaint Contains Insufficient Factual
 Allegations Implicating the Pentair Defendants.16

VII. Conclusion21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Amdocs (Israel) Ltd. v. Openet Telecom, Inc.</i> , No. 1:10CV910 2014 WL 5430956, at *5 (E.D.Va. Oct. 24, 2014).....	1
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	6
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	6, 21
<i>Consolidated Metal Prod. v. American Petroleum Inst.</i> , 846 F.2d 284 (5th Cir. 1988)	19
<i>DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.</i> , 540 F.2d 681 (4th Cir. 1976)	13
<i>Giarratano v. Johnson</i> , 521 F.3d 298 (4th Cir. 2008)	6
<i>Informatics Applications Group, Inc. v. Shkolnikov</i> , 836 F. Supp. 2d 400 (E.D. Va. 2011)	15
<i>Jones v. Bank of Am. Corp.</i> , No. 4:09cv162, 2010 U.S. Dist. LEXIS 142918 (E.D. Va. Aug. 24, 2010)	13
<i>LaFlamme v. Societe Air France</i> , 702 F. Supp. 2d 136 (E.D.N.Y. 2010)	19
<i>Loren Data Corp. v. GXS, Inc.</i> , 501 F. App'x 275 (4th Cir. 2012) (unpublished op.).....	6
<i>MacDonald v. Summit Orthopedics, Ltd.</i> , 681 F. Supp. 2d 1019 (D. Minn. 2010).....	14, 15
<i>Masco Contr. Servs. East, Inc. v. Beals</i> , 279 F. Supp. 2d 699 (E.D. Va. 2003)	9

<i>Matson Logistics, LLC v. Smiens</i> , No. 12-400 ADM/JJK, 2012 U.S. Dist. LEXIS 77454, *20 (D. Minn. June 5, 2012)	14
<i>Maung Ng We v. Merrill Lynch & Co.</i> , No. 99 Civ. 9687 (CSH), 2000 U.S. Dist. LEXIS 11660 (S.D.N.Y. Aug. 15, 2000)	15
<i>Mincey v. World Sav. Bank, FSB</i> , 614 F. Supp. 2d 610 (D.S.C. 2008)	15
<i>Muigai v. IB Prop. Holdings, LLC</i> , No. 08:09-CV-01623-AW, 2010 U.S. Dist. LEXIS 131873 (D. Md. Dec. 14, 2010)	9
<i>Nova Designs v. Scuba Retailers Ass'n</i> , 202 F.3d 1088 (9th Cir. 2000)	19
<i>Plant Oil Powered Diesel Fuel Sys. v. ExxonMobil Corp.</i> , 801 F. Supp. 2d 1163 (D.N.M. 2011)	19
<i>Reynolds Metals Co. v. Columbia Gas Sys., Inc.</i> , 669 F. Supp. 744 (E.D. Va. 1987)	13
<i>Richard v. Bell Atlantic Corp.</i> , 946 F. Supp. 54 (D.D.C. 1996)	15
<i>Robertson v. Sea Pines Real Estate Companies, Inc.</i> , 679 F.3d 278 (4th Cir. 2012)	5, 8
<i>Thomaz v. It's My Party, Inc.</i> , 548 F. App'x 893 (4th Cir. 2013)	5
<i>United States v. Bestfoods</i> , 524 U.S. 51 (1998)	13
<i>Virginia Acad. of Clinical Psychologists v. Blue Shield of Va.</i> , 469 F. Supp. 552 (E.D. Va. 1979)	19
<i>Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia</i> , 624 F.2d 476 (4th Cir. 1980)	19

Walker v. Kelly,
589 F.3d 127 (4th Cir. 2009)1

Other Authorities

Local Rule 28(i)1

Rule 12(b)(6).....7, 10

I. JURISDICTIONAL STATEMENT

Pursuant to Local Rule 28(i)¹ of the Fourth Circuit Federal Rules of Appellate Procedure, Defendants-Appellees' Pentair, Inc. ("Pentair") and Pentair Water Group ("PWG") (collectively, the "Pentair Defendants") incorporate by reference the Jurisdictional Statements contained in the Joint Response Brief being filed by Defendants-Appellees and the Opening Brief (Cir. Dkt. #57), filed on behalf of SD3, LLC and SawStop, LLC (collectively, "SawStop").²

¹ The Pentair Defendants also incorporate by reference the Defendants-Appellees' Joint Defense Brief to the extent that it relates to any alleged conduct attributed to the Pentair Defendants in the Amended Complaint or Opening Brief.

² Some Defendants raised Fed. R. Civ. P. 12(b)(6) issues that the district court did not address in its dismissal Order. Those issues have not been waived. *Walker v. Kelly*, 589 F.3d 127, 137-38 (4th Cir. 2009); *Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, No. 1:10CV910, 2014 WL 5430956, at *5 (E.D.Va. Oct. 24, 2014).

II. STATEMENT OF THE CASE³

Until 2004, Pentair owned a subsidiary, Pentair Tools Group, which in turn owned two manufacturers of table saws: Delta Power Equipment Corporation (“Delta”)⁴ and Porter-Cable Corporation (“Porter-Cable”). (FAC at ¶ 110, A-98); (Pentair MTD Mem. at 10, 14); (Pentair Ans. at ¶ 28). Pentair itself never manufactured table saws. (Pentair Ans. at ¶ 2).

³ The pleadings, motions, or appeal documents cited in this brief consist of the following: (1) the Original Complaint filed on February 20, 2014 (Dkt. #1) (cited by paragraph number as “Comp.”); (2) the First Amended Complaint filed on April 24, 2014 (Dkt. #120) (cited by paragraph number as “FAC”); (3) the Pentair Defendants’ Memorandum in Support of their Motion to Dismiss SawStop’s First Amended Complaint (Dkt. # 174) (cited by page number as “Pentair MTD Mem.”); (4) the Pentair Defendants’ Answer and Affirmative Defenses to First Amended Complaint (Dkt. # 208) (cited by paragraph number as “Pentair Ans.”); (5) SawStop’s Opposition to Pentair Defendants’ Motion to Dismiss Their First Amended Complaint (Dkt. # 189) (cited by page number as “Opp. Pentair MTD”); (6) Memorandum Opinion (Dkt. #259) (cited by page number as “Mem. Opinion”); (7) District Court Order Dismissing FAC (Dkt. # 260) (cited by page numbers as “MTD Order”); (8) Notice of Appeal (Dkt. # 261) (cited by page numbers as “Notice of Appeal”); (9) Briefing Order (Cir. Dkt. # 56) (cited by page numbers as “Briefing Order”); (10) Opening Brief (Cir. Dkt. # 57) (cited by page numbers as “Opening Brief”).

⁴ SawStop refers to the “Delta” subsidiary owned by Pentair Tools Group as Delta International Machinery Corp. or “DIMC” in the Amended Complaint (FAC ¶ 28, A-77-78). Although it is unclear from the allegations, according to the Amended Complaint, DIMC is a separate entity from the Defendant Delta Power Equipment Corporation. (FAC ¶ 30, A-78). This is contradicted by SawStop’s allegations in its Original Complaint stating that Delta Power Equipment Corporation was a part of the Pentair Tools Group (Comp. ¶¶ 26, 28, 42, A-40, A-41, A-46). Due to this confusion, Delta is not specifically addressed below. However, the veil piercing arguments apply equally to these entities and the very limited allegations regarding them in the Amended Complaint. (FAC ¶¶ 29, 71, 78, 116, 121, A-78, A-87, A-89, A-99, A-100).

In 2004, Pentair Tools Group was dissolved and divested itself of its power tools subsidiaries, selling Delta and Porter-Cable to Black & Decker. (FAC at ¶ 28, 110, A-77-78, A-98); (Pentair Ans. at ¶ 28, 110). As a part of the divestiture and dissolution, Pentair Tools Group was folded into another of Pentair's subsidiaries, PWG. (FAC at ¶ 28, A-77-78). PWG itself never manufactured table saws. (Pentair Ans. at ¶ 2). After Black & Decker acquired Delta and Porter-Cable, Pentair Tools Group no longer participated in the table saw business. (FAC at ¶ 110, A-98).

Nearly a decade later, on February 20, 2014, SawStop filed its original Complaint against Pentair and 22 other named Defendants (*see generally* Comp., A-30-69). On April 24, 2014, SawStop filed its First Amended Complaint, the dismissal of which is the subject of this appeal. (*See generally* FAC, A-70-113). Like its original Complaint, SawStop's Amended Complaint alleged an industry-wide conspiracy by 20 suppliers of power tools and two "co-conspirators," Power Tool Institute ("PTI") and Underwriters Laboratory ("UL"). Unlike its original Complaint, SawStop for the first time added PWG as a Defendant in the action.

Of the 196 numbered paragraphs of the Complaint, only one—Paragraph 28—even mentions PWG. (FAC at ¶ 28, A-77-78). Paragraph 28 states as follows:

28. Pentair Water Group, Inc. ("PWG") is a Delaware corporation with its principal place of business at 5500 Wayzata

Boulevard, Suite 800, Minneapolis, MN 55415. At all pertinent times until October 2004, Pentair was the sole shareholder of (1) Delta International Machinery Corp. (“DIMC”), a Minnesota corporation, which manufactured table saws and other equipment, and (2) Porter-Cable Corp. (“Porter-Cable”), a Minnesota corporation. Pentair was also the sole shareholder of the Pentair Tools Group, Inc. (“PTG”), a Delaware corporation, at all pertinent times until PTG’s dissolution by merger into PWG; PWG is the legal successor to all liabilities of PTG. While they were subsidiaries of Pentair, DIMC, Porter-Cable and PTG were totally dominated by Pentair and were mere alter egos of Pentair. PWG is, and has been at all times, totally dominated by Pentair and is a mere alter ego of Pentair. In October 2004, Pentair sold its interest in DIMC and Porter-Cable to B&D (and/or an affiliate of B&D) and they became subsidiaries of B&D. Pentair conducts business in Virginia. Pentair has transacted business in Virginia by using the U.S. Patent and Trademark Office in Alexandria, VA to apply for approximately 114 patents for technology and processes that will be used in their manufacturing operations.

In addition to Paragraph 28, the Amended Complaint contains five other numbered paragraphs (out of 196) that even mention Pentair. (FAC at ¶ 27, 79, 83, 109, 110, A-77, A-89, A-90-91, A-97-98). These paragraphs state as follows:

- 27. Pentair, Inc. (“Pentair”) is a Minnesota corporation with its principal place of business at 5500 Wayzata Boulevard, Suite 800, Minneapolis, MN 55415 and sells products and services relating to water and other fluids, thermal management, and equipment protection, in the United States.
- 79. In conjunction with the PTI annual meeting, a separate meeting of representatives of table saw manufacturers was held. Attendees at the meeting included, but were not necessarily limited to, Domeny (on behalf of SBTC and Bosch), Peot (on behalf of Ryobi, TIC and affiliates), Stanley Rodrigues (for Makita), Ray Mayginnes (for Emerson), David V. Keller (of Porter-Cable, who also spoke for Pentair and DICM), Steven Karaga (for Hitachi), and representatives of B&D and Milwaukee Electric. Mr. Domeny, at the time, was the Chair of the PTI’s Product Liability Committee, and chaired the meeting.

- 83. At, or within a period of months following the October 2001 meeting, each of Defendants Bosch, Ryobi, Makita, Hitachi, Pentair, Emerson and Milwaukee Electric, and entities affiliated with them, had agreed to enter into a boycott (the “AIMT Boycott”) of SawStop’s intellectual property, by collectively (1) refusing to license SawStop technology, and (2) agreeing not to otherwise implement AIMT.
- 109. On October 8, 2003, a “Joint Venture Agreement” was executed by Defendants B&D Corp., Hitachi USA, Pentair, RBTC, RBG, Ryobi, OW Technologies and TIC. It was also executed by the PTG and Scintilla AG (an affiliate of Bosch). The ostensible purpose of the collaboration (the “Blade Contact JV”) was to work collectively to develop technology for blade contact injury avoidance. But it functioned, as a practical matter, as a smokescreen designed to fend off potential implementation by the CPSC of AIMT requirements, and as an act of fraudulent concealment of the Defendants’ agreements not to license SawStop’s AIMT, and to manipulate industry standards in their favor. It would later be revealed in discovery in product liability litigation that the venture had produced few or zero results, that inadequate resources had been devoted to its efforts.
- 110. In or around July 2004, B&D acquired Porter-Cable and DICM from Pentair and both became subsidiaries of B&D. B&D totally dominated Porter-Cable and DICM during the period of time that they were B&D subsidiaries, and they acted as mere alter egos of B&D. Pentair remained the sole shareholder of PTG, but PTG no longer participated in the table saw business.

On July 15, 2014 the District Court—only once mentioning Pentair and never mentioning PWG—dismissed all Counts against all Defendants. *See generally* (Mem. Opinion (Dkt. # 259), A-163-179); (MTD Order (Dkt. # 260), A-180). On July 23, 2014, SawStop filed its notice of appeal. *See generally* (Notice of Appeal (Dkt. # 261), A-181-84). In accordance with the October 1, 2014 Briefing Order (Cir. Dkt # 56), SawStop’s Opening Brief (Cir. Dkt. #57) was filed

on November 10, 2014. In its Opening Brief filed in this Court, SawStop mentions “Pentair” only once, stating that “Pentair, Inc. and its two (then) manufacturing subsidiaries” were “represented on STP 745 at the formation of the Standards Conspiracy.” (Opening Brief at p. 64).

III. STANDARD OF REVIEW

This Court reviews the District Court’s dismissal of SawStop’s claims *de novo*. See, e.g., *Robertson v. Sea Pines Real Estate Companies, Inc.*, 679 F.3d 278, 283-84 (4th Cir. 2012); *Thomaz v. It’s My Party, Inc.*, 548 F. App’x 893, 894 (4th Cir. 2013). As a result, this Court is not limited to the grounds for dismissal articulated by the District Court. Rather, this Court “may affirm [a motion to dismiss] based on any grounds apparent from the record.” *Thomaz*, 548 F. App’x at 895 (quoting *United States v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005)).

SawStop’s Amended Complaint is evaluated under the “plausibility” standard articulated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 676-80 (2009). To be “plausible,” SawStop’s Amended Complaint must be supported by sufficient *factual* allegations. The Court need not accept the truth of legal conclusions. *Iqbal*, 556 U.S. at 678. In particular, the Court “need not accept the legal conclusions drawn from the facts, and [it] need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.” *Giarratano v. Johnson*, 521

F.3d 298, 302 (4th Cir. 2008) (internal citations omitted). With respect to SawStop's allegations of an agreement in restraint of trade, "*Twombly* teaches that a court may not simply credit conclusory allegations of conspiracy. Rather, the court must determine whether the well-pleaded, non-conclusory factual allegations give rise to a 'plausible suggestion of conspiracy.'" *Loren Data Corp. v. GXS, Inc.*, 501 F. App'x 275, 279 (4th Cir. 2012) (unpublished op.) (internal citations omitted).

IV. STATEMENT OF ISSUES FOR REVIEW

1. Accepting as true the factual allegations in the Amended Complaint, did SawStop assert sufficient, non-conclusory factual matters against the Pentair Defendants to satisfy the *Twombly* pleading standard?

2. Did SawStop assert sufficient facts to support piercing the corporate veil as required to hold the Pentair Defendants liable for the conduct of indirect subsidiaries under the law of Virginia and the law of the Pentair Defendants' state of incorporation, Minnesota?

V. SUMMARY OF ARGUMENT

Because the District Court found the allegations of the Amended Complaint to be deficient generally, it did not address the sufficiency of SawStop's allegations against the Pentair Defendants. Although not articulated by the District Court, there are at least two additional reasons that warranted dismissal of the Pentair

Defendants as set forth in their Rule 12(b)(6) motion. First, the Amended Complaint contains no non-conclusory allegations against the Pentair Defendants. Second, the Amended Complaint improperly seeks to pierce the corporate veil between the Pentair Defendants and two of their indirect subsidiaries that at one time manufactured table saws.

VI. ARGUMENT

A. **The Amended Complaint Contains No Factual Allegations that PWG “Conspired” with Any of the Other Defendants.**

Tellingly, PWG is not discussed in SawStop’s Opening Brief. It is only mentioned once in the Amended Complaint. SawStop alleges merely that it is a Delaware corporation that “is the legal successor to all liabilities of [Pentair Tools Group]” following Pentair Tools Group’s dissolution by merger into PWG. (FAC at ¶ 28, A-77-78). The Amended Complaint also states the legal conclusion that PWG “is, and has been at all times, totally dominated by Pentair and is a mere alter ego of Pentair.” *Id.* The remainder of Paragraph 28 addresses Pentair’s relationship with two former subsidiaries of its former subsidiary, Pentair Tools Group. In sum and substance, the “anticompetitive behavior” attributed to PWG is that it is the entity with which Pentair Tools Group merged upon dissolution.

The Amended Complaint *does not allege* that PWG itself was even a member of PTI, much less that it participated in any alleged conspiracy involving PTI. Nor does the Amended Complaint allege that PWG worked with the other

alleged co-conspirator, UL, as a part of its UL Standards Technical Panel 745 or any of its other industry initiatives.

Similarly, *none* of the other eighteen Defendants is alleged to have had any connection whatsoever with PWG. This is woefully insufficient and falls short of *Twombly*'s requirements for pleading a Sherman Act Section 1 conspiracy. Sherman Act Section 1 requires "direct *or* circumstantial evidence that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective." *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 289 (4th Cir. 2012) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)). Because it lacks any specific factual allegations about how or when PWG conspired, SawStop's Amended Complaint was properly dismissed as to PWG. *See, e.g., Muigai v. IB Prop. Holdings, LLC*, No. 08:09-CV-01623-AW, 2010 U.S. Dist. LEXIS 131873, *11 (D. Md. Dec. 14, 2010); *Masco Contr. Servs. East, Inc. v. Beals*, 279 F. Supp. 2d 699, 705-706 (E.D. Va. 2003). In particular, SawStop's Amended Complaint fails to meet the "time, place, and alleged effect" standard required to establish a conspiracy under Section 1.

B. SawStop's Factual Allegations Are Insufficient to Pierce the Corporate Veil or Otherwise State a Claim Against Pentair.

To the extent that the Amended Complaint contains any "factual" allegations regarding Pentair, they are insufficient because they are conclusory and because

they in fact relate to alleged conduct of Porter-Cable and Pentair Tools Group—not Pentair.

SawStop’s first allegation against Pentair is that it “agreed to enter into a boycott (the ‘AIMT Boycott’) of SawStop’s intellectual property, by collectively (1) refusing to license SawStop technology, and (2) agreeing not to otherwise implement AIMT.” (FAC ¶ 83, A-90-91). The second allegation against Pentair is that it signed an agreement to be part of a joint venture that served “as a smokescreen designed to fend off potential implementation by the CPSC of AIMT requirements” and to manipulate industry standards. (FAC ¶ 109, A-97-98). These are exactly the type of conclusory statements that carry no weight in escaping dismissal under Rule 12(b)(6). *See Labram v. Havel*, 43 F.3d 918, 921 (4th Cir. 1995).

Rather than accept the truth of its own allegations, SawStop’s Opening Brief seeks to rewrite them after the fact—ignoring the legal distinctions between separate legal entities and attributing actions of Pentair Tools Group and Porter-Cable to Pentair. In the one and only mention of Pentair in its 74-page Opening Brief, SawStop cites Paragraphs 79 and 106 of the Amended Complaint as supporting the proposition that “Pentair, Inc. and its two (then) manufacturing subsidiaries” were “represented on STP 745 at the formation of the Standards Conspiracy.” (Opening Brief at p. 64).

Paragraphs 79 and 106 say no such thing. They do not allege that Pentair, Inc. was a part of STP 745. Instead, they specifically state that David Keller of Porter-Cable was a member of STP 745. Paragraph 79 alleges merely that Mr. Keller of Porter-Cable “also spoke for Pentair” (whatever that means) at an industry-wide meeting. (A-89). Paragraph 106 alleges that Mr. Keller was a part of STP 745 in 2003. (A-97).

SawStop’s Opening Brief refers to a joint venture among the Defendants to develop blade guard contact injury avoidance technology. (Opening Brief at pp. 54, 57). While Pentair is not specifically mentioned in the Opening Brief with respect to this joint venture, the Amended Complaint states that on “October 8, 2003, a ‘Joint Venture Agreement’ was executed by Defendants B&D Corp., Hitachi USA, *Pentair*, RBTC, RBG, Ryobi, OW Technologies and TIC.” (FAC ¶ 109, A-97-98) (emphasis added).

At the outset, the public record of the joint venture—of which the District Court properly took judicial notice—clearly states that Pentair Tools Group, *not* Pentair, was the signatory to this “Joint Venture Agreement.” In the “Notice Pursuant to the National Cooperative Research and Production Act of 1993 Power Tool Institute Joint Venture Project” published in the *Federal Register*, the parties to the Joint Venture Agreement were publicly identified. (Pentair MTD Mem. at Exhibit A). The *Federal Register* notice stated as follows with respect to Pentair

Tools Group: “Pursuant to section 6(b) of the Act, the identities of the parties are ... *Pentair Tools Group, Jackson, TN, a subsidiary of Pentair Corporation, Golden Valley, MN....*” (*Id.*) (emphasis added).

Particularly in its Opening Brief, SawStop attempts to connect Pentair with actions purportedly committed by Pentair Tools Group *after* Pentair Tools Group was *no longer a participant in the power tool industry* according to the Amended Complaint. Paragraphs 111, 113, 115, 116, and 117 allege an “on-going” conspiracy orchestrated by the members of the joint venture from November 23, 2004 to the present. (A-98-99). The paragraph immediately preceding these allegations, however, describes Black & Decker’s acquisition of Delta and Porter-Cable and the fact that Pentair Tools Group “no longer participated in the table saw business.” (FAC at ¶ 110, A-98).

Accordingly, *every* specific allegation against Pentair in the Amended Complaint is related to former subsidiaries. Indeed, SawStop even attempts to hold Pentair liable for actions allegedly committed by its former subsidiary *after* Pentair Tools Group was no longer even a part of the table saw business. *Nowhere* does the Amended Complaint allege any *facts* sufficient to establish that Porter-Cable and Pentair Tools Group were alter egos of Pentair as required to hold Pentair liable for their actions. All SawStop provides is more conclusory statements that these entities were at all times “dominated by Pentair and were

mere alter egos.” (FAC ¶ 28, A-77-78). This is insufficient to pierce the corporate veil as a matter of law.

C. It Would Be Improper to Pierce the Corporate Veil Between the Pentair Defendants and Their Former Subsidiaries.

The only specific allegations even tangentially related to the Pentair Defendants relate to conduct on the part of a former subsidiary of Pentair, Pentair Tools Group, and conduct on the part of a former subsidiary of Pentair Tools Group, Porter-Cable. Indeed, it was a representative of Porter-Cable who purportedly attended a secret meeting held at the PTI conference and Pentair Tools Group that signed the Joint Venture Agreement that supposedly served as subterfuge for an antitrust conspiracy. Additionally, it was Pentair Tools Group “(or, alternatively, a membership of DIMC and/or Porter-Cable)” that was allegedly a part of PTI in 2001. (FAC ¶ 78, A-89). Even assuming *arguendo* that these allegations were otherwise sufficient to survive a motion to dismiss, they fail to establish that SawStop can pierce not only one but two corporate veils to hold the Pentair Defendants liable for the conduct of these two entities.

Piercing the corporate veil to hold a parent company liable for the conduct of a subsidiary is highly disfavored. Corporations are generally recognized as separate legal entities. *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 683 (4th Cir. 1976). As the Supreme Court has stated, “[i]t is a general principle of corporate law deeply ‘ingrained in our economic and legal

systems' that a parent corporation . . . is not liable for the acts of its subsidiaries.” *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal citation omitted). Citing *DeWitt*, the Eastern District of Virginia has found that “[a]lthough the courts may pierce the corporate veil to reach the parent, such power is to be exercised reluctantly, and the burden of establishing a basis for such action rests on the party asserting the claim.” *Reynolds Metals Co. v. Columbia Gas Sys., Inc.*, 669 F. Supp. 744, 750 (E.D. Va. 1987) (citing *Dewitt*, 540 F.2d at 683). “[O]wnership alone is insufficient to disregard the corporate identity.” *Id.*

Under Virginia law, “the law of the state of incorporation . . . determine[s] whether the corporate veil may be pierced.” *Jones v. Bank of Am. Corp.*, No. 4:09cv162, 2010 U.S. Dist. LEXIS 142918, *34-35 (E.D. Va. Aug. 24, 2010) (internal citations omitted). The Amended Complaint alleges that Pentair has its principal place of business in Minnesota. (FAC ¶ 27, A-77). Under Minnesota law, the Court would be required to analyze whether (1) SawStop has alleged sufficient facts to establish that Porter-Cable and Pentair Tools Group functioned as mere instrumentalities of Pentair, and (2) piercing the corporate veil “is necessary to avoid ‘an element of injustice or fundamental unfairness.’” *MacDonald v. Summit Orthopedics, Ltd.*, 681 F. Supp. 2d 1019, 1025 (D. Minn. 2010) (citing *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979)). Minnesota courts have articulated a number of factors that would

support the first prong of Minnesota's corporate veil test, "mere instrumentalities." These factors include insufficient capitalization, failure to observe corporate formalities, and non-functioning of other officers and directors.⁵ The record and SawStop's Amended Complaint provide *no facts* that would establish any one of these factors.⁶

In *MacDonald*, the court found that Minnesota's two-pronged test for piercing the corporate veil was met where the complaint contained factual allegations that the shareholders siphoned funds from the company, worsened the company's insolvency, and engaged in illegal self-dealing. 681 F. Supp. 2d at 1026. On the other hand, where the complaint alleges only that the subsidiaries are the alter egos of or operate through the parent, the complaint should be dismissed under Rule 12(b)(6). The Eastern District of Virginia so held in *Informatics Applications Group, Inc. v. Shkolnikov*, 836 F. Supp. 2d 400, 426-27 (E.D. Va. 2011), among other cases. Numerous other courts have reached the same conclusion when faced with similar allegations. *See, e.g., Mincey v. World Sav.*

⁵ *See Matson Logistics, LLC v. Smiens*, No. 12-400 ADM/JJK, 2012 U.S. Dist. LEXIS 77454, *20 (D. Minn. June 5, 2012) (identifying seven factors: "(1) insufficient capitalization of the corporation; (2) failure to observe corporate formalities; (3) failure to pay dividends; (4) insolvency of debtor corporation at time of transaction; (5) siphoning of funds by dominant shareholder; (6) non-functioning of other officers and directors; (7) lack of corporate records; (8) existence of the corporation as a facade for individual dealings.").

⁶ In the proceedings before the District Court, the Pentair Defendants also showed how SawStop's allegations would be equally deficient to pierce the corporate veil under Virginia law. *See also* Pentair MTD Mem. at pp. 15-16.

Bank, FSB, 614 F. Supp. 2d 610, 623-24 (D.S.C. 2008); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 60 (D.D.C. 1996). Courts have also denounced veil piercing where no facts supporting an alter ego are pled and plaintiff instead uses the theory that actual authority was given by a parent to a subsidiary to act on its behalf. See *Maung Ng We v. Merrill Lynch & Co.*, No. 99 Civ. 9687 (CSH), 2000 U.S. Dist. LEXIS 11660, at *4-6 (S.D.N.Y. Aug. 15, 2000).

Unlike the complaint at issue in *MacDonald*, SawStop's Amended Complaint alleges no *facts* that would establish that Pentair Tools Group or Porter-Cable acted as "mere instrumentalities" of Pentair. Without the ability to attribute to Pentair the statements or actions of Pentair Tools Group or Porter-Cable, SawStop is left with no allegations supporting any of its claims against Pentair. SawStop's claims against Pentair and PWG alike therefore were properly dismissed.

D. SawStop's Amended Complaint Contains Insufficient Factual Allegations Implicating the Pentair Defendants.

Throughout the Opening Brief, SawStop repeatedly characterizes the joint venture and the alleged Standards Conspiracy as conduct in which all the Defendants participated. See, e.g., Opening Brief at pp. 24, 52, 53, 57. That is not what the Amended Complaint actually alleges, however. Similarly, in opposition to the Pentair Defendants' motion to dismiss, SawStop made allegations involving the conduct of Pentair and Pentair Tools Group that were contrary to the actual

allegations in the Amended Complaint. The following side-by-side comparison is illustrative:

<u>Allegations in Opposition</u>	<u>Allegations in Amended Complaint</u>
<p>“Plaintiffs have pleaded that Pentair Tools Group was a member of the PTI and that David V. Keller, its representative at the PTI, attended the October 2001 PTI Meeting on behalf of Pentair... FAC ¶¶ 78-83. Plaintiffs have further pleaded that Pentair and PTG joined the Boycott...FAC ¶ 83.” Opp. Pentair MTD at p. 21.</p>	<p>The Amended Complaint states only that Pentair joined the boycott and that Mr. Keller of Porter-Cable attended the PTI meeting “on behalf” of Pentair. Paragraphs 79–83 say nothing about Pentair Tools Group related to the PTI meeting or joining any conspiracy.</p>
<p>“Beyond that, Pentair and PTG participated in an act of fraudulent concealment, directly joining the 2003 joint venture that served as a means of concealing the conspiracy’s agreement not to implement AIMT. FAC ¶ 109.” Opp. Pentair MTD at p. 21.</p>	<p>Paragraph 109 states that Pentair and Pentair Tools Group executed the 2003 Joint Venture Agreement. The Amended Complaint does not allege that mere execution of the Joint Venture Agreement was illegal. Paragraph 110 acknowledges that shortly after the Joint Venture Agreement was sold, Pentair Tools Group ceased operation in the table saw business and that Pentair’s interests in Delta and Porter-Cable were sold.</p>
<p>“With respect to the Standards Conspiracy, Plaintiffs have pleaded that Pentair and PTG joined the conspiracy upon its formation in or around February 2003 and that the group agreed to ‘vote as a bloc...’ FAC ¶ 105.” Opp. Pentair MTD at p. 21.</p>	<p>Paragraph 105 relates to the members of STP 745. The Amended Complaint does not allege that Pentair or Pentair Tools Group were members of STP 745.</p>
<p>“Plaintiffs have also pleaded that the Standards Conspiracy committed at least two overt acts during PTG’s and Pentair’s membership. STP 745 met on February 11, 2003, to consider the SawStop proposal to require AIMT, which was rejected in accordance with</p>	<p>There are no allegations in the Complaint that Pentair Tools Group or Pentair were members of STP 745. Paragraph 106 states that Mr. Keller of Porter-Cable was a member of STP 745. The meeting discussed in Paragraph 107 referred to Mr. Keller and the other</p>

<p>Defendants’ agreement. FAC ¶ 107. And, in 2004, the members of the PTI, including PTG, began a collaboration to develop a uniform blade guard standard to preclude quality competition on blade guard standards and to protect Defendants’ competitive position. FAC ¶ 111.” Opp. Pentair MTD at p. 21.</p>	<p>members of STP 745 identified in Paragraph 106. Paragraph 111 discusses a collaboration entered into by Defendants B&D Corp., Makita USA, RBTC, and TINA” on November 23, 2004—a date <i>after</i> the Amended Complaint acknowledges that Pentair and Pentair Tools Group no longer had any connections to the table saw business.</p>
<p>“This dominance is reflected in the fact that the affiliated entities represented their PTI affiliation as, intermittently, belonging to Pentair and also, at times, various subsidiaries.” Opp. Pentair MTD at p. 22.</p>	<p>SawStop does not cite any paragraph of the Amended Complaint for this proposition. On its face, the Amended Complaint does not contain any facts in support of the allegation that affiliated entities represented their PTI affiliation for Pentair or “at times, various subsidiaries.” The Amended Complaint mentions only Mr. Keller’s attendance at a PTI meeting, purportedly also speaking on behalf of Pentair.</p>

In short, SawStop persists in seeking to avoid dismissal of its claims against the Pentair Defendants based on allegations that are nowhere to be found in the Amended Complaint or are inappropriately tied to Pentair or PWG. Just as importantly, the facts alleged still would not establish any violation of the antitrust laws even if the allegations had been properly made against the Pentair Defendants, for the reasons articulated by the District Court when it dismissed the Amended Complaint altogether.

Pentair stands accused of joining a AIMT boycott allegedly agreed to by Mr. Keller of Porter-Cable and a conspiracy to manipulate standards in which

Pentair Tools Group is not implicated. The claims against Pentair are based on the bald assertion that Porter-Cable and Pentair Tools Group were “its alter egos and which it completely dominated.” (Opp. Pentair MTD at p. 22). In an effort to bootstrap these conclusory allegations, SawStop insists that PWG is implicated because it assumed all of Pentair Tools Group’s liabilities. *Id.* SawStop has alleged *no specific facts* related to Pentair and PWG. Nor has it alleged any facts supporting its conclusory allegations that Delta, Porter-Cable, and Pentair Tools Group were mere alter egos of Pentair.

Even if SawStop could pierce multiple corporate veils, its allegations against Pentair Tools Group and Porter-Cable would still be insufficient. The Amended Complaint alleges only that Pentair Tools Group and Porter-Cable were members of PTI, that a Porter-Cable representative attended a PTI meeting of manufacturers, and that Pentair Tools Group was a signatory to the 2003 Joint Venture Agreement. Membership in a trade association or participation in a meeting alone are not sufficient to establish an unlawful conspiracy as a matter of law. “Section 1 of the Sherman Act does not prohibit a business entity which needs information and advice from obtaining information and advice from other knowledgeable business entities.” *Virginia. Acad. of Clinical Psychologists v. Blue Shield of Va.*, 469 F. Supp. 552, 559 (E.D. Va. 1979), *overruled on other grounds but affirmed for this point by Virginia Academy of Clinical Psychologists v. Blue Shield of*

Virginia, 624 F.2d 476, 483 (4th Cir. 1980)(internal citation omitted).⁷ Even if Pentair itself had signed the Joint Venture Agreement, that act alone would not violate the antitrust laws for the reasons articulated by the District Court.

By its own admission, SawStop seeks to hold the Pentair Defendants guilty by association, arguing that co-conspirators are responsible for the acts of the conspiracy “whether or not that defendant directly participates in any overt act after joining the conspiracy.” (Opp. Pentair MTD at p. 20). One of many missing links is establishing the existence of a conspiracy, much less one that the Pentair Defendants joined. For the reasons articulated by the District Court in dismissing the Amended Complaint, SawStop’s allegations of a conspiracy generally were legally insufficient. It therefore was not necessary for the District Court to evaluate the sufficiency of SawStop’s allegations against the Pentair Defendants

⁷ See also *Nova Designs v. Scuba Retailers Ass’n*, 202 F.3d 1088, 1091-92 (9th Cir. 2000) (finding membership in association in and of itself insufficient proof of agreement); *Consolidated Metal Prod. v. American Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988) (stating that “[a] trade association by its nature involves collective action by competitors. Nonetheless, a trade association is not by its nature a ‘walking conspiracy,’ it’s every denial of some benefit amounting to an unreasonable restraint of trade”); *Plant Oil Powered Diesel Fuel Sys. v. ExxonMobil Corp.*, 801 F. Supp. 2d 1163, 1194 (D.N.M. 2011)(citing *Moore v. Boating Indus. Ass’n*, 819 F.2d 693, 712 (7th Cir. 1987) which states that “mere membership in trade association, attendance at trade association meetings and participation in trade association activities are not, in and of themselves, condemned or even discouraged by the antitrust laws”); *LaFlamme v. Societe Air France*, 702 F. Supp. 2d 136, 148 (E.D.N.Y. 2010) (“membership and participation in a trade association alone does not give rise to a plausible inference of illegal agreement”).

for participating in a conspiracy for which there were insufficient factual allegations generally.

Rather than identify any specific facts implicating the Pentair Defendants, SawStop attempts to allege that the Pentair Defendants participated in a uniform blade guard collaboration in November of 2004, actively opposed UL 987 in 2010, influenced European standards in 2010, and participated in “secret” meetings in 2012. (Opp. Pentair MTD at pp. 21-22; 28-29). These recently fabricated allegations are particularly implausible because all these events occurred after Pentair Tools Group no longer had an ownership interest in the table saw business. SawStop is effectively attempting to implicate the Pentair Defendants for an alleged conspiracy based on conduct that purportedly occurred *years* after any entity associated with Pentair was a part of the table saw industry.

VII. CONCLUSION

In the end, the Pentair Defendants should not have been parties to this litigation and were properly dismissed by the District Court. The one “factual” allegation in the Amended Complaint involving PWG is insufficient under *Twombly*. SawStop’s allegations against Pentair are equally deficient. Stripped of conclusory allegations of Pentair’s involvement in the alleged conspiracy, the Amended Complaint contains no specific allegations that are “plausible” within the meaning of *Twombly*. To the contrary, they are internally inconsistent. While

SawStop argues that Pentair participated in PTI, colluded at a special PTI meeting, and signed a Joint Venture Agreement that set the stage for the illegal manipulation of the table saw safety standards, the specific facts alleged show that Porter-Cable and Pentair Tools Group were members of PTI, that a Porter-Cable representative attended PTI meetings, and that the Joint Venture Agreement was signed by Pentair Tools Group. *None* of the factual allegations relates to conduct by Pentair. Nor has SawStop established how conduct of these separate entities that in and of itself does not violate the antitrust laws could be used to implicate Pentair. Nowhere in its submissions to the District Court or this Court has SawStop even deigned to address why piercing the corporate veil in this case is supposedly proper. Strategic avoidance is simply insufficient to cure this pleading defect. SawStop must plead specific factual allegations against all Defendants. In this case, SawStop did not do this with the Pentair Defendants. As a result, the District Court's dismissal of the Pentair Defendants should be affirmed.

Dated: December 15, 2014

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CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e)

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 5,580 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.

Dated: December 15, 2014

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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of December, 2014, I caused the foregoing THE PENTAIR DEFENDANTS' RESPONSE BRIEF to be filed in the United States Court of Appeals for the Fourth Circuit via CM/ECF, which will serve a Notice of Electronic Filing ("NEF") on all counsel of record.

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