Nos. 07-6052, 07-6114, 07-6115, 07-6116

In the United States Court of Appeals for the Sixth Circuit

CARRIER CORPORATION; CARRIER SA; CARRIER ITALIA S.P.A,
Plaintiffs-Appellants Cross-Appellees, 07-6052, 07-6114, 07-6115, 07-6116

v.

OUTOKUMPU OYJ; OUTOKUMPU COPPER PRODUCTS OY; OUTOKUMPU COPPER FRANKLIN, INC.,
Defendants-Appellees Cross-Appellants, 07-6052, 07-6114, 07-6115, 07-6116

MUELLER INDUSTRIES, INC.;
Defendant-Appellee, 07-6052, 07-6114, 07-6116
Defendant-Appellee Cross-Appellant, 07-6115

MUELLER EUROPE LTD,
Defendant-Appellee, 07-6052, 07-6114, 07-6115
Defendant-Appellee Cross-Appellant, 07-6116

and

EUROPA METALLI SPA; TREFIMETAUX SA,
Defendants. 07-6052, 07-6114, 07-6115, 07-6116

On Appeal from the United States District Court for the Western District of Tennessee at Memphis

FINAL SECOND BRIEF OF DEFENDANT-APPELLEE CROSS-APPELLANT MUELLER INDUSTRIES, INC.

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ORAL ARGUMENT REQUESTED

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel for Mueller Industries, Inc., which is a nongovernmental corporate party, certifies that

1. Mueller Industries, Inc. has no parent corporations.

2. There are no publicly owned corporations, not a party to the appeal, that have a financial interest in the outcome.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a) and 6 Cir. R. 34(a), Defendant-Appellee and Cross-Appellant Mueller Industries, Inc. respectfully requests that the Court permit oral argument. This appeal involves complex legal arguments and oral argument is likely to aid the decisional process significantly.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants, Carrier Corporation, Carrier S.A., and Carrier Italia S.p.A. (together, "Carrier"), filed this action in the United States District Court for the Western District of Tennessee against Outokumpu Oyj, Outokumpu Copper Products Oy, Outokumpu Copper (U.S.A.), Inc., and Outokumpu Copper Franklin, Inc. (collectively "Outokumpu") as well as against Mueller Industries, Inc. ("Mueller") and Mueller Europe, Ltd. ("Mueller Europe"). (R. 46, Apx. 0019-62.)[1] Carrier sought relief for purported violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, and the Tennessee Trade Practices Act, Tenn. Code Ann. § 47-25-101, *et seq.* (*Id.*, Apx. 0057-59.) Carrier asserted that the district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26. (*Id.* ¶ 9, Apx. 0023.)

On July 27, 2007, the district court dismissed Carrrier's amended complaint (the "Amended Complaint") for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). (R. 93, Dismissal Order, Apx. 0921-31.) The district court also concluded that, even if subject matter jurisdiction existed, it would have granted defendants' motions to dismiss on Rule 12(b)(6) grounds for failure to state a claim. (*Id.* at 10-11, Apx. 0930-31.) The

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[1] Citations to "Apx. __" refer to the Joint Appendix.

district court entered a final judgment on July 27, 2007. (R. 94, Judgment, Apx. 0932.)

On August 23, 2007, Carrier filed a notice of appeal. On August 31, 2007, Mueller filed a notice of cross-appeal. Because the appeal and cross-appeal are from the district court's final judgment, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The Amended Complaint purports to allege that a conspiracy that the European Commission found had occurred in Europe extended to the United States and involved the allocation of Carrier's purchases in the United States to Outokumpu. This appeal presents the following issues:

1. Whether the district court properly dismissed the Amended Complaint for lack of subject matter jurisdiction.

2. Whether, even if the district court had subject matter jurisdiction over the claims presented in the Amended Complaint, the Amended Complaint should be dismissed for failure to comply with Federal Rules of Civil Procedure 8(a) and 12(b)(6), particularly insofar as it failed to plead a plausible entitlement to relief under *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

3. Whether, even if the district court had subject matter jurisdiction over the claims presented in Amended Complaint, the Amended

Complaint should be dismissed because: (a) it is time-barred on its face; and (b) Carrier has failed to allege with particularity fraudulent concealment, as required by Federal Rule of Civil Procedure 9(b), to toll the limitations period.

STATEMENT OF THE CASE

In a decision dated December 16, 2003 (the "EC ACR Decision"), the European Commission ("EC") described the operation of a cartel in *Europe* in the sale of air conditioning and refrigeration tube ("ACR tube," which is also known as "copper tube for industrial applications").[2] (*See* R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision, Part B(1), Apx. 0283-84; *see also* R. 46, Am. Cplt. ¶ 12(a), Apx. 0024.) Carrier asserts in this action that the cartel found by the EC extended to the United States, that Mueller was a party to the cartel, and that Carrier's purchases of ACR tube in the United States, with Mueller's agreement, were allocated to Outokumpu. (Carrier Br. at 5, 12.) But the EC expressly found

[2] The EC conducted two separate investigations into two main classes of copper tubes: (i) industrial tubes, which include tubes for use in air-conditioning and refrigeration (ACR), telecommunications and other applications (*see* R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 3, Apx. 0283); and (ii) plumbing tubes, used primarily for water, oil, gas and heating installations in the construction industry. (*See* R. 55, Mot. to Dismiss, Wax Dec., Ex. 1, Decision of EC regarding plumbing tubes dated September 3, 2004 ("EC Plumbing Tubes Decision") ¶ 3, Apx. 0072.) The EC has concluded that plumbing tubes and ACR copper tubes occupy distinct relevant markets. (*See* R. 55, Mot. to Dismiss, Wax Dec., Ex. 1, EC Plumbing Tubes Decision ¶ 5, Apx. 0073 ("[C]opper plumbing tubes and industrial copper tubes . . . constitute different product markets."); Ex. 2, EC ACR Decision ¶¶ 3-5, Apx. 0283-84.)

that Mueller was not a party to the reported European cartel that forms the basis of the Amended Complaint. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 394, Apx. 0366.)

Mueller moved to dismiss Carrier's initial complaint on September 12, 2006. Instead of opposing that motion, Carrier filed its Amended Complaint on October 27, 2006. (R. 46, Apx. 0019-62.) Mueller's and the other defendants' motions to dismiss the Amended Complaint, which were based on Federal Rule of Civil Procedure 12(b), subsections (1), (2), and (6), followed on December 6, 2006. (R. 55, 56, 57.)

Mueller argued in its dismissal motion that Carrier alleged no facts in support of the alleged cartel and that the Amended Complaint was effectively silent as to Mueller's participation in any such cartel. Mueller noted that Carrier borrowed its substantive facts largely from the EC ACR Decision but that, with respect to Mueller, Carrier's facts were contradicted by the EC's finding that Mueller was not a party to the European ACR conspiracy. Mueller further argued that the facts alleged in the Amended Complaint, like those in the EC ACR Decision, support only the European agreement found by the EC.

On that basis, Mueller argued, the Amended Complaint neither established subject matter jurisdiction nor pled facts sufficient to state a claim under the Sherman Act or Tennessee Trade Practices Act. Mueller also argued that

the Amended Complaint was time-barred on its face. Various defendants further asserted that the district court lacked personal jurisdiction over them.

By order dated July 27, 2007 (the "Dismissal Order"), the district court dismissed Carrier's Sherman Act claim for failure to establish subject matter jurisdiction. The district court further concluded that, even if subject matter jurisdiction existed, it would have dismissed the claim on Rule 12(b)(6) grounds. (R. 93, Dismissal Order at 10-11, Apx. 0930-31.) The district court declined to exercise supplemental jurisdiction over Carrier's state law claim. (*Id.* at 11, Apx. 0931.) Judgment was entered on July 27, 2007. (R. 94, Apx. 0932.)

Carrier filed a notice of appeal. (R. 95, Apx. 0933-36.) Mueller cross-appealed to permit this Court to enlarge the relief that the district court granted by affirming the Judgment on the basis that Carrier failed to state a claim for which relief can be granted and dismissing the case with prejudice. (R. 98, Apx. 0939-40.) The other Defendants-Appellees also filed cross-appeals. (R. 97, Apx. 0937-38; R. 99, Apx. 0942-44.) On October 16, 2007, Carrier moved to dismiss the cross-appeals, arguing that Defendants-Appellees were not aggrieved by the district court's ruling and therefore lacked standing. On December 3, 2007, this Court denied Carrier's motion to dismiss the cross-appeals.

Mueller requests this Court to affirm the Judgment because the district court lacked subject matter jurisdiction over the claims as presented in the

Amended Complaint. Mueller further requests this Court, to the extent that it does not affirm the Judgment for lack of subject matter jurisdiction, to affirm the Judgment by dismissing with prejudice the Amended Complaint as insufficient to state a plausible entitlement to relief and/or as time-barred under Rule 12(b)(6).[3]

STATEMENT OF FACTS

The district court concluded that Carrier's U.S. claim was improperly based on European findings of a European agreement that was organized and implemented in Europe to affect only European markets. "[I]n both their amended complaint and in their subsequent response to Defendants' motions, Plaintiffs seem to have relied entirely on facts from the [European Commission] decisions peppered with language from the Sherman and Clayton Acts and conclusory statements about price-fixing in the U.S." (R. 93, Dismissal Order at 6, Apx. 0926.) Indeed, the district court observed: "Plaintiffs have simply 'cut-and-pasted' into their complaint the collusive activities found by the E.C. to have taken place in Europe and tacked on 'in the United States and elsewhere.'" (*Id.*, Apx. 0926.)

[3] If this Court affirms the dismissal of Carrier's Sherman Act claim, it should also affirm the district court's decision not to exercise supplemental jurisdiction over Carrier's state law claim for violation of the Tennessee Trade Practices Act.

Based on those determinations, the district court concluded that it lacked subject matter jurisdiction over Carrier's claims. In the alternative, and for the same reasons, the district court found that the Amended Complaint's allegations did not show a plausible entitlement to relief as required by *Bell Atlantic Corp v. Twombly*, 127 S. Ct. 1955 (2007).

A. The European Commission ACR Tube Investigation And Decision

The EC investigation that culminated in the EC ACR Decision began in early 2001, when Mueller disclosed to the EC possible ACR cartel activity (among other things). (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 56, Apx. 0293-94; R. 46, Am. Cplt ¶ 39, Apx. 0035.) Thereafter, on March 22-23, 2001, the EC conducted "unannounced inspections," commonly referred to as "dawn raids," at five European manufacturers of ACR (and other) tube. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶¶ 56, 58, Apx. 0293, 0294.)

A March 23, 2001, EC press release confirmed that the EC had conducted dawn raids at "five European companies . . . to ascertain whether there is evidence of a cartel agreement and related illegal practices concerning price fixing . . . on *copper tubes[] used . . . for industrial applications*" – the very ACR tubes that are the subject of Carrier's claims. (R. 56, Mot. to Dismiss, Wax Dec., Ex. 3 (emphasis added), Apx. 0386.) A multitude of press reports soon followed,

and some specifically reported that copper tubes for industrial applications were under investigation. (R. 56, Mot. to Dismiss, Wax Dec., Ex. 4, Apx. 0387-416.)

After an extended investigation, the EC concluded that Outokumpu, Wieland Werke AG ("Wieland"), KM Europa Metal AG (together with Tréfimétaux SA and Europa Metalli SpA ("KME")), by virtue of their participation in a European trade association called the Cuproclima Quality Association ("Cuproclima"), "participated in [an] . . . infringement . . . covering most of the [European Economic Area] . . . *to 22 March 2001*." (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶¶ 1-2 (emphasis added), Apx. 0283; *see also* R. 46, Am. Cplt. ¶¶ 65-69, Apx. 0043-44.)

As to Mueller, the EC reached the opposite conclusion: "*Mueller cannot be held liable for the infringement, as it never directly participated in the cartel in question*." (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 394 (emphasis added), Apx. 0366.) Mueller therefore was not an "addressee" of – *i.e.*, a defendant or respondent in – the EC ACR Decision and, *a fortiori*, was not liable for the infringement found in that decision.

The EC found that Cuproclima "board meetings were normally held in Zurich" (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 12, Apx. 0285); the Cuproclima "Technical Committee met once a year, mostly in Germany" (*Id.* ¶ 13, Apx. 0285); and other Cuproclima meetings took place in

Tegernsee, Germany (Carrier Br. at 10), in Prague, Czech Republic (Carrier Br. at 10), and Oslo, Norway. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶¶ 151, 152, Apx. 0313-14.) In short, every Cuproclima meeting took place in Europe. (*Id*. ¶¶ 124-176, Apx. 0305-21.)

Given those findings, the EC ACR Decision has two important limitations as it relates to this action. First, the cartel that the EC ACR Decision reported was limited to *European* companies that participated in a *European* trade association (Cuproclima) relating to sales of ACR tube in *Europe* that had no connection to the United States. Second, the EC expressly found that Mueller had *no* liability for that cartel.

The district court recognized those limitations and the contradictions between the EC ACR Decision and Carrier's allegations. The district court found that Carrier had "do[ne] injury to [its] argument by *discarding the conclusions of the EC Decision when they deviate[d] from [Carrier's] agenda*, e.g., the fact that the EC findings were limited to European conduct." (R. 93, Dismissal Order at 7 (emphasis added), Apx. 0927.) The district court concluded that the EC ACR Decision "nowhere implie[d] that the cartel extended beyond the European market." (*Id.*, Apx. 0927.)

B. The Separate EC Plumbing Tubes Decision

The EC ACR Decision was not the only EC decision that Carrier brought before the district court. The Amended Complaint also draws from (albeit largely without attribution) a September 3, 2004, decision of the European Commission (the "EC Plumbing Tubes Decision," and with the "EC ACR Decision," the "EC Decisions") that concerned an alleged European conspiracy relating to the sale of plumbing tubes in Europe. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 1, Apx. 0063-275.)

The EC Plumbing Tubes Decision explains unequivocally that the ACR and plumbing tubes conspiracies reported in the EC Decisions were separate and distinct – they "*involved different companies (and employees), and were organised in a different way*." (R. 55, Mot. to Dismiss, Wax Dec., Ex. 1, ¶ 5 (emphasis added), Apx. 0073.) Although the EC Plumbing Tubes Decision named as respondents certain entities that also were respondents in the EC ACR Decision, the groups of respondents in the two EC Decisions were not the same and the respondents in the EC ACR Decision did not include Mueller. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 1, ¶ 5, Apx. 0073.)

Following the issuance of the EC Plumbing Tubes Decision, U.S. civil plaintiffs filed suit in the Western District of Tennessee alleging Sherman Act claims regarding plumbing tubes. Before Carrier filed the Amended Complaint in

this action, the same district court that later adjudicated Carrier's claims dismissed the Sherman Act claims relating to plumbing tubes.[4] (R. 57, Mem. in Support of Mot. of Def. Outokumpu to Dismiss Carrier's Am. Cplt., Ex. 2, at 1-9, Apx. 0417-25.) The district court held that the plumbing tubes claims – much like the ACR tube claims in the Amended Complaint – were insufficient as against Mueller and the other defendants because they simply borrowed factual allegations from the EC Plumbing Tubes Decision. (*Id*.)

As discussed below, Carrier has attempted to present statements from the EC Plumbing Tubes Decision as support for the alleged ACR conspiracy. The district court properly rejected Carrier's efforts to mix the EC Decisions and the conspiracies they report:

> Also troubling is the fact that Plaintiffs have presented facts from the plumbing tube and ACR tubing investigations as if they described a single conspiracy. Through its inclusion of factual details which do not pertain to the cartel at issue in this case, Plaintiffs have undermined any credibility the complaint otherwise possessed.

(R. 93, Dismissal Order at 7, Apx. 0927.)

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[4] *American Copper & Brass, Inc. v. Boliden AB*, No. 04-2771 (W.D. Tenn. Oct. 10, 2006) (finding lack of subject matter jurisdiction and dismissing plaintiffs' complaint in its entirety). The decision in *American Copper & Brass, Inc. v. Boliden AB*, can be found at the record citation contained in the text following note 4.

C. The Amended Complaint

The Amended Complaint "cut-and-pasted" numerous statements from the EC ACR Decision and otherwise used its facts to allege that the reported European cartel extended to the United States. For example, both the EC ACR Decision and the Amended Complaint state that the cartel "in Europe" included Outokumpu, Wieland, and KME, and was organized through a European trade association, Cuproclima. (R. 55, Mot. to Dismiss, Wax. Dec., Ex. 2, EC ACR Decision ¶ 78, Apx. 0296; R. 46, Am. Cplt. ¶ 66, Apx. 0043.) The EC ACR Decision describes Cuproclima meetings in Tegernsee in 1993 and in France and in Prague in 1995. (R. 55, Mot. to Dismiss, Wax. Dec., Ex. 2, EC ACR Decision ¶¶ 137, 153, Apx. 0309, 0314-15.) The Amended Complaint cribs those allegations and mimics other EC findings, but typically appends the assertion that the European conduct related to the "United States, Europe, and elsewhere." (*See, e.g.*, R. 46, Am. Cplt. ¶¶ 2, 54, 55, 56, 57(a), 57(b), 57(d), 70, 114(a), 114(b), 114(c), 117, Apx. 0020, 0039, 0040, 0044, 0056, 0057.)

In an apparent effort to shift its emphasis from Europe to the United States, Carrier has abandoned in this appeal its claims based on foreign purchases: "[i]n the interest of expediting this litigation, Carrier had decided to limit its claims

in this litigation to purchases made in the United States." (Carrier Br. at 23 n.2.)[5] A single purported basis for relief now remains: the European cartel reported in the EC ACR Decision included Mueller despite the EC's finding to the contrary; and the reported European cartel extended to the United States and resulted in Carrier's U.S. purchases, with Mueller's supposed agreement, having been allocated to Outokumpu.

But the Amended Complaint provides no factual basis for an anticompetitive agreement in the United States. That basis is most conspicuously absent as to Mueller. Carrier supplies *no* facts as to Mueller's participation in the conspiracy in Europe, and makes no *mention*, other than a conclusory assertion, of Mueller's participation in the alleged U.S. agreement. (R. 46, Am. Cplt. ¶ 39, Apx. 0035.) Nor does the Amended Complaint reconcile "some" unspecified sales by Mueller to Carrier in the United States with Mueller's supposed agreement to allocate Carrier's United States purchases to Outokumpu. (*Id.*)

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[5] Carrier thus has withdrawn its claims that were asserted on behalf of Carrier France S.A. and Carrier Italia S.p.A. Both entities are located in Europe (R. 46, Am. Cplt. ¶ 16, Apx. 0025), and any purchases made by those entities even from entities in the United States would constitute the foreign commerce of the United States, on which Carrier has disclaimed reliance. (*See* Carrier Br. at 23 n.2.) In addition, the district court's judgment as to those entities and any purchases by Carrier Corporation outside the United States has now become final.

With no U.S. conspiratorial facts to allege, Carrier resorts to a generic "global market" contention as the sole basis on which Carrier asserts that the European cartel included the United States. According to Carrier, "the supply chain dynamics of the global ACR Copper Tubing market, such as supply cost and lead time, are conducive to importing and exporting product between the different sales regions." (R. 46, Am. Cplt. ¶ 51, Apx. 0038.) Carrier offers such generalities as the supposed basis for a cartel agreement by which Mueller purportedly agreed to allocate Carrier's U.S. ACR purchases to Outokumpu.

As to the timeliness of Carrier's claims, the Amended Complaint concedes that the alleged conspiracy ended in March 2001 (R. 46, Am. Cplt. ¶ 12(b), Apx. 0024) and that Mueller withdrew from any conspiracy in early 2001, when it made disclosures to the EC that prompted the EC's investigation. (*Id.* ¶ 7, Apx. 0022-23.) Carrier did not commence this action until March 29, 2006, *five years* after Carrier alleges that the conspiracy ended. The Amended Complaint is therefore time-barred on its face under the four-year limitations period applicable to Sherman Act claims.

Carrier claims that the limitations period did not begin to run until December 16, 2003 – the date of the EC ACR Decision. (R. 46, Am. Cplt. ¶ 103, Apx. 0051.) Carrier asserts in conclusory fashion that the limitations period was tolled until December 2003 as to Mueller pursuant to the doctrine of fraudulent

concealment. But Carrier identifies not a single act of wrongful concealment by Mueller to support that assertion, and, indeed, admits that Mueller disclosed the conspiracy to the European Commission in or prior to March 2001.

SUMMARY OF ARGUMENT

Carrier has neither denied that it copied the Amended Complaint from the EC Decisions nor identified factual allegations of a supposed U.S. conspiracy. Presented with only conclusory allegations of a U.S. conspiracy, the district court rightly concluded that it lacked subject matter jurisdiction, and, alternatively, that Carrier failed to state a claim for which relief can be granted under *Twombly*.

As to subject matter jurisdiction, Carrier's allegations of a conspiracy contain no facts regarding an intended, substantial U.S. effect from the reported European ACR conspiracy or regarding the supposed allocation of Carrier's U.S. ACR purchases to Outokumpu. Carrier's Sherman Act claim is thus "'so attenuated and unsubstantial as to be absolutely devoid of merit'" and unable to support subject matter jurisdiction. (R. 93, Dismissal Order at 8 (quoting *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974)), Apx. 0928.) The absence of a U.S. predicate is particularly well-illustrated with respect to Carrier's claim against Mueller, for Carrier does not allege with factual substance that Mueller engaged in any ACR conspiratorial act anywhere, let alone in the United States.

The Amended Complaint is also deficient for the separate reason that it fails to state a claim for which relief can be granted under *Twombly*. This Court has read *Twombly* to require that an antitrust plaintiff such as Carrier plead "enough facts to state a claim to relief that is plausible on its face" and, specifically, the "who, what, where, when, how or why" of the supposed conspiracy. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, No. 07-4115, 2008 WL 5273309, at *3, 6 (6th Cir. Dec. 22, 2008) [hereinafter *Total Benefits*] (internal quotations omitted).

Carrier's Sherman Act claim is particularly wanting under Rule 12(b)(6) as to Mueller. Although specific allegations are required as to each defendant, *see Total Benefits*, 2008 WL 5273309, at *5, Carrier has pled no facts supporting Mueller's participation in any conspiracy by any name – not a European ACR conspiracy, a U.S. allocation of Carrier's purchases, or a global conspiracy. Indeed, the EC's conclusion that Mueller was not involved in the reported European ACR conspiracy is itself fatal to Carrier's claim against Mueller. Carrier's effort to bootstrap a Mueller role in the ACR conspiracy through facts lifted from the EC Plumbing Tubes Decision is equally ineffective.

The Amended Complaint also fails more generally to meet the *Twombly* standard for pleading a cognizable Sherman Act conspiracy. It alleges no facts supporting its conclusory allegation that the European conspiracy found in the

EC ACR Decision was instead a "global" one that included the United States. Carrier's use of generic allegations of a "global market" to support its "global conspiracy" is similarly inadequate. Numerous courts have refused to accept such allegations as a substitute for the facts required to aver an *agreement* and a plausible entitlement to relief under the Sherman Act.

The Amended Complaint is also time-barred. It was filed on March 29, 2006, more than five years after Carrier concedes the alleged conspiracy ended, and more than one year after the expiration of the four-year limitations period. (R. 46, Am. Cplt. ¶¶ 2, 7, 12(b), 39, 55, 86, Apx. 0020, 0022-23, 0024, 0035, 0039, 0046.) Although Carrier makes cursory allegations of fraudulent concealment in an attempt to toll the limitations period, those allegations lack both substance and the particularity required by Federal Rule of Civil Procedure 9(b).

Specifically, Carrier fails to plead with particularity: (1) that Mueller engaged in affirmative acts of concealment (in fact, Mueller disclosed possible ACR cartel activity to the EC); (2) that Carrier was not on inquiry notice that it may have potential claims against Mueller (in fact, public news reports disclosed possible cartel activity in March 2001); and (3) that Carrier exercised due diligence in pursuing claims against Mueller (in fact, Carrier alleges that it made only a single oral inquiry of an unnamed ACR tube supplier and does not know when the inquiry occurred). Because Carrier has not made particularized factual allegations

against Mueller that would support a finding of fraudulent concealment, Carrier's claims are time-barred.

STANDARD OF REVIEW

The Court of Appeals reviews *de novo* district court dismissals pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). *See Giesse v. Sec'y of Dep't of Health & Human Servs.*, 522 F.3d 697, 702 (6th Cir. 2008); *Total Benefits*, 2008 WL 5273309, at *2 ("[t]he standard of appellate review for a motion to dismiss pursuant to Rule 12(b)(6) is *de novo*"). If a Rule 12(b)(1) dismissal is based in part on the resolution of factual disputes, the district court's application of the law to the facts is reviewed *de novo*, but the "reviewing court must accept the district court's factual findings unless they are clearly erroneous." *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1135 (6th Cir. 1996).

ARGUMENT

I. CARRIER'S SHERMAN ACT CLAIM WAS PROPERLY DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

This Court should affirm the Judgment of the district court dismissing the Amended Complaint for lack of subject matter jurisdiction under Rule 12(b)(1) for the reasons set forth below and for the reasons discussed in the brief submitted in this appeal by Outokumpu and dated January 26, 2009 ("Outokumpu Brief"). Mueller hereby joins in, and adopts in all respects applicable to it, the Outokumpu

Brief urging this Court to affirm the Judgment dismissing the Amended Complaint for lack of subject matter jurisdiction.

A. A Sherman Act Claim Based On Foreign Conduct Must Allege An Intended, Substantial Effect In The United States To Establish Subject Matter Jurisdiction.

A claim must be scrutinized to ensure that it falls within the limited jurisdiction of federal courts. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). In that regard, the Supreme Court noted that "[i]t is to be presumed that a cause of action lies outside of [the federal courts'] limited jurisdiction . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* at 377 (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936)); *see also McGrady v. U.S. Postal Serv.*, 289 F. App'x 904, 906 (6th Cir. 2008); *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007).

Federal subject matter jurisdiction will not lie where, as here, a complaint's claims are "so attenuated and unsubstantial as to be absolutely devoid of merit." (R. 93, Dismissal Order at 8 (citing *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974)); Apx. 0928.) *See O'Bryan v. Holy See*, 556 F.3d 361, 376 (6th Cir. 2009) ("conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss" pursuant to Rule 12(b)(1)) (internal quotation marks omitted). Rather, "[t]he plaintiff must assert

facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right." *Church of the Universal Bhd. v. Farmington Twp. Supervisors*, No. 07-4021, 2008 U.S. App. LEXIS 21961, at *5 (3d Cir. Oct. 20, 2008) (citing *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007), which cited *Twombly*, 127 S. Ct. 1955 (2007)) (internal quotation marks omitted).

In the Sherman Act context, to avoid a subject-matter dismissal for "wholly insubstantial" jurisdictional allegations, the plaintiff must plead facts that show that the foreign conduct "was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) [hereinafter "*Alcoa*"] (agreements made abroad are unlawful under the Sherman Act "if they were intended to affect imports and did affect them").[6] Pleadings that do not "allege sufficient facts to demonstrate that Defendants' foreign conduct 'meant to produce and did in fact produce some substantial effect in the United States'" will be dismissed. *Commercial St. Express LLC v. Sara Lee*

[6] *See also F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (FTAIA "bring[s foreign] conduct back within the Sherman Act's reach provided that the conduct both (1) . . . has a 'direct, substantial, and reasonably foreseeable effect' on [U.S. commerce], and (2) . . . the effect give[s] rise to a Sherman Act claim.").

Corp., No. 08 C 1179, 2008 U.S. Dist. LEXIS 102298, at *11-12 (N.D. Ill. Dec. 18, 2008).

To the extent that Carrier grounds its claim of subject matter jurisdiction on the European cartel described in the EC ACR Decision, Carrier has failed to allege that it had the requisite intended, substantial effect on U.S. commerce. To the extent that Carrier grounds subject matter jurisdiction on allegations of a U.S. allocation of Carrier's purchases to Outokumpu, those allegations are supported by no facts whatsoever. In either case, the allegations are thus "wholly insubstantial" and fail "affirmatively and plausibly [to] suggest" that the district court had subject matter jurisdiction over Carrier's claims. *See Church of the Universal Bhd.*, 2008 U.S. App. LEXIS 21961, at *5; *Commercial St. Express LLC*, 2008 U.S. Dist. LEXIS 102298, at *11-12.

B. The District Court Properly Dismissed The Amended Complaint For Failing To Allege The Requisite Intended, Substantial Effect In The United States.

In dismissing the Amended Complaint for lack of subject matter jurisdiction, the district court rightly found that the Amended Complaint had "no substance of its own," was "insubstantial" and "cut and pasted" from the EC ACR Decision, and was supported by "nothing more than mere speculation." (R. 93, Dismissal Order at 6, 9, Apx. 0926, 0929.) The district court thus determined that "Plaintiffs [did] not legitimately allege" any "factual basis" for their Sherman Act

claims, and that Carrier's claims were "wholly insubstantial" under *Bell v. Hood*, 327 U.S. 678, 682 (1946), and *Moore v. Lafayette Life Insurance Co.*, 458 F.3d 416, 444 (6th Cir. 2006). (R. 93, Dismissal Order at 8-9, Apx. 0928-29.)

As discussed below, that holding is correct regardless of whether Carrier attempts to tether subject matter jurisdiction to the reported European conspiracy (*see* Point I.B.1.), the asserted allocation of Carrier's U.S. purchase (*see* Point I.B.2.), or allegations of a global market. (*See* Point I.B.3.)

1. Carrier Does Not Allege That The European Conspiracy Described In The EC ACR Decision Had The Requisite Intended, Substantial Effect In The United States.

The Amended Complaint provided no facts suggesting that the European conspiracy described in the EC ACR Decision had the intended, substantial effect on U.S. commerce required by *Hartford Fire* and *Alcoa*, or the "direct, substantial, and reasonably foreseeable effect" on U.S. commerce required by the Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6(a) (the "FTAIA"). Whether viewed through the lens of the foreign commerce cases (*e.g.*, *Hartford Fire* and *Alcoa*) or the FTAIA (*e.g.*, *Empagran*), the result is the same – Carrier has failed to allege facts supporting the U.S. effect required for a court to have jurisdiction over a Sherman Act claim. Indeed, Carrier only conclusorily averred that the European cartel extended to "the United States and elsewhere," (R. 93, Dismissal Order at 6, Apx. 0926), and its non-conclusory allegations were

"illegitimately borrow[ed]" from the EC ACR Decision, which was limited to Europe. (R. 93, Dismissal Order at 9, Apx. 0929.)

Such unsubstantiated allegations do not permit the reported European conspiracy to provide the basis for subject matter jurisdiction under the Sherman Act. *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 332 (6th Cir. 2007) ("Where the plaintiff's claims are clearly immaterial, made solely for the purpose of obtaining jurisdiction or are wholly unsubstantiated and frivolous . . . , the court should dismiss the claim" for lack of subject matter jurisdiction.) (internal quotation marks omitted).

For example, the court in *Commercial St. Express LLC* found a lack of subject matter jurisdiction to adjudicate a Sherman Act claim based on an alleged foreign cartel. 2008 U.S. Dist. LEXIS 102298, at *11-12. Plaintiffs had alleged facts regarding a German Federal Cartel Office investigation into an antitrust conspiracy in Germany, and conclusorily asserted that such conspiracy also occurred "in the United States." *Id.* at *10. The court held, however, that plaintiffs provided "no factual allegations . . . that any defendant agreed in Germany, or anywhere else, to restrict competition in the United States." *Id.* at *10. In dismissing the complaint for lack of subject matter jurisdiction, the court concluded that "[c]ount I of Plaintiffs' Complaint does not allege sufficient facts to

demonstrate that Defendants' foreign conduct 'meant to produce and did in fact produce some substantial effect in the United States.'" *Id.* at *11-12.

The baselessness of the Amended Complaint is particularly well-illustrated by Carrier's allegations as to Mueller. The EC ACR Decision found that Mueller was not a participant in the European conspiracy that it reported, and that any participation of a Mueller affiliate had ended before Mueller acquired the affiliate. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶¶ 394, 92 Apx. 0366, 0298.) Despite Mueller's having no link to the foreign conduct, Carrier nonetheless purports to ground its claim against Mueller in the reported EC conspiracy. That effort is wholly insubstantial and is emblematic of Carrier's unsuccessful effort to secure subject matter jurisdiction.

2. Carrier's Allegation That Its U.S. Purchases Were "Allocated" To Outokumpu Does Not Establish Subject Matter Jurisdiction.

Carrier's allegations that the European conspiracy was a global agreement that included the allocation of Carrier's U.S. purchases to Outokumpu are equally defective. As described in Point II *infra*, Carrier's references to the Sherman and Clayton Acts and assertions of an allocation conspiracy in the United States were nothing more than "legal conclusions masquerading as factual conclusions," which the district court properly rejected. *O'Bryan v. Holy See*, 556 F.3d 361, 376 (6th Cir. 2009).

Carrier's failure to allege the required United States predicate for its antitrust claim is again well-illustrated by its assertions against Mueller. Carrier's averments as to Mueller's involvement in the purported conspiracy are limited to a handful of sentences in the Amended Complaint, none of which identifies a single conspiratorial act by Mueller in any purported ACR conspiracy in or relating to the United States. In those sentences, Carrier alternatively alleged either that Mueller had essentially no business dealings with Carrier or that Mueller "benefited from some sales of ACR Copper Tubing to Carrier." (R. 46, Am. Cplt. ¶ 39, Apx. 0035.) Nowhere does the Amended Complaint allege any fact even remotely indicating that Mueller *agreed* not to supply ACR tube to Carrier in the United States (or elsewhere).

In the wake of *Twombly*, to meet its obligation to establish subject matter jurisdiction, "[t]he plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right." *Church of the Universal Bhd.*, 2008 U.S. App. LEXIS 21961, at *5 (internal quotations omitted); *Commercial St. Express LLC*, 2008 U.S. Dist. LEXIS 102298, at *11-12. Given the absence of any factual predicate other than the events reported in the EC ACR Decision, Carrier cannot plausibly suggest a right to subject matter jurisdiction on the basis of an asserted allocation of its U.S. purchases.

3. Carrier's Allegation Of A "Global Market" Does Not Establish Subject Matter Jurisdiction.

Carrier's argument that the Court should assume subject matter jurisdiction because the market for ACR tube is purportedly "global" is similar to the global-market arguments that have been rejected by numerous decisions. In *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535 (8th Cir. 2007) [hereinafter "*Monosodium*"], for example, plaintiffs were foreign corporations that purchased MSG from defendants in transactions that occurred entirely outside of the United States. *Monosodium*, 477 F.3d at 536. In an attempt to bring the challenged foreign conduct within the purview of the Sherman Act, plaintiffs contended that the U.S. market was included in the conspiracy. *Id.* at 530-37.

The *Monosodium* plaintiffs argued that "the domestic and foreign markets [were] interconnected, such that super-competitive prices abroad could be sustained only by maintaining super-competitive prices in the United States." *Id.* In dismissing plaintiffs' claims for lack of subject matter jurisdiction, the court concluded that plaintiffs' worldwide market theory "does not satisfy the proximate cause standard," and established "at best only an indirect connection between the domestic prices and the prices paid by the appellants."[7] *Id.* at 539-40.

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[7] The proximate causation requirement of the FTAIA is consistent with the causal requirements of antitrust claims generally. *See Monosodium*, 477 F.3d at 538-39 ("this [FTAIA] standard is also consistent with general antitrust principles, which typically require a more direct causation standard

To similar effect was the Second Circuit's decision in *Sniado v. Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004). There, the court declined to exercise subject matter jurisdiction despite allegations that "the domestic component of the alleged worldwide conspiracy was necessary for the conspiracy's overall success." *Id.* at 213 (internal quotation marks omitted). As the district court effectively concluded here, the Second Circuit found such global-conspiracy allegations "too conclusory to avert dismissal."[8] *See Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1106-07 (S.D.N.Y. 1984) (failure "to allege any facts demonstrating a causal connection between defendants' conduct in Europe and the price increase in the United States" warrants a dismissal for lack of subject matter jurisdiction); *see also Commercial Street Express LLC*, 2008 U.S. Dist. LEXIS, 102298 at *10-11 (holding as insufficient allegations that defendants "are global companies that sell products in the United States" because plaintiffs "do not set forth any facts in their

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[than but-for causation]"); *see also Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267-69 (1992) ("[A] plaintiff's right to sue under [Section 4 of the Clayton Act] required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well.").

[8] Although the plaintiffs in *Monosodium* and *Sniado* were foreign, Carrier cannot distinguish those cases on the ground that it is not. The cases that have rejected allegations of a "world" market as insufficient to provide a causal link between foreign and domestic events and effects demonstrate that allegations of a world market do not alone provide subject matter jurisdiction in a U.S. court over conduct that is fundamentally foreign.

Complaint to support that Defendants engaged in an anti-competitive conspiracy to effect the price of products in the U.S.") (citing *Eurim-Pharm*).

The Amended Complaint thus offers no facts linking the foreign conduct described in the EC ACR Decision to the United States or otherwise supporting an alleged U.S. conspiracy. The district court properly determined that the Amended Complaint's jurisdictional allegations were "wholly insubstantial" and, therefore, that the district court lacked subject matter jurisdiction.

C. The District Court Did Not Improperly Decide The Merits Of The Case In Determining That It Lacked Subject Matter Jurisdiction.

Carrier incorrectly argues that the district court's subject matter jurisdiction ruling was an improper decision on the merits. (*See* Carrier Br. at 22-23.) The district court acknowledged that Supreme Court and Sixth Circuit precedent exhorted district courts to exercise caution when jurisdictional facts may be related to the merits of the complaint. (R. 93, Dismissal Order at 8, Apx. 0928.) Indeed, the district court recognized the "strong disapproval of dismissals for lack of subject matter jurisdiction that are in reality determinations on the merits." (R. 93, Dismissal Order at 8, Apx. 0928.)

Having considered those admonitions, the district court emphasized that "its dismissal of this case was based on neither the merits of Plaintiffs' case nor the likelihood of Plaintiffs' ultimately prevailing" and that "the Court has not imposed a heightened pleading standard." (R. 93, Dismissal Order at 8-9, Apx.

0928-29.) Instead, the district court determined that Carrier's claims were "wholly insubstantial" under *Bell* and *Moore* because the Amended Complaint had "no substance of its own but rather illegitimately borrows its substance entirely from elsewhere." (*Id.* at 9, Apx. 0929.)

The district court's assessment was not a merits determination, but rather a proper examination by a court of limited jurisdiction as to its power to consider a controversy before proceeding to the merits. "Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of the case." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("'For a court to pronounce upon [the merits] when it has no jurisdiction to do so . . . is for a court to act ultra vires.'") (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 101-02 (1998)). The district court conducted that examination by reviewing the Amended Complaint and EC Decisions that were repeatedly referenced and quoted in the Amended Complaint.[9]

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[9] The EC Decisions were properly before the district court on the defendants' motions to dismiss. *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997) ("Documents 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."); *see also Jorge v. Rumsfeld*, 404 F.3d 556, 559 (1st Cir. 2005) (district court may consider the whole of a document integral to or explicitly relied upon in a complaint, whether or not annexed to it).

"If inconsistent with the allegations of the complaint, the exhibit controls." *Mengel Co. v. Nashville Paper Prods. & Specialty Workers Union No. 513*,

Defendants demonstrated that the EC ACR Decision and the EC Plumbing Tubes Decision contradict Carrier's allegations of a U.S. effect from the European conspiracy and provide no support for the alleged allocation of Carrier's U.S. sales. As discussed above and more fully at Point II *infra*, the Amended Complaint does not resolve the conflict between the EC Decisions and Carrier's claim or fill the factual void as to its U.S. allocation assertion. Under those circumstances, dismissal for lack of subject matter jurisdiction was the only proper course.[10]

II. CARRIER'S SHERMAN ACT CLAIM FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER *TWOMBLY*.

Even if the district court had subject matter jurisdiction over the Amended Complaint, this Court should affirm the Judgment on the basis that the

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221 F.2d 644, 647 (6th Cir. 1955). *See Nat'l Ass'n of Minority Contractors v. Martinez*, 248 F. Supp. 2d 679, 681 (S.D. Ohio 2002) ("[I]f a factual assertion in the pleadings is inconsistent with a document attached for support, the Court is to accept the facts as stated in the attached document."); *see also Dulude v. Cigna Secs., Inc.*, No. 90-cv-72191-DT, 1993 U.S. Dist. LEXIS 17615, at *6-12 (E.D. Mich. Oct. 4, 1993) (motion to dismiss granted where statements in a document integral to the complaint contradicted complaint's allegations and precluded plaintiffs' claims).

[10] Although the Amended Complaint fails under a facial attack to jurisdiction, the record before the Court demonstrates that the Amended Complaint is equally susceptible to a factual attack. When confronted with defendants' 12(b)(1) motions to dismiss, Carrier presented no facts demonstrating that an intended, substantial U.S. effect resulted from its allegations of purely foreign conduct, but instead relied on the conclusory allegations of its Amended Complaint. Nothing in the record supports the exercise of subject matter jurisdiction over the Amended Complaint.

Amended Complaint fails to state a claim for which relief can be granted. In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the Supreme Court clarified that, to avert dismissal pursuant to Rule 12(b)(6), a claim based on an unlawful agreement among competitors must allege facts showing a plausible entitlement to relief.

For the reasons set forth below and in the Outokumpu Brief (which Mueller hereby adopts to the extent applicable to it), the district court correctly concluded that the Amended Complaint failed to meet that standard. (R. 93, Dismissal Order at 11, Apx. 0931.)

A. *Twombly* Requires Sherman Act Plaintiffs To Plead A Plausible Entitlement To Relief.

In *Twombly*, the Supreme Court distinguished complaints that assert a "possible" entitlement to relief from those that assert a "plausible" entitlement, and held that plausibility is required. 127 S. Ct. at 1967 (allegation of parallel conduct "without some further factual enhancement . . . stops short of the line between possibility and plausibility of entitlement to relief") (internal citations omitted). That distinction provides the legal principle that requires the dismissal of Carrier's claims.

The Sixth Circuit, sitting *en banc*, has emphasized the need under *Twombly* for allegations to provide a plausible basis for entitlement to relief. *NicSand Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007). In *NicSand*, a sandpaper

supplier brought an antitrust action against its competitor. *Id.* at 447. Following *Twombly*, this Court warned that the Supreme Court has instructed that a "naked assertion of antitrust injury [ ] is not enough; an antitrust claimant must put forth factual allegations plausibly suggesting (not merely consistent with) antitrust injury." *Id.* at 451 (quoting *Twombly*, 127 S. Ct. at 1966) (internal quotation marks omitted). The Sixth Circuit affirmed the complaint's dismissal based on the inadequacy of the antitrust injury allegations: "NicSand's speculations show at most the possibility of an entitlement to relief, which is just what [*Twombly*] said would not suffice at the pleading stage." *Id.* at 458 (internal citations and quotation marks omitted). This Court concluded that the *Twombly* Court "set out to eliminate" the "kind of loose antitrust pleading" that NicSand exhibited. *Id.*

Particularly relevant to this appeal, this Court has also rejected conclusory allegations of an illegal agreement among competitors for failure to provide the necessary factual support for the assertion. *Total Benefits*, 2008 WL 5273309, at *3. In *Total Benefits*, an insurance agency alleged that insurers and another agency violated Section 1 of the Sherman Act by engaging in a "group boycott" and a vertical price-fixing conspiracy. *Id.* at *3. Plaintiffs alleged that defendants and co-conspirators engaged in a variety of illegal and concerted acts, including coercion, boycott, and blacklisting since September 2004. *Id.* at *5.

Plaintiffs' allegations, this Court held, fell "significantly short of the required pleading threshold" because they were "vague and conclusory" and not "factual allegations plausibly suggesting, not merely consistent with such a [conspiracy] claim." *Id.* Specifically, "[p]laintiffs only offer[ed] bare allegations without any reference to the who, what, where, when, how or why," and "d[id] not supply facts adequate to show illegality as required by *Twombly*." *Id.* at *6 (internal citations and quotation marks omitted); *see also Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008) ("Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice.").

The expensive costs of antitrust discovery served as an important basis for *Twombly* to reject an *allege-first, investigate-later* approach to pleading. 127 S. Ct. at 1966-67 ("Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence to support a § 1 claim.") (internal quotations omitted). This Court has similarly recognized that costly discovery without a proper pleading, particularly in antitrust cases, will allow the antitrust laws to become "a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be." *NicSand*, 507 F.3d at 450.

Carrier attempts to minimize the importance of *Twombly* by characterizing it as an unremarkable "reaffirmation" of the Rule 8 notice pleading standard. (*See* Carrier Br. at 35.) But *Twombly* clarified that a pleading must have substantive, factual allegations, particularly of an averred agreement among competitors, that show a plausible entitlement to relief. To emphasize that requirement, *Twombly* "retired" the *Conley v. Gibson* standard, under which dismissal was proper only where "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 127 S. Ct. at 1968 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Carrier also tries to avoid *Twombly* by citing *Erickson v. Pardus*, 127 S. Ct. 2197 (2007). (*See* Carrier Br. at 35-36.) In *Erickson*, a *pro se* plaintiff sought relief under 42 U.S.C. § 1983, alleging a failure to provide medical treatment during his incarceration. *Erickson*, 127 S. Ct. at 2198. After explaining that a less stringent pleading standard governs *pro se* complaints, the Supreme Court held that the complaint satisfied Rule 8's requirements. *Id.* at 2200. Carrier, of course, is not a *pro se* plaintiff and proclaims itself among the most sophisticated purchasers of ACR tube in the world. (R. 46, Am. Cplt. ¶¶ 15, 18, Apx. 0025, 0026.)

This Court has consistently held litigants in complex commercial disputes such as this to the full import of *Twombly*. *See, e.g., Nat'l Bus. Dev.*

Servs., Inc. v. Am. Credit Educ., Nos. 07-2290, 08-1184, 2008 WL 4772074, at *2 (6th Cir. Oct. 31, 2008) (applying *Twombly* to copyright action which, like antitrust actions, "lends itself readily to abusive litigation"). As discussed below, the Amended Complaint does not meet *Twombly*'s plausibility standard either as to Mueller in particular or, more generally, as to the alleged U.S. conspiracy on which Carrier bases its claim.

B. The Amended Complaint Fails To State A Sherman Act Claim Against Mueller.

An antitrust complaint must satisfy *Twombly*'s pleading standard as to each defendant. *See Total Benefits*, 2008 WL 5273309, at *5 ("Generic pleading, alleging misconduct against defendants without specifics as to the role each played in the alleged conspiracy was specifically rejected by *Twombly* . . ."); *see also Twombly*, 127 S. Ct. at 1971 n.10 ("[T]he complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place."); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827, 2008 WL 3916309, at *4 (N.D. Cal. Aug. 25, 2008) (dismissing complaint as to certain defendants where sufficient individualized allegations were lacking).

Carrier's Amended Complaint does not, and cannot, satisfy *Twombly*'s pleading requirements as to Mueller because:

(i) Carrier's allegation that Mueller participated in a European ACR tube conspiracy is defeated by the EC ACR Decision itself, thereby removing any basis for applying to Mueller the only factual allegations in the Amended Complaint;

(ii) Carrier has asserted no factual allegations as to Mueller's participation in any ACR conspiracy and particularly none as to any conspiracy including the United States; and

(iii) Carrier's attempt to link Mueller to a U.S. conspiracy by merging the separate conspiracies described in the EC ACR Decision and the EC Plumbing Tubes Decision is defeated by those decisions, and, in any event, lacks the necessary connection to the United States.

1. The EC Found That Mueller Did Not Participate In The European Cartel Reported In The EC ACR Decision.

The EC ACR Decision expressly found that Mueller never participated in the European cartel on which Carrier's case is based: "Mueller cannot be held liable for the infringement, as it never directly participated in the cartel in question." (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 394 (emphasis added), Apx. 0366.) That finding, contained in a document that was referenced, quoted, and relied upon by the Amended Complaint, defeats Carrier's conclusory allegations to the contrary. See Mengel, 221 F.2d at 647; see also n.9, supra. The district court rightly concluded that Carrier could not rely only on aspects of the EC ACR Decision that supported its allegations and ignore those that contradicted them. (See R. 93, Dismissal Order at 7 ("Plaintiffs do further injury to their argument by discarding the conclusions of the EC Decision when they deviate from Plaintiff's agenda. . . ."), Apx. 0927.)

Carrier attempts to evade the EC's express finding that Mueller was not a party to the European ACR conspiracy by claiming that Mueller was involved "through Desnoyers," a French company that Mueller acquired in 1997. (Carrier Br. at 48-49; R. 46, Am. Cplt. ¶¶ 34-38, Apx. 0032-35.) But that argument, too, is foreclosed by the EC ACR Decision. The EC determined that Desnoyers should not be a respondent in the EC ACR Decision because, among other reasons, "it withdrew voluntarily from the cartel in 1996," prior to Mueller's acquisition of Desnoyers. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶¶ 91, 394 (emphasis added), Apx. 0298, 0366.) The EC expressly found "no evidence on Desnoyers' involvement in the infringement after May 1997, when Mueller acquired [Desnoyers]." (*Id.* at ¶ 394, Apx. 0366.)

With respect to Mueller, then, even the few substantive allegations in the Amended Complaint, all relating to the operation of Cuproclima and facts reported in the EC ACR Decision, have no application.

2. Carrier Has Asserted No Factual Allegations As To Mueller's Participation In An ACR Conspiracy.

Aside from the EC ACR Decision, Carrier offers no substance in support of its alleged conspiracy, and particularly none as to Mueller. According to Carrier, Mueller is a "small competitor" in the market for ACR tube and did not compete for Carrier's business. (Carrier Br. at 5; *see also* R. 46, Am. Cplt. ¶¶ 5, 6, 35, Apx. 0022, 0032-33.) From those two bare facts, Carrier infers that Mueller

entered a *cartel agreement* to allocate Carrier's U.S. ACR tube business to Outokumpu. (*Id.*)

Carrier nowhere alleges, as *Twombly* requires, the "who, what, where, when, how or why" of Mueller's participation in the supposed global conspiracy, including a U.S. allocation agreement. *Total Benefits*, 2008 WL 5273309, at *6. Although Carrier touts its "extensive allegations of specific meetings and communications in furtherance of the cartel" (Carrier Br. at 39; *see also id.* at 19, 38), those allegations only underscore Carrier's copycat approach to pleading and the deficiency of its allegations against Mueller. *Every* allegation of a meeting or communication is copied from the EC ACR Decision and relates only to Europe. *No* allegation of any meeting or communication in or relating to the United States can be found in the Amended Complaint. And even as to the European meetings and communications, not one is said to have included Mueller. (*See* Carrier Br. at 10; R. 46, Am. Cplt. ¶¶ 82, 83, 84, 87, 95, Apx. 0046, 0048.)

Carrier's sole allegation that Mueller did not compete for its business cannot advance Carrier's cause, as Carrier has asserted no act of agreement against Mueller. *In re Travel Agent Comm'n Antitrust Litig.*, No. 1:03 CV 30000, 2007 WL 3171675, at *4 (N.D. Ohio Oct. 29, 2007) (dismissing complaint against defendant not alleged to have performed "any specific action" with respect to agreement). Carrier affirmatively argues that Mueller is a "small competitor" and

that Outokumpu, Wieland, and KME were "key participants in the ACR Copper Tubing cartel." (Carrier Br. at 5.) Those competitors, according to Carrier, "dominated the market," and "[n]o other major competitors in Europe or the United States" – including Mueller – could meet Carrier's needs. (*Id*.)

Mueller's alleged failure to pursue Carrier's business, if an affirmative decision at all, would thus have been a rational, unilateral business decision, not a conspiratorial one. Not only is Mueller's conduct "just as much in line with a wide swath of rational and competitive [unilateral] business strategy" as with any conspiracy claim, but it is not even "suggestive" of a conspiracy. *See Twombly*, 127 S. Ct. at 1964, 1967.

3. The Reported ACR And Plumbing Tubes Conspiracies Were Separate And Neither Had Any U.S. Contact.

Carrier attempts to save its claim against Mueller by relying on the EC's finding of Mueller's involvement in a separate plumbing tubes conspiracy. (R. 46, Am. Cplt. ¶¶ 36-38, Apx. 0033-35; Carrier Br. at 42-43 n.9.) Carrier's speculation that Mueller's European participation in a plumbing tubes conspiracy supports its involvement in a U.S. ACR conspiracy is supported by no facts and is contrary to the EC Decisions on which Carrier purports to rely.

The EC Plumbing Tubes Decision itself states that the two conspiracies found by the EC "*involved different companies (and employees), and were organised in a different way*." (R. 55, Mot. to Dismiss, Wax Dec., Ex. 1, EC

Plumbing Tubes Decision ¶ 5 (emphasis added), Apx. 0073.) (*Compare* EC Plumbing Tubes Decision ¶¶ 769-70, Apx. 0255 *with* R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 394, Apx. 0366.) The EC's Director of anti-Cartel enforcement at the Directorate General for competition, Mr. Kirtikumar Mehta, similarly stated in a letter to the district court that "the cartel found and reported in the [EC ACR Decision] was separate from the cartel found and reported in the [EC Plumbing Tubes Decision]."[11]

As the district court correctly observed, "[t]hrough its inclusion of factual details [relating to plumbing tubes] which do not pertain to the cartel at issue in this case, Plaintiffs have undermined any credibility the complaint

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[11] Mr. Mehta's letter to the district court was filed pursuant to a Notice Of Filing & Service Of Correspondence From The European Commission's Director of Anti-Cartel Enforcement on March 7, 2007. (R. 76, Notice of Filing & Service of Correspondence, Ex. A, Letter, Apx. 0913-20.) Mr. Mehta's letter related to, among other things, Carrier's litigation and the EC ACR Decision and was, with the EC Decisions, properly before the district court. *See* p. 29 n.9, *supra*.

See New England Health Care Employees Pension Fund v. Ernst & Young, LLP, 336 F.3d 495, 501 (6th Cir. 2003) ("A court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice."). In addition, "[w]hen a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

otherwise possessed." (R. 93, Dismissal Order at 7, Apx. 0927.) Carrier's unsupported effort to draw from the reported European plumbing tubes conspiracy to support a U.S. ACR conspiracy indeed confirms that the Amended Complaint lacks plausibility.

Regardless of whether the conspiracies reported in the EC Decisions were separate, neither had any connection with the United States. The district court dismissed civil actions that were based on the EC Plumbing Tubes Decision for lack of any U.S. link whatsoever. In denying the Plumbing Tube plaintiffs' motion for reconsideration, the district court affirmed its prior finding that: "Plaintiffs have simply "cut-and-pasted" into their complaint the collusive activities found by the E.C. to have taken place in Europe and tacked on "in the United States and elsewhere." *Am. Copper & Brass, Inc. v. Halcor S.A.*, 494 F. Supp. 2d 873, 876-77 (W.D. Tenn. 2007). The district court held that plaintiffs' allegations of a U.S. plumbing tubes cartel were "implausible, purely speculative and unsupportive of its Sherman Act claim." *Id.* at 880.

Carrier cannot find a factual foundation for its U.S. ACR conspiracy in a reported plumbing tubes (or ACR) conspiracy that was itself found to be unconnected to the United States. The EC Decisions, including the EC Plumbing Tubes Decision, thus provide no support for Carrier's claim against Mueller.

4. Dismissal Of The Amended Complaint Against Mueller Is Particularly Warranted Due To The Discovery Burdens That This Action Would Pose.

The district court concluded that the significant costs and burdens of discovery that the action would impose were unwarranted given the implausibility of the Amended Complaint: "[t]o allow Plaintiffs to proceed with discovery in hopes that their speculation bears fruit would be unjust and a gross abuse of the judicial system. The discovery process is not available where, at the complaint stage, a plaintiff has nothing more than mere speculation." (*See* R. 93, Dismissal Order at 9, Apx. 0929.) *See also Mich. Div. Monument Builders of N. Am. v. Mich. Cemetery Ass'n*, 524 F.3d 726, 731-32 (6th Cir. 2008) (noting *Twombly*'s instruction that courts "not forget that proceeding to antitrust discovery can be expensive").

That finding has particular force as to Mueller given the absence of any substantive allegation as to Mueller's purported participation in Carrier's alleged conspiracy. (R. 46, Am. Cplt. ¶ 39, Apx. 0035.) Carrier repeatedly asserts that its purported conspiracy claim is global and likely would have sought worldwide discovery of defendants' tube businesses for the 13-year period covered by the Amended Complaint (1988-2001). The costs and burdens of such discovery, which would involve documents and testimony on at least two continents and in multiple languages, would have been enormous for Mueller,

other defendants, and the judicial process. Those burdens confirm the propriety of the district court's dismissal of the Amended Complaint.

C. Carrier's Conspiracy Allegations Generally Fail To Satisfy *Twombly*.

Point II.B. demonstrated that Carrier failed to meet the requirements of *Twombly* as to Mueller in particular. As discussed below, the Amended Complaint also fails to meet those requirements more generally as to the claimed global conspiracy that supposedly included the allocation of Carrier's U.S. purchases of ACR tube to Outkumpu. (Carrier Br. at 12.) (*See* Point II.C.1., *infra*.) Nor do Carrier's conclusory allegations of a "global market" support a U.S. conspiracy or otherwise substitute for the factual allegations of agreement that *Twombly* requires. (*See* Point II.C.2., *infra*.)

1. Carrier Pleads No Facts Supporting The Existence Of A Global Conspiracy That Includes The U.S.

Carrier fails to allege the "*who, what, where, when, how or why*" of the supposed conspiracy not only as to Mueller but also as to its general global conspiracy allegations. *See Total Benefits*, 2008 WL 5273309, at *6 (emphasis added). Carrier touts that the Amended Complaint has "extensive allegations" of cartel meetings and so is "[i]n absolute contrast to the complaint in *Twombly*." (Carrier Br. at 39, *see also id.* at 19, 38.) But, as demonstrated in Point II.B. above, every meeting or communication alleged is copied from the EC ACR

Decision and relates only to Europe, and none involves the United States. Carrier's repeated reference to "meetings and communications" as a shield against the application of *Twombly* is thus, in fact, a sword that defeats its Sherman Act claim.

The EC ACR Decision more generally is of no use to Carrier as it describes only a European conspiracy and provides no basis for alleging that the conspiracy extended to the United States. The European limitations of the EC ACR Decision may be contrasted to many other EC cartel decisions that describe conspiratorial conduct in countries outside the European Union,[12] including the United States. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 2 (conspiracy "cover[ed] most of the [European Economic Area]"), Apx. 0283.) And the head of the anti-cartel unit of the EC has confirmed that "the cartel found

[12] Past EC decisions demonstrate that, when a cartel extends beyond Europe, the EC investigates the extraterritorial conduct and effects and incorporates them into the decision. (*See*, *e.g.*, R. 71, Reply Mem. in Support of Def.'s Mot. to Dismiss Am. Cplt., Ex. 1, Rubber Chemicals EC Decision ¶ 144 ("Bayer offered its support for Crompton/Uniroyal's price increase initiative in Europe and North America on several occasions in the first quarter of 2001."), Apx. 0632; Ex. 2, Choline Chloride EC Decision ¶ 68 (providing factual description of how the cartel planned to "bring discipline to the worldwide pricing of choline chloride, and to stabilize the market positions of participating companies (together accounting for more than 80% of the world market) around the world."), Apx. 0720-21; Ex. 3, Specialty Graphite EC Decision ¶ 134 (providing descriptions of "International Working Level meetings," including one in which the participants agreed to a schedule of worldwide price increases, "with an initial growth of 20% in the U.S. and Europe as from October 1993."), Apx. 0808.)

and reported in the [EC ACR Decision] concerns only an infringement of the European Competition rules and that *its scope is limited to the European territory*." (R. 76, Notice of Filing & Service of Correspondence, Ex. A, Letter (emphasis added), Apx. 0919.)

Carrier's alleged conspiracy, as discussed more fully above in Point I, thus has no substantive connection with the United States. As a result, the Amended Complaint necessarily fails to plead any of the elements of a Sherman Act claim: (1) a cognizable agreement, (2) affecting interstate commerce, and (3) unreasonably restraining trade. *Lie v. St. Joseph Hosp. of Mount Clemens, Mich.*, 964 F.2d 567, 568 (6th Cir. 1992). Its only allegations regarding an agreement are taken from and limited to statements in the EC ACR Decision and are inadequate for the reasons described above. Carrier has averred no facts indicating any impact on the United States, thereby failing to allege the second element – a proper U.S. interstate effect. And, finally, the Amended Complaint states no facts demonstrating an unreasonable restraint of trade, including the purported allocation of Carrier's U.S. purchases to Outokumpu.

Lacking any facts to support a U.S. conspiracy, Carrier offers only generalities in an attempt to move the reported European conspiracy into the United States. In support of its claim that its U.S. purchases were "allocated" to

Outokumpu, Carrier alleges that: (1) Carrier made purchases from Outokumpu in the United States; (2) Mueller did not pursue Carrier's business in the United States; (3) the corporate structure of some ACR suppliers includes affiliates in the United States and Europe; (4) annual sales negotiations in the United States were conducted after the fall season, when Cuproclima meetings in Europe were held; and (5) Wieland and KME *increased* their competitive efforts in the United States following the end of the alleged conspiracy. (Carrier Br. at 5, 12; *see also* R. 46, Am. Cplt. ¶¶ 4, 6, 101(a), (c), (f), Apx. 0021, 0022, 0050-51.)

But those allegations are fully consistent with competitive conduct and cannot support a plausible entitlement to relief. *See Twombly*, 127 S. Ct. at 1964 (finding insufficient alleged conduct that was "in line with a wide swath of rational and competitive business strategy"). As an initial matter, Carrier's purchases of ACR tube from Outokumpu in the United States are nothing more than ordinary-course business. That Carrier purchased ACR tube in Europe from other suppliers is innocuous and does not suggest a conspiracy.

In addition, Carrier admits that Mueller was a "small competitor" and fails to allege (and could not allege) that Mueller was capable of serving, or otherwise considered serving, Carrier's U.S. ACR tube needs. (*See* pp. 38, 39, *supra*.) Nor are generic allegations that ACR suppliers are organized internationally and negotiated with customers annually after the fall season (R. 46,

Am. Cplt. ¶ 101(c), Apx. 0050) anything more than a description of competitively neutral, rational business conduct. Lastly, Carrier alleges no facts that would tie increased competition by KME and Wieland to anything other than unilateral, procompetitive behavior.

Carrier cites a reference in the EC ACR Decision to a single 1994 Outokumpu document containing the words "global agreement" in quotations. (*See* R. 46, Am. Cplt. ¶¶ 101(g), 102, Apx. 0051.) But Carrier's argument that "global" necessarily refers to the geographic scope of an agreement (particularly one in which Mueller is involved) is contradicted by the EC's own finding of assigned "territorial responsibilities" *in Europe*, (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 146 (emphasis added), Apx. 0312), and Mr. Mehta's letter. (R. 76, Notice of Filing & Service of Correspondence, Ex. A, Letter, Apx. 0913-20.) Nor does Carrier provide a factual basis for interpreting "global" to include the United States. The single use of "global agreement" perhaps provides Carrier with a sound bite, but not with a plausible entitlement to relief under *Twombly*.

Finally, Carrier is left to argue that "the E.C. [ACR] Decision *in no way precludes* the plausibility of a conspiracy extending beyond Europe and into the United States." (Carrier Br. at 42 (emphasis added).) But that asserts possibility, not *plausibility*, and is insufficient under *Twombly*. *See Twombly*, 127

S. Ct. at 1968 (to survive a motion to dismiss, Section 1 claim must do more than "open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery") (alteration in original).

2. Generic "Global Market" Allegations Are Insufficient To Support Carrier's U.S. Sherman Act Claim.

With *no* factual allegations to support a U.S. conspiracy, Carrier attempts to use market conditions as a substitute. To that end, Carrier argues that ACR tube suppliers compete in a global market. Carrier then asserts that, given a global market, "for the [European] cartel to succeed, members *had* to engage in conduct across both continents to ensure the success of the illegal arrangement in Europe." (Carrier Br. at 45 (emphasis in original).) Carrier's global market allegations lack both legal and factual sufficiency.

a. Carrier's global market allegations are inconsistent with the EC ACR Decision and allegations in the Amended Complaint.

As an initial matter, Carrier's allegations of a "global market" for ACR copper tubing are inconsistent with facts in the EC ACR Decision. The EC describes the "European" industrial tube production as being concentrated in several "European" countries and the flow of ACR trade as occurring "between the Member States [of the European Union]." (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶¶ 54-55, Apx. 0293.) The EC further noted that all Cuproclima members were European (*id*. ¶¶ 17-42, Apx. 0285-90), that members

exchanged "sales data in the Western and Eastern European markets" (*id*. ¶ 14, Apx. 0285), and that, "[f]rom 1998 onwards, the discussions concerned only the 70 largest European customers." (*Id*. ¶ 116, Apx. 0304.)

The EC nowhere refers to a "global market" or describes conditions or operations consistent with the global market that Carrier attempts to assert. Indeed, rather than providing the necessary factual support for Carrier's conclusory allegations that "Defendants affirmatively acted to eliminate any regional procurement price differentials by setting and maintaining artificially high prices throughout the global market," (R. 46, Am. Cplt. ¶ 59, Apx. 0041), the EC ACR Decision undermines that assertion. (R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶ 197 (the "overall plan" of the Cuproclima cartel "was to control the *European* market for industrial tubes.") (emphasis added), Apx. 0326.).

Carrier itself recognizes impediments to the free flow of ACR tube across continents. The Amended Complaint asserts that Mueller "looked for an opportunity to enter into the European arena. In 1997, Mueller Industries made that move through the acquisitions of Wednesbury Tube Company in Great Britain and Desnoyers S.A. [] in France." (R. 46, Am. Cplt. ¶ 35, Apx. 0032-33.) A global market of the sort that Carrier imagines would not require "entry into the European arena" or the purchase of businesses within Europe to compete effectively in that geographic market.

Carrier's global market assertion also excludes Asian suppliers of ACR tube, which Carrier appears to concede would have been able to meet its large-scale ACR needs. (*See* Carrier Br. at 5; R. 46, Am. Cplt. ¶ 5, Apx. 0022). Despite Carrier's claims of a global market, Carrier acknowledges that Asian manufacturers did not sell outside of Asia. (*Id.*) Also absent from Carrier's discussion of ACR tube suppliers is any reference to significant North American suppliers (such as Wolverine Tube, Inc.). Carrier's so-called global market is thus implausible even on its own terms, as it is limited to Europe and the United States and includes only the European suppliers that were named in the EC ACR Decision.

In short, Carrier alleges no factual support for the global market on which it attempts to rest its U.S. cartel claim. Still, even if factually supported and not contradicted by Carrier's own pleading and the EC ACR Decision, global market allegations are legally insufficient to supply the missing factual allegations of an unlawful agreement required by *Twombly*.

b. Courts have rejected global market allegations as sufficient to support a U.S. conspiracy.

Courts have held that global market allegations are inadequate to supply a plausible basis for Sherman Act claims predicated on a European conspiracy. In *In re Elevator Antitrust Litig.*, No. 04 CV 1178 (TPG), 2006 U.S. Dist. LEXIS 34517 (S.D.N.Y. May 26, 2006), *aff'd*, 502 F.3d 47 (2d Cir. 2007)

[hereinafter "*Elevator*"], a Sherman Act claim followed the EC's announcement of raids at defendants' European subsidiaries as part of an EC investigation into a European bid-rigging conspiracy. The EC investigation was accompanied by admissions of several supposed European conspiracy members. Plaintiffs there, like Carrier, used those publicly reported facts as the basis for their U.S. claims, and alleged a "global market" in which prices in the United States were "closely intertwined with pricing in Europe." *Id.* at *21.

The district court, applying pre-*Twombly* jurisprudence, dismissed the complaint pursuant to Rule 12(b)(6), stating that "allegations regarding investigations of defendants' subsidiaries' business practices in Europe are patently insufficient." *Id*. at *29. The Second Circuit, applying *Twombly*, affirmed the district court's dismissal, rejecting plaintiffs' theory that "if it happened there, it could have happened here." *Elevator*, 502 F.3d at 48, 52. The Second Circuit specifically rejected plaintiffs' assertion that "[t]he European misconduct is alleged to reflect the existence of a worldwide conspiracy; and even if the misconduct took place only in Europe, it is alleged that 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.* at 51 (internal quotation marks omitted).

The Second Circuit agreed with the *Elevator* district court that "[p]laintiffs provide[d] an insufficient factual basis for their assertions of a

worldwide conspiracy affecting a global market. . . ." *Id.* at 52. Quoting *Twombly*, the Second Circuit concluded that, "[w]ithout 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.'" *Id.*

To similar effect is *In re Bath & Kitchen Fixtures Antitrust Litig.*, No. 05-cv-00510 (MAM), 2006 U.S. Dist. LEXIS 49576 (E.D. Pa. July 19, 2006) [hereinafter "*Bath & Kitchen Fixtures*"], *remanded*, 535 F.3d 161 (3d Cir. 2008) (instructing district court to dismiss complaint without prejudice in light of plaintiffs' timely voluntary dismissal). In *Bath & Kitchen Fixtures*, the court, like the *Elevator* district court, dismissed pursuant to Rule 12(b)(6) plaintiffs' antitrust claims that were predicated on an alleged European conspiracy. Because the European investigation "only involved the distribution of [products] in certain European countries" (*id.* at *7) and the complaint was "devoid of even a minimal factual background" supporting allegations that there was price-fixing in the United States (*id.* at *10), the court dismissed the complaint pursuant to Rule 12(b)(6). *Id.* at *3.

As discussed in Point I above, consistent with *Elevator* and *Bath & Kitchen Fixtures* is a uniform line of cases holding that allegations of a "*global market*" are not a sufficient link to the United States to establish subject matter

jurisdiction over a Sherman Act claim. One district court summarized the relevant law as follows: "Most courts addressing this issue have concluded that . . . allegations[] describing a 'single, unified global [price-fixing] conspiracy' that could not be maintained without price-fixing in the United States market" do not state a Sherman Act claim. *In re Graphite Electrodes Antitrust Litig.*, Nos. 10-md-1244, 00-5414, 2007 WL 137684, at *4 (E.D. Pa. Jan. 16, 2007). *See* Point I.B.3., *supra*. Against the numerous cases holding that allegations of foreign conduct and a "global market" are insufficient to support a U.S. conspiracy, Carrier does not cite a single authority in its favor.[13] In short, Carrier's generalized allegation that, "for the cartel to succeed, members *had* to engage in conduct across both continents to ensure the success of the illegal arrangement in Europe" (Carrier Br. at 45), speaks only to possibility, not plausibility.

[13] Carrier argues that its Amended Complaint supplies the linkage between European conduct and the U.S. that the Second Circuit found was missing in *Elevator*. (*See* Carrier Br. at 46-47.) *Elevator*, in *dicta*, observed that particularized allegations of "global marketing or fungible products," "participants monitor[ing] prices in other markets," or "actual pricing of elevators or maintenance services in the United States or changes therein attributable to defendants' alleged misconduct," were absent from the complaint there at issue. *Elevator*, 502 F.3d at 52. As discussed above, the Amended Complaint also contains no allegations of any conduct in the United States, much less U.S. conduct that is more consistent with an allocation conspiracy than with unilateral behavior.

D. Leave To Amend Should Be Denied.

Carrier's request for leave to amend its complaint a second time should be denied. When the Supreme Court decided *Twombly*, defendants' motions were *sub judice*. Rather than seeking leave to amend in response to *Twombly*, however, Carrier argued that the Amended Complaint was sufficient under *Twombly*. Carrier's argument that *Twombly* represents a "change in the law" is at odds with its characterization of *Twombly* elsewhere as a reaffirmation of Rule 8 (*see* Carrier Br. at 35) and should be rejected. *See, e.g.*, *Total Benefits*, 2008 WL 5273309, at *6 (affirming order denying leave to amend where plaintiffs "had every reason to make sure their amended [antitrust] complaint met the standard of adequate notice pleading and 'plausibility'").

In addition, Carrier amended its complaint once before, after defendants moved to dismiss its initial complaint. The Amended Complaint also post-dates the dismissal of the plumbing tubes case, *American Copper & Brass, Inc. v. Boliden AB*, for lack of subject matter jurisdiction, thus reflecting Carrier's best effort to avoid a similar dismissal of its own ACR tube case. And, Carrier did not move the district court for leave to amend its pleading following the issuance of the Dismissal Order.

Because Carrier failed to seek relief from the district court, and also because any amendment of the Amended Complaint would be futile, Carrier's

request should be denied. *See Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 569-70 (6th Cir. 2003) ("Following entry of final judgment, a party may not seek leave to amend their complaint without first moving to alter, set aside or vacate the judgment pursuant to Rule 59 or Rule 60 of the Federal Rules of Civil Procedure" and "leave to amend may be denied where the amendment would be futile.").

III. CARRIER'S SHERMAN ACT CLAIM SHOULD BE DISMISSED AS TIME-BARRED.

For the reasons set forth below and in the Outokumpu Brief (which Mueller hereby adopts to the extent applicable to it), the Judgment should be affirmed on the separate basis that the Amended Complaint is time-barred on its face. Carrier's attempt to plead a toll of the limitations period fails because Carrier has not alleged particular facts supporting each of the three elements of fraudulent concealment.

A. Carrier's Sherman Act Claim Is Time-Barred On Its Face.

A four-year statute of limitations governs Sherman Act claims. *See* 15 U.S.C. § 15b (2006). The Amended Complaint concedes that the alleged conspiracy ended in March 2001. (R. 46, Am. Cplt. ¶¶ 2, 7, 12(b), 39, 55, 86, Apx. 0020, 0022-23, 0024, 0035, 0039, 0046.) Carrier filed its initial complaint on March 29, 2006, more than *five years* after the alleged conspiracy ended and more than one year after the expiration of the four-year limitations period. Accordingly, Carrier's Sherman Act claim is time-barred. *See Hoover v. Langston Equip.*

Assocs., Inc., 958 F.2d 742, 744 (6th Cir. 1992) (dismissing action where it was "apparent from the face of the complaint that the time limit for bringing the claim has passed").

B. Carrier's Allegations Of Fraudulent Concealment Are Not Sufficient To Toll The Limitations Period.

Carrier attempts to salvage its claim with generic allegations of fraudulent concealment that purportedly tolled the limitations period. (R. 46, Am. Cplt. ¶¶ 103-13, Apx. 0051-56.) But Carrier has not pled the requisite elements of fraudulent concealment, much less pled them with particularity as to each defendant, including Mueller, as the law requires.

"Three elements must be pleaded in order to establish fraudulent concealment: (1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975).

This Court requires a plaintiff to plead the circumstances underlying the alleged fraudulent concealment with particularity pursuant to Federal Rule of Civil Procedure 9(b). *See Gumbus v. United Food & Commercial Workers Int'l Union*, Nos. 93-5113, 93-5253, 1995 WL 5935, at *3 (6th Cir. Jan. 6, 1995) ("*all* facts [as to fraudulent concealment] must be pleaded with particularity . . .")

(emphasis in original). Failure to plead each element with particularity renders an otherwise time-barred complaint subject to dismissal. *See, e.g., id.* at *4; *Friedman v. Estate of Presser*, 929 F.2d 1151, 1159-60 (6th Cir. 1991).

The particularized pleading requirement applies to *each defendant*. *See Metz v. Unizan Bank*, 416 F. Supp. 2d 568, 579 (N.D. Ohio 2006) ("The Plaintiff must affirmatively plead facts supporting a claim for fraudulent concealment against each specific Defendant . . . to state a claim against that Defendant which would survive an otherwise expired statute of limitations."); *see also U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 643 (6th Cir. 2003) ("[A] complaint may not rely upon blanket references to acts or omissions by all of the 'defendants,' for each defendant . . . is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which he individually stands charged.").

1. Carrier Has Pled No Wrongful Concealment By Mueller.

The Amended Complaint does not allege that Mueller committed a single act of wrongful concealment, the first and most basic element of a fraudulent concealment toll. Indeed, the Amended Complaint attributes only a single affirmative act to Mueller from 2001, the year that Carrier concedes the alleged conspiracy ended, to 2003, the year through which Carrier argues the

limitations period was tolled. That single Mueller act was one of *disclosure*, not concealment.

Carrier acknowledges what the EC reports in its EC Decisions: "[In 2001, Mueller] decided to blow the whistle to the European Commission in an effort to gain amnesty. . . . As a result, the European Commission began an investigation." (R. 46, Am. Cplt. ¶ 7, Apx. 0022-23; *see also* R. 55, Mot. to Dismiss, Wax Dec., Ex. 2, EC ACR Decision ¶¶ 56-58, Apx. 0293-94; Ex. 1, EC Plumbing Tube Decision ¶¶ 76-77, Apx. 0087.) That act of disclosure is the antithesis of concealment, and Carrier has cited no authority to the contrary.

Carrier further admits that Mueller's disclosure of possible cartel behavior also acted as a withdrawal from the cartel even if, contrary to the EC ACR Decision, Mueller had been a member of the European ACR conspiracy: "when Mueller reported the cartel to the European Commission . . . [,] Mueller and its subsidiaries beg[a]n a withdrawal from the cartel." (R. 46, Am. Cplt. ¶ 39, Apx. 0035.) Withdrawal from a conspiracy triggers the running of the limitations period and precludes assertions of fraudulent concealment. *See, e.g., United States v. Grimmett*, 236 F.3d 452, 453 (8th Cir. 2001) ("The limitations period begins when a conspirator withdraws from a continuing conspiracy."); *Chiropractic Coop. Ass'n of Mich. v. Am. Med. Ass'n*, 867 F.2d 270, 272, 276-77 (6th Cir. 1989)

(affirming judgment for parties found to have withdrawn before commencement of the limitations period).

To support its claim of concealment against Mueller, Carrier complains that, prior to 2003, Mueller did not disclose the existence of the EC's investigation of an ACR conspiracy, or Mueller's supposed involvement in it, in its public filings with the Securities & Exchange Commission. (R. 46, Am. Cplt. ¶ 107, Apx. 0053.) As a matter of law, however, a defendant's silence cannot constitute fraudulent concealment. *See Wood v. Carpenter*, 101 U.S. 135, 143 (1879) ("Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."); *Browning v. Levy*, 283 F.3d 761, 770 (6th Cir. 2002) ("In order to invoke the doctrine of fraudulent concealment, affirmative concealment must be shown; mere silence or unwillingness to divulge wrongful activities is not sufficient.") (internal quotation marks and citations omitted).[14]

Carrier thus made no particularized allegations that would satisfy the first element of fraudulent concealment – wrongful concealment by Mueller – but

[14] This Court does not recognize antitrust conspiracies as self-concealing. *See Pinney Dock & Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988) (holding that, in the context of an alleged antitrust conspiracy, plaintiff asserting a fraudulent-concealment claim must "prove affirmative acts of concealment, particularly in light of the strong policy in favor of statutes of limitations").

instead alleged that Mueller disclosed, and withdrew from, the alleged conspiracy, which directly contradicts a claim of concealment.

2. Carrier Was On Inquiry Notice Of Its Purported Claim As Of March 2001.

The second element of fraudulent concealment, which Carrier also does not meet, requires particularized allegations that Carrier could not have discovered the operative facts relating to its claim within the limitations period. Carrier, however, was on inquiry notice of the bases for its purported claims against Mueller as of *March 2001*.

a. Inquiry Notice Is Triggered By The Possibility Of A Wrong.

Inquiry notice, as the term implies, is triggered by only the possibility of a wrong – the approach of storm clouds, not thunder and lightning:

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

Greenburg v. Hiner, 359 F. Supp. 2d 675, 682 (N.D. Ohio 2005) (internal quotation marks and footnote omitted) (emphasis added), *aff'd*, 173 F. App'x 367 (6th Cir. 2006). The existence of inquiry notice may be determined as a matter of law. *Id.* at 684 (complaint dismissed because "the Court may decide as a matter of law whether Plaintiffs were put on inquiry notice").

A plaintiff cannot plead a tolling of the limitations period beyond the date on which it was on inquiry notice of the claim. *See Harner v. Prudential-Bache Sec., Inc.*, Nos. 92-1353, 92-1910, 1994 WL 494871, at *6 (6th Cir. Sept. 8, 1994) ("[B]ecause plaintiffs were on inquiry notice of the alleged fraud . . . they cannot satisfy the second element of fraudulent concealment – failure to discover the operative facts.") (citing *Elec. Power Bd. v. Monsanto Co.*, 879 F.2d 1368, 1377-78 (6th Cir. 1989)); *Dayco Corp.*, 523 F.2d at 394 ("[A]n injured party has a positive duty to use diligence in discovering his cause of action within the limitations period. *Any fact that should excite his suspicion is the same as actual knowledge of his entire claim. Indeed, the means of knowledge are the same thing . . . as knowledge itself*.") (internal quotation marks and citation omitted) (emphasis added).

b. Carrier Was On Inquiry Notice In March 2001 And Therefore Cannot Assert A Toll After That Time.

Carrier was put on inquiry notice in March 2001. On March 23, 2001, the European Commission announced that it had raided "five European companies" pursuant to its investigation of a "cartel agreement and related illegal practices concerning price fixing and market sharing on *copper tubes*[] *used . . . for industrial applications*." (R. 56, Mot. to Dismiss, Wax Dec., Ex. 3, EC Public Statement (emphasis added), Apx. 0386.) The EC thus announced to the world that it had a basis to raid European suppliers of ACR tube for evidence of cartel

activities. That alone was sufficient to place Carrier, which describes itself as "one of the [world's] largest purchasers – if not the single largest" group of purchasers of ACR tube (R. 46, Am. Cplt. ¶ 1, Apx. 0019-20), on inquiry notice of any claim that it purports to have against Mueller. *See Hamilton County Bd. of Com'rs v. Nat'l Football League*, 491 F.3d 310, 318-19 (6th Cir. 2007) (press articles put plaintiff on notice and triggered duty to investigate to satisfy requirements of fraudulent concealment).

But the European Commission was not alone in announcing the dawn raids. A host of reports detailing the Commission's investigation of copper tube manufacturers followed. A summary of a sampling of those articles follows:[15]

- On March 23, 2001, international news wire Reuters specifically referred to the ACR tube that is the subject of Carrier's claim, as it reported that the European Commission was investigating companies, including Outokumpu, that made "water and gas pipes for households and *for industrial applications*." *EU Confirms Says* [sic] *Raided Firms in Five Countries*, Reuters News, Mar. 23, 2001 (internal quotation marks omitted) (emphasis added). (Apx. 0410.)
- On March 24, 2001, The New York Times reported that "The European Commission has conducted unannounced inspections at five European companies in Britain, Germany, Italy, France and Finland, looking for evidence of anti-competitive behavior in the market for copper tubes." The

[15] A larger collection of articles, which was submitted to the district court, is included in the Joint Appendix. (R. 56, Mot. to Dismiss, Wax Dec., Ex. 4, Apx. 0387-416.) Those materials – which relate directly to inquiry notice – can be properly considered in evaluating a motion to dismiss. *See In re Unumprovident Corp. Sec. Litig.*, 396 F. Supp. 2d 858, 876 (E.D. Tenn. 2005).

> New York Times further reported that Outokumpu "confirmed in a statement on its Web site that the commission had visited its headquarters in Espoo." *European Copper Industry Investigated*, The New York Times, Mar. 24, 2001. (Apx. 0408.)

- On March 27, 2001, the Birmingham Post reported that the British company IMI "was one of five concerns across Europe raided by European Commission investigators last Thursday." The report identified Outokumpu as one of the companies targeted by the raids in the "UK, Germany, Italy, France and Finland," and noted the "*industrial applications*" of the copper tubes and fittings at issue. *Copper Questions As IMI Is Raided*¸ Birmingham Post (UK), Mar. 27, 2001 (internal quotation marks omitted) (emphasis added). (Apx. 0389.)

But press reports of the EC's ACR tube investigation did not stand alone. Carrier alleges that the marketplace changed as well:

> [Mueller] decided to blow the whistle to the European Commission . . . . As a result, the European Commission began an investigation. *Thereafter, competition increased*. Those companies that, pursuant to the cartel's agreement, had previously failed to compete effectively for Carrier's business in the United States *began to do so because the cartel had begun to disband*.

(R. 46, Am. Cplt. ¶ 7 (emphasis added), Apx. 0022-23.)

The EC announced an ACR tube cartel investigation, the press widely reported the ACR tube investigation, and Carrier alleges that it itself purportedly experienced a marketplace change after the investigation began. Carrier thus essentially admits to having, as of March 2001, inquiry notice of the alleged illegal activities and of its own purported injuries.

Carrier has alleged no basis for tolling the limitations period after March 2001, leaving its claim time-barred on the face of the Amended Complaint.

3. Carrier Fails To Plead Sufficient Due Diligence.

Finally, Carrier fails to satisfy the third element of fraudulent concealment – particularized allegations that it diligently pursued its purported claims. This Court has required that a plaintiff must "fully plead the facts and circumstances" of its due diligence when seeking to toll the statute of limitations through a claim of fraudulent concealment. *Dayco Corp.*, 523 F.2d at 394 (citing *Wood v. Carpenter*, 101 U.S. 135, 143 (1879)). A plaintiff's "mere allegation of due diligence without asserting what steps were taken is insufficient under the *Wood* standard." *Id.*; *see also Friedman*, 929 F.2d at 1159 ("[P]laintiffs have failed to plead their own due diligence with the requisite particularity demanded by Rule 9(b).").

In *Dayco*, this Court held that a plaintiff's failure to investigate its claims following government hearings concerning the same purported violations did not meet due-diligence requirements. "[T]he congressional proceedings should have aroused Dayco's suspicions, and its failure to investigate further at that time was not the exercise of due diligence required in order to employ the fraudulent concealment doctrine to avoid the bar of the statute of limitations." *Dayco Corp.*, 523 F.2d at 394.

Dayco controls here. Given Carrier's European presence and self-proclaimed sophistication (*see* R. 46, Am. Cplt. ¶¶ 14-19, Apx. 0025-27), Carrier failed to discharge its "positive duty to use *diligence in discovering [its] cause of action*," *Dayco Corp.*, 523 F.2d at 394 (emphasis added), following the EC's public announcement of the ACR cartel and the numerous press reports that ensued.

Carrier attempts to satisfy its diligence obligations with a single allegation: "[s]ometime before the E.C. issued its [ACR] decision in December 2003," one of its employees, who has since retired, made an oral inquiry of "one or more" unidentified ACR supplier representatives about "the press reports Carrier had seen." (R. 46, Am. Cplt. ¶ 108, Apx. 0053-54.) The unnamed person supposedly "refused to give [the Carrier employee] any *meaningful information* about the E.C. investigation or to acknowledge the existence of the illegal cartel." (*Id.* (emphasis added).)

Notably, Carrier does not claim that its inquiry elicited a *denial* of wrongdoing, but rather a reply *not to discuss* the matter – that is, one that conveyed no "meaningful information." As noted above, "silence" is not sufficient to support a claim of fraudulent concealment. And with respect to the single inquiry made, Carrier states no belief, much less a particular allegation, that the inquiry was made of Mueller.

Even if Carrier had pled a denial of wrongdoing by an ACR supplier representative, reliance on that denial would be insufficient to satisfy Carrier's due diligence obligations. This Court has held that, even where a denial of wrongdoing is properly pled, reliance on the denial does not meet the plaintiff's obligation of due diligence. *See Gumbus*, 1995 WL 5935, at *4 ("*[R]elying on assurances from a . . . company official is not sufficient to meet the burden of due diligence*.") (emphasis added).

Carrier's failure to establish through particularized allegations any one (much less all) of the three required elements of fraudulent concealment means that the Amended Complaint is time-barred on its face as to Mueller.[16]

CONCLUSION

For the reasons set forth herein and in the Outokumpu Brief, the Judgment of the district court should be affirmed based on: (1) lack of subject matter jurisdiction; (2) failure to state a plausible entitlement to relief under

[16] The district court properly dismissed Carrier's claim for violation of the Tennessee Trade Practices Act in light of its conclusion that it lacked subject matter jurisdiction over Carrier's Sherman Act claim (and that dismissal would have been warranted for failure to state a claim). (R. 93, Dismissal Order at 11, Apx. 0931.) *See Hankins v. Gap, Inc.*, 84 F.3d 797, 802-03 (6th Cir. 1996) ("[T]his court has stated that generally, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well.") (internal citations omitted).

Twombly; and (3) failure to allege fraudulent concealment with particularity as to a claim that is time-barred on the face of the Amended Complaint.

Dated: New York, New York
May 1, 2009

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(A)(7)(C)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B) of 16,500 words for appellee's principal and response brief because this brief contains 15,898 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Sixth Circuit Rule 28(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, 14 point font.

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CERTIFICATE OF SERVICE

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ADDENDUM - COUNTER-DESIGNATION OF JOINT APPENDIX CONTENTS

As a supplement to the documents already designated by Carrier in connection with its principal brief, Mueller hereby counter-designates the following portions of the district court record for inclusion in the Joint Appendix:

Description of Entry	Date	Record Entry No.
Amended Complaint	10/27/2006	46
Motion to Dismiss the Amended Complaint by Mueller Industries, Inc., Attachments 3-6	12/06/2006	56
Memorandum in Support of Motion of Defendant Outokumpu to Dismiss Carrier's Amended Complaint, Attachment 3	12/06/2006	57
Reply Memorandum in Support of Defendant's Motion to Dismiss Amended Complaint, Attachments 1-3	02/09/2007	71
Notice by Mueller Industries of Filing and Service of Correspondence From the European Commission's Director of Anti-Cartel Enforcement	03/07/2007	76
Order of Dismissal	07/27/2007	93
Judgment	07/27/2007	94

Description of Entry	Date	Record Entry No.
Notice of Cross-Appeal by Mueller Industries, Inc.	08/31/2007	98