No. 14-1746

IN THE

United States Court of Appeals for the Fourth Circuit

SD3, LLC, ET AL.,

Plaintiffs-Appellants,

v.

BLACK & DECKER (U.S.), INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court,
Eastern District of Virginia, Alexandria Division
No. 14-cv-00191-CMH-IDD
Judge Claude M. Hilton, Presiding

PETITION FOR REHEARING FOR DEFENDANTS-APPELLEES ROBERT BOSCH GMBH AND TECHTRONIC INDUSTRIES CO., LTD.

JAMES G. KRESS
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

SCOTT W. HANSEN
REINHART BOERNER VAN DEUREN S.C.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202-6650
(414) 298-1000

Counsel for Defendant-Appellee Techtronic Industries Co., Ltd.

DAVID M. FOSTER
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W., Suite 1000
Washington, D.C. 20001-4501
(202) 662-4517

LAYNE E. KRUSE
ELIOT FIELDING TURNER
NORTON ROSE FULBRIGHT US LLP
1301 McKinney Street, Suite 5100
Houston, TX 77010
(713) 651-5151

Counsel for Defendant-Appellee Robert Bosch GmbH

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STATEMENT OF PURPOSE PURSUANT TO 4th CIRCUIT RULE 40(b)

Pursuant to Fed. R. App. P. 40(a)(2) and 4th Cir. R. 40(b), Defendants-Appellees Robert Bosch GmbH ("RBG") and Techtronic Industries Co., Ltd. ("TIC") respectfully petition for rehearing because the panel opinion overlooked a material factual and legal matter that can be easily rectified. The panel opinion affirmed the dismissal of all claims brought by SD3, LLC and SawStop LLC ("Plaintiffs") against several foreign parent corporations because, as to those defendants, the "'complaint was vague, never explained its case, and lumped [them] together without sufficient detail.'" Slip op. at 17 (citation omitted). The same analysis applies equally to the foreign parent corporations RBG and TIC, but neither was listed among the parties dismissed on this basis. RBG and TIC submit that rehearing is warranted as the simplest and most efficient way to correct the judgment to account for this possible oversight.

BACKGROUND AND PANEL DECISION

Plaintiffs filed their complaint in 2014, alleging violations of the Sherman Act, 15 U.S.C. § 1, as well as various state law claims. J.A. 104-10. RBG and TIC were two of several foreign parent corporations that were named as defendants along with their U.S. operating subsidiaries. J.A. 74-75. Plaintiffs asserted a Sherman Act claim arising from an alleged "group boycott," as well as two Sherman Act claims arising from an alleged "standard-setting conspiracy." J.A.

86, 96, 104-07. The district court granted defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) as to all claims against all parties. JA. 175, 179. Plaintiffs appealed the district court's decision, but only as to its three Sherman Act claims. *See* J.A. 181-82; Slip op. at 13.

On appeal, the panel affirmed the district court's decision in part. *See* Slip op. at 54. The panel affirmed dismissal of Plaintiffs' standard-setting claims against all defendants. *Id.* As to Plaintiffs' group boycott claims, the panel also affirmed dismissal as to certain defendants due to the insufficiency of Plaintiffs' allegations linking them to the alleged boycott: Hitachi Koki Co., Ltd.; Makita Corporation; Chang Type Industrial Co., Ltd.; OWT Industries, Inc.; Pentair Water Group, Inc.; Stanley Black & Decker, Inc.; Delta Power Equipment, Inc.; and Techtronic Industries North America, Inc. Slip op. at 17, 54. The panel decision allowed Plaintiffs' group boycott claims to proceed against other defendants. *Id.* at 54. The opinion was silent with respect to RBG and TIC.

REASONS FOR GRANTING REHEARING

RBG and TIC believe the panel overlooked the fact that the allegations against them are no less vague and conclusory than those against the other parent corporation defendants as to whom the panel held that Plaintiffs' group boycott claims failed to state a claim. The Court should therefore grant rehearing, and amend its opinion to reflect that Plaintiffs' group boycott allegations likewise fail

to state a claim against RBG and TIC. *See* Fed. R. App. P. 40(a)(2) (rehearing appropriate if panel "overlooked" point of law or fact); 4th Cir. R. 40(b)(ii) (same). This request for correction is amply justified by the record.

1. The panel decision correctly held that Plaintiffs failed to state a group boycott claim against various foreign parent defendants. *See supra* at 2; Slip op. at 17, 54. This holding was based on the fact that Plaintiffs' sole allegation against several of these defendants was that they totally "dominated" their subsidiaries, and that the subsidiaries were their "alter ego[s]." *See* Slip op. at 15; *see, e.g.*, J.A. 76 (¶¶ 23-24) (allegation regarding Hitachi Koki Co., Ltd.); J.A. 77 (¶¶ 25-26) (allegation regarding Makita Corporation). The panel found that Plaintiffs "alleged ***no facts*** suggesting the kind of unity of interests" necessary to plead an alter ego theory of liability, slip op. at 15, and as to these defendants, "the 'complaint was vague, never explained its case, and lumped [them] together without sufficient detail,'" *id*. at 17 (citation omitted). The panel thus held that Plaintiffs failed to state a group boycott claim against these parent defendants. *Id*. at 17, 54.

The panel's justification for dismissing the group boycott claims as to the specified parent defendants applies equally to RBG and TIC. Both RBG and TIC are foreign parent corporations of other named defendant-subsidiaries. *See* J.A. 74 (¶¶ 14-15), 74-75 (¶¶ 16-17). And as RBG and TIC argued on appeal, Plaintiffs "do not claim [RBG or TIC] were directly involved in the conspiratorial

agreement." Joint Br. for Appellees at 26. Plaintiffs also "alleged ***no facts*** suggesting the kind of unity of interests" necessary to sustain an alter ego theory against RBG or TIC. *See* Slip op. at 15. Because RBG and TIC share these characteristics with the other, now-dismissed, corporate parents, defendants-appellees argued that Plaintiffs' group boycott claims should be dismissed as to ***all*** foreign, parent companies. *See* Joint Br. for Appellees at 26-27. Thus, all of the reasons for the Court's affirmance of the dismissal of Plaintiffs' group boycott claims against the other foreign, parent corporations apply equally to RBG and TIC.

2. The only allegation of wrongful conduct made specifically against RBG and TIC is the conclusory statement in ¶ 109 of the amended complaint that they purportedly executed a joint venture agreement to develop safety technology. *See* J.A. 97-98 (¶109). But this allegation was part of the Plaintiffs' "standard-setting" conspiracy claims, which the Court found insufficient as a matter of law. *See* J.A. 96-104; Slip op. at 54. The panel did not rely on ¶ 109 to support its decision reinstating Plaintiffs' group boycott claims as to certain defendants. *See* Slip op. at 23-46. That decision relied instead on factual allegations that are contained under the complaint's headings that refer to the alleged group boycott. *See* JA. 86-95 (¶¶ 65-100). Indeed, far from relying on ¶ 109 to sustain any claims,

the Court specifically rejected the allegations of that paragraph as "conclusory and non-specific." *See* Slip op. at 52 (citing, *inter alia*, ¶ 109).

In any event, ¶ 109 does not allege that RBG or TIC entered into a group boycott agreement at all. It alleges only that the joint venture agreement that RBG and TIC allegedly executed functioned "as a practical matter" as a "smokescreen" and a "concealment" of the Defendants' purported agreement to manipulate standards and not to license Plaintiffs' technology. J.A. 97. But there are no specific, non-conclusory allegations in ¶ 109 or elsewhere that RBG or TIC ever were part of the alleged group boycott or even that they knew of its existence. Thus, the Court's finding that the allegations of ¶ 109 are "conclusory and non-specific" holds true regardless of which type of claim ¶ 109 is said to support. *See* Slip op. at 52 (citing, *inter alia*, ¶ 109 and concluding that "the complaint's only assertions of concerted action are conclusory and non-specific"). Finally, the record (including judicially noticeable material) demonstrates that neither RBG nor TIC executed the joint venture agreement. *See* 68 Fed. Reg. 67,216 (Dec. 1, 2003) (listing members of joint venture, which do not include RBG or TIC) (reproduced at J.A. 132). Only their respective subsidiaries executed the agreement. *Id.*

3. The complaint's other references to RBG and TIC allege no specific wrongful conduct. The complaint makes the same "alter ego" and "domination" allegations about RBG and TIC that the Court held were insufficient as to the other

foreign parents. *See* J.A. 74-75 (¶¶ 15, 17, 19, 20, 21); Slip op. 15-16. RBG is alleged to have participated in "discussions" with SawStop (J.A. 88 ¶ 73), but there is nothing wrongful about that. Mr. Peot, who was an employee of Ryobi (J.A. 71 ¶ 3), is alleged to have attended the October 2001 PTI meeting "on behalf" of, *inter alia*, TIC (J.A. 89 ¶ 79), but TIC (like RBG) is not alleged to have been a member of PTI (J.A. 89 ¶ 78) and there is no specific, non-conclusory allegation that TIC was part of any alleged anticompetitive agreement. And the complaint alleges that management "at Ryobi and/or TIC" decided not to discuss further licensing with SawStop (J.A. 92 ¶ 87), but that is also not an allegation of wrongful conduct. As the Court noted, "Antitrust law does not recognize guilt by mere association…." Slip op. at 16.

RBG and TIC respectfully submit that the panel overlooked that the allegations against them were just as conclusory and non-specific as the allegations against the other foreign parents that the panel held were properly dismissed from Plaintiffs' group boycott claims. The Court should therefore grant this petition for rehearing simply to amend the panel decision to include RBG and TIC within the list of defendants for whom the panel affirmed the dismissal of Plaintiffs' group boycott claims.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing and amend the panel decision to hold that the dismissal of all claims against both RBG and TIC is affirmed.

Respectfully submitted,

/s/ James G. Kress
James G. Kress
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, DC 20004-2400
(202) 639-7700

Scott W. Hansen
REINHART BOERNER VAN DEUREN S.C.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202-6650
(414) 298-1000

Counsel for Defendant-Appellee Techtronic Industries Co., Ltd.

/s/ David M. Foster
David M. Foster
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 662-4517

Layne E. Kruse
Eliot Fielding Turner
NORTON ROSE FULBRIGHT US LLP
1301 McKinney Street, Suite 5100
Houston, TX 77010
(713) 651-5151

Counsel for Defendant-Appellee Robert Bosch GmbH

September 29, 2015

CERTIFICATE OF SERVICE

I certify that on September 29, 2015, the foregoing petition for rehearing was served on all parties and *amici*, or their counsel of record, through the CM/ECF system.

/s/ David M. Foster
David M. Foster

Counsel of Record for Defendant-Appellee Robert Bosch GmbH