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

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CARRIER CORPORATION, ET AL.,
Plaintiffs-Appellants,
v.

OUTOKUMPU OYJ, ET AL.,
Defendants-Appellees.

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

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

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INTRODUCTION

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

Although now it is obvious, Carrier's original and amended complaints were less than candid about the extent of their reliance on the EC Decision and the extent to which Carrier had simply lifted language from that decision and inserted it into its Complaint, in the process deleting references to the exclusively European focus of the conduct reported by the EC and replacing them with conclusory statements claiming U.S. connections. *Compare, e.g.*, EC Decision, Exhibit 1 to Outokumpu's Mot. to Dismiss ¶79, App.__ ("EC") ("[i]mplementation was ensured through a market leader arrangement *for European territories* and key customers" (emphasis added)) *with* R.46, Amended Complaint ("Compl.") ¶72, App.__ ("[i]mplementation was ensured through a 'market leader' arrangement *for certain territories* and key customers" (emphasis added)).

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

While, as explained in Outokumpu's opening brief, the district court did not err in its application of the substantiality doctrine, it in some sense went further than necessary to address the shortcomings of Carrier's Complaint. It went further than necessary because—even putting aside the district court's view of Carrier's conduct and credibility in pleading its claims in this case—Carrier's Complaint simply fails to state a plausible Section 1 claim under Rule 12(b)(6) and, in particular, under the Supreme Court's re-articulation of that standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

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

But even accepting Carrier's position that, at least, "there is nothing in the E.C. Decision that undermines the plausibility of [Carrier's] allegations," Third Br. 13-14, that alone is not enough to sustain a Sherman Act claim. Instead, under *Twombly*, Carrier has the burden to allege facts which, taken as true, would affirmatively support its Section 1 claim, and which would make plausible the notion that the Cuproclima cartel extended to the United States in ways not recognized or identified by the European Commission. Carrier's efforts to meet this burden are exceedingly weak, consisting of just three arguments: *first*, Carrier claims that the ACR tubing market is a worldwide market; *second*, it claims that KME and Wieland's entry into the U.S. ACR market in 2003 somehow demonstrates that they previously had refrained from entry pursuant to the Cuproclima cartel; and, *third*, it claims that a redacted excerpt of a fax mentioned in the EC Decision that includes the words "Global Agreement" makes plausible, as opposed to merely conceivable, that the Cuproclima cartel extended to the United States.

These three slender reeds are far from sufficient to meet the pleading requirements of Rule 12(b)(6) and *Twombly*. The notion that there is a single worldwide market for ACR tubing is belied by Carrier's own allegations in its Complaint and submissions. The entry of KME and Wieland into the United States some two years after the EC's dawn raids—and two years after the complete dissolution of Cuproclima—says nothing about whether their failure to enter earlier was part of a market allocation agreement. And a single, redacted excerpt from a fax hardly supplies the kind of factual "heft" that *Twombly* requires.

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

ARGUMENT

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

While Carrier appears now to concede that the EC Decision does not *support* its allegations of a U.S. component to the Cuproclima cartel, it contends that the Commission's silence on the issue does not foreclose its own conclusions with respect to U.S. conduct. But Carrier's principal allegation—that the Cuproclima cartel allocated Carrier's European business to KME and Wieland in exchange for the allocation of Carrier's U.S. business to Outokumpu—falls squarely within the subject matter so comprehensively addressed in the EC's decision. Moreover, even if the EC Decision itself does not *require* dismissal, it certainly does not *support* Carrier's claim. Instead, Carrier must come forward with something more in order to satisfy Rule 12(b)(6) and *Twombly*. Specifically, Carrier "must allege 'enough factual matter ... to suggest that an agreement was made,'" in this case, an agreement to allocate Carrier's U.S. business to Outokumpu in exchange for the allocation of Carrier's European business to KME and Wieland. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008) (citing *Twombly*, 550 U.S. at 556-557). Its failure to do so here is fatal to its claim.

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

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

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

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

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

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

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

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

DG, European Commission, App.__ .[2]

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

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

market”).

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

Carrier’s argument betrays a deep misunderstanding of *Twombly*’s pleading requirements, and its assertion that it is entitled to proceed to discovery because nothing “precludes” its allegations should be rejected. The absence of a negative does not prove a positive, and silence cannot “nudge[a] claim[] across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. Moreover, even if the EC Decision’s treatment of U.S. conduct or effects could be construed as mere silence, Carrier’s Complaint should still be dismissed because its U.S. allegations constitute unwarranted factual inferences. *See, e.g.*, *Total Benefits Planning Agency*, 552 F.3d at 434 (“court need not ... accept unwarranted factual inferences” and affirming 12(b)(6) dismissal). There simply is no factual basis for tacking “in the United States” onto the Commission’s findings concerning an exclusively European cartel. *See* Order 6, App.__. On Carrier’s own terms, its Sherman Act claim remains but one of a myriad “theoretical possibilities” and requires dismissal. *See In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-51 (2d Cir. 2007); *see also Bishop v. Lucent Tech., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008) ("Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice.").

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

Lacking factual support for a U.S. conspiracy, Carrier asks that its claim be "viewed in the context that Defendants have admitted that they engaged in market allocation in Europe." Third Br. 20-21. But this "if it happened there, it could have happened here" argument has been soundly rejected, *see Elevators*, 502 F.3d at 52, and Carrier's attempts to align this case with *Flat Glass* and *Chocolate Confectionary* are inapposite.

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

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

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

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

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

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

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

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

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

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

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

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

Carrier attempts to convert the exclusively European conduct set out in the EC Decision into a U.S. treble damages claim by contending that the geographic market for ACR tubing is worldwide in scope. Through this worldwide market definition, Carrier argues that "[p]rices in the United States had to be and were maintained at levels comparable to those fixed in other regions in order to maintain the price levels in Europe and elsewhere." Compl. ¶101(d), App.__. In other words, if the conspiracy were not worldwide, Carrier would have been able to turn to alternative, U.S. (or Asian) sources of supply in response to supracompetitive cartel prices in Europe. Carrier's worldwide market argument fails, however, both as a matter of law and because the facts alleged in Carrier's Complaint and in its submissions below suggest just the opposite, *i.e.*, that the U.S., Asian, and European ACR markets operated quite independently of one another.

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

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

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

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

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

Finally, the lack of an economic relationship between the U.S. and European ACR markets is shown vividly by the dearth of evidence Carrier provides concerning commerce between these markets. Carrier alleges it is "one of the largest purchasers—if not the single largest—of ACR Copper Tubing … in the United States, Europe, and elsewhere …." Compl. ¶1, App.__. Yet, in a Complaint containing allegations beginning as early as May 1988 and continuing up to and through at least 2003, Carrier provides *only one* example of its having purchased ACR tubing from a European supplier for use in the United States, and that example is itself suspect: Carrier alleges that a European ACR producer—not one of the defendants in this case—sold an undisclosed amount of ACR tubing to a company called ICP at an undisclosed date. Compl. ¶51, App.__. Carrier apparently acquired ICP in 1999, although it does not reveal whether ICP's European purchase took place before or after that date. *Id.* In any event, that the world's largest purchaser of ACR tubing can point to *only one* purchase of an *undisclosed* amount of ACR tubing at an *undisclosed* point in time over a period of at least 15 years is simply insufficient to establish a U.S. dimension to the Cuproclima cartel, both before, and especially after, *Twombly*.

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

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

Instead of responding, Carrier argues that, regardless of how likely alternative explanations may be, its "direct allegations that these market dynamics occurred *pursuant to* a cartel" ought to suffice. Third Br. 19. But *Twombly*

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[4] Carrier's reliance on *Flat Glass* is wholly misguided. *See* Third Br. 20. As even Carrier notes, the complaint in that case "alleged evidence of admitted conspiratorial conduct in Europe along with lockstep pricing patterns in the U.S. that *ended contemporaneously* with the *commencement* of an EC investigation." *In re Flat Glass Antitrust Litig.*, 2009 WL 331361, *2 (W.D. Pa. Feb. 11, 2009). An end that is "contemporaneous" with the "commencement of an EC investigation" is a far cry from the two-year delay Carrier asserts here. *See* Compl. ¶7, App.___.

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

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

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[5] In a half-hearted effort to overcome this point, Carrier suggests that any "anticompetitive landscape continued until at least near the time of the publication of the EC Decision," two years later. *See* Third Br. 1-2. But it is implausible that

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

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

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the Cuproclima cartel persisted for two years after the EC's dawn raids and the dissolution of Cuproclima in March 2001, and after both Mueller and Outokumpu had begun extensive cooperation with the Commission by April 2001. *See* EC ¶¶16, 56-59, App.___.

confirming that the EC's findings were "limited to the European territory."

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

II. CARRIER'S CLAIM IS TIME-BARRED

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

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

A. Carrier Was On Inquiry Notice As Of March 2001

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

B. Carrier Failed To Allege Reasonable Diligence

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

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

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

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

Carrier failed to plead a single affirmative act of fraudulent concealment with the particularity required by Rule 9(b), and the allegations that it did offer in no way prevented it from filing a timely claim. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-451 (7th Cir. 1990) (requiring "active steps" "beyond the wrongdoing upon which the plaintiff's claim is founded—to prevent the plaintiff from suing in time"); *Dry Cleaning & Laundry Inst. v. Flom's Corp.*, 841 F. Supp. 212, 218 (E.D. Mich. 1993) ("[C]landestine meetings and telephone conversations [are] not sufficient to establish requisite 'affirmative acts' of fraudulent concealment"). Carrier was required to allege more than just that the Cuproclima cartel operated in a manner designed to avoid detection; it was required to show that defendants engaged in affirmative acts of concealment (fraud) that kept Carrier from filing its claim within the limitations period. *Pinney Dock*, 838 F.2d at 1471-1472.

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

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

The affidavits and other record material before the district court demonstrate that the Outokumpu Oyj (OTK) and Outokumpu Copper Products Oy (OCP) (together, the "Finnish Entities") are foreign corporations lacking any significant contacts with the United States. Carrier does not challenge this factual material. Instead, it exaggerates the significance of a handful of minor contacts in an attempt to justify the exercise of specific jurisdiction. Carrier claims that it satisfied the purposeful availment prong of the specific jurisdiction test by alleging: (i) Over aperiod of at least eight years, OCP appointed to its internal management boards a handful of employees from the U.S. companies it acquired; (ii) a former Carrier employee said that a few unnamed employees from the Finnish entities attended one meeting with him "in the mid-1990s"; and (iii) a Finnish Outokumpu subsidiary that is not a defendant in this case exported copper *electrical* tubing to the United States in 1999. Third Br. 53-54. None of these allegations, considered together or separately, satisfy the purposeful availment requirement to establish personal jurisdiction.

Carrier has mined almost a decade's-worth of regulatory filings, press releases, website postings, and newspaper articles to try to show that OCP conducted business in the United States. The only allegation resulting from that search was that the Finnish Entities appointed eight U.S. employees to their international boards, and the majority of those employees were employees of recently-acquired U.S. subsidiaries. Appointing U.S. residents to a board of an international corporation does not constitute purposeful availment. Moreover, Carrier has failed to plead any facts showing that these employees played any role in causing the harm it allegedly suffered. *See Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1237 (6th Cir. 1981) (holding that jurisdictional contacts at issue in a particular case must relate to events giving rise to litigation). Significantly, there is no mention of any U.S. employees in the EC Decision.

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

Finally, Carrier mischaracterizes the contents of an import report showing that one of OTK's European subsidiaries—Outokumpu Poricopper Oy, *not* a defendant in this case—shipped level-wound coil to a U.S. customer a total of three times in 1999. Outokumpu explained in the district court that these shipments were not ACR tubing, but oxygen-free copper tubing for use in the electronics industry. *See* Reply Decl. of Ulf Anvin, Exhibit 7 to Outokumpu's Reply ¶¶2-5, App.__; Exhibit 8 to Outokumpu's Reply, App.__. The relevant customer, Cablewave, now known as Radio Frequency Systems, is a "global designer and manufacturer of cable and antenna systems ... for wireless infrastructure," and has nothing to do with the ACR industry. *Id*. These few shipments of an unrelated product by an Outokumpu subsidiary not named in Carrier's Complaint are insufficient to establish specific jurisdiction over that subsidiary, let alone over its European parents.

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

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[7] Moreover, Carrier misreads its own exhibits and exaggerates the roles these U.S. employees performed for the Finnish Entities to support its claim that the Boards of the U.S. subsidiaries were "dominated" by OCP executives. *See* Reply 55. For example, Carrier claims that Ari Ingman was the only Director of Outokumpu Copper (U.S.A.), Inc. in 1999, whereas the cited exhibit shows that he was the only *outside* director. *See* Foreign Corp. Annual Report, Exhibit 23 to Carrier's Response, App.___. The rest of the board consisted of inside directors who were identified as the company's President and Secretary. *See id*. Carrier also claims that Hannu Wahlroos was the sole director of Outokumpu Copper Franklin, Inc. in 2000, when in reality, Geoff Palmer, Ed Rottman, and Martin

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

CONCLUSION

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

Respectfully submitted,

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Dated: March 31, 2009
Washington, D.C.

Kroll served on the board as Director-Officers. *See* Annual Report, Exhibit 24 to Carrier's Response, App___.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation provided in Federal Rule of Appellate Procedure 32(a)(7)(B). The foregoing Brief contains 6,981 words of Times New Roman (14-point) proportional type. The word processing software used to prepare this Brief was Microsoft Word 2003, version 5.1.2600 Service Pack 2 Build 2600.

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ADDENDUM—DESIGNATION OF JOINT APPENDIX CONTENTS

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2009, pursuant to 6 Cir. R. 25, I caused one true and accurate copy of the foregoing Brief to be served via First class mail, electronic mail, and/or the Court's Electronic Case Filing ("ECF") system upon the following:

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

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARRIER CORPORATION, ET AL.,
Plaintiffs-Appellants,
v.

OUTOKUMPU OYJ, ET AL.,
Defendants-Appellees.

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

PROOF FOURTH BRIEF APPENDIX

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March 31, 2009

APPENDIX

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DOCKETED CASES

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: FLAT GLASS ANTITRUST LITIGATION (II)	**Master Docket** **Misc. No.: 08-180 (DWA)** **MDL No.: 1942**
This Document Relates to: **All Actions**	**CONSOLIDATED AMENDED COMPLAINT – CLASS ACTION** **JURY TRIAL DEMANDED**

CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

Plaintiffs Colonial Glass Solutions, Gilkey Window Company, Inc., Girard Glass Corporation, Jackson Glass Company, Inc., Maran-Wurzell Glass & Mirror, and Thermo-Twin Industries, Inc., individually and on behalf of a class of those similarly situated, bring this action for treble damages under the antitrust laws of the United States against Defendants named in this Complaint and demand a trial by jury.

Plaintiffs, by and through undersigned counsel, allege as follows upon information and belief except as to paragraphs applicable to individual Plaintiffs, which are based upon personal knowledge:

NATURE OF THE ACTION

1. This is an antitrust class action charging the principal United States manufacturers of high quality float glass used for construction and architectural applications ("Construction Flat Glass") with price fixing in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Plaintiffs bring this action on behalf of themselves and all entities that purchased Construction Flat Glass in the United States directly from Defendants, or their controlled subsidiaries, from at least July 1, 2002 and continuing through at least December 31, 2006 (the

"Class Period"). As a result of Defendants' anticompetitive conduct, Plaintiffs and members of the proposed Class paid Defendants higher prices for Construction Flat Glass than they would have paid absent Defendants' anticompetitive conduct.

3. Defendants – AGC America, Inc., AGC Flat Glass North America, Inc. (collectively, "AGC"), Guardian Industries Corp. ("Guardian"), Pilkington North America, Inc., Pilkington Holdings Inc. (together, "Pilkington"), and PPG Industries, Inc. ("PPG") – are the largest manufacturers of Construction Flat Glass in the United States.

4. During the Class Period, Defendants controlled approximately 75% of the United States market for Construction Flat Glass. In addition, Guardian, AGC, and Pilkington (through affiliated companies) dominated the European market for Construction Flat Glass, along with the French company Saint-Gobain, similarly controlling about 75% of that market.

5. In mid-2002, Defendants agreed to raise and fix prices of Construction Flat Glass sold in the United States. Defendants accomplished this through a combination of collusive "energy surcharges" and price increases. Defendants agreed to impose identical "energy surcharges," which they would present as cost-recovery vehicles and add to the price of truckloads of Construction Flat Glass they sold. Defendants also agreed to raise prices of their Construction Flat Glass products by identical percentages. For a period of over thirty months, pursuant to their agreement, Defendants raised energy surcharges and prices by identical amounts on numerous occasions.

6. Defendants first introduced energy surcharges for a short period of time beginning in late 2000, prior to the Class Period, when Defendants' natural gas costs unexpectedly spiked. These surcharges were in effect from approximately October 2000 until the end of 2001. During this period, Defendants imposed different energy surcharges, reflecting the fact that their actual

energy costs differed. For example, some Defendants set different surcharge levels for different regions of the country, since their energy costs varied in the different regions in which their plants were located. By the end of 2001, with natural gas costs under control, Defendants stopped imposing the surcharges.

7. By 2002, prices of Construction Flat Glass in the United States were falling, and Defendants were having difficulty unilaterally raising or even maintaining the prices of their products. Defendants recognized that imposing energy surcharges could be an effective way to raise prices across the board but only if all Defendants agreed to implement the same energy surcharge program and to set their energy surcharges at identical levels. Only through such agreement and coordination could Defendants guarantee industry-wide acceptance of energy surcharges at inflated levels.

8. In mid-2002, when natural gas prices began to rise, Defendants saw an opportunity to increase prices and profits by imposing coordinated across-the-board price increases under the guise of energy surcharges. In approximately June 2002, Defendants entered into an agreement to fix energy surcharges and impose them on their customers for truckloads of Construction Flat Glass.

9. Pursuant to their agreement, Defendants falsely presented "energy surcharges" to their customers as fees necessary to recoup unexpected increases in energy costs. Defendants knew, however, that the surcharges did not correspond to their actual energy costs. Rather, the surcharges were a means to increase prices and profits.

10. Defendants agreed to reintroduce energy surcharges at the same time and to adopt identical surcharge programs and a new surcharge schedule. This new schedule set energy surcharges at higher levels than the previous schedules Defendants had used and did not account

for any regional variation. Defendants also agreed to announce the same energy surcharges on a quarterly basis, to adjust them in lockstep, and not to deviate from the agreed-upon price schedule.

11. In June 2002, each Defendant separately informed its customers that it was reinstituting energy surcharges linked to a new surcharge schedule. Each Defendant set its new, identical energy surcharges to go into effect on the same day – July 1, 2002.

12. Beginning July 1, 2002, Defendants invariably set their energy surcharges at the exact same level, quarter after quarter, for over thirty months. Over this period, Defendants' energy surcharges steadily increased – from $200/truckload for the third quarter of 2002 to $900/truckload in the first quarter of 2005.

13. In furtherance of their agreement, Defendants also announced identical percentage-based price increases on their Construction Flat Glass products.

14. Defendants' price-fixing agreement met with unprecedented success in raising and stabilizing prices of Construction Flat Glass across the board. Defendants' collusion permitted them to achieve robust and record profits, even though they were operating in a mature industry under challenging economic conditions. Pilkington, for example, informed investors in November 2004 that it had achieved "robust profits, despite rising costs." Pilkington's chief executive observed: "Against a background where 80 percent of our business is in markets where prices are flat or in decline and volumes are flat, I'm very pleased with our result."

15. At the same time Defendants were fixing prices in the United States, their European counterparts (except PPG) were similarly fixing prices in Europe. On February 22 and 23, 2005, the European Commission (the "EC" or "Commission") carried out surprise raids on the European premises of Guardian, Pilkington, AGC Flat Glass Europe (formerly known as

Glaverbel), and Saint-Gobain. On March 2, 2005, the EC conducted a second round of raids on the premises of Guardian and the leading European trade association for flat glass manufacturers, known as GEPVP. The EC investigation focused on Defendants' coordinated imposition of "energy surcharges" and price increases in various European countries.

16. The EC uncovered definitive evidence of a price-fixing cartel in the European Construction Flat Glass market. The cartel operated through face-to-face meetings in restaurants and hotels during which representatives of the European affiliates of AGC, Guardian, Pilkington, and Saint-Gobain agreed on prices and other commercial conditions for the sale of Construction Flat Glass, the timing of price-increase announcements, and minimum prices to be charged.

17. The EC imposed the fifth largest fine for a price-fixing cartel in the history of the European Union, totaling €486.9 million. Guardian (which is based in the United States) received the largest fine of €148 million. The EC fined Pilkington €140 million, Saint-Gobain €133.9 million, and Asahi/AGC, which had applied for leniency and turned over evidence of the cartel's operation, €65 million.

18. With the onset of the EC investigation, Defendants sought to give at least the appearance of price competition in the United States. Following the EC's surprise raids in Europe, for the first time in over thirty months, Defendants diverged from each other on their surcharges in the United States. For a period thereafter, in a striking change from prior practice, Defendants' surcharges differed, quarter after quarter, sometimes by several hundreds of dollars per truckload.

PARTIES

Plaintiffs

19. Plaintiff Colonial Glass Solutions ("Colonial Glass") is a New York corporation with its principal place of business located at 35 Kent Avenue, Brooklyn, New York 11211. Colonial Glass is in the business of fabricating various glass products, including insulated windows, tempered glass, security glass, and pattern glass. Colonial Glass purchased Construction Flat Glass directly from one or more of the Defendants during the Class Period and paid an energy surcharge imposed by Defendants on those purchases.

20. Plaintiff Gilkey Window Company, Inc. ("Gilkey Window") is an Ohio corporation with its principal place of business located at 3625 Hauck Road, Cincinnati, Ohio 45241. Gilkey Window is in the business of manufacturing and installing doors and windows. Gilkey Window purchased Construction Flat Glass directly from one or more of the Defendants during the Class Period and paid an energy surcharge imposed by Defendants on those purchases.

21. Plaintiff Girard Glass Corporation is a California corporation with its principal place of business located at 2350 E. 37th Street, Los Angeles, California 90058. Girard Glass is in the business of fabricating glass into various sizes and shapes for resale. Girard Glass purchased Construction Flat Glass directly from one or more of the Defendants during the Class Period and paid an energy surcharge imposed by Defendants on those purchases.

22. Plaintiff Jackson Glass Company, Inc. ("Jackson Glass") is an Alabama corporation with its principal place of business located at 1510 Forest Avenue, Jackson, Alabama 36545. Jackson Glass is in the business of installing commercial, residential, and automobile glass. Jackson Glass purchased Construction Flat Glass directly from one or more of the

Defendants during the Class Period and paid an energy surcharge imposed by Defendants on those purchases.

23. Plaintiff Maran-Wurzell Glass & Mirror ("Maran-Wurzell") is a California corporation with its principal place of business formerly located at 1683 Mount Vernon Avenue, Pomona, California 91768. From its inception in 1939 until March 2008, Maran-Wurzell was in the business of fabricating mirrors and other glass products. Maran-Wurzell purchased Construction Flat Glass directly from one or more of the Defendants during the Class Period and paid an energy surcharge imposed by Defendants on those purchases.

24. Plaintiff Thermo-Twin Industries, Inc. ("Thermo-Twin") is a Pennsylvania corporation with its principal place of business located at 1155 Allegheny Ave., Oakmont, Pennsylvania 15139. Thermo-Twin is in the business of fabricating and installing windows, doors, and other glass products. Thermo-Twin purchased Construction Flat Glass directly from one or more of the Defendants during the Class Period and paid an energy surcharge imposed by Defendants on those purchases.

Defendants

25. Defendant AGC America, Inc., previously known as Asahi Glass America, Inc., is a Delaware corporation with its principal place of business at 2201 Water Ridge Parkway, Suite 400, Charlotte, North Carolina 28217. It is a regional headquarters, representative office, and holding company of AGC Group and the parent of AGC Flat Glass North America, Inc. During the Class Period, AGC America, Inc., directly or through its subsidiaries or affiliates, manufactured and sold Construction Flat Glass in the United States.

26. Defendant AGC Flat Glass North America, Inc. is a Delaware corporation with its principal place of business at 11175 Cicero Drive, Alpharetta, Georgia 30022-1166. AGC Flat

Glass North America, Inc., a subsidiary of AGC America, Inc. and Asahi Glass Company, Limited, was previously named AFG Industries Inc. On September 4, 2007, AFG Industries, Inc. changed its name to AGC Flat Glass North America, Inc. At that time, Asahi Glass Company, Limited, AFG Industries Inc.'s parent company since 1992, unified the Group brand globally under the name "AGC." AGC Flat Glass North America, Inc. is the second-largest glass manufacturing company in North America. During the Class Period, AGC Flat Glass North America, Inc., directly or through its subsidiaries or affiliates, manufactured and sold Construction Flat Glass in the United States. AGC America, Inc. and AGC Flat Glass North America, Inc. will be collectively referred to herein as "AGC."

27. Defendant Guardian Industries Corp. ("Guardian") is a Michigan corporation with its principal place of business located at 2300 Harmon Road, Auburn Hills, Michigan 48326. During the Class Period, Guardian manufactured, sold, and distributed Construction Flat Glass in the United States.

28. Defendant Pilkington North America, Inc. is an Ohio corporation with its principal place of business located at 811 Madison Avenue, Toledo, Ohio 43697. In June 2006, Pilkington North America, Inc. was acquired by Nippon Sheet Glass, Ltd. ("NSG"). During the Class Period, Pilkington North America, Inc. manufactured, sold, and distributed Construction Flat Glass in the United States.

29. Defendant Pilkington Holdings Inc. is a Delaware corporation and holds the Pilkington Group's U.S.-based assets. Its principal place of business is 811 Madison Avenue, Toledo, Ohio 43697. Pilkington North America, Inc. and Pilkington Holdings Inc. will be collectively referred to herein as "Pilkington."

30. Defendant PPG Industries, Inc. ("PPG") is a Pennsylvania corporation with its principal place of business at One PPG Place, Pittsburgh, Pennsylvania 15272. During the Class Period, PPG manufactured, sold, and distributed Construction Flat Glass in the United States.

Co-Conspirators

31. Various other persons, firms, and corporations, not named as Defendants herein, have participated as co-conspirators with the Defendants in the violations of law alleged in this Complaint and have engaged in conduct and made statements in furtherance of the conspiracy. The acts charged in this Complaint have been done by Defendants and their co-conspirators, or were authorized, ordered, or done by their respective officers, agents, employees, or representatives while actively engaged in the management of each Defendant's business or affairs.

JURISDICTION AND VENUE

32. Plaintiffs bring this action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to recover treble damages, injunctive relief, and costs of suit, including reasonable attorneys' fees, as a result of Defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

33. Subject-matter jurisdiction is proper pursuant to 28 U.S.C. § 1337 and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

34. This Court has personal jurisdiction over each Defendant because, *inter alia*, each: (a) transacted business in this District; (b) directly or indirectly sold Construction Flat Glass in this District; (c) has substantial aggregate contacts with this District; and (d) engaged in an illegal price-fixing conspiracy that was directed at, and had the intended effect of causing injury to, persons and entities located in or doing business in this District.

35. Venue is proper in this District under Sections 4, 12, and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 22, and 28 U.S.C. § 1391 (b) and (c), because during the Class Period Defendants resided, transacted business, were found, or had agents within this District.

36. Venue is also proper in this District because this action was transferred to this District by the Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407(a).

37. The activities of Defendants and their co-conspirators were within the flow of, were intended to, and did have, a substantial effect on the foreign and interstate commerce of the United States.

CLASS ACTION ALLEGATIONS

38. Plaintiffs bring this action as a class action under Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of themselves and a proposed class (the "Class") defined as follows:

> All entities that, from at least July 1, 2002 and continuing through at least December 31, 2006, purchased Construction Flat Glass directly from Defendants for delivery or pick-up in the United States. Excluded from the Class are Defendants, any parent, subsidiary, or affiliate of Defendants, any of Defendants' co-conspirators, and all governmental entities.

39. The Class is so numerous and geographically dispersed throughout the United States that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time, Plaintiffs believe that there are at least hundreds of members of the Class located nationwide, whose identity can be readily ascertained from Defendants' records.

40. Plaintiffs' claims are typical of the claims of the other members of the Class. Plaintiffs and all members of the Class purchased Construction Flat Glass directly from one or

more Defendants or their co-conspirators, and Plaintiffs' claims arise from the same common course of conduct giving rise to the claims of the members of the Class, and the relief sought is common to the Class.

41. Plaintiffs will fairly and adequately protect the interests of the members of the Class and are represented by counsel experienced and competent in the prosecution of complex antitrust litigation.

42. Questions of law and fact common to class members predominate over any questions affecting only individual members of the Class. Among the questions of law and fact common to the Class are:

a. Whether Defendants conspired or combined for the purpose and with the effect of fixing the price of Construction Flat Glass;

b. Whether Defendants agreed to implement, impose, and revise an "energy surcharge" on purchases of Construction Flat Glass;

c. Whether Defendants' conduct violated the federal antitrust laws;

d. Whether Defendants' conduct caused injury to the business or property of Plaintiffs and the members of the Class; and

e. The proper measure of class-wide damages.

43. A class action is superior to any other method for the fair and efficient adjudication of this controversy since joinder of all Class members is impracticable. The prosecution of separate actions by individual members of the Class, to the extent it would be feasible for individual members to bring such claims, would impose heavy burdens upon the courts and the parties and would create a risk of inconsistent or varying adjudications of the questions of law and fact common to the Class members. A class action will achieve substantial

economies of time, effort, and expense and will assure uniformity of decision as to entities similarly situated.

44. The Class has a strong and pervasive community of interest, and no difficulty is anticipated in the management of this action as a class action.

FACTUAL ALLEGATIONS

Industry Overview

45. Construction Flat Glass is flat glass formed through the “float” process for use in the construction or architectural sector, which includes clear and tinted float glass, low emissivity glass (*i.e.*, glass coated with thin metal or metallic oxide layers to improve its insulating qualities), laminated glass, and unprocessed mirror glass.

46. The float process involves the use of a molten tin bath where molten glass flows freely until it forms a flat ribbon floating on the surface of molten metal. This flat layer of floating glass is allowed to cool until it is sufficiently rigid to retain its flat shape and is then removed from the surface. In a Construction Flat Glass plant, the process proceeds uninterrupted: a stream of molten glass is delivered continuously to one end of the molten metal surface, forming an endless, cooling ribbon of glass that is removed from the opposite end of the surface when sufficiently cooled. The ribbon of glass is then subjected to further processing, inspection, and cutting to desired dimensions.

47. Commercial float glass manufacture requires relatively large-scale, single purpose plants which are not efficiently convertible to other uses; nor are other manufacturing facilities efficiently convertible to float glass production. Float glass plants are operated continuously for periods of 8 to 12 years or more before requiring “cold shut-down” for extensive rebuilding and repair.

48. The largest demand for Construction Flat Glass is for use in windows for dwellings, commercial structures, and architectural products (*e.g.*, curtain-wall panels for office towers and glass doors), which constitutes as much as 70% of all Construction Flat Glass production.

49. In 2005, the Construction Flat Glass market in the United States exceeded $5.3 billion.

50. Defendants' customers – Plaintiffs and the proposed Class members – generally purchase Construction Flat Glass from Defendants by the truckload. Truckloads of Construction Flat Glass are typically delivered by trucking companies hired by Defendants, but some customers occasionally pick up the truckloads themselves from Defendants' plants.

<u>Operation of the United States Construction Flat Glass Conspiracy</u>

The Structure of the United States Flat Glass Industry Is Conducive to Collusion

51. Defendants' price-fixing conspiracy was made possible and facilitated by the structure of the Construction Flat Glass industry, which is conducive to collusion. Indeed, the Construction Flat Glass industry is in many respects a textbook example of an industry susceptible to efforts to maintain supracompetitive prices.

52. The United States Construction Flat Glass market is highly concentrated. Defendants dominate the United States market, accounting for approximately 75% of the market by capacity or sales. There are a few other firms manufacturing high quality float glass, such as Cardinal Glass Industries, but none of the market shares of any of these other companies rose above approximately 10% during the Class Period.

53. Construction Flat Glass is an interchangeable, fungible commodity which is principally marketed on price. Although it may vary in tint or thickness, it is generally a

standardized product. Many purchasers of Construction Flat Glass purchase from multiple suppliers.

54. The Construction Flat Glass industry has high barriers to entry, including high fixed costs. Production of flat glass is capital intensive. A float plant typically requires an initial investment of $100 million to $250 million, depending on size, location, and product complexity. The economics of the continuous-flow float operation require a high capacity utilization rate before a plant becomes profitable. Potential entrants to the flat glass industry also face barriers to entry in the form of environmental and other regulations, including those imposed by the Occupational Safety and Health Administration.

55. Instead of new entry, the Construction Flat Glass industry has experienced a consolidation movement worldwide through various mergers and acquisitions which have contributed to the high level of industry concentration.

56. There is a history of collusion in the United States flat glass market. AGC, Guardian, Pilkington, and PPG were previously sued for fixing prices of flat glass products over the period of August 1, 1991 to December 31, 1995. PPG paid $60 million to settle that action; AGC paid $19.8 million; Pilkington paid $17 million; and Guardian paid $16.9 million.

57. The Construction Flat Glass industry is characterized by multi-market contact, in that the firms dominating the U.S. market simultaneously are dominant firms in the Construction Flat Glass industry in other countries. AGC, Pilkington, and Guardian, along with Saint-Gobain (a French company), dominate the European market for Construction Flat Glass through their foreign affiliates. Defendants' multi-market contacts facilitated and made collusion more feasible in the highly concentrated United States and European markets.

58. The United States Construction Flat Glass market is mature and stable. In fact, the United States and European Construction Flat Glass markets are the two most mature Construction Flat Glass markets in the world. Like most mature markets, they are dominated by sales of commodity products which are marketed and sold principally on the basis of price and are characterized by slim profit margins. Both characteristics provide a motivation to collude.

Defendants Exploit Industry Conditions Facilitating Collusion by Agreeing to Fix Prices of Construction Flat Glass

59. Defendants recognized and exploited the features of their industry that make it susceptible and conducive to collusion.

60. Defendants' representatives met with each other during the Class Period to discuss pricing levels and practices and agreed to fix prices of Construction Flat Glass sold in the United States.

61. Defendants agreed to implement identical "energy surcharge" programs and set their energy surcharges at identical amounts and to raise prices of Construction Flat Glass products by identical percentages in a coordinated fashion.

62. In implementing their conspiracy, Defendants at times engaged in practically simultaneous conduct, unsupported by existing economic and market conditions, demonstrating that their activities were the result of prior knowledge, coordination, and agreement, as opposed to truly independent activity.

Defendants Introduce Energy Surcharges in Late 2000

63. Defendants first introduced energy surcharges in late 2000 when natural gas prices abruptly spiked to a level that exceeded Defendants' estimates. During the end of 2000 and the beginning of 2001, PPG, AGC, Pilkington, and Guardian each announced "energy surcharges" on truckloads of Construction Flat Glass products shipped from the manufacturer.

The surcharges were purportedly intended to recover the unanticipated rise in Defendants' natural gas costs.

64. Defendants informed their customers that the surcharges would be linked to the New York Mercantile Exchange ("NYMEX") 3-day average natural gas futures price. NYMEX measures natural gas futures trades in units of 10,000 million British thermal units ("mmBtu") with a reported price based on delivery at the Henry Hub in Louisiana.

65. Defendants provided charts to their customers showing expected surcharge levels at certain NYMEX averages. With the NYMEX average around $4.30 mmBtu, Defendants each set their energy surcharges for the 4th quarter ("4Q") of 2000 at $300/truckload.

66. Although each Defendant initially circulated to its customers a similar chart for energy surcharges, in practice Defendants varied their announced surcharges as circumstances warranted. Before long, the charts were largely disregarded. By varying their surcharges, Defendants gave at least the appearance of competition on surcharge prices.

67. Defendants varied their surcharges by region of the country, depending on the plant from which their products were shipped. In June 2001, for example, AGC announced its energy surcharge would be $400/truckload, except that all West Coast shipments out of its Victorville, CA plants would be $700/truckload. PPG set its energy surcharge from its West Coast plants (Fresno, CA and Salem, OR) at $900/truckload and later changed it to $700/truckload.

68. Such regional variation reflected the fact that Defendants had different energy costs – including natural gas costs – in different regions of the country.

69. In September 2001, AGC informed customers that its surcharge would be $200/truckload for all products shipped from its Victorville Plant, located on the West Coast, but

it would not impose an energy surcharge on products shipped from other plants. At the same time, Pilkington was charging a surcharge of $200/truckload from *all* of its plant locations, although in light of the NYMEX average at the time, it would not have been charging any surcharge at all if it followed the chart it originally circulated.

70. By the end of 2001, with natural gas prices declining, Defendants stopped imposing energy surcharges and did not impose any surcharges during the first two quarters of 2002.

Defendants Agree to Reintroduce Collusive Energy Surcharges as a Way to Increase Prices Across the Board

71. By 2002, demand for flat glass was easing in both the United States and Europe, and prices of Defendants' flat glass products were falling. Defendants had attempted to raise or stabilize prices through conventional price-increase announcements, but those efforts were unsuccessful. Declining sales and downward pressure on prices provided Defendants the motivation and rationale for the formation of a collusive arrangement designed to arrest and reverse those pressures.

72. As natural gas prices began to rise again in mid-2002, Defendants saw an opportunity. Defendants' experience with energy surcharges in 2001 suggested that imposing coordinated energy surcharges could be an effective way to achieve across-the-board price increases, provided Defendants agreed to adopt the same surcharge program and not to depart from the agreed-upon surcharge schedule.

73. Defendants saw that coordinated energy surcharges could be effective to increase prices because surcharges were set as a flat fee imposed on each truckload of glass. When imposing energy surcharges, Defendants did not need to go through the logistics of changing prices on multiple products with their customers. Also, linking surcharges to a schedule made

surcharges easier to increase periodically. Additionally, surcharges were easier to "sell" to customers because they were presented as pure cost-recovery mechanisms, rather than price increases.

74. Crucial to the success of Defendants' plan to use energy surcharges as a way to increase their prices across the board was Defendants' agreement to adopt and stick to the same schedule for surcharges and to announce surcharge increases in lockstep at the same time. Defendants agreed to use a chart linked to the NYMEX average for their energy surcharges because this made it easier to implement and monitor their price-fixing agreement.

75. Defendants' representatives met, in the United States and Europe, and agreed on surcharge and price levels, minimum prices, and the timing of surcharge and price increase announcements.

76. In the United States, Defendants' discussions about reintroducing surcharges occurred, among other places, under the cover of trade association activities. As discussed further below, *infra* ¶¶ 126-128, in 2002, Guardian, Pilkington, and PPG were members of a stand-alone trade group for flat glass manufacturers (the Primary Glass Manufacturers Council), which they dominated and controlled. AGC had been a member until 2001. Defendants decided that belonging to a stand-alone trade group made it harder to use the trade group to achieve their objectives because their activities received too much attention. Consequently, in mid-2002, at the same time they were agreeing to reintroduce surcharges, Defendants jointly decided to dissolve their stand-alone trade association and reorganize (along with AGC) as one of several divisions under the umbrella of the Glass Association of North America ("GANA"), which would afford them additional cover for their discussions.

77. In June 2002, pursuant to their agreement, Defendants announced to their customers that they were reintroducing "energy surcharges." Each Defendant adopted the same surcharge program, linked to the NYMEX 3-day average natural gas price, with new surcharges announced on a quarterly basis. Each Defendant adopted the same surcharge schedule, which set surcharges at a higher level than any surcharge schedules Defendants had previously used.

78. Each Defendant adopted the same complex method of setting prices – including the use of the particular NYMEX average to set surcharges, the particular schedule of surcharge values linked to the NYMEX average, and the announcements of new surcharges on a quarterly basis – which was not a natural response to any common economic factors.

79. When Defendants collectively reintroduced surcharges in June 2002, they could no longer claim to be caught off-guard by natural gas increases and needed to justify imposition of a higher surcharge schedule. Defendants thus provided to their customers a new, coordinated justification for the higher surcharges: that, in PPG's words, the higher surcharges were necessary to "share electricity cost inflation in addition to natural gas inflation." Guardian similarly claimed that its new and higher surcharges were justified in light of costs of "electricity and natural gas."

80. This justification of electricity cost inflation was pretextual. PPG told its customers that "electricity has become a much more significant cost factor in producing flat and fabricated glass," but referred only to the fact that electricity had become more expensive in the West. To the extent this had any validity, and if PPG was operating independently, PPG could have imposed a regional surcharge on shipments from its plants in the West, as it had done previously. It did not do this, however, because Defendants had agreed to impose the same

surcharges and not to vary them based on region even when different regions had different energy costs.

81. Defendants recognized they needed to coordinate with each other to impose and maintain their supracompetitive surcharges. In 2005, a "senior official at one of the primary glass manufacturers [*i.e.*, the Defendants], who preferred not to be identified" was quoted in a trade publication discussing the widespread use of surcharges. The official noted: "[A]nyone would have to be careful to deviate from what has become accepted, because then the question of price gouging would come into the picture."

82. Defendants appeared together at industry conferences to present a unified front on energy surcharges. For example, during the 2003 Summer Northeast Window & Door Association meeting, Scott Hoover of Pilkington and Larry Tumminia of AGC gave a joint presentation on the *State of the Glass Industry – The Economic Future of Glass*, during which they told glass purchasers, and publicly agreed, that energy surcharges would not end anytime soon and that purchasers should expect an upward trend in prices.

Defendants Impose Lockstep Surcharges on Their Customers Pursuant to Their Unlawful Agreement

83. On June 11, 2002, pursuant to Defendants' agreement, PPG announced to its customers that it would impose a surcharge of $200/truckload effective July 1, 2002, for all flat glass products. The NYMEX average at the time was around $3.20 mmBtu. (Under PPG's prior chart, this would have amounted to a $100/truckload surcharge.) PPG sent to its customers the following chart:

NYMEX Average (Per MMBtu)	*Surcharge*
*	*
$5.0 – 5.49	$600
$4.5 – 4.99	$500
$4.0 – 4.49	$400
$3.5 – 3.99	$300
$3.0 – 3.49	**$200**
$2.5 – 2.99	$100
$2.0 – 2.49	$ 0
$1.5 – 1.99	-$100

* Above $5.49 – increases of $100 per truckload (as defined in PPG general terms and conditions) for every $0.50 increase in the NYMEX average futures price for natural gas.

84. On June 14, 2002, Pilkington announced to its customers that it would impose a surcharge of $200/truckload effective July 1, 2002, for all flat glass products. Pilkington attached to its letter a surcharge chart that was identical to PPG's chart.

85. On June 17, 2002, Guardian announced to its customers that it would impose a surcharge of $200/truckload effective July 1, 2002, for all flat glass products. Guardian included with its letter a surcharge chart that was identical to PPG's and Pilkington's chart.

86. On June 24, 2002, AGC announced to its customers that it would impose a surcharge of $200/truckload effective July 1, 2002, for all flat glass products. AGC attached to its letter a surcharge chart that was identical to PPG's, Pilkington's, and Guardian's chart.

87. Thereafter, for a period of over 30 months, Defendants announced the exact same surcharges, quarter after quarter, typically attaching the exact same chart, even as the surcharges steadily increased from $200/truckload to $900/truckload for first quarter ("1Q") 2005.

Defendants often announced their quarterly surcharges over the period of just a few days, giving identical reasons for the increases.

88. For example, on June 3, 2004, PPG announced an energy surcharge of \$700/truckload for 3Q 2004.

89. On June 5, 2004, AGC announced an energy surcharge of \$700/truckload for 3Q 2004.

90. On June 8, 2004, Guardian announced an energy surcharge of \$700/truckload for 3Q 2004.

91. On June 11, 2004, Pilkington announced an energy surcharge of \$700/truckload for 3Q 2004.

92. Pursuant to their agreement, Defendants varied who would lead the surcharge announcements. As noted above, PPG announced the 3Q 2004 surcharge first, on the third of the month. The quarter before, however, AGC had announced the 2Q 2004 surcharge of \$700/truckload first, on March 5, with PPG announcing its 2Q 2004 surcharge of \$700/truckload on March 11.

93. Defendants falsely attempted to generate the appearance of price competition by representing to customers that they were pricing independently and were "reviewing" their surcharges on a quarterly basis. When PPG announced its 3Q 2004 energy surcharge of \$700/truckload, for example, it assured its customers that it "will continue to monitor this market and try to create opportunities for reducing our overall energy costs." Similarly, when AGC announced its 3Q 2004 energy surcharge of \$700/truckload, it assured its customers that its surcharge rate would be "reviewed in September."

94. In 2004 and 2005, Defendants' collusion and charging of supracompetitive prices led to substantial capacity expansion by Cardinal Glass Industries Inc. ("Cardinal"). Cardinal, which did not move its surcharges in lockstep with Defendants, is also a manufacturer of high quality float glass for construction and architectural applications. In May 2004, Cardinal expanded its capacity in the United States market by opening a $102.5 million float glass manufacturing facility in Durant, Oklahoma, designed to melt 650 tons of glass daily on a continuous basis. In mid-2005, Cardinal broke ground on another new $130 million plant in Winlock, Washington, also designed to produce 650 tons of glass a day.

Defendants' Collusive Surcharges Do Not Reflect Actual Energy Costs

95. The increasing price of natural gas on the NYMEX futures market in 2002 constituted only a pretextual justification for Defendants to impose energy surcharges that were unrelated to Defendants' actual natural gas costs.

96. By June 2002, Defendants were aware that natural gas prices on the open market could remain somewhat volatile, and Defendants had taken numerous steps to manage future energy costs, such as engaging in carefully-planned hedging of the prices of future natural gas requirements. Such practices made Defendants' future natural gas costs substantially more predictable, even as those costs remained somewhat volatile on the open market.

97. PPG has acknowledged, for example, that in 2003 it used "a number of techniques" to reduce the risks associated with volatile energy prices, including hedging, reducing consumption through improved manufacturing processes, and switching to alternative fuels. PPG hedged approximately one-third of its anticipated natural gas requirements for 2003 at an average price of $3.25 per mmBtu. PPG relied heavily on "derivative instruments to manage its exposure to fluctuating natural gas prices through the use of natural gas swap and

option contracts." During every year of the Class Period, PPG hedged a significant portion of its anticipated natural gas requirements. PPG did not even mention in its public reports the use of energy surcharges to offset rising natural gas prices until 2007.

98. All Defendants employed measures to manage future energy costs. However, none of these cost-saving measures were reflected in adjustment of any Defendant's energy surcharges, as all Defendants moved in complete lockstep, pursuant to their agreement, until the EC's surprise raids in 2005. Because of these cost-management measures, Defendants' energy surcharges did not reflect their true energy costs (much less *unanticipated* increases in natural gas costs).

99. During the Class Period, in many (if not all) cases, the quarterly surcharge amount Defendants set to correspond to any particular NYMEX value was substantially greater than Defendants' actual natural gas costs.

100. For example, during an earnings call on April 15, 2004, PPG Senior Vice President William Hernandez stated, "In the fourth quarter [of 2003], we benefited from the fact that about a third of our requirements were hedged at $3.25 which reduced our average cost to about $4.15." According to the surcharge schedule PPG had circulated to its customers, a NYMEX average of $4.15 would amount to an energy surcharge of $400/truckload. However, for 4Q 2003, PPG imposed an energy surcharge of $600/truckload, *i.e.*, the same surcharge announced by the other Defendants, citing NYMEX's average price of $5.099.

101. In a competitive market, Defendants would have used differences in their independent energy costs to compete on price and seek to gain market share.

Defendants Agree to Raise Prices and Coordinate Commercial Conditions Using Conventional Price-Increase Announcements

102. During the period in which they were fixing energy surcharges on glass truckloads, Defendants also agreed to announce identical percentage-based price increases for Construction Flat Glass products to their customers. For the first time in years, due to their collusion, Defendants successfully raised prices using conventional price-increase announcements.

103. In 2004, for example, on at least two different occasions, Defendants successfully raised their prices by a fixed percentage throughout the United States market. An AGC executive was quoted in the trade press discussing the price increases AGC (and its competitors) accomplished in 2004: "We really did not have price erosion of those two increases. The prices stuck and we still have them today."

104. The timing of Defendants' price increases during the Class Period is itself evidence of their collusive nature. The price increases were not the type of truly sequential price increases that occur in a competitive market, as the time-frame over which the identical price increases occurred was insufficient to permit each Defendant independently to learn of the price increase announced by another Defendant and then make the independent business judgments about whether or not to announce an increase and, if so, at what level.

105. For example, on August 30, 2004, PPG sent to its customers a letter announcing a price increase of 5% on its Construction Flat Glass products. On September 1, 2004, Guardian sent to its customers a letter announcing an identical price increase of 5% for all Construction Flat Glass products. On September 2, 2004, AGC sent to its customers a letter announcing a price increase of 5% for all Construction Flat Glass products.

106. As the timing of these announcements indicates, Defendants communicated their pricing intentions to each other prior to sending the announcements to customers. Defendants also monitored implementation of their agreed-upon price increases to ensure their effectiveness.

107. Defendants' September 2004 price increase coincided with cartel meetings in Europe in 2004, and the coordinated imposition by the European cartel in September 2004 of energy surcharges. Pursuant to their agreement, European affiliates of Guardian, Pilkington, AGC, and Saint-Gobain, announced implementation of energy surcharges in Europe on September 1, 2004.

108. Defendants' September 2004 price increase in the United States also occurred just before the GANA Fall conference in Nashville, Tennessee. Defendants are all members of GANA's Flat Glass Manufacturing division, which they joined as founding members in January 2003. Defendants regularly met under the cover of GANA's Flat Glass Manufacturing division, including in advance of GANA conferences.

109. Defendants made coordinated statements to the market about market conditions in order to minimize suspicion about their price increases. For example, in a January 2005 article in the trade press, executives from Pilkington and AGC publicly agreed with each other that capacity in the glass market in 2005 would be "tighter" than in 2004 (a year in which Defendants were successful in raising prices on at least two occasions). Such statements were false, as capacity was not tight in the Construction Flat Glass market in either 2004 or 2005. The same article noted that "a number of people in the industry have expressed the belief that the primary manufacturers [*i.e.*, Defendants] are using the specter of a glass shortage to raise the price of commodity glass."

110. The increases in Defendants' Construction Flat Glass prices during the Class Period cannot be reconciled with prevailing economic conditions (*i.e.*, demand and cost factors) during the Class Period.

111. The near-simultaneous price increases imposed by Defendants during the Class Period were based on prior coordination and agreement rather than the result of independent behavior, and as a result, prices were inflated above what would have prevailed under competitive conditions.

Defendants' Prices in the United States Diverge for the First Time in Over Thirty Months Because of the EC Investigation

112. Following the surprise EC raids (discussed further below) in February 2005 at the European offices of Guardian, Pilkington, AGC Flat Glass Europe (formerly known as Glaverbel), and Saint-Gobain, Defendants varied their surcharges in the United States *for the first time* since their reintroduction in 2002 in order to give at least the appearance of price competition.

113. With the onset of the EC investigation, Defendants' coordination of pricing in the United States changed dramatically. Since Defendants' reintroduction of energy surcharges in June 2002, Defendants had invariably announced the exact same surcharges. In April 2005, following the EC raids, PPG announced to its customers that it was increasing its surcharge by $100/truckload, but not all Defendants announced a similar increase. In September 2005, Guardian announced a surcharge for 4Q 2005 that was $275 *lower* than PPG, Pilkington, and AGC's. For 1Q 2006, Guardian's announced surcharge was $375 lower than PPG, Pilkington, and AGC's. Prior to the EC investigation, Guardian had announced the exact same surcharges as the other Defendants, month after month, quarter after quarter, since June 2002.

114. Similarly, in June 2006, AGC announced a surcharge that differed from PPG and Pilkington's *for the first time* since Defendants reintroduced surcharges in June of 2002. PPG and Pilkington announced surcharges that were $25/truckload lower than AGC's. At the same time, Guardian's surcharge was $350/truckload lower than PPG's and Pilkington's, and $375/truckload lower than AGC's.

European Commission Proceedings

115. The EC launched its investigation into the Construction Flat Glass industry in February 2005 after obtaining "reason to believe that the manufacturers concerned may have (amongst other things) coordinated price-increases and agreed upon the introduction of a so called 'energy surcharge' in the area of flat glass."

116. On February 22 and 23, 2005, the Commission carried out surprise raids on the premises of Guardian, Pilkington, AGC Flat Glass Europe ("AGC Europe," formerly known as Glaverbel), and Saint-Gobain. On March 2, 2005, the Commission carried out a second round of raids at the premises of Guardian and GEPVP, the European trade association.

117. In between the two rounds of raids, AGC Europe (and its parent company, Asahi) applied to the Commission for immunity from fines or, in the alternative, reduction of fines. Under the Commission's Leniency Policy, participants in cartels may be eligible for immunity from or reductions in fines if they provide cooperation and evidence helping to substantiate the cartel. Asahi cooperated with the Commission and provided affirmative evidence of the operation of the flat-glass price-fixing cartel and, in response, was ultimately granted a reduction in fines.

118. The Commission's investigation revealed definitive evidence of a Construction Flat Glass price-fixing cartel operating in the European Economic Area from January 2004 to February 2005. The Commission found that the European affiliates of AGC, Guardian,

Pilkington, and Saint-Gobain agreed to fix prices and exchange sensitive commercial information and agreed on the timing of their price increase announcements, minimum prices, and other commercial conditions for flat glass.

119. As stated by the Commission:

> Between early 2004 and early 2005, Asahi, Guardian, Pilkington and Saint-Gobain managed to raise or otherwise stabilise prices through a series of meetings and other illicit contacts.
>
> ***
>
> The evidence uncovered describes in detail several meetings in restaurants and hotels in different European countries during which Asahi, Guardian, Pilkington and Saint-Gobain discussed and agreed the level and timing of price increases (including which undertaking was to lead the price increase), target prices, minimum prices and/or exchanged sensitive commercial information.

120. The Commission found evidence of face-to-face cartel meetings among company representatives at restaurants and hotels on January 9, 2004, April 20, 2004, December 2, 2004, and February 11, 2005.

121. The Commission found both the European divisions and their parent companies liable for the price-fixing cartel, and imposed fines totaling €486.9 million on the members of the cartel, with Guardian – the United States-based participant – receiving the largest fine of €148 million. Pilkington was fined €140 million, Saint-Gobain was fined €133.9 million, and Asahi – the leniency applicant – was fined €65 million. Collectively, this was the fifth largest fine in the history of the European Union.

122. None of the companies appealed the fine. On January 31, 2008, Nippon Sheet Glass Co., Ltd. confirmed that its subsidiary, Pilkington Group Limited, would not appeal and

would pay the €140 million fine. On February 5, 2008, Asahi and AGC Europe announced that Asahi would pay the €65 million fine.

123. In 2004, before the EC raids, Pilkington publicly acknowledged that its 2002 reintroduction of energy surcharges in the United States was connected to the "similar" introduction of surcharges in 2004 in Europe. Pilkington's Interim Year Report for 2004 states: "Following the sharp increase in the cost of gas in North America, in 2002 Pilkington introduced a surcharge on glass delivered to Building Products' customers in North America. The recent surge in energy costs in other territories has led to the introduction of a similar energy surcharge on deliveries of glass to Building Products' customers in Europe, beginning in November 2004."

124. Thus, at the same time Defendants were engaging in an unlawful conspiracy to increase prices of Construction Flat Glass sold to United States purchasers, by collusively imposing energy surcharges and issuing price-increase announcements, several of the same entities (through foreign affiliates) were engaging in similar anticompetitive conduct in Europe.

<u>Defendants' Use of Trade Association and Industry Meetings</u>

125. In the United States and Europe, Defendants' meetings were facilitated by, and occurred under cover of, membership in trade associations.

126. Prior to 2002, Defendants were members of a stand-alone trade group in the United States called the Primary Glass Manufacturers Council ("PGMC"). AGC withdrew from PGMC around 2001. Following AGC's departure, PGMC consisted of Guardian, Pilkington, and PPG. Defendants wished to use the trade group to provide cover for their conspiratorial meetings, but were concerned that being involved in a stand-alone trade group brought too much scrutiny to their activities.

127. Accordingly, in mid-2002, just as Defendants were agreeing to impose their collusive energy surcharges, Defendants discussed disbanding and ultimately agreed to disband PGMC and to reform as a division within GANA. GANA is a trade association organized into several divisions representing different elements of the glass industry. Defendants believed that operating as a division within a larger organization such as GANA would provide them additional cover for their discussions.

128. At a December 3, 2002 PGMC meeting, representatives of Guardian, Pilkington, and PPG agreed to dissolve the organization effective December 31, 2002. Directly thereafter, in January 2003, Defendants reformed their trade group under the umbrella of GANA, as GANA's Flat Glass Manufacturing Division. The new division's founding full members were AGC, Guardian, Pilkington, PPG, and Visteon. AGC, Guardian, PPG, and Pilkington met regularly during the Class Period under the auspices of the association and discussed energy surcharges and prices for Construction Flat Glass.

129. GANA's stated mission is to "provide a forum for exchanging information and ideas, for reaching consensus and presenting a unified voice on matters affecting the glass industry." GANA proclaims that it provides a forum to "put members in regular contact with their peers" and that it strives to provide its members "networking opportunities."

130. Some of Defendants' representatives on GANA's Flat Glass Manufacturing Division during operation of the United States and European cartels had global business responsibilities. Guardian's director of international business, Stephen P. Farrar, who was responsible for Guardian's global business development efforts, was Guardian's representative on and a co-chairperson, along with Stephen Weidner, Pilkington's director of sales and marketing, of GANA's Flat Glass Manufacturing Division in 2004 and 2005.

131. As noted above, certain price increases occurred in close conjunction with Defendants' GANA meetings. For example, in September 2004, Defendants announced price increases of 5% on their flat glass products just before GANA's Fall Conference.

132. In 2004, an affiliate of Saint-Gobain joined GANA's Flat Glass Manufacturing Division, despite the fact that Saint-Gobain – although having a large flat-glass manufacturing presence in Europe – had an insubstantial presence in the United States. With the addition of Saint-Gobain in 2004, GANA's Flat Glass Manufacturing Division contained the four companies whose foreign counterparts were operating a Construction Flat Glass cartel in Europe in 2004 and 2005.

133. The European Commission, which found that the Construction Flat Glass cartel in Europe was organized through meetings in restaurants and hotels in 2004 and 2005, focused its investigation on a European trade association of flat glass manufacturers known as the European Association of Flat Glass producers, or by its French name Groupement Europeen des Producteurs de Verre Plat ("GEPVP").

134. In September of 2007, GEPVP changed its name to "Glass For Europe." The four member companies of GEPVP were: AGC, Guardian, Pilkington, and Saint-Gobain – *i.e.*, precisely the four companies found by the European Commission to be members of the European flat glass cartel in 2004 and 2005. (It appears Guardian recently left Glass for Europe.)

<u>Relationship Between United States and European Markets</u>

Similarities Between United States and European Markets

135. The United States and European Construction Flat Glass markets are similar and share numerous important common features. Given this similarity, the recognition by the dominant players in the European market (including foreign affiliates of Defendants here) that

collusion was necessary during 2004 and 2005 to impose energy surcharges and price increases in Europe is itself evidence that similar measures to impose surcharges and increase prices were achieved in the United States through collusion.

136. One significant similarity between the United States and European flat glass markets is that both markets are mature. Glass markets outside of the United States and Europe are considerably less mature. This market maturity provided a significant incentive to collude.

137. Both the United States and European markets are dominated by a small number of overlapping firms, selling a fungible commodity product, with basically identical supply chains; both markets also impose similar entry barriers and fixed costs.

Defendants' Multi-Market Contacts

138. Simultaneous interaction by firms in multiple markets makes collusion easier to sustain. Multi-market contact can mute market level asymmetries. For example, although a firm with a competitive advantage in one market may be tempted to defect from a price-fixing agreement, it will be deterred from doing so if it knows that another firm would respond in a different market in which it has a competitive advantage. Additionally, multi-market contact increases the frequency of interaction, permitting one firm to discipline another more rapidly than would otherwise be possible.

139. AGC, Pilkington, and Guardian (through affiliates) are significant players in both the United States and European markets. This multi-market contact made it both desirable and feasible for Defendants to sustain collusion in both markets. Defendants' maintenance of collusion in the United States, for example, could have been compromised if Defendants were not simultaneously colluding in Europe, and vice versa, as each Defendant's collusive profits in

one market could have been undercut if a counterpart was aggressively competing in the other market.

140. Defendants' maintenance of collusion was not undercut by defection from the price-fixing arrangement in either the United States or Europe. Defendants' collusion – in both the United States and Europe – was only compromised when it was uncovered by the EC.

Defendants' Global Management of Operations

141. Defendants operating in both the United States and Europe manage their glass operations, and monitor prices of Construction Flat Glass, on a global scale.

142. Guardian is managed globally out of its United States headquarters. As noted, Guardian's director of international business served as a chairperson of GANA's Flat Glass Manufacturing Division while the cartels were operating in the United States and Europe in 2004 and 2005.

143. During this period, Asahi's flat glass company was also managed on a global basis, with the CEO of the North American division reporting directly to the CEO of the flat glass company, who in turn reported to the president and CEO of Asahi. Asahi states that it uses an "integrated strategy of a global organization" and that it is committed to taking "full advantage of globally integrated glass operations."

144. Luc Willame was named head of the worldwide flat glass operations of Asahi Glass in mid-2002. He was replaced in December 2004 by Arthur Ulens, who had been serving as regional president of Europe for the flat glass company. While serving as President of Asahi's flat glass company, Ulens stressed the global nature of the flat glass market. In a speech at Glass Processing Days in 2005, for example, he emphasized that flat glass companies must "develop a global strategy."

145. In January 2008, following the EC findings, Asahi announced that Ulens would leave the company. Aside from heading Asahi's worldwide operations, Ulens also served as chairman of the glass manufacturing trade association GEPVP, the European counterpart to GANA's flat glass manufacturing division and a focal point of the EC investigation, during the period of the European cartel.

146. Both prior to and after being sold to NSG, Pilkington has been managed globally out of its London headquarters. During the Class Period, the worldwide Building Products division of Pilkington was managed by the president of the worldwide Building Products business line, with regional Building Products managing directors for Europe, North America, Japan, South America, and South East Asia reporting to the president of the worldwide Building Products business line.

147. On May 14, 2002, around the start of Defendants' United States price-fixing conspiracy, Pilkington announced that Stuart Chambers, then president of the worldwide Building Products business line, would be appointed CEO of the entire company's operations. Chambers served as CEO of Pilkington until the company was purchased by NSG Group in 2007.

148. This global management means that participants in the European cartel, including those who met in person, had management and pricing responsibilities for both the United States and Europe.

Defendants' Price-Fixing Was Effective

149. As a result of Defendants' coordinated imposition of price increases and energy surcharges, prices of Construction Flat Glass in the United States were elevated above competitive levels during the Class Period.

150. Defendants' collusion allowed them to reap record profits even as their input costs increased. Indeed, Defendants were able to collect *more* than the increase in their input costs through their supracompetitive pricing. PPG acknowledged, for example, that it "had success in passing along increases in raw materials and energy. As an example, we pioneered a natural gas energy surcharge in the performance glazings, or architectural glass, industry, which has enabled us to recapture a portion of our higher energy costs. As a matter of fact, we have *more than offset* the combined $600 million of higher input costs with our own pricing increases."

151. As a result of their supracompetitive prices for Construction Flat Glass, Defendants reaped unprecedented profits during the Class Period. PPG, for example, announced that it "delivered a *record* fourth-quarter performance" in 2004, despite charges associated with an asbestos settlement. In April 2005, PPG announced that it had "generated record sales" over all of 2004, and that "pricing is up" again in 2005.

152. In February 2005, Asahi Glass Company, Limited, the parent corporation of AGC, reported record pre-tax profits for the year 2004.

153. Similarly, Pilkington announced in November 2004 that it had achieved "robust profits, despite rising costs." Pilkington's chief executive noted: "Against a background where 80 percent of our business is in markets where prices are flat or in decline and volumes are flat, I'm very pleased with our result."

TOLLING OF STATUTE OF LIMITATIONS

154. Defendants actively misled their customers about the fact that they had agreed to fix prices of Construction Flat Glass in the United States. While Defendants were fixing prices, Defendants falsely represented to their customers that they were pricing independently and were, for example, reviewing their surcharges and surcharge schedules in light of actual energy costs

and market conditions. Defendants gave numerous pretextual justifications for their surcharges and price increases, which were designed to conceal the fact that Defendants had agreed upon prices.

155. Given Defendants' affirmative conduct to conceal their price-fixing agreement, and the self-concealing nature of price-fixing conspiracies, no reasonable person would have had grounds to know about or investigate Defendants' price-fixing conspiracy until, at the earliest, the date of the EC's surprise raids in Europe.

156. Before and after the disclosure of the EC surprise raids, Plaintiffs were reasonably and duly diligent in protecting their business interests. However, Plaintiffs failed to discover the facts giving rise to their claim until sometime within the past four years. Following the commencement of the EC investigation, Plaintiffs through counsel investigated Defendants' conduct in the United States.

ANTITRUST INJURY TO PLAINTIFFS AND CLASS

157. Defendants' unlawful conduct, combination, or conspiracy, as alleged herein, had and is having the following effects, among others:

a. Prices paid by Plaintiffs and the Class for Construction Flat Glass were fixed or stabilized at supracompetitive levels;

b. "Energy surcharges" paid by Plaintiffs and the Class as part of the purchase of Construction Flat Glass were fixed or stabilized at supracompetitive levels;

c. Plaintiffs and the Class have been deprived of the benefits of free, open, and unrestricted competition in the market for Construction Flat Glass; and

d. Competition in establishing the prices paid in the United States for Construction Flat Glass has been unlawfully restrained, suppressed and eliminated.

158. By reason of the violations of Section 1 of the Sherman Act and Section 4 of the Clayton Act, Plaintiffs and the members of the Class have sustained injury to their business or property. The injury sustained by the Plaintiffs and the Class is the payment of supracompetitive prices for Construction Flat Glass as a result of Defendants' illegal combination and conspiracy to restrain trade as alleged. This is an antitrust injury of the type that the federal antitrust laws were meant to punish and prevent.

VIOLATIONS ALLEGED

First Claim for Relief

Violation of Section 1 of Sherman Act and Section 4 of Clayton Act

159. Plaintiffs incorporate and re-allege, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

160. Beginning at least as early as July 1, 2002, Defendants and their co-conspirators entered into a continuing agreement, understanding, and conspiracy in restraint of trade to artificially raise, fix, maintain, and/or stabilize prices for Construction Flat Glass sold in the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15.

161. In formulating and carrying out the alleged agreement, understanding, and conspiracy, Defendants and their co-conspirators did those things that they combined and conspired to do, including but not limited to the acts, practices, and course of conduct set forth above, and the following:

a. Fix, raise, maintain, and stabilize the price of Construction Flat Glass;

b. Implement, impose, and revise an "energy surcharge" to increase the price of Construction Flat Glass; and

c. Restrain competition for sales of Construction Flat Glass in the United States.

162. Defendants' combination and conspiracy as alleged herein has had the following effects, among others:

a. Price competition in the sale of Construction Flat Glass has been restrained, suppressed, and/or eliminated in the United States;

b. Prices for Construction Flat Glass sold by Defendants and their co-conspirators have been fixed, raised, maintained, and stabilized at artificially high, supracompetitive levels throughout the United States; and

c. Plaintiffs and other Class members who purchased Construction Flat Glass directly from Defendants and their co-conspirators have been deprived of the benefits of free and open competition.

163. Plaintiffs have been injured and will continue to be injured in their business and property by paying more for Construction Flat Glass purchased directly from Defendants and their co-conspirators than they would have paid (and will pay) in the absence of the combination and conspiracy.

164. As a proximate result of Defendants' unlawful conduct, Plaintiffs and the Class have suffered injury in that they have paid supracompetitive prices and surcharges for Construction Flat Glass during the Class Period.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request:

(1) That the Court determine that this action may be maintained as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure, that Plaintiffs be denominated as class representatives, and that Plaintiffs' counsel be appointed as counsel for the Class;

(2) That the unlawful combination and conspiracy alleged in Count I be adjudged and decreed to be an unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act;

(3) That Plaintiffs and the Class recover compensatory damages, as provided by law, determined to have been sustained as to each of them, and that judgment be entered against Defendants on behalf of Plaintiffs and each and every member of the Class;

(4) That each of the Defendants' respective officers, directors, agents, and employees, and all other persons acting on behalf of or in concert with them, be permanently enjoined and restrained from, directly, continuing, or maintaining the combination, conspiracy, or agreement alleged in this case;

(5) That Plaintiffs and the Class recover treble damages, as provided by law;

(6) That Plaintiffs and the Class recover their costs of the suit, including attorneys' fees, as provided by law; and

(7) For such further relief as the Court may deem just and proper.

JURY TRIAL DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury for all issues so triable.

Dated: September 5, 2008	**SPECTER SPECTER EVANS & MANOGUE, P.C.** By: s/John C. Evans . John C. Evans (PA ID No. 49351) David J. Manogue (PA ID No. 42119)

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ORIGINAL

DOC #24

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM TWOMBLY and LAWRENCE MARCUS, individually and on behalf of all others similarly situated,	Civil Action No. 02 CIV. 10220 (GEL)
Plaintiffs,	**CONSOLIDATED AMENDED CLASS ACTION COMPLAINT**
- against -	**JURY TRIAL DEMANDED**
BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL, INC., SBC COMMUNICATIONS, INC., and VERIZON COMMUNICATIONS, INC.,	
Defendants.	

U.S. DISTRICT COURT FILED APR 14 2003 S.D. OF N.Y.

Plaintiffs, by and through their undersigned attorneys, for their Amended Class Action Complaint allege the claims set forth herein. Plaintiffs' claims as to themselves and their own actions, as set forth in ¶¶ 9 and 10 are based upon their own knowledge. All other allegations are based upon information and belief pursuant to the investigation of counsel.

I.

NATURE OF THE ACTION

1. This lawsuit is brought as a class action on behalf of all individuals and entities who purchased local telephone and/or high speed internet services in the continental United States (excluding Alaska and Hawaii) from at least as early as February 8, 1996 and continuing to present (the "Class Period").

2. The Telecommunications Act of 1996, 47 U.S.C. §§ 151 to 614 (the "Act") was designed to promote competition for local telephone services by opening the markets to effective competition. The purpose, intent and requirements of the Act are to create competition without delay in the local telephone services markets so that the public's local telephone bills and charges will be reduced as soon as possible by virtue of such competition.

3. Local telephone services include traditional dial tone primarily used to make or receive voice, fax, or analog modem calls from a residence or business and exchange access services which allow long distance carriers to use their local exchange facilities to originate and terminate long distance calls to end users. Local telephone services also include, but is not limited to, custom calling services such as Caller ID, Call Waiting, Voice Mail and other advanced services. High speed internet services include circuits that connect customers to the internet at speeds in excess of 56K such as, but not limited to, T1 lines, asynchronous transfer mode circuits, frame relay circuits, ISDN, and digital subscriber lines ("DSL"). The rates concerning certain features or services are either not subject to tariff filing requirements and/or are not subject to any meaningful review.

4. Plaintiffs allege that Defendants entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another.

5. As a direct and proximate result of Defendants' unlawful contract, combination or conspiracy, Plaintiffs and members of the Class allege that Defendants have hindered the development of the local telephone and/or high speed internet services markets. Plaintiffs and members of the Class further allege that they have been and continue to be denied the benefits of free

and unrestrained competition for local telephone and/or high speed internet services. Plaintiffs and members of the Class have, therefore, been forced to pay supracompetitive prices for such services causing them to sustain injury to their business or property.

II.

JURISDICTION AND VENUE

6. Plaintiffs bring this class action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. § 15 and 26, to recover treble damages and injunctive relief as well as reasonable attorneys' fees and costs with respect to injuries arising from violations by Defendants of the federal antitrust laws, including Section 1 of the Sherman Act. 15 U.S.C. § 1.

7. The Court has federal question subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337(a) and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26. The Court has supplemental jurisdiction over the state antitrust law claims pursuant to 28 U.S.C. § 1367.

8. Venue in this district is proper pursuant to 28 U.S.C. §1391(b)(2) because a part of the events or omissions giving rise to the claims occurred in this district, and pursuant to 28 U.S.C. §1391(b)(3) and 15 U.S.C. §§15 and 22 because Defendants Bell Atlantic and Verizon have maintained or maintain a principal place of business within this district.

III.

PARTIES

9. Plaintiff William Twombly is a resident of Bethel, Connecticut. At times relevant herein, William Twombly was a resident of New York, New York and purchased local telephone

and/or high speed internet services from Defendants Bell Atlantic Corporation or Verizon Communications, Inc.

10. Plaintiff Lawrence Marcus is a resident of Maple Glen, Pennsylvania. At times relevant herein, Lawrence Marcus purchased local telephone and/or high speed internet services from Defendants Bell Atlantic Corporation or Verizon Communications, Inc.

11. Defendant Bell Atlantic Corporation is a Delaware corporation with its principal place of business at 1095 Avenue of Americas, New York, New York. Bell Atlantic Corporation is a telecommunications company with principal operating subsidiaries (together with the parent company "Bell Atlantic") that provide local telephone and/or high speed internet services to subscribers in Connecticut, Delaware, Maryland, Massachusetts, Maine, New Hampshire, New York, New Jersey, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia and the District of Columbia.

12. Defendant BellSouth Corporation is a Delaware corporation with its principal place of business at 1155 Peachtree Street, N.E., Atlanta, Georgia. BellSouth Corporation, is a telecommunications company that, through its wholly owned subsidiaries including but not limited to Bell South Telecommunications, Inc. (together with the parent company "BellSouth"), provides local telephone and/or high speed internet services to millions of subscribers in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee ("BellSouth").

13. Defendant Qwest Communications International, Inc., is a Delaware corporation with its principal place of business at 1801 California Street, Denver, Colorado. Qwest Communications International, Inc., is a telecommunications company that, through its wholly-owned subsidiaries

including but not limited to Qwest Corporation, Inc (together with the parent company "Qwest"), provides local telephone and/or high speed internet services in fourteen states, including Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming ("Qwest").

14. Defendant SBC Communications, Inc., is a Delaware corporation with its principal place of business at 175 East Houston, San Antonio, Texas. SBC Communications, Inc., is a telecommunications company that, through its operating subsidiaries including but not limited to SBC Ameritech, SBC Nevada Bell, SBC Pacific Bell, SBC SNET and SBC Southwestern Bell (together with the parent company "SBC"), provides local telephone and/or high speed internet services to subscribers in Arkansas, California, Connecticut, Florida, Illinois, Indiana, Kansas, Michigan, Missouri, Nevada, Ohio, Oklahoma, Texas and Wisconsin.

15. Defendant Verizon Communications, Inc. ("Verizon") is a Delaware corporation with its principal place of business at 1095 Avenue of Americas, New York, New York. GTE Corporation ("GTE") merged with and became a wholly-owned subsidiary of Bell Atlantic. Bell Atlantic now does business as Verizon Communications, Inc.

IV.

CO-CONSPIRATORS

16. Various other persons, firms, corporations and associations, not named in this Complaint, have participated in the violations alleged herein and have performed acts and made statements in furtherance thereof.

V.

BACKGROUND

A. The Bell Operating System and Divestiture

17. During the early part of its approximately 120-year history, the telephone industry experienced varying periods of competition, monopolization and regulation. By 1934, the Bell System, consisting of Bell Operating Companies, along with American Telephone and Telegraph Company ("AT&T"), owned 80 percent of all the local telephone lines and services in the United States and owned a monopoly long-distance network. The Bell Operating Companies were wholly-owned subsidiaries of AT&T.

18. In 1934, the Communications Act of 1934 was adopted. That act severed regulation of the telephone industry from the Interstate Commerce Commission and provided for the creation of the Federal Communications Commission ("FCC") to regulate interstate telephone, telegraph and radio companies. Interstate and international telephone services fell under the aegis of the FCC, and intrastate telephone services became regulated under the auspices of respective state commissions. Once a telephone communications service crossed a state line, it fell under the jurisdiction of the FCC.

19. In 1974, the United States filed a lawsuit against AT&T alleging that it had monopolized and conspired to restrain trade in the manufacture, distribution, sale and installation of telephones, telephone apparatus equipment and materials and supplies in violation of §§ 1, 2, and 3 of the Sherman Act, 15 U.S.C. §§ 1, 2, and 3. The basic theory of the government's case, as explained by the District Court, was that AT&T had unlawfully used its control of local exchange facilities to suppress competition in related markets, such as the markets for long distance services,

which are dependent upon access to the local exchange to originate and terminate calls. *United States v. AT&T*, 524 F. Supp. 1336, 1352 (D.D.C. 1981).

20. In 1982, the United States and AT&T agreed to settle the case through the entry of a consent decree. In 1982, United States District Court Judge Harold H. Greene signed the Modified Final Judgment, settling the antitrust suit against AT&T. The Modified Final Judgment was based on divestiture; AT&T was required to divest itself of its twenty-two Bell Operating Companies ("BOCs"). The BOCs provided the means by which local telephone service was furnished. Bell customers gained access to the network for both local and long distance telecommunications services through the BOCs. The Modified Final Judgment, however, imposed certain business restrictions on the newly divested BOCs. Specifically, the BOCs were prohibited from providing interLATA services (which are long distance services involving calls that terminated outside the "local access and transport area" in which they originate, as defined in the Modified Final Judgment), or any non-telecommunications services, and from manufacturing telecommunications equipment. In addition, the Modified Final Judgment required the BOCs to provide all interexchange carriers (*i.e.*, long distance providers) with exchange access that was equal in type, quality and price to the access provided to AT&T. *United States v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001, 103 S. Ct. 1240, 75 L.Ed.2d 472 (1983).

21. On January 1, 1984, divestiture of the Bell System by AT&T took effect. AT&T divested the seven Regional Bell Operating Companies ("RBOCs") and exited the local telephone business. The RBOCs were barred from providing long distance services. The seven RBOCs became known as the Baby Bells and included: Ameritech; SBC Communications; Pacific Telesis; Bell South; US West; Bell Atlantic; and NYNEX. SBC became the parent corporation of

Southwestern Bell, and Pacific Telesis became the parent corporation of Pacific Bell and Nevada Bell. SBC and Pacific Telesis merged in early 1997. NYNEX and Bell Atlantic merged in mid-1997 and became known as Bell Atlantic Corporation. Bell Atlantic later merged with GTE Corporation and is now doing business as Verizon Communications, Inc.

22. Local telephone companies such as the Bell Operating Companies are commonly referred to as local exchange carriers ("LECs") and provide business and residential customers with local telephone and/or high speed internet services.

23. In addition to the Bell Operating Companies, there are hundreds of other local exchange carriers operating in the United States. These local exchange carriers generally offer the same services as the Bell Operating Companies. Although GTE was not one of the original Bell Operating Companies, prior to merging with Bell Atlantic it acquired local telephone systems in 28 states and was one of the largest local phone companies in the nation in terms of telephone lines. Local exchange carriers historically operated in their local franchise areas free of competition, pursuant to exclusive franchises granted by state regulatory authorities.

24. A consent decree also was entered against GTE in 1984. *United States v. GTE Corp.*, 1985-1 Trade Cas. (CCH) § 66.355 (D.D.C. 1984) ("GTE Consent Decree"). The GTE Consent Decree was prompted by GTE's acquisition of one of the largest long-distance companies in the United States, and was based upon the same concerns underlying the AT&T consent decree with the United States. Under the GTE Consent Decree, operating companies (*i.e.*, the local exchange providers) were prohibited from providing long distance services, but GTE Corporation itself was permitted to provide long distance services through other subsidiaries. GTE was required to maintain total separation between its long distance operations and the GTE operating companies, so

that those companies could not use their position as exclusive local telephone service providers within their franchised areas to lessen competition in long distance services.

B. The Telecommunications Act of 1996

25. On February 8, 1996, the Telecommunications Act of 1996 became law when it was signed by President Clinton. Pub. L. No. 104, 110 Stat. 56. The Act amends the Communications Act of 1934. (See 47 U.S.C. § 609, Historical and Statutory Notes.) The Act changed the landscape of federal and state telecommunications regulatory policies and the telecommunications industry.

26. The Act adopts a pro-competitive framework for the telecommunications industry in the United States. It opens the markets for both local telephone and long-distance services to effective competition.

27. Because of their prior unique existence as government granted monopolies and the benefits that they enjoyed as government granted monopolies, the Act requires that the LECs, including Defendants, must provide potential competitors access and connections to their lines and equipment on just, reasonable and non-discriminatory terms.

28. The Act also requires the incumbent local exchange companies ("ILEC") to provide competitors with the same quality of service that the incumbent local exchange carriers provide to themselves or their own customers. The Act specifically defines an ILEC as follows: "With respect to an area, the local exchange carrier that on February 8, 1996, provided telephone exchange service in such area." 47 U.S.C. § 251. The seven original RBOCs, GTE and Defendants herein are ILECs.

29. With respect to long-distance service, the Act establishes a detailed mechanism for the RBOCs to compete for the first time in the long distance business. Unlike the RBOCs, GTE was allowed to expand into long-distance telephone service as soon as the Act became law on February 8, 1996.

30. Pursuant to the Act, before the respective RBOCs can offer long-distance telephone service, they must, *inter alia*, satisfy a 14-point checklist of requirements and demonstrate that there is competition in their respective local markets. It is up to the FCC in coordination with the Department of Justice and various state public utilities commissions to decide, upon request by an RBOC, when the RBOC has met the requirements.

31. Section 251 of the Act (47 U.S.C. § 251) imposes certain obligations on ILECs designed to permit new entrants to use some or all of the ILECs' networks to offer local-exchange services.

32. Section 251 of the Act requires an ILEC to: (1) allow a competitor to interconnect with its network so that the competitor can provide calls to and from that network; (2) sell to competitors access to components of its network, called network elements, on an unbundled or individual basis; and (3) sell its retail telephone services to competitors at wholesale prices. All of these requirements of an ILEC are to be provided by the ILEC "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *Id.* Section 251 imposes specific obligations on telecommunications carriers designed to promote competition in local exchange markets across the country. Federal Register/Vol. 61. No. 169, August 29, 1996, at 45476.

33. The Act directed the FCC to establish regulations to implement § 251's requirements within six months of its enactment. On August 8, 1996, the FCC released its Report and Order ("Report and Order").

34. The Report and Order promulgated "national rules and regulations implementing the statutory requirements of the Act intended to encourage the development of competition in local exchange and exchange access markets." Federal Register/Vol. 61. No. 169, August 29, 1996 at 45476.

35. GTE and the RBOCs appealed the Report and Order to the 8th Circuit, and on October 15, 1996, the 8th Circuit stayed the Report and Order, including its pricing rules and regulations, pending a decision on the merits. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996). The group defending the Report and Order included, among others, the FCC and the U.S. Department of Justice.

36. On July 18, 1997, the U.S. Court of Appeals for the Eighth Circuit filed its Opinion in the *Iowa Utilities Board v. FCC* case. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997). The Court vacated certain provisions of the FCC's Report and Order and upheld the remainder. Specifically, the Court stated: "We decline the petitioners' request to vacate the FCC's entire First Report and Order and limit our rejection of FCC rules only to those that we have specifically overturned in this opinion." *Id.* at 819. In a footnote, the Court stated: "In total we vacate the following provisions: 47 C.F.R. §§51.303 51.305(a)(4) 51.311(c)-f 51.317 (vacated only to the extent this rule establishes a presumption that a network element must be unbundled if it is technically feasible to do so) 51.405 51.501-51.515 (inclusive except for 51.515 (b) 51.601-51.611 (inclusive) 51.701-51.717 (inclusive except for 51.701 51.703 51.709 (b) 51.7119a0910 51.7159d0

and 51.717 but only as they apply to CMRS providers) 51.809 First Report and Order ¶¶ 101-103 121-128 180. We also vacate the proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration dated September 27 1996." *Id.*

C. <u>The RBOCs' Market Allocation and Refusal to Compete</u>

37. The 1996 Telecommunications Act authorized RBOCs to offer local telephone and/or high speed internet services in each other's territories, yet they have stayed almost completely out of one another's markets. Indeed,"[t]he major telephone companies have not sought to provide local telephone service outside of their home territories." Consumer Federation of America, *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, February 2001, p. 2. "Major incumbent service providers have failed to attack markets within their industry . . . [m]ajor incumbent service providers have failed to use their facilities to attack cross markets." *Id.* at 20.

38. "It was hoped that the large incumbent local monopoly companies (RBOCs) might attack their neighbors' service areas, as they are the best situated to do so. But such competition has not happened. The incumbent local exchange carriers (RBOCs) have simply not tried to enter each other's service territories in any significant way." Consumer Federation of America, *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, February 2001, p. 13.

39. Although the RBOCs contend that CLECs are hurting them by leasing network components at below-cost rates, the RBOCs have refrained from engaging in meaningful head-to-head competition in each other's markets. For example, "[i]n New York, SBC served a grand total

of six residential lines at the end of 2001." Joan Campion, *Competition Is Vital For Phone Customers*, Chicago Tribune, Nov. 11, 2002, Commentary pg. 20.

40. The failure of the RBOCs to compete with one another would be anomalous in the absence of an agreement among the RBOCs not to compete with one another in view of the fact that in significant respects, the territories that they service are non-contiguous. As reflected in Exhibit A hereto, SBC serves most of the State of Connecticut even though Verizon rather than SBC serves the surrounding states. SBC serves California and Nevada, even though Qwest serves the other surrounding states. Similarly, there are many relatively small areas within the States of California, Texas, Illinois, Michigan, Ohio, Wisconsin, Indiana and other states that are served by Verizon, even though SBC serves all surrounding territories, as illustrated in Exhibit B hereto.[1] The failure of the RBOCs that serve the surrounding territories to make significant attempts to compete in the surrounded territories is strongly suggestive of conspiracy, since the service of such surrounded territories presents the RBOC serving surrounding territories with an especially attractive business opportunity that such RBOCs have not meaningfully pursued.

41. In competing for business in Connecticut, Verizon's predominance in the surrounding states would have provided it with substantial competitive advantages. In competing for business in California and Nevada, Qwest's predominance in surrounding states would have given it substantial competitive advantages. In competing for the business in the many smaller territories

[1]On information and belief, all or substantially all of the small areas served by Verizon that are surrounded by territories served by other RBOCs, as illustrated in Exhibit B hereto, were acquired by Verizon not as the result of competition by it with other RBOCs since the time of enactment of the Telecommunications Act, but rather through acquisition of territories served by Verizon's corporate predecessors-in-interest who served those areas prior to that time.

that Verizon serves that are surrounded by territories served by other RBOCs, the dominance of those other RBOCs in surrounding areas would have given them substantial competitive advantages. Nevertheless, Verizon has not sought to compete in a meaningful manner with SBC in Connecticut, Qwest has not sought to compete meaningfully with SBC in California and Nevada, and the RBOCs that serve the areas surrounding the smaller areas served by Verizon, as illustrated on Exhibit B hereto, have not sought to compete meaningfully with Verizon in those smaller areas. In the absence of an agreement not to compete, it is especially unlikely that there would have been no efforts by surrounding and dominant RBOCs to compete in such surrounded territories.

42. On October 31, 2002, Richard Notebaert the former Chief Executive Officer of Ameritech, who sold the company to Defendant SBC in 1999 and who currently serves as the Chief Executive Officer of Defendant Qwest, was quoted in a *Chicago Tribune* article as saying it would be fundamentally wrong to compete in the SBC/Ameritech territory, adding "it might be a good way to turn a quick dollar but that doesn't make it right." Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune, Oct. 31, 2002 Business, pg. 1.

43. The pronouncement that Qwest would forgo lucrative opportunities in its sister monopoly markets and in its principal line of business came as Qwest announced a Third Quarter loss of $214 million and 13% fall in revenue.

44. On November 8, 2002, in response to Notebaert's remarks, the Illinois Coalition For Competitive Telecom called Notebaert's statement "evidence of potential collusion among regional Bell phone monopolies to not compete against one another and kill off potential competitors in local phone service." *Illinois CLECS Assail Notebaert*, State Telephone Regulation Report, Comment, Vol. 20, No. 22. According to the article, "[t]he CLEC group said Notebaert indicated that the Bells'

strategy was to divide the country into local phone 'fiefdoms,' not to compete against each other, and to devote their collective efforts to 'eliminating would-be competitors in local service.'" *Id.*

45. On December 18, 2002, United States Representatives John Conyers, Jr. of Michigan and Zoe Lofgren of California sent a letter to United States Attorney General John Ashcroft requesting that the U.S. Department of Justice, Antitrust Division investigate whether the RBOCs are violating the antitrust laws by carving up their market territories and deliberately refraining from competing with one another. Jon Van, *Lawmakers Seek Probe of Bells; Do Firms Agree Not To Compete*, Chicago Tribune, Dec. 19, 2002, Business, pg. 2; James S. Granelli, *Federal Probe of Baby Bells Urged; Comments By Chairman Of Qwest Raise Questions About The Competitive Zeal Of The Regional Phone Companies*, Los Angeles Times, Dec. 19, 2002, Business, Part 3, Pg. 3.; *Conyers Asks Justice Dept. To Investigate Bells On Anticompetitive Practices*, Communications Daily, Dec. 20, 2002, Today's News. Representatives Conyers and Lofgren questioned the extent to which the RBOCs' "very apparent non-competition policy in each others' markets is coordinated." Letter to The Honorable John D. Ashcroft dated December 18, 2002, p. 2.

46. The RBOCs do indeed communicate amongst themselves through a myriad of organizations, including but not limited to the United States Telecom Association, the TeleMessaging Industry Association, the Alliance for Telecommunications Industry Solutions, Telecordia, Alliance for Public Technology, the Telecommunications Industry Association and the Progress and Freedom Foundation.

47. Defendants have engaged in parallel conduct in order to prevent competition in their respective local telephone and/or high speed internet services markets. "They have refused to open their markets by dragging their feet in allowing competitors to interconnect, refusing to negotiate

in good faith, litigating every nook and cranny of the law, and avoiding head-to-head competition like the plague." Consumer Federation of America, *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, February 2001, p. 1. Defendants also have engaged and continue to engage in unanimity of action by committing one or more of the following wrongful acts in furtherance of a common anticompetitive objective to prevent competition from Competitive Local Exchange Carriers ("CLECS") in the their respective local telephone and/or high speed internet services markets:

(a) Defendants have failed to provide the same quality of service to competitors that Defendants provided to their own retail customers;

(b) Defendants have failed to provide access to their operational support systems ("OSS"), including on-line customer service records ("CSRs"), on a nondiscriminatory basis that places competitors at parity. Moreover, competitors do not have access to unbundled elements on the same basis on which Defendants accessed the same elements;

(c) Defendants' competitors have experienced undue delays in the provisioning of unbundled elements. Such delays are discriminatory and preclude competitors from offering service as attractive to customers as Defendants' services and on a basis that places competitors at parity with a respective Defendant;

(d) Defendants have billed customers of competitors who are converted from Defendants' retail service. As a result of Defendants' practices, customers of competitors are double-billed. Defendants' practices have severely impacted competitors' relationships with customers;

(e) Defendants have failed to provide interconnection between the network and those of competitors that is equal in quality to the interconnection that each provided itself;

(f) Defendants have refused to sell to competitors, on just, reasonable, and non-discriminatory terms, access to components of the network on an unbundled or individual basis;

(g) Defendants have refused to sell to competitors local telephone and/or high speed internet services at wholesale prices that are just, reasonable and nondiscriminatory, thereby preventing Defendants' competitors from being able to competitively resell the services to Plaintiffs and members of the Class;

(h) Defendants have refused to allow competitors to connect to essential facilities, consisting of, but not limited to, local telephone lines, equipment, transmission and central switching stations (central office) and "local loop" on just, reasonable and non-discriminatory terms;

(i) Defendants have used discriminatory and error filled methods to bill local telephone service competitors in order to discourage competition by making it virtually impossible for competitors to audit the bills they received from Defendants;

(j) Defendants have imposed slow and inaccurate manual order processing causing competitors to devote significant time, effort and expense to identify and rectify problems to ensure that orders were ultimately processed correctly;

(k) Defendants have used monopoly power in their respective wholesale local telephone and/or high speed internet services market in order to gain or maintain a competitive advantage in the retail market for the provision of local telephone and/or high speed internet services; and

(l) Defendants have used their respective monopoly power and exclusive control over essential facilities consisting of, but not limited to, local telephone lines, equipment, transmission and central switching stations (central office) and "local loop" to negotiate agreements on unfair terms with competitors who were seeking access to their respective local telephone networks. Each Defendant, possessing the exclusive and sole source of entry into its own local telephone and/or high speed internet services market, was in a superior bargaining position to competitors and potential competitors and used that superior bargaining position to dictate unfair terms upon competitors.

48. The structure of the market for local telephone services is such as to make a market allocation agreement feasible, in that the four defendants, taken together, account for as much as ninety percent or more of the markets for local telephone services within the 48 contiguous states. Elaborate communications thus would not have been necessary in order to enable Defendants to agree to allocate territories and to refrain from competing with one another. A successful conspiracy among the Defendants to allocate territories would not require such frequent communications as to make prompt detection likely.

49. If one of the Defendants had broken ranks and commenced competition in another's territory the others would quickly have discovered that fact. The likely immediacy of such discovery makes a territorial allocation agreement among the Defendants more feasible, more readily enforceable, and more probable. In this respect as well, the structure of the market was conducive to an agreement among the Defendants to allocate territories to one another.

50. Had any one of the Defendants not sought to prevent CLECs (other than the other Defendants) from competing effectively within that Defendant's allocated territory in the ways

described above, the resulting greater competitive inroads into that Defendant's territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct. In addition, the greater success of any CLEC that made substantial competitive inroads into one Defendant's territory would have enhanced the likelihood that such a CLEC might present a competitive threat in other Defendants' territories as well. In these respects as well as others, Defendants had compelling common motivations to include in their unlawful horizontal agreement an agreement that each of them would engage in a course of concerted conduct calculated to prevent effective competition from CLECs in each of the allocated territories.

51. In the absence of any meaningful competition between the RBOCs in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.

VI.

INTERSTATE TRADE AND COMMERCE

52. At times relevant herein, Defendants and/or their subsidiaries provided local and regional telephone and/or high speed internet services across state lines, and regularly and frequently solicited customers and sent bills and received payments via the mail throughout the United States.

The marketing, sale and provision of local telephone and/or high speed internet services regularly occurs in and substantially affects interstate trade and commerce.

VII.

CLASS ACTION ALLEGATIONS

53. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following class:

> All persons or entities who reside or resided in the continental United States (excluding Alaska and Hawaii) and are or were subscribers of local telephone and/or high speed internet services (the "Class") from February 8, 1996 to present (the "Class Period"). Excluded from the Class are the Defendants and any parent, subsidiary, corporate affiliate, officer, director or employee of a Defendant and any judge or magistrate judge assigned to entertain any portion of this case.

54. The members of the Class are so numerous and geographically dispersed that joinder of all members is impracticable. The exact number and identity of Class members is unknown to Plaintiffs but can readily be ascertained from books and records maintained by Defendants or their agents. Upon information and belief, there are millions of local telephone and/or high speed internet services subscribers in the United States who are within the defined Class.

55. There are questions of law or fact common to the Class members concerning:

(a) whether Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and otherwise allocating customers and markets to one another;

(b) the duration and extent of the contract, combination or conspiracy alleged herein;

(c) whether the Defendants were participants in the contract, combination or conspiracy alleged herein;

(d) whether the alleged contract, combination or conspiracy violated Section 1 of the Sherman Act, 15 U.S.C. § 1;

(e) whether the alleged contract, combination or conspiracy caused injury and damage to Plaintiffs and members of the Class and the appropriate measure of damages;

(f) whether a Defendant's conduct violated state antitrust laws;

(g) whether Plaintiffs and members of the Class are entitled to injunctive and other equitable relief; and

(h) whether Defendants and their co-conspirators fraudulently concealed the conspiracy alleged herein.

56. The claims of Plaintiffs are typical of the claims of each of the members of the Class. Plaintiffs and members of the Class purchased local telephone and/or high speed internet services from a Defendant or a competitor of a Defendant in the continental United States.

57. Plaintiffs will fairly and adequately protect the interests of the Class. There is no conflict of interest between Plaintiffs and other members of the Class and Plaintiffs are represented by experienced class action counsel.

58. Defendants have acted in an unlawful manner on grounds generally applicable to all members of the Class.

59. The questions of law or of fact common to the claims of the Class predominate over any questions affecting only individual class members, so that the certification of this case as a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

60. For these reasons, the proposed Class may be certified under Fed. R. Civ. P. 23.

VIII.

FRAUDULENT CONCEALMENT

61. Plaintiffs and members of the Class had no knowledge of the contract, combination or conspiracy or any facts alleged herein which might have led to the discovery thereof until shortly before the filing of this Complaint. Plaintiffs and members of the Class could not have discovered the contract, combination or conspiracy at an earlier date by the exercise of due diligence because of the affirmative, deceptive practices and techniques of secrecy employed by Defendants. Through these acts of secrecy and deception, which included affirmative acts to hide their wrongdoing, Defendants actively misled Plaintiffs and the Class about the existence and terms of their contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another.

COUNT I

Violation of Sherman Act § 1 - 15 U.S.C. § 1

62. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 61 as if fully set forth herein.

63. Defendants and their co-conspirators have engaged in a horizontal contract, combination or conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.

64. Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.

65. The contract, combination or conspiracy has had and will continue to have the following effects:

(a) competition in the local telephone and/or high speed internet services market has been unlawfully restrained, suppressed or eliminated;

(b) Plaintiffs and members of the Class have been denied the benefits of free, open and unrestricted competition in the local telephone and/or high speed internet services markets; and

(c) the price of local telephone and/or high speed internet services in the United States have been fixed, raised, maintained or stabilized at artificially high and non-competitive levels.

66. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs and members of the Class have suffered injury to their business or property and have paid supracompetitive prices for local telephone and/or high speed internet services.

67. If not permanently enjoined, the unlawful contract, combination or conspiracy will continue and cause irreparable harm to Plaintiffs and members of the Class who have no adequate remedy at law.

COUNT II

Violation of State Antitrust Laws

68. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 67 as if fully set forth herein.

69. As described above, Defendants have engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of the following state antitrust laws.

70. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Arizona Revised Stat. §§ 44-1401, *et seq.*

71. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Cal. Bus. & Prof. Code §§ 16700, *et seq.*, and Cal. Bus. & Prof. Code §§ 17200.

72. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of violation of D.C. Code Ann. §§ 28-45031, *et seq.*

73. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Fla. Stat. §§ 501. Part II, *et seq.*

74. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Iowa Code §§ 553.4 *et seq.*

75. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Kan. Stat. Ann. §§ 50-101, *et seq.*

76. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of La. Rev. Stat. §§ 51:137, *et seq.*

77. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Me. Rev. Stat. Ann. 10, § 1101, *et seq.*

78. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Mass. Ann. Laws ch. 93, *et seq.*

79. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Mich.Comp.Laws Ann. §§ 445.771, *et seq.*

80. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Minn. Stat. §§ 325D.52, *et seq.*

81. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Miss. Code Ann. §§ 75-21-1, *et seq.*

82. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Nev. Rev. Stat. Ann. § 598A., *et seq.*

83. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 *et seq.*

84. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of N.M. Stat. Ann. §§ 57-1-1 *et seq*.

85. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of New York General Business Law §§ 340, *et seq*. And § 349 *et. seq*.

86. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of N.C. Gen. Stat. §§ 75-1, *et seq*.

87. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of N.D. Cent. Code § 51-08.1-01, *et seq*.

88. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of S.D. Codified Laws Ann. § 37-1, *et seq*.

89. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Tenn. Code Ann. §§ 47-25-101, *et seq*.

90. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Vt. Stat. Ann. 9, § 2453, *et seq*.

91. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of W.Va. Code §§ 47-18-1, *et seq*.

92. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Wis. Stat. § 133.01, *et seq*.

93. Plaintiffs and members of the Class have been injured in their business or property by reason of Defendants' antitrust violations alleged in this Count. Their injury consists of paying higher prices for local telephone and/or high speed internet services than they would have paid in

the absence of the violations alleged herein. This injury is of the type the antitrust laws of the above States and the District of Columbia were designed to prevent and flows from that which makes Defendants' conduct unlawful.

COUNT III

Unjust Enrichment

94. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 93 as if fully set forth herein.

95. Defendants have benefitted from their unlawful acts through the overpayments from Plaintiffs and other Class members and the increased profits resulting from such overpayments. It would be inequitable for Defendants to be permitted to retain the benefit of these overpayments, which were conferred by Plaintiffs and the other class members and retained by Defendants.

96. Plaintiffs and members of the Class are entitled to the establishment of a constructive trust consisting of the benefit to Defendants of such overpayments, from which Plaintiffs and the other Class members may make claims on a pro-rata basis for restitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and members of the Class pray that the Court enter judgment in their favor as follows:

A. Declaring this action to be a proper class action and certifying Plaintiffs as the representative of the Class pursuant to Rule 23 of the Federal Rules of Civil Procedure;

B. Declaring that Defendants violated and are in violation of the Sherman Act § 1 and the various state antitrust statutes alleged herein;

C. Awarding threefold the damages sustained by Plaintiffs and members of the Class as a result Defendants' violations;

D. Ordering injunctive relief preventing and restraining Defendants and all persons acting on their behalf from engaging in the unlawful acts alleged herein;

F. Awarding Plaintiffs and members of the Class the costs, expenses, and reasonable attorneys' fees and experts' fees for bringing and prosecuting this action; and

G. Awarding Plaintiffs and members of the Class such other and further relief as the Court may deem just and proper.

JURY DEMAND

Pursuant to Rule 38(h) of the Federal Rules of Civil Procedure, Plaintiffs hereby demand a jury trial on all issues so triable.

Dated: April 11, 2003
New York, New York

MILBERG WEISS BERSHAD HYNES & LERACH LLP

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