No. 15-2130

In the United States Court of Appeals for the Sixth Circuit

ENERGY CONVERSION DEVICES LIQUIDATION TRUST,
APPELLANT,

v.

TRINA SOLAR LIMITED, TRINA SOLAR (U.S.), INC., YINGLI GREEN ENERGY HOLDINGS CO., LTD., YINGLI GREEN ENERGY AMERICAS, INC.,
APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, NO. 2:13-cv-14241
HON. ROBERT H. CLELAND, PRESIDING

REPLY BRIEF FOR APPELLANT ENERGY CONVERSION DEVICES LIQUIDATION TRUST

W. GORDON DOBIE
WILLIAM C. O'NEIL
KATHRYN W. BAYER

Winston & Strawn LLP
35 W. Wacker Dr.
Chicago, IL 60601
(312) 558-5600

ROBERT B. PRINGLE

Winston & Strawn LLP
OF COUNSEL

Counsel for Appellant Energy Conversion Devices Liquidation Trust

CORPORATE DISCLOSURE STATEMENT

Sixth Circuit Case #: 15-2130

Case Name: Energy Conversion Devices Liquidation Trust v. Trina Solar Limited et al.

Pursuant to Federal Rules of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, Appellant Energy Conversion Devices makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   Yes. Creditors of claims filed in Energy Conversion Devices bankruptcy proceeding, *In re Energy Conversion Devices, Inc.*, et al., No. 12-43166 (TJT) (filed in U.S. Bankruptcy Court for the Eastern District of Michigan on February 14, 2012).

/s/ W. Gordon Dobie Dated: April 4, 2016

W. Gordon Dobie

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Defendants argue that the antitrust laws permit—even encourage—concerted action by competitors to fix prices and dump products below-cost with the purpose of destroying an entire segment of American industry so long as the conspiracy yields low prices. But, the Sherman Act is to the contrary.

First, missing the forest for the trees, Defendants distort Supreme Court precedent to reach their incorrect conclusion. Specifically, Defendants misread *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), claiming it required Section 1 plaintiffs to plead recoupment. It did not; rather, the Supreme Court remanded the case to the Third Circuit to consider whether—in the absence of any evidence of recoupment—other evidence supported the existence of a conspiracy. Just last year, in *Superior Production Partnership v. Gordon Auto Parts Co.*, 784 F.3d 311 (6th Cir. 2015), this Court recognized that *Matsushita* did not "lay out a recoupment requirement" and declined to create one.

Second, Defendants cite no case holding that a horizontal conspiracy between direct competitors to fix prices and dump product below-cost with the express intent and effect of destroying an entire industry does not raise antitrust concerns and antitrust injury. Defendants also ignore hornbook law that antitrust injury occurs when the plaintiff's loss stems from a "competition-***reducing*** aspect or effect of the defendants' behavior." *In re Cardizem CD Antitrust Litig.*, 332

F.3d 896, 910 (6th Cir. 2003). Since Congress passed the Sherman Act in 1890, courts have condemned ever-evolving business practices that present pernicious and anti-competitive behavior, like Defendants' conspiracy.

Third, without a hearing, court appearance, or scheduling order for amending pleadings, the District Court improperly entered judgment against ECD and denied all amendment. The court found ECD's complaint fatally flawed because it did not allege that Defendants recouped their losses or had begun that process at the time ECD filed its complaint. But, even if ECD was required to plead recoupment, the pertinent question would have been whether Defendants had a dangerous probability of recouping at the time they entered into the conspiracy years earlier—which they did. Instead, the District Court improperly denied ECD—a 50 year-old, successful Michigan-based company—any right to seek redress for the harm resulting from Defendants' illegal conspiracy.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REQUIRING SECTION 2 RECOUPMENT TO BE PLED IN A SECTION 1 RESTRAINT OF TRADE CASE.

A. Neither *Matsushita* Nor *Superior Production* Require Recoupment To Sustain A Section 1 Claim.

Defendants pretend that this case only involves their agreement to fix low prices—which they claim is lawful unless the plaintiff pleads that they successfully recouped their losses before the complaint was filed. Defendants are wrong.

Neither *Matsushita*, *Superior Production*, nor any other case cited by Defendants requires a Section 1 plaintiff to plead recoupment.

1. Under *Matsushita*, A Plausible Conspiracy May Exist Even Without Recoupment.

Defendants claim throughout their brief that "*Matsushita* imposed a recoupment requirement on Section 1 low-price conspiracy claims." (*See, e.g.*, Resp. Br. at 6, 22-23.) Not so. In addressing evidence of a conspiracy ***at summary judgment***, *Matsushita* reasoned that while the absence of recoupment was significant to the plausibility of the conspiracy, it was not determinative. 475 U.S. at 596-98. After finding that defendants failed to recoup their losses during the 20 years of the alleged conspiracy, the Supreme Court nevertheless remanded the case:

> On remand, the Court of Appeals is free to consider ***whether there is other evidence*** [besides recoupment] that is sufficiently unambiguous to permit a trier of fact to find that [defendants] conspired to price predatorily for two decades despite the absence of any apparent motive to do so.

Id. at 597; *see also Superior Prod.*, 784 F.3d at 320 (noting that *Matsushita* did not "expressly lay out a recoupment requirement" and declining to require one). Defendants' argument thus flies in the face of the very Supreme Court precedent they rely upon.

In an effort to avoid this fact, Defendants take a new approach—characterizing ECD's claim as a Section 2 conspiracy to monopolize. (*See* Resp.

Br. at 22-24.) A Section 2 plaintiff must allege that the defendant ***unilaterally*** possessed market (or monopoly) power and could ***unilaterally*** control prices—including recouping losses incurred in achieving the monopoly. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191 (2010); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 390-91 (1956). Thus, in a Section 2 case, requiring recoupment lines up perfectly with the requirement that a defendant achieve market (or monopoly) power.[1] But, ECD, as the master of its complaint, brought only a Section 1 claim for concerted action.[2] (*See* Compl., R.E. 1, Page ID 28-29, ¶¶ 87-89; *see also* Am. Compl., R.E. 53, ¶¶ 124-126.)

Regardless, Defendants' attempt to shoehorn ECD's allegations into those brought in *Matsushita* is unavailing. Under *Matsushita*, a court should consider all evidence bearing on the plausibility of the alleged conspiracy. (*See* Op. Br. at 6-10, 31-33.) Here, ECD has alleged direct facts of Defendants' conspiracy and explained Defendants' motive for conspiring (*see* Op. Br. at 6-10), whereas the *Matsushita* plaintiffs failed to meet this burden ***even after discovery***.

[1] Defendants have no response to the Supreme Court's *American Needle* decision which ECD cited five times in its Opening Brief—not to mention in the *Solyndra* decision which reached the exact opposite conclusion from the District Court here.

[2] Defendants' reliance on a superseded *Solyndra* complaint which was amended and never even addressed by the District Court highlights their desperation. Further, saying at least something about the plausibility of the alleged conspiracy, Solyndra obtained substantial settlements from Defendants of more than $58 million (in addition to other amounts which remain under seal). *In re Solyndra LLC*, Case No. 11-cv-12799 (Bankr. D. Del.) Dkt. No. 1880 at 6-13.

2. Nor Does *Superior Production* Require Recoupment In A Section 1 Case.

Defendants argue that this Court "recently confirmed the recoupment requirement in Section 1 cases." (Resp. Br. at 9.) But *Superior Production* actually stated that a plaintiff need only "grapple" with issues of recoupment when proving a low-price conspiracy at ***summary judgment***.[3] 784 F.3d at 320. Thus, *Superior Production* is entirely consistent with the reading of *Matsushita* advanced by ECD.

B. ECD Has Alleged A Plausible Conspiracy To Fix Prices For Solar Panels And To Dump Their Products At Below-Cost Prices With The Express Purpose Of Eliminating U.S. Competition, Including ECD.

At the pleading stage, the only question for the court is whether ECD has alleged a plausible conspiracy. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

The allegations of Defendants' conspiracy are overwhelming.[4] For example:

- [redacted] (Am. Compl., R.E. 53, ¶ 87.)

[3] That a Section 1 plaintiff must "grapple" with issues of recoupment at summary judgment is a far cry from Defendants' interpretation of *Superior Production* as purportedly joining the "consensus" that "low-price conspiracies brought under Section 1 require recoupment." (Resp. Br. at 9, 11, 18.) In fact, the consensus is that Section 1 conspiracies do ***not*** require recoupment. (*See* Op. Br. at 47-48.)

[4] Defendants challenged only the existence of an agreement. (*See* Pl.'s Opp. Mot. Dismiss, R.E. 38, Page ID 374.)

- [redacted]
(*Id.*, ¶¶ 69-70.)

- [redacted] (*Id.* ¶¶ 85, 87-88, 90.)

- [redacted] (Compl., R.E. 1, Page ID 20-22, ¶¶ 54-59; Ex. A, R.E. 1-1, Page ID 36, ¶¶ 18-22; Am. Compl., R.E. 53, ¶¶ 65-66.)

- These three Defendants collectively exported more than 95% of their production, despite huge unmet Chinese energy needs and demand for clean energy in China—one of the most polluted countries on the planet. (Compl., R.E. 1, Page ID 25, ¶ 77.)

- Defendants slashed prices in tandem by more than 60% (contrary to the rest of the market and despite rising market demand). (*Id.*, Page ID 20-21, ¶¶ 54-58.)

This is not an oligopoly where parallel prices could be explained by market conditions—rather, Defendants, acting together, fixed their prices below-cost and contrary to the rest of the market.

[5] The Sherman Act prohibits ***all*** agreements, contracts and conspiracies that restrain trade. 15 U.S.C. § 1. That Defendants' pricing conduct has already been determined to be illegal does not insulate that conduct from antitrust scrutiny, given their concerted action. In fact, the findings of the DOC and ITC— including that Defendants dumped their product in the U.S. to the "material injury" of American industry—are highly relevant to key issues raised by ECD. (*See* Op. Br. at 10-12.)

Further, Defendants fixate on the pricing aspect of their conspiracy, but their horizontal agreement to export more than 95% of their production below-cost for the purpose of eliminating U.S. competition alone is a *per se* violation of the antitrust laws. *See Cardizem*, 332 F.3d at 907 (market allocations between competitors are *per se* illegal). This is far different from a private claim for dumping—it is concerted action that had the express purpose of eliminating U.S. competition through Defendants' joint agreement to export more than 95% of their production below-cost and at fixed prices that runs afoul of Section 1. *See Am. Needle*, 560 U.S. at 190.

Equally important, but strangely absent from Defendants' lengthy brief is any discussion of the fact that the District Court expressly found that ECD had adequately alleged that Defendants were selling below cost—the *sine qua non* of a unlawful low-price conspiracy. (Mot. Dismiss Order, R.E. 40, Page ID 446).

ECD also alleged that operating in the Chinese non-market economy makes Defendants' conspiracy even more plausible.[6] In fact, China's Anti-Monopoly

[6] Defendants were incorporated in the Cayman Islands—and two actually share an address—although their operations are based in China. (FY 2014 Trina 20-F at 18, 20, 26, 27; FY 2014 Yingli 20-F at 30, 38, 76.) Defendants' operating companies (which are pled as Defendants' alter egos) are Chinese-based, and substantially influenced and/or owned by the Chinese government. For example, Trina admits that the Chinese government "exercises significant control" over it. (FY 2014 Trina 20-F at 23.) And, the government owns a significant portion of Yingli's manufacturing facility. (FY 2014 Yingli 20-F at 41.) That Defendants also had

Law expressly permits horizontal agreements between competitors, including agreements to fix prices, for purposes of (i) protecting China's interest in international trade and foreign economic cooperation, (ii) alleviating declining sales volumes or production over-capacity in recessions, and (iii) other circumstances. *See* Antimonopoly Law of the People's Republic of China of 30 August 2007, Presidential Order No. 68 ("AML"), Art. 15 (available at http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml). While China is free to regulate businesses in China the way it sees fit, when those businesses enter the American stream of commerce, they must comply with American laws. *See, e.g.*, 15 U.S.C. § 6a.

Further, as ECD alleged, Defendants were motiviated by factors other than profit, such as increasing employment and market share. For example, Defendants were "rewarded" for maintaining full employment in their Chinese factories.[7] (*See* Op. Br. at 32.) In fact, the AML expressly states that its purpose is to promote

---

shares on the New York Stock Exchange is hardly controlling. (*See* Resp. Br. at 29.)

[7] *See also* Bruce Owen, *China's Competition Policy Reforms*, 75 ANTITRUST L. J. 231, 249-50 (2008) (explaining that the AML is more concerned with market stabilization than competition); R. Hewitt Pate, *What I Heard In The Great Hall of The People*, 75 ANTITRUST L.J. 195, 199-202 (2008) (explaining that maintaining social stability and resulting full employment is of paramount importance to Chinese government); Danny Reed, *Creating Competitive Market Economies in Poland and Hungary*, 48 ADMIN. L. REV. 515, 516 (1996) (explaining that in socialist countries, "managers will tend to collude rather than compete").

China's socialist economy. AML, Art. 1. Such a purpose is in direct conflict with the notion that Defendants' conspiracy is implausible without recoupment. *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.").

ECD has more than sufficiently alleged a plausible conspiracy as required by *Twombly*. (*See also* Op. Br. at 23-24.) The District Court did not find otherwise. (*See* Mot. to Dismiss Order, R.E. 40, Page ID 452.) Nor did the Northern District of California, which found that these allegations stated a plausible conspiracy and allowed the plaintiff to proceed. *Solyndra Residual Trust v. Suntech Power Holdings Co.*, 62 F. Supp. 3d 1027, 1040 (N.D. Cal. 2014).

C. Defendants' Financial Difficulties Years After Entering Into the Conspiracy Do Not Impact Its Plausibility.

Defendants seek to avoid the Sherman Act's reach by highlighting their current financial problems. (*See* Resp. Br. at 8-10.) Defendants essentially argue that because Suntech is now bankrupt and Yingli recently issued a going concern notice, they could not have conspired in 2008-2011. (Resp. Br. at 47-48.) But, legally, "[w]hen evaluating the element of a dangerous probability of success, [courts] do not rely on hindsight but ***examine the probability of success at the time the acts occur***." *United States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1118 (5th Cir. 1984) (emphasis added); *see also Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810

F.2d 795, 807 (8th Cir. 1987) (same); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 318 (3d Cir. 2007) (recoupment is a "particularly fact-intensive inquiry").

ECD alleges (and a jury could well conclude) that there was a dangerous probability of success, given, *inter alia*, that between 2008 and 2011, (a) Defendants jointly exported more than 95% of their production despite huge and unquenched needs for energy in China; (b) Defendants collectively cut their prices by more than 60% despite rising demand; (c) Defendants rapidly grew market share from a negligible amount to over 80% in just three years at the expense of American companies with 50-year track records; and (d) Defendants drove more than a dozen American manufacturers out of business and forced many more to shutter factories. (*See* Op. Br. at 6-10, 51-52.)

Even considering events from 2014 and 2015 (contrary to the law), Suntech admitted in its bankruptcy filings that its financial difficulties were caused by ***unanticipated*** tariffs triggered by its own illegal conduct. (*In re Suntech Am., Inc.*, No. 15-10054, DKT No. 8 ¶¶ 26-27 (Bankr. D. Del. 2015).) Further, Suntech still helps its Chinese operating entity sell panels under the Suntech brand and into the U.S. (*See* 4/11/14 Suntech 6-K.) Yingli also announced it is building a new solar panel factory, and that it would repay all of its outstanding notes within one year, despite its alleged going concern. (*See, e.g.*, 10/14/2015 Yingli 6-K; 1/12/16 Yingli 6-K.)

D. None Of Defendants' Other Cases Require A Plaintiff Alleging A Section 1 *Per Se* Horizontal Conspiracy To Plead Recoupment.

As noted above, neither *Matsushita* nor *Superior Production* require ECD to plead anything more than a plausible conspiracy, which ECD has more than adequately done. But, Defendants cite to a handful of other cases that purportedly support their bizarre argument that a conspiracy between competitors to destroy competition, fix prices, and sell below-cost is nevertheless lawful provided that at least one result is lower prices for consumers—at least when the complaint is brought. But not a single one of Defendants' cases so holds.

Defendants place great emphasis on *Wallace v. International Business Machines Corp.*, where a *pro se* plaintiff brought a two-page, conclusory complaint objecting to the development of open source software—software for which the copyright is not enforced. 467 F.3d 1104, 1106 (7th Cir. 2006); (*see also* No. 05-cv-678, Dkt. No. 29 (S.D. Ind.).) But it has always been the case that a copyright holder (whether for software, a book or music) can either enforce his exclusivity or not. William F. Patry, 2 Patry on Copyright § 5:155 ("[C]opyright owners need not use or enforce their rights."). By not enforcing their copyright, the defendants also ***facilitated*** the development of new works. *Wallace*, 467 F.3d at 1107. Further, Mr. Wallace (the *pro se* plaintiff) had not yet even written any software to compete with the defendants' software, and the court refused to allow him to use the antitrust laws to broker his entry. *Id*. at 1106. And, while the two-

page *pro se* complaint is vague, there appears to have been vertical elements to the alleged conspiracy, and he was allowed two amendments. *Id.* In short, *Wallace* says nothing about the allegations in this case, where there is detailed evidence of Defendants conspiring amongst themselves to drive American competitors out of business, sell below cost, and fix prices, and all to the injury of competition and consumers who have lost product choice and innovation.

None of Defendants' other cases dismissed a Section 1 plaintiff for failing to plead recoupment. (*See* Resp. Br. at 20-21.) For example, the plaintiff in *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.* ***did not bring any antitrust claims at all***, but rather claims for violations of various state laws and of the Anti-Dumping Act (the same law that Defendants insist has no impact whatsoever on ECD's claims (*see* Resp. Br. at 33-36)). 35 F. Supp. 2d 597, 599, 606 (S.D. Ohio 1999).

Defendants' other cases fare no better. *See, e.g.*, *Multistate Legal Studies, Inc. v. Harcourt Brace Javanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540 (10th Cir. 1995) (reversing summary judgment for defendants); *Traffic Scan Network, Inc. v. Winston*, No. 92-2243, 1995 WL 317307 (E.D. La. May 24, 1995) (predatory pricing claims rejected at summary judgment where plaintiff offered no admissible evidence of below-cost sales); *Lifeschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 805 F. Supp. 1277 (D.S.C. 1992) (Section 1

and 2 claims alleging the Teamsters, Jimmy Hoffa, and defendants engaged in racketeering, predatory pricing, and mail and wire fraud conspiracies found unsupported by any admissible evidence at summary judgment).

In fact, the two courts that have addressed whether a plaintiff must plead recoupment in a Section 1 *per se* horizontal conspiracy, allowed the claim to proceed past a motion to dismiss without recoupment because "[t]he recoupment requirement derives directly from the Supreme Court's insistence that § 2 claims be supported by a showing of monopolization or the dangerous threat of monopolization. . . . a defendant's recoupment of losses resulting from its below cost pricing need not be alleged to state a claim under § 1." *Solyndra*, 62 F. Supp. 3d at 1042; *see also Fricke-Parks Press, Inc. v. Fang*, 149 F. Supp. 2d 1175, 1183 (N.D. Cal. 2001) ("[E]lements crucial in monopoly and price discrimination claims are not required for a claim under Section 1 . . . . [Plaintiff] need not prove that the underlying objective of the alleged conspiracy between [defendants] is likely to succeed through ultimate recoupment . . . .").

II. DEFENDANTS FAIL TO REBUT ECD'S ANTITRUST STANDING.

ECD easily meets the standard for antitrust standing which requires the Court to balance five factors (with no one factor being determinative). *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 976 (6th Cir. 2000); *see also Schwartz v. Sun Co. (R & M)*, 276 F.3d 900, 904 (6th Cir. 2002) ("It is

well-established that proving antitrust injury should not be unduly rigorous."). Of these five factors, Defendants and the District Court challenged only the second factor—antitrust injury. But ECD has alleged antitrust injury and thus has antitrust standing.

A. ECD Pled Injury To Itself As A Competitor, To The Entire Solar Industry In The Relevant Market, And To Consumers.

ECD's complaint details widespread injury to competition within the meaning of the Sherman Act. (*See* Op. Br. at 34-42.) Defendants respond that a horizontal agreement among competitors to fix prices, dump product at below-cost prices, and eliminate American competitors causes no antitrust injury unless the defendant conspirators already raised prices at the time the complaint was filed. (*See* Resp. Br. at 15-18.) Antitrust injury is not so limited. *See Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 275 (6th Cir. 2015), *cert. dismissed*, 136 S. Ct. 498 (2015) ("When the defendant effectively sells below its own costs, it puts pressure on its competitors to lower prices without actually lowering its own costs or otherwise creating a market efficiency. This is sufficient for the competitors to have antitrust standing.").

B. Defendants' Antitrust Injury Cases Are Wholly Inapplicable, Involving Unilateral Conduct Challenged Under Different Law.

Ignoring ECD's well-pled allegations, Defendants and the District Court rely on cases that do not show that ECD lacks antitrust standing.

1. *NicSand, Inc. v. 3M Co.*

The principal case the District Court cited in finding ECD lacked antitrust standing is the divided decision in *NicSand*, 507 F.3d 442 (2007), which actually supports ECD. The plaintiff, a manufacturer and distributor of sandpaper, sued its principal competitor, 3M, for matching the low prices and exclusive contract policies that the plaintiff previously offered. *Id.* at 447-49. Key to the decision, as the majority highlighted, was the absence of any allegation that 3M sold below cost. *Id.* at 455. In addition, there was no allegation that 3M (i) eliminated an entire industry or (ii) engaged in collective action with any competitor. *Id.* at 451-59. Despite this, four judges dissented (including now Chief Judge Cole), arguing that the plaintiff should have been permitted to proceed with a Section 2 predatory pricing claim, despite having expressly disavowed any below-cost claim. *Id.* at 463-65.

The factual contrast with ECD's case could not be starker. Here, the District Court expressly found that ECD successfully pled below-cost pricing. (Mot. Dismiss Order, R.E. 40, Page ID 446.) Further, ECD's complaint includes allegations such as:

- "In furtherance of Defendants' combination and conspiracy, they collectively agreed to price, offer for sale, and did sell solar panels ***below cost*** in the American market." (Compl., R.E. 1, Page ID 29, ¶ 93.)

- "ECD was directly injured by the importation of Chinese manufactured solar panels at unreasonably low prices, far below fair value and/or ***below cost***." (*Id.*, Page ID 28, ¶ 86.)

- "Defendants' sales at unreasonably low prices, far below fair value and/or ***below cost***, were directed at destroying competition, not benefitting consumers, and in the long run, neutralizing or destroying competition in the United States for commercial and industrial rooftops." (*Id.*, Page ID 26, ¶ 80.)

- The U.S. Government found "that the solar manufacturing industry in the United States has been materially injured." Defendants, represented by major law firms, fully litigated the matter before the ITC and DOC.[8] (*Id.*, Page ID 19, 33, ¶ 50, Ex. A, ¶¶ 6-7.)

As is plain from these allegations, ECD alleges concerted action by competitors to fix prices, dump product below cost, and eliminate American competition, including ECD, in violation of Section 1. What is more, Defendants successfully caused "material injury" to ECD and an entire American industry. This stands in strong contrast to the cases Defendants rely upon.

2. *Atlantic Richfield Co. v. USA Petroleum Co.*

In *Atlantic Richfield*, a low-priced, independent gas station operator sued when Atlantic Richfield encouraged its retail distributors to ***match*** the plaintiff's prices.[9] 495 U.S. 328, 331-32 (1990). Not surprisingly, the Court found that Atlantic Richfield's vertical instruction to its distributors did not injure

[8] There are multiple ITC determinations of Defendants' illegal dumping. (*See* Op. Br. at 10-13.)

[9] The *Rebel Oil* cases involve substantially the same conduct by Atlantic Richfield. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995); *Rebel Oil Co. v. Atl. Richfield Co.*, 146 F.3d 1088 (9th Cir. 1998).

competition. *Id.* at 345. Importantly, the challenged conduct involved above-cost prices and the ***vertical*** relationship between a supplier and its distributors. *Id.* at 332. ECD is not complaining that Defendants matched its prices in the marketplace; rather that they concertedly and horizontally fixed prices below their costs to eliminate ECD and others.

3. *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*

Brooke Group involved price discrimination by ***a single firm*** directed at ***one*** competitor that it engaged in a price war. 509 U.S. 209, 216-17 (1993). The case did not involve a conspiracy among competitors to destroy an entire industry, which is treated differently than unilateral action aimed at one competitor.[10] *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984) ("Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2.").[11]

4. *Advo, Inc. v. Philadelphia Newspapers, Inc.*

The Third Circuit's *Advo* decision involved a Section 2 claim of attempted monopolization by a single actor—a newspaper that had begun competing with

[10] Likewise with *Pacific Bell Telephone Corp. v. Linkline Communications Inc.*, which contained no allegations of below-cost pricing or any allegation of concerted action. 555 U.S. 438, 442-46 (2009).

[11] Defendants make the surprising argument that there is no difference between Sections 1 and 2 of the Sherman Act, citing *Atlantic Richfield*. The argument is routinely contradicted by precedent that clearly treats the two claims separately. *E.g.*, *Am. Needle*, 560 U.S. at 190; *Superior Prod.*, 784 F.3d at 318-20; (*see also* Op. Br. at 26-27, n.9.)

plaintiff in distributing door-to-door advertising circulars. 51 F.3d 1191 (3d Cir. 1995). Only after considering a voluminous discovery record (more than 30 depositions and expert reports) was the court able to conclude at summary judgment that the plaintiff's Section 2 claim lacked: (i) predatory or anticompetitive conduct; (ii) intent to monopolize; and (iii) dangerous probability of achieving monopoly power. *Id.* at 1198-99. The decision hardly supports granting a motion to dismiss to protect a horizontal agreement among competitors to fix prices and dump product at below-cost prices to the material injury of an entire sector of American industry.

C. Antitrust Injury Properly Concerns Injury To Competitors And the Market, In Particular Where An Entire Industry Is Destroyed.

Defendants completely ignore and leave unrebutted Supreme Court authority and legislative history confirming that harm to competitors is also part of the "injury to competition" and antitrust injury inquiries. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 118-19 (1986) (defining predatory pricing and antitrust injury as the elimination of competitors); *United States v. Am. Linseed Oil. Co.*, 262 U.S. 371, 388 (1923) (Sherman Act was enacted to protect the public against "combinations which tend directly to suppress . . . competition."); 21 CONG. REC. 4100 (1890) (statement of Rep. Mason) ("Some say that the trusts have made products cheaper [but] it would not right the wrong done to the people

of the country by the 'trusts' which have destroyed legitimate competition."); *see also W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 105 (3d Cir. 2010) (rejecting argument that there is no antitrust injury when there are low prices because "the central purpose of the antitrust laws . . . is to preserve competition. It is competition—not the collusive fixing of prices at levels either low or high—that these statutes recognize as vital to the public interest.") (quotations omitted).[12]

D. Loss Of Consumer Choice And Innovation Must Also Be Considered As Part Of Antitrust Standing Inquiry.

Defendants also fail to properly consider the impact of the loss of innovation and consumer choice. Indeed, Defendants wrongly dismiss binding precedent on these issues, claiming that such authorities are inapplicable since they involve group boycotts and/or refusals to deal.[13] (*See* Resp. Br. at 31-32.) But, like the horizontal price-fixing conspiracy alleged by ECD, horizontal group boycotts and refusals to deal are *per se* illegal under Section 1—they all involve concerted action among competitors. *See Cardizem*, 332 F.3d at 907; *FTC v. Super. Ct. Trial Lawyers Assoc.*, 493 US 411, 422-23 (1990).

---

[12] Defendants completely ignore ECD's discussion at pages 34-42 of its Opening Brief together with landmark decisions *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 45 (1930).

[13] Defendants' purported concern for whether the cited case arises under the exact same antitrust theory as ECD's claim is a sudden about-face from their usual and repeated attempts to apply Section 2 and Robinson-Patman Act law to ECD's Section 1 claim.

Defendants fail to cite a single Section 1 horizontal conspiracy case in which a court found an absence of antitrust injury to a competitor when there was the loss of an entire industry, consumer choice, and innovation.[14] To the contrary, this Court has found antitrust injury in Section 1 cases in such circumstances. *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1023 (6th Cir. 1999) ("[I]mpeding an innovative competitor's access to the market" is an injury of the type sought to be redressed by the antitrust laws). The Supreme Court is in accord. *See Blue Shield of Virginia v. McCready*, 457 U.S. 465, 484 (1982) (denying consumers choice of seeing a psychiatrist or a psychologist was an injury that "flow[ed] from that which makes the defendants' acts unlawful" and sufficient to show antitrust injury); *Full Draw Prods. v. Easton Sports, Inc.*, 182 F.3d 745, 754-55 (10th Cir. 1999) (defendants' actions caused antitrust injury because they substantially reduced consumer choice); *Amarel v. Connell*, 102 F.3d 1494, 1509 (9th Cir. 1997) (when defendant's activity prevents consumers from making free choices between market

[14] Defendants highlight ***only one*** American company still in the solar industry. (*See* Resp. Br. at 31.) Defendants, however, fail to disclose that First Solar competes primarily in the large utility scale, ground mount market, while ECD competed in the commercial and industrial rooftop market. (*Compare* Compl., R.E. 1, Page ID 13, ¶¶ 28-29 *with* 2015 First Solar 10-K at 3 (available at http://www.sec.gov/Archives/edgar/data/1274494/000127449416000067/fslr10-k12x31x2015.htm.) In fact, First Solar has expressed concerns about being able to compete in ECD's "commercial and industrial rooftop market." (*See* 2015 First Solar 10-K at 24.) In any event, such argument is better left for summary judgment and trial.

alternatives, there is antitrust injury); *Solyndra*, 62 F. Supp. 3d at 1044 ("The elimination of market alternatives may also be considered a form of antitrust injury.") (internal citations omitted); *see also Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 789 (6th Cir. 2002) (reducing consumer choice is harmful to competition).

III. THE DISTRICT COURT ERRED IN DISMISSING ECD'S COMPLAINT WITH PREJUDICE AND IN REFUSING TO ALLOW ECD TO AMEND ITS COMPLAINT.

In dismissing ECD's complaint with prejudice for failing to include factual allegations relating to an element of its cause of action and denying ECD the opportunity to amend its complaint upon a timely motion, the District Court improperly deprived ECD of its "one chance" to amend its complaint. *See United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 644 (6th Cir. 2003). Defendants do not contest that the District Court acted harshly, but rather argue that any amendment would be (and was) futile.[15] (*See* Resp. Br. at 42.) But Defendants miss the mark—the purported "evidence" they submit says nothing about the possibility of recoupment at the time the conspiracy was entered into.

[15] When a motion to amend is denied as futile, review is *de novo*. *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002).

A. A Dangerous Probability Of Recoupment Is Measured At The Time Defendants Entered Into The Conspiracy.

As discussed above, *supra* Part I.C, Defendants' argument that they "are not recouping and have no plausible hope of recouping" ignores the correct legal inquiry. In a tacit admission, Defendants do not even address the law set forth in ECD's Opening Brief that a dangerous probability of recoupment is measured at the time Defendants entered into the conspiracy. *Am. Airlines*, 743 F.2d at 1118; *Gen. Indus.*, 810 F.2d at 807. Much the same, they have no response to the well-grounded factual allegation that when their conspiracy began in 2008-2009, there was a "dangerous probability of recoupment." For example:

- Defendants had rapidly grown their market share to 80%. (Compl., R.E. 1, Page ID 18, ¶ 48.)
- [redacted] (Am. Compl., R.E. 53, ¶ 106.)
- [redacted] (*Id.*, ¶ 107.)
- [redacted] (*Id.*)

In other words, Defendants were poised to recoup their losses (and intended to do so) when they entered into the conspiracy.[16]

[16] Defendants wrongly suggest that their anticompetitive intent is immaterial. (*See* Resp. Br. at 51.) But this Court examines "what a rational firm would have expected its prices to accomplish" to determine whether predatory pricing exists. *See Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 938 (6th Cir. 2005).

B. Defendants' Post-Hoc "Evidence" Says Nothing About The Dangerous Probability Of Recoupment At The Time The Conspiracy Began.

Instead of responding to ECD's arguments, Defendants seek refuge in "evidence" that has nothing to do with the probability that Defendants would recoup their losses ***at the time they entered into the conspiracy***.[17]

Indeed, Defendants' market share ***in 2014*** says nothing about Defendants' increasing market share (from negligible to 80%) in the relevant market during the time they hatched their conspiracy and worked to eliminate competitors from the market through years of below-cost sales. (*See* Compl., R.E. 1, Page ID 18, ¶ 48.) Nor do Defendants' recent financial struggles caused by their own below-cost dumping mean that at the time the conspiracy began, the Defendants did not have a dangerous probability of recovering their losses. *See United States v. DiCarlantonio*, 870 F.2d 1058, 1061 (6th Cir. 1989) (rejecting defendants' argument that conspiracy convictions cannot be predicated upon failed crimes).

ECD's own 2011 statements about the "number of solar manufacturers rapidly increasing" and "relatively low barriers to entry" were obviously made before the bulk of the U.S. solar industry was destroyed, and in advance of the

---

By Defendants' own admissions, [redacted] (*See* Op. Br. at 51.)

[17] In any event, disputes as to the probability of recoupment are factual questions better left for summary judgment. *See Broadcom*, 501 F.3d at 318.

marketplace and ECD having any understanding of Defendants' misconduct and their role in ECD's demise. Indeed, it was not until 2012—a year later—that the ITC and DOC published their determinations that Defendants had engaged in illegal sales and massive dumping to the material injury of American solar manufacturers. (Compl., R.E. 1, Page ID 37, Ex. A ¶ 24.)

It is now clear that substantial barriers to entry exist. Indeed, recent filings disclosed that ***Yingli spent over $1 billion and Trina over $400 million*** just on property, plant ,and equipment. (FY 2014 Yingli 20-F at F-11[18]; FY 2014 Trina 20-F at F-8[19].) And, much the same, ECD spent over $240 million on property, plant and equipment in 2011—not to mention its rich patent portfolio covering the makeup of its solar cells, and its manufacturing and installation processes. (2011 ECD 10-K at 47[20]; Compl. R.E., 1, Page ID 15-17, ¶¶ 39-40.)

Following three ITC determinations of Defendants' dumping, why would any U.S. company spend hundreds of millions of dollars building a solar panel manufacturing facility knowing that Defendants will sell below cost to eliminate that company? *See United States v. Am. Tobacco Co.*, 221 U.S. 106, 183 (1911)

---

[18] Available at http://www.sec.gov/Archives/edgar/data/1394029/000110465915038741/a15-6390_120f.htm.

[19] Available at http://www.sec.gov/Archives/edgar/data/1382158/000110465915030119/a15-5815_120f.htm.

[20] Available at http://www.sec.gov/Archives/edgar/data/32878/000095012311079926/k50674e10vk.htm.

(recognizing that anticompetitive conduct can serve as "perpetual barrier[] to the entry of others into the . . . trade"); Paul Milgrom and John Roberts, *Informational Asymmetries, Strategic Behavior, and Industrial Organization,* AM. ECON. R., Vol. 77, No. 2, May 1987, at 185-187 ("[T]the threat of predation (even if it will fail to induce exit) will deter entry."). Indeed, even bankrupt Suntech, which had blamed unanticipated U.S. tariffs for its bankruptcy, continued to help sell panels into the U.S. under the Suntech name. And, supposedly troubled Yingli has recently opened still another new factory and promised to repay its outstanding notes within a year. (*See* Part I.C. *supra*.)

In any event, the existence of entry barriers, and their effectiveness in preventing entry (and continued existence) in the market, is a fact question better left for expert economists and trial.[21] *See In re EVIC Class Action Litig.*, No. 00-CIV-3811, 2002 WL 1766554, at *11, n.34 (S.D.N.Y. July 31, 2002) ("[W]hether barriers to entry exist is usually a fact-intensive question."); *Retrophin, Inc. v. Questcor Pharm., Inc.*, 41 F. Supp. 3d 906, 917 (C.D. Cal. 2014) ("[B]arriers to entry is not an issue appropriately decided this Motion [to dismiss]."). Thus, the District Court far overstepped its bounds in resolving "barriers to entry" in connection with Defendants' motion to dismiss—and stands in strong contrast to

[21] In the related *Solyndra* matter, the former chief economist of the FTC opined that there were substantial entry barriers. (*See Solyndra*, No. 12-cv-9272 (N.D. Cal.) Dkt. No. 218 at 12.)

Defendants' cases involving low entry barriers. *E.g.*, *Advo*, 51 F.3d at 1200 (finding, at summary judgment, entry into advertising circular business required only a "small cadre of experienced managers" and "low-skill employees . . . stuff[ing] circulars . . . and hang[ing] them on doorknobs.").

Likewise, Defendants' arguments about the possibility of recoupment in the face of recently lower prices for conventional energy raises only factual issues for trial. *See Broadcom*, 501 F.3d at 318. Further, defendants' own SEC filings define their relevant market as solar. (*See* FY 2014 Yingli 20-F at 15 ("We compete with both local and international producers of solar products."); 2014 Trina 20-F at 12 ("We compete with other PV module manufacturing companies.").)

C. Because Amendment Would Not Be Futile, ECD Should Be Allowed To Amend Its Complaint.

If required to, ECD can allege that Defendants had a dangerous probability of recoupment at the time they began their conspiracy. (*See* Section I.C *supra*.) In the absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, or undue prejudice, ECD should be allowed to amend its complaint and seek redress for the serious wrongs caused by Defendants' illegal conspiracy.[22] (*See* Op. Br. at 53-54.)

[22] None of ECD's motions to amend were untimely under the Federal Rules of Civil Procedure or any scheduling order (as the judge never set one). Rather, ECD timely filed its motions to amend to conform with the evidence obtained in

Defendants fail to address ***any*** of the applicable law cited by ECD (with the exception of *Bledsoe*). Instead, they point to a handful of cases that are wholly distinguishable and show just how badly the District Court erred in not allowing ECD to amend its complaint. For example, in most of the cases cited by Defendants, the plaintiffs never moved to amend their complaints and never filed amended complaints. Instead, they relied on the district court to *sua sponte* enter an order allowing amendment. *See Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 844 (6th Cir. 2012); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008); *Begala v. PNC Bank, Ohio, Nat'l Ass'n*, 214 F.3d 776, 783-84 (6th Cir. 2000). Thus, this Court could easily state that it is not the district court's role to "initiate" amendments. *Ohio Police*, 700 F.3d at 844.

Much the same, in *Leisure Caviar, LLC v. U.S. Fish & Wildlife Service*, the district court dismissed plaintiffs' complaint because they did not exhaust their administrative remedies and the suit was not justiciable—incurable legal defects—not because plaintiffs failed to plead sufficient factual support for their existing claim. 616 F.3d 612, 614-15 (6th Cir. 2010). Undeterred, the *Leisure Caviar* plaintiffs sought leave to amend to bring four ***new*** claims, and leave was rightly

---

discovery in *Solyndra*, where the parties had an agreement to coordinate discovery. (*See* Op. Br. at 56-57.)

denied. *Id.* at 616-18. And in *Glazer v. Chase Home Finance LLC*, the defendants were unduly prejudiced by the proposed amendment and thus it was not granted. 704 F.3d 453, 459 (6th Cir. 2013).

Defendants' attempt to address *Bledsoe* highlights the impropriety of the District Court's action. But, if merely raising an argument in a motion to dismiss was sufficient, amendment would never be proper and dismissal would always be with prejudice. *See, e.g.*, *E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993). If anything, ECD was "on notice" that its claims were sufficient—these allegations were upheld on Defendants' motion to dismiss the *Solyndra* action. *Solyndra*, 62 F. Supp. 3d at 1040. ECD suffered a manifest injustice when the District Court found otherwise, misread *Superior Production* and *Matsushita*, and denied ECD its day in court.

CONCLUSION

For the foregoing reasons, and those set forth in ECD's opening brief, ECD prays that the Court reverses the District Court's order granting Defendants' motion to dismiss, or in the alternative, reverses thae District Court's order denying ECD's motion to file an amended complaint.

Respectfully submitted,

/s/ W. Gordon Dobie

W. GORDON DOBIE
WILLIAM C. O'NEIL
KATHRYN W. BAYER

Winston & Strawn LLP
35 W. Wacker Dr.
Chicago, IL 60601
(312) 558-5600

ROBERT B. PRINGLE

Winston & Strawn LLP
Of Counsel

Counsel for Appellant Energy Conversion Devices Liquidation Trust

APRIL 4, 2016

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Kathryn W. Bayer, an attorney, certify that I have complied with the above-referenced rule. The brief was printed using a 14-point proportional Times New Roman font. According to the word processor used to prepare this brief, Microsoft Word, this brief contains 6,893 words and therefore complies with the type-volume limitation of Rule 32(a)(7)(B) and (C).

Dated: April 4, 2016

/s/ Kathryn W. Bayer
Kathryn W. Bayer

CERTIFICATE OF SERVICE

I, W. Gordon Dobie, an attorney, certify that on this day I caused the foregoing **Reply Brief For Appellant Energy Conversion Devices Liquidation Trust**, to be filed with the United States Court of Appeals for the Sixth Circuit via the Court's ECF system. I further certify that on this day I caused the foregoing **Reply Brief For Appellant Energy Conversion Devices Liquidation Trust** to be served electronically via the Court's ECF system on the following parties:

Daniel Laytin
Leonid Feller
James Hileman
KIRKLAND & ELLIS LLP
300 N. LaSalle St.
Chicago, IL 60654

Attorneys for Trina Solar Limited and Trina Solar (U.S.), Inc.

Catherine Dobrowitsky
RIVENOAK LAW GROUP, P.C.
101 W. Big Beaver Rd.
Troy, MI 48084

Mikael Abye
SHEARMAN & STERLING LLP
4 Embarcadero Center
San Francisco, CA 94111

Jerome Fortinsky
SHEARMAN & STERLING LLP
599 Lexington Ave.
New York, NY 10022

Attorneys for Suntech America, Inc.

Patrick Gerard Seyferth
Susan McNeil McKeever
BUSH, SEYFERTH & PAIGE
3001 W. Big Beaver Rd.
Suite 600
Troy, MI 48084

Jonathan C. Sanders
SIMPSON, THACHER & BARTLETT
2475 Hanover St.
Palo Alto, CA 94304

Karen Michelle Gift
SIMPSON, THACHER & BARTLETT
900 G Street, NW
Washington DC 20001

Attorneys for Yingli Green Energy Holding Co. Ltd. and Yingli Green Energy Americas, Inc.

Dated: April 4, 2016

/s/ W. Gordon Dobie
W. Gordon Dobie