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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARRIER CORPORATION, ET AL.,

Plaintiffs-Appellants,

v.

OUTOKUMPU OYJ, ET AL.,

Defendants-Appellees.

On Appeal From The
United States District Court
For The Western District of Tennessee
Western Division

FINAL FIRST BRIEF OF PLAINTIFFS-APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, Carrier Corporation, Carrier S.A., and Carrier Italia S.p.A. make the following disclosures:

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

Yes. Carrier Corporation is a direct subsidiary of United Technologies Corporation. Carrier S.A. is an indirect subsidiary of United Technologies Corporation. Carrier Italia S.p.A. is an indirect subsidiary of United Technologies Corporation. United Technologies Corporation is a publicly owned corporation.

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

None other than United Technologies Corporation, as described above.

Dated: May 1, 2009

/s/ David M. Schnorrenberg
David M. Schnorrenberg

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34, Plaintiffs-Appellants Carrier Corporation, Carrier S.A., and Carrier Italia S.p.A. hereby request oral argument. Argument on the issues presented by this appeal will assist Carrier in explaining its positions to the Court, and will likely assist the Court in obtaining a response to questions it may have concerning the proceedings below and issues presented.

Dated: May 1, 2009

/s/ David M. Schnorrenberg
David M. Schnorrenberg

JURISDICTIONAL STATEMENT

Appellants filed this action in the United States District Court for the Western District of Tennessee seeking relief for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 ("Section 1"), and the Tennessee Trade Practices Act, § 47-25-101, *et seq.* (R. 46, Amended Complaint ¶¶ 115-125, Apx. pp. 0057-59 ("Am. Compl.").) 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. p. 0023.)

On July 27, 2007, the District Court dismissed the complaint pursuant to Federal Rules of Civil Procedure ("Rule" or "Rules") 12(b)(1) and 12(b)(6). (R. 93, Order of Dismissal, Apx. pp. 0921-31 ("Order").) The District Court entered a final judgment on July 27, 2007. (R. 94, Judgment, Apx. p. 0932.)

On August 23, 2007, Plaintiffs-Appellants filed their notice of appeal. (R. 95, Notice of Appeal, Apx. pp. 0933-0936.) Because this appeal is from a final judgment by the District Court disposing of all the parties' claims, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in dismissing Plaintiffs-Appellants' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

2. Whether the District Court erred in dismissing the Plaintiffs-Appellants' Complaint for failure to state a claim pursuant to Rule 12(b)(6) in light of the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007).

STATEMENT OF THE CASE

This litigation arises from a long-standing cartel in violation of the antitrust laws. On March 29, 2006, Plaintiffs-Appellants Carrier Corporation, Carrier S.A., and Carrier Italia S.p.A. (collectively, "Carrier") filed a complaint in the United States District Court for the Western District of Tennessee, alleging violations of the Sherman Act, 15 U.S.C. § 1, and the Tennessee Trade Practices Act ("TTPA"), § 47-25-101, *et seq.* On October 27, 2007, Carrier filed an amended complaint ("Complaint" or "Am. Compl."). (R. 46, Am. Compl., Apx. pp. 0019-62.) The Complaint named as defendants Appellee Outokumpu Oyj and its subsidiaries Appellees Outokumpu Copper Products Oy ("Outokumpu Copper"), Outokumpu Copper (U.S.A.), Inc. ("Outokumpu USA"), and Outokumpu Copper Franklin, Inc. ("Outokumpu Franklin"), as well as Appellee Mueller Industries, Inc. ("Mueller Industries") and its subsidiary Appellee Mueller Europe Ltd. ("Mueller Europe").

(*Id.* ¶¶ 27-35, Apx. pp. 0027-35.) Outokumpu Oyj and its defendant subsidiaries are referred to collectively herein and in the Complaint as "Outokumpu." Mueller Industries and Mueller Europe are referred to collectively herein and in the Complaint as "Mueller."

On December 6, 2006, Defendants-Appellees moved to dismiss the Complaint pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6). Briefing on the motions to dismiss was completed by February 9, 2007. On July 27, 2007, the District Court granted dismissal pursuant to Rules 12(b)(1) and 12(b)(6) and found it unnecessary to address the 12(b)(2) motions. (R. 93, Order, Apx. pp. 0921-31.) This appeal followed.

STATEMENT OF FACTS

The Allegations of Carrier's Complaint

1. The Market for ACR Copper Tubing

Carrier alleges an international conspiracy to allocate customers, stabilize market shares, and fix prices in the market for copper tubing used in the manufacture of air-conditioning and refrigeration equipment, which is referred to herein and in the Complaint as ACR Copper Tubing. (R. 46, Am. Compl. ¶ 1, Apx. pp. 0019.)

Generally speaking, copper tubing is divided into two main product groups: (1) plumbing tubes; and (2) industrial tubes with various value-added qualities that

make them appropriate for their end use. (*Id.* ¶ 41, Apx. p. 0036.) ACR Copper Tubing is a specialized type of industrial tube designed to facilitate heat exchange as the interior walls of the tubing are exposed to the coolant/refrigerant. (*Id.* ¶ 41-42, Apx. p. 0036.)

The market for ACR Copper Tubing is global. Supply chain dynamics, such as supply cost and lead time, can be conducive to importing and exporting product between different sales regions. (*Id.* ¶ 51, Apx. p. 0038.) As a result, Carrier relied not only on domestic sources of supply, but could, and did, purchase ACR Copper Tubing from abroad. (*Id.*) For example, during the conspiracy period, Carrier S.A. and Carrier Italia S.p.A. (based in France and Italy, respectively) purchased ACR Copper Tubing from Outokumpu Franklin in the United States. (*Id.*)

The sale of ACR Copper Tubing also flowed from Europe to the United States. For example, International Comfort Products ("ICP"), which was purchased by Carrier late in the conspiracy period, imported ACR Copper Tubing from France to its manufacturing facility in Tennessee. (*Id.*) Likewise, during the conspiracy period, Defendants-Appellees Outokumpu Oyj manufactured ACR Copper Tubing in Finland and imported it into the United States for sale in the United States. (*Id.* ¶ 21, Apx. p. 0027.)

During the conspiracy period, three European-based suppliers dominated the market for ACR Copper Tubing. Outokumpu Oyj, Wieland-Werke AG ("Wieland"), and KM Europa Metal AG ("KME") were the three largest suppliers of ACR Copper Tubing in the world. (*Id.* ¶ 5, Apx. p. 0022.) No other major competitors in Europe or the United States could meet the large-scale needs of a major purchaser like Carrier in terms of the type, quality, reliability and quantity of ACR Copper Tubing. (*Id.*) Their principal potential competitors were located in Asia, but Asian manufacturers found it unnecessary to sell outside Asia due to high local demand. (*Id.*) Thus, the conditions were ripe for a cartel focused principally on Europe and the United States.

Outokumpu Oyj, Wieland and KME were key participants in the ACR Copper Tubing cartel. They took steps to ensure that small competitors would not undermine the cartel. Thus, for example, they enlisted Mueller Industries and its European affiliates as cartel members. (*Id.* ¶ 6, Apx. p. 0022.) In return for its agreement not to compete for the ACR Copper Tubing business of Carrier and others, Mueller gained not only the benefits of anticompetitive agreements regarding ACR Copper Tubing, but the benefits of anticompetitive agreements for plumbing tubes that they had established. (*Id.*) Mueller Industries joined the cartel in approximately 1997, enabling its executives to ascend quickly to the status of

"elephant," which was a code-name used by cartel members to refer to the executives of major tube manufacturers. (*Id.* ¶ 37, Apx. p. 0034.)

2. Carrier's Global Purchasing Operations

Carrier is the world's largest manufacturer of air-conditioning and commercial refrigeration equipment. (*Id.* ¶ 1, Apx. p. 0019.) Its customers include millions of people and businesses in 172 countries on six continents around the world, making it one of the world's largest purchasers of ACR Copper Tubing. (*Id.* ¶¶ 1, 18, Apx. pp. 0019, 0026.) Carrier estimates that during the known conspiracy period, it spent over $1 billion in the United States and Europe for ACR Copper Tubing. (*Id.* ¶ 19, Apx. pp. 0026-27.)

Carrier has its roots as a corporation in the United States, dating back to 1902 when the company's founder and namesake invented air-conditioning. (*Id.* ¶ 18, Apx. p. 0026.) Today, Carrier's worldwide headquarters are based in Connecticut. (*Id.* ¶ 14, Apx. p. 0025.) From its headquarters, Carrier manages its global purchasing operations. (*Id.* ¶ 60, Apx. pp. 0041-42.) During the conspiracy period, as part of this centralized purchasing operation, personnel from Carrier's Connecticut headquarters worked with personnel responsible for Carrier plants throughout the world to ensure it obtained the best price possible for its purchases wherever the product could be obtained. (*Id.*) Carrier's centralized purchasing department would collect data on sales prices being charged by ACR Copper

Tubing suppliers for use in negotiating supply contracts and would participate in such purchase negotiations in different parts of the world, including the United States and Europe. (*Id.*)

The cartel was organized to address the centralized purchasing management of Carrier and other large customers that were the cartel's focus. (*Id.* ¶ 61, Apx. p. 0042.) Hence, the cartel acted to eliminate regional price differentials by setting and maintaining artificially high prices globally, and acted to ensure that prices for ACR Copper Tubing in the United States were the same, after taking shipping costs into account, as those charged elsewhere to large, global purchasers like Carrier. (*Id.* ¶ 59, Apx. p. 0041.) Otherwise, these customers would have purchased their world-wide demand for ACR Copper Tubing in the United States and then shipped it to Europe or other places where needed. (*Id.* ¶¶ 59-63, Apx. pp. 0041-43.) Thus, centralized management and coordination of the cartel for companies like Carrier was a critical component to its success. (*Id.* ¶ 61, Apx. p. 0042.)

3. The Global Structure of Defendants' Sales Operations

Like Carrier, the cartel members were structured to do business on a multi-national, rather than simply regional, basis. Control over cartel decisions existed at the highest levels of the participating companies. Defendant Outokumpu Oyj, for example, divided its business into different divisions, one of which was its Copper

Products Division. (*Id.* ¶ 26, Apx. p. 0029.) To operate this division, including the implementation of the copper tubing cartel, Outokumpu Oyj created its wholly-owned subsidiary Defendant-Appellee Outokumpu Copper. (*Id.*, ¶¶ 26-27 Apx. pp. 0029-30.) For its part, Outokumpu Copper operated world-wide through a network of subsidiaries, including United States-based subsidiaries and Defendants-Appellees Outokumpu USA and Outokumpu Franklin. (*Id.*)

The management of Outokumpu Copper reflects the global approach to Outokumpu's business model. It was led by an Executive Board composed of nearly the entire membership of Outokumpu Oyj's executive management (usually four or five individuals), plus one to three members of Outokumpu Copper's top executives. (*Id.* ¶ 27 Apx. pp. 0029-30.) Beneath the Executive Board was an executive committee composed of executives from various global subsidiaries of Outokumpu Copper, including United States subsidiaries. (*Id.*) Buttressing this structure was a close-working relationship between United States and European executives of Outokumpu Copper's subsidiaries developed through a regional rotation program, whereby Outokumpu executives rotated between Europe and the United States. (*Id.* ¶ 30, Apx. p. 0031.) Carrier witnessed this executive rotation first-hand through its negotiations with Outokumpu executives in Europe and the United States. (*Id.*)

Centralized control of operations was an important aspect of the cartel, and thus, the success of the cartel was facilitated by the involvement of the highest levels of upper management. For example, Outokumpu Oyj's Chief Executive Officer, who had ultimate responsibility for Outokumpu's global operations, had meetings and other communications with high-ranking executive officers of other cartel members to discuss conditions in the copper tubing market. (*Id.*)

4. Conspiratorial Meetings in Furtherance of an Anticompetitive Cartel

The cartel began by at least the late 1980's. (*Id.* ¶ 66, Apx. p. 0043.) A trade association called the Cuproclima Quality Association for ACR Tubing ("Cuproclima") was used as a vehicle for organizing and controlling the cartel. (*Id.* ¶ 65-66, Apx. p. 0043.) By 1989, an Outokumpu representative praised the cartel, writing in handwritten notes that "prices have been raised . . . Cuproclima works well." (*Id.* ¶ 77, Apx. p. 0045.)

Official Cuproclima meetings – which occurred twice a year – allowed cartel members to plan and monitor cartel activities. (*Id.* ¶ 66, Apx. p. 0043.) Cuproclima's fall meetings would take place prior to supply negotiations with major customers and would focus on the coordination of those negotiations by agreeing to allocate different customers and fix prices. (*Id.* ¶ 71, Apx. p. 0044.) The spring Cuproclima meetings would then be used to monitor compliance with these conspiratorial plans. (*Id.*) The cartel members also had additional meetings

in furtherance of their conspiracy outside the Cuproclima meetings, as well as telephone calls and written communications. (*Id.* ¶¶ 67, 72, & 86, Apx. pp. 0043, 0044, 0046.)

The full extent of the illicit cartel communications and meetings are unknown to Carrier, but specific examples of meetings are mentioned in the Complaint, such as:

- A spring 1993 Cuproclima meeting at Tegernsee at which means for ensuring compliance with the cartel were discussed. (*Id.* ¶ 95, Apx. p. 0048.)
- A July 24, 1995 meeting at which price increase targets for 1996 were discussed. (*Id.* ¶ 82, Apx. p. 0046.)
- An October 31, 1995 Cuproclima meeting in Prague where cartel members agreed to supply volumes for various customers, the prices and terms of agreements for those customers, and the order in which cartel members would approach those customers. (*Id.* ¶ 84, Apx. p. 0046.)
- A Cuproclima meeting on February 2, 2001, during which the cartel members discussed future market share and sales volume projections. (*Id.* ¶ 87, Apx. p. 0046.)

Carrier is aware of these secret meetings from findings by the European Commission ("E.C."), the primary antitrust enforcer in the European Union ("E.U."). Although the E.C.'s jurisdictional reach required that it focus its investigation on defendants' anticompetitive behavior in the E.U., it unearthed evidence that the cartel's reach was not simply limited to the E.U. An internal Outokumpu document discovered by the E.C. evidences a "global" agreement with

respect to the cartel's customer allocation scheme, stating, "[…] is 'our client' and will also keep it. If […] goes along with the 'Global Agreement,' we will have to take it." (R 55.4, E.C. Industrial Tubes Decision, ¶ 144, Apx. pp. 0311-12 ("E.C. ACR Decision").)

5. The Cartel's Customer/Market Allocation Scheme

Customer allocation was a key component to the cartel's success in stabilizing market shares and enabling supra-competitive prices. (R. 46, Am. Compl. ¶ 72, Apx. p. 0044.) The cartel focused on the key customers important to the business of the cartel members. (*Id.* ¶ 3, Apx. p. 0020.) According to the E.C.'s findings, the cartel particularly targeted "'big industrial companies with which prices were negotiated once a year.'" (*Id.* (quoting E.C. ACR Decision ¶ 98).) As one of the world's largest purchasers of ACR Copper Tubing, Carrier was one of the customers at whom the cartel was aimed. (*Id.*)

Each customer was assigned an identification number that was used to facilitate communications and agreements with respect to the customer. (*Id.* ¶ 91, Apx. p. 0047.) If a customer courted business from a cartel member that had not been allocated that portion of the customer's business, the cartel member – pursuant to the cartel's prior agreement – quoted a non-competitive price. (*Id.* ¶ 92, Apx. p. 0047.)

The cartel appointed "market leaders" for key customers and territories who were responsible for monitoring compliance with the cartel's objectives, and developed a special mechanism for enabling the sharing of customers in order to ensure stabilized market shares. (*Id.* ¶ 90-93, Apx. p. 0047.)

Pursuant to the cartel's allocation scheme, Carrier's business in the United States was allocated to Outokumpu, while the Carrier business in Europe was allocated to Wieland and KME. (*Id.* ¶ 4, Apx. p. 0021.) The cartel members agreed not to pursue Carrier's business in other territories. (*Id.*) Accordingly, with occasional exceptions designed to conceal the cartel, Outokumpu refused to bid for business or submitted non-competitive proposals for Carrier's facilities in Europe. (*Id.*) It did so even though it was well-positioned to obtain this business due to its demonstrated capability and close relationship with Carrier in the United States. (*Id.*)

This anti-competitive landscape continued until at least near the time of the publication of the E.C. ACR Decision. (*Id.* ¶ 7, Apx. pp. 0022-23.) At that time, companies that had not previously competed meaningfully for Carrier's business in the United States began to do so. In 2003, Wieland formed a joint venture in the United States that aggressively pursued Carrier for business in the United States. (*Id.*) Also in 2003, KME began to pursue Carrier for business in the United States beyond the smaller quantities previously supplied to ICP. (*Id.*) This competition

for the business in the United States previously awarded to Outokumpu was unprecedented and resulted in purchases from both Wieland and KME. (*Id.*)

6. The Cartel's Scheme to Increase Prices for ACR Copper Tubing

The cartel used its market and customer allocation scheme to successfully implement price increases in the United States and Europe to enable supra-competitive profits. (*Id.* ¶¶ 4, 72, Apx. pp. 0021, 0044.) The Complaint pleads several examples of illicit discussions and agreements by the cartel members regarding price increases, including:

- An internal Outokumpu fax from August 1994 noting "the price increase of ACR tubes in Europe – target 20%." (*Id.* ¶ 80, Apx. p. 0045.)
- A July 24, 1995 meeting at which price increase targets of 5-10% for 1996 were established. (*Id.* ¶ 82, Apx. p. 0046.)
- The preparation by the cartel members in 2000 of a pricing sheet that contained price increase targets of 4-5.5% for 2001. (*Id.* ¶ 85, Apx. p. 0046.)

Through the allocation and price increase scheme, the cartel eliminated regional price differentials and stabilized prices in the United States at levels comparable to those fixed in Europe. (*Id.* ¶¶ 62 & 101(d), Apx. pp. 0042, 0050.) Economic data concerning the ACR Copper Tubing market shows patterns of pricing indicative of a conspiracy occurring both in Europe and the United States. (*Id.* ¶ 111, Apx. p. 0055.)

This cartel continued until at least 2001, at which point Defendant-Appellee Mueller reported the cartel to the E.C. in an effort to gain amnesty and avoid penalties. (*Id.* ¶ 7, Apx. p. 0022.) On December 16, 2003, the E.C. published a decision regarding its investigation of the ACR Copper Tubing cartel and imposed fines on various Outokumpu, Wieland and KME entities. (*Id.* ¶ 97, Apx. pp. 0048-49.) It found that cartel participants agreed on price targets, coordinated price increases, allocated customers and market shares, exchanged competitively sensitive information, and collectively monitored implementation of the cartel. (*Id.* ¶ 98, Apx. p. 0049.) The E.C. further found that "[n]one of the parties substantially contested . . . the anti-competitive infringements identified in this Decision." (*Id.* ¶ 99, Apx. p. 0049.)

The District Court's Dismissal of Carrier's Complaint

The District Court dismissed Carrier's Complaint pursuant to Rules 12(b)(1) and 12(b)(6), focusing its analysis principally on Rule 12(b)(1). (R. 93, Order, Apx. pp. 0921-31.)[1]

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[1] The District Court also declined to exercise supplemental jurisdiction over the TTPA claims under 28 U.S.C. § 1367, in light of its decision dismissing the federal claims over which it had original jurisdiction. (R. 93, Order p. 11, Apx. p. 0931).

1. The Rule 12(b)(1) Decision

In its Rule 12(b)(1) analysis, the District Court found that "[o]n its face" the Complaint "appears to satisfy Fed. R. Civ. P. 8(a)'s requirement of a 'short and plain statement of the grounds upon which the court's jurisdiction depends'" and that "all the necessary elements of a federal question action appear to be present." (*Id.* pp. 5-6, Apx. pp. 0925-26.) However, the District Court criticized the Complaint for "seem[ing] to have relied entirely on facts from the EC decisions peppered with language from the Sherman and Clayton Acts and conclusory statements about a price-fixing conspiracy in U.S." (*Id.* p. 6, Apx. p. 0926.) The District Court concluded that the Complaint "is without a factual foundation." (*Id.*) It did so even while acknowledging that "Plaintiffs discuss at length how the conspiracy was global in nature and directly involved the U.S. market" and that "Carrier does make some factual allegations not borrowed from the EC decision involving Carrier and specific Defendants." (*Id.*) But in finding these allegations insufficient, the District Court held that

> Plaintiffs create a close approximation of a factual predicate by alleging a specific market allocation agreement between specific defendants. However, the core facts presented that Outokumpu pursued Carrier European business with insufficient vigor and the other conspirators did not pursue Carrier's U.S. business, without more, are not adequate to suggest conspiracy.

(*Id.* p. 7, Apx. p. 0927.)

Moreover, the District Court found that the Complaint's references to the plumbing tube cartel "undermined any credibility the complaint otherwise possessed," because in the District Court's view, the plumbing tube cartel "did not pertain to the cartel at issue in this case." (*Id.*) The District Court further faulted Carrier for "discarding conclusions of the EC Decision" that "the EC findings were limited to European conduct", and that there was a "distinction between the copper tubing cartels." (*Id.*) In particular, it concluded that the E.C. ACR Decision "nowhere implies that the cartel extended beyond the European market." (*Id.*)

Applying the Rule 12(b)(1) standard set forth in *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974), and *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 444 (6th Cir. 2006), the District Court determined that the "Plaintiffs' claims are 'wholly insubstantial' in that they are without any factual basis whatsoever." (R. 93, Order p. 8, Apx. p. 0928.) According to the District Court, the Complaint's problem was that it "has no substance of its own but rather illegitimately borrows its substance entirely from elsewhere." (*Id.* p. 9, Apx. p. 0929.)

In reaching this conclusion, the District Court noted that it was not imposing a heightened pleading standard beyond Rule 8's "short and plain statement" requirement. (*Id.*) Instead, it ruled that it was "empowered to resolve" disputes over jurisdictional facts "by making reasonable inquiry into the facts." (*Id.*) (citing *Rogers v. Stratton, Inc.*, 798 F.2d 913, 915-16 (6th Cir. 1986), and

Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981). The District Court concluded, therefore, that "[n]o presumptive truthfulness applies to the factual allegations of jurisdiction and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" (R. 93, Order p. 9, Apx. p. 0929.)

2. The Rule 12(b)(6) Decision

In dismissing Carrier's complaint pursuant to Rule 12(b)(6), the District Court relied exclusively on the recent decision of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007). It observed that in *Twombly*, the Supreme Court "expressly abrogated the standard articulated in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)." (R. 93, Order p. 10, Apx. p. 0930.) The District Court ruled that under *Twombly*, a complaint brought under Section 1 "must have enough factual matter (taken as true) to plausibly suggest collusion in restraint of trade." (*Id.*)

The District Court did not provide much in the way of analysis of the Complaint under the *Twombly* standard, finding only:

> Through the *Twombly* decision it has now become evident that cases like the present one, which lack a legitimate foundation, are vulnerable to 12(b)(6) challenge. The Court concludes that if the Court had not found that it lacked subject matter jurisdiction over this matter, it would have nevertheless been obligated to grant

> Defendants' motions to dismiss on 12(b)(6) grounds for failure to state a claim.

(*Id.* p. 11, Apx. p. 0931.)

SUMMARY OF ARGUMENT

The District Court erred in dismissing Carrier's Complaint pursuant to Rules 12(b)(1) and 12(b)(6). In ruling on the Defendants' 12(b)(1) motion, the District Court misconstrued its power to dismiss Carrier's Section 1 claim as "wholly insubstantial" by impermissibly judging the factual sufficiency of Carrier's allegations.

The "wholly insubstantial" standard invoked by the District Court is a very narrowly applied exception to the general rule that a federal court has jurisdiction over claims seeking recovery under federal law. Courts may invoke this narrow exception only when a clear and obvious legal deficiency is apparent on the face of the complaint – *i.e.*, where a complaint fails to state a cognizable legal right or pleads facts wholly inconsistent with the claim alleged. Carrier's Section 1 claim, as alleged on the face of the Complaint, is neither based upon an implausible legal theory nor obviously inconsistent with the facts pled. Consequently, the Complaint should not have been dismissed as "wholly insubstantial."

Instead of presuming the truth of the Complaint's allegations, the District Court erroneously used the "wholly insubstantial" standard as a mechanism for judging the merits of Carrier's claim without the restrictions imposed on such a

review by Rule 12(b)(6). It thereby expanded impermissibly the very limited "wholly insubstantial" exception to federal question jurisdiction articulated in *Bell v. Hood*, 327 U.S. 678, 681-82 (1946) . Accordingly, the District Court's 12(b)(1) decision should be reversed.

The District Court also erred in its Rule 12(b)(6) decision. Carrier's Complaint adequately states a claim in accordance with the Supreme Court's recent guidance in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007). While *Twombly* clarified pleading requirements, it did not impose a heightened pleading standard or otherwise alter the basic Rule 8 notice standard. Thus, a complaint need contain only a short and plain statement showing that the pleader is entitled to relief. Carrier's Complaint satisfies this requirement.

In contrast to *Twombly*, Carrier's Complaint does not rest on mere allegations of parallel business conduct, but instead contains the factual context necessary to state a plausible cartel claim. It is replete with allegations of specific meetings and communications held for the purpose of furthering an illicit cartel. These allegations reflect agreements among the cartel members to allocate customers, stabilize market shares and raise prices in the market for ACR Copper Tubing. Although these facts were largely drawn from findings by the E.C., the E.C. did not find that the subject of these meetings was confined to the E.U., and in

fact, it uncovered evidence that Outokumpu discussed a "Global Agreement" as part of its conspiratorial plan.

Moreover, the Complaint provides context for these meetings by alleging the global nature of the market, including the intercontinental sale and purchase of ACR Copper Tubing. It explains that ACR Copper Tubing manufacturers managed their operations and sold product on a global scale, and purchasers such as Carrier similarly behaved. From Carrier's centralized purchasing department in its Connecticut headquarters, it shopped comparatively around the world for the best prices of ACR Copper Tubing, and used this information to negotiate supply contracts with ACR Copper Tubing manufacturers both in Europe and the United States. The cartel members were aware of this practice and likewise managed their global operations to ensure there were no regional price differences that could undercut the success of the cartel. Different prices in one region would have had a direct, substantial and foreseeable effect on prices charged in another region. Therefore, in accordance with the cartel's plan, prices in Europe and the United States rose in parallel to supra-competitive levels, and the resulting pricing pattern is indicative of an anticompetitive market arrangement.

As the Complaint further alleges, the cartel was focused on key customers like Carrier with multi-national operations. The cartel had to ensure that there was not competition for these accounts that would drive prices down. Thus, as set forth

in the Complaint, the cartel members allocated customers among themselves to ensure the success of the cartel. Carrier – as one of the largest purchasers of ACR Copper Tubing in the world, if not the largest – was an important target of the cartel. The cartel divided Carrier's business among the world's three largest ACR Copper Tubing manufacturers, with Outokumpu taking the United States business and KME and Wieland splitting Europe. This practice continued until near the time of the publication of the E.C. ACR Decision, when Wieland and KME began aggressively pursuing Carrier's business in the United States for the first time.

Put together, these factual allegations reflect an international cartel with anticompetitive effects in the United States. The Complaint contains the kind of allegations that the Supreme Court found missing in *Twombly* – plausible factual allegations that give the Defendants reasonable notice of the claims against them. The District Court's decision to the contrary was based on a cramped reading of the Complaint that raised *Twombly's* plausibility standard to the level of "probability." But only plausibility must be alleged, and Carrier has done so here. Accordingly, this Court should reverse the District Court's decision and permit Carrier's claims to move forward.

ARGUMENT

STANDARD OF REVIEW

The Court of Appeals reviews *de novo* district court dismissals pursuant to Rules 12(b)(1) and 12(b)(6). *See Giesse v. Dept. of Health and Human Servs.*, 522 F.3d 697, 702 (6th Cir. 2008); *Ricco v. Potter*, 377 F.3d 599, 602 (6th Cir. 2004). When it is necessary to go beyond the face of a complaint and consider the factual predicates for subject matter jurisdiction, this Court reviews any findings by the district court for clear error. *Giesse*, 522 F.3d at 702.

I. THE DISTRICT COURT ERRED IN DISMISSING CARRIER'S COMPLAINT PURSUANT RULE 12(b)(1)

In dismissing Carrier's Section 1 claim as "wholly insubstantial" for supposed lack of factual support, the District Court misconstrued its power to dismiss a claim for lack of jurisdiction. The District Court may not judge for itself the factual sufficiency of Carrier's allegations; rather, it may only determine, from the face of Carrier's complaint, whether the legal theory underlying Carrier's antitrust claim is so obviously frivolous and attenuated that the claim cannot be said to arise under federal law in any meaningful way. Because Carrier's claims, if ultimately proven true, clearly arise under the Sherman Act, the District Court had

subject matter jurisdiction over them, and it should not have dismissed Carrier's claims under Rule 12(b)(1).[2]

A. The "Wholly Insubstantial" Standard Invoked by the District Court Is A Narrowly Applied Exception to the General Rule That a Federal Court Has Jurisdiction Over Claims Arising Under Federal Law Regardless of Whether the Plaintiff Has Pled Facts Sufficient to State a Claim

Generally, a court may not dismiss a complaint for lack of subject matter jurisdiction merely because the facts alleged in the complaint do not sufficiently state a claim under federal law. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998); *Bell v. Hood*, 327 U.S. 678, 681-82 (1946). Rather, a federal court has jurisdiction over any complaint that pleads a cause of action created by federal law regardless of the ultimate merit of the claim, even where facts that would establish an element of the plaintiff's claim also provide the basis for federal subject matter jurisdiction. *See Steel Co.*, 523 U.S. at 89; *Moore*, 458 F.3d at 443-44. As long as the plaintiff's complaint "is so drawn as to seek

[2] The briefing by Defendants in the District Court regarding Rule 12(b)(1) focused on the supposed application of the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a, as Carrier sought recovery of damages for purchases made both in the United States and abroad. Carrier believes that it should be entitled to obtain recovery in one proceeding for the globalized effect of this international cartel. However, it is also clear to Carrier that its attempt to seek recovery for foreign purchases was a time-consuming distraction to the proceedings below that may have led to the District Court's misapplication of Rule 12(b)(1). In the interest of expediting this litigation, Carrier has decided to limit its claims in this litigation to purchases made in the United States.

recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit." *Bell*, 327 U.S. at 681-82.

The "wholly insubstantial" standard invoked by the District Court below is one of the two exceptions set forth by the Supreme Court in *Bell*. *Id.* at 682.[3] Under this standard, only when a federal claim is "'so attenuated or insubstantial as to be absolutely devoid of merit,' 'wholly insubstantial,' 'obviously frivolous,' 'plainly unsubstantial,' or 'no longer open to discussion,'" may a federal court dismiss the claim for lack of subject matter jurisdiction rather than on the merits. *Hagans*, 415 U.S. at 536-37 (citations omitted). This Court has noted that these attempts to define "wholly insubstantial" are inevitably circular, and has held that any non-frivolous claim is sufficiently "substantial" for purposes of establishing federal subject matter jurisdiction. *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 n.1 (6th Cir. 1997).

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[3] The second exception – where the federal claim asserted "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction" – clearly does not apply in this case. *Bell*, 327 U.S. at 682. Courts have dismissed claims under this standard in cases where the dispute between the parties arises under state law and the federal cause of action alleged was obviously unrelated to the actual dispute. *See, e.g.*, *Matters v. Ryan*, 249 U.S. 375, 377-78 (1919) (dismissing case where plaintiff sought custody over her alleged daughter in federal court on the ground that her alleged daughter had been transported into the United States from Canada in violation of U.S. immigration laws).

B. The District Court Misapplied the "Wholly Insubstantial" Standard to Carrier's Complaint

Courts have dismissed claims under Rule 12(b)(1) as "wholly insubstantial" in only two situations: (1) where the claim is clearly foreclosed by precedent; or (2) where the claim is based on an implausible legal theory. The District Court held that Carrier's Section 1 claim fell into the second category; however, this ruling was in error because it misapplied the Rule 12(b)(1) standard.[4]

Courts have dismissed alleged federal claims as "wholly insubstantial" for relying upon an implausible legal theory only when there is a clear and obvious legal deficiency on the face of the complaint. These situations can arise where a complaint fails to state a cognizable legal right or pleads facts wholly inconsistent with the legal right claimed.

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[4] As for the first category, the legal theory upon which Carrier's Sherman Act claim is based has not been foreclosed by prior decisions. Claims are dismissed because of foreclosure only where there is a prior controlling authority on the precise legal issue raised by the complaint. *See, e.g.*, *Hagans*, 415 U.S. at 1380-82 (reversing dismissal because although the Supreme Court had previously rejected an equal protection challenge to a similar state welfare regulation, the prior decision did not foreclose all equal protection challenges to all other social welfare regulations); *Griffith v. Bell-Whitley Cmty. Action Agency*, 614 F.2d 1102, 1106 (6th Cir. 1980) (finding lack of jurisdiction to subject the defendant to mandamus order because prior precedent held that the Administrative Procedures Act did not apply to defendant, but reversing dismissal of constitutional claims because case law did not squarely foreclose whether defendant could be considered a state actor).

For example, in *Apple v. Glenn*, 183 F.3d 477 (6th Cir. 1999), the plaintiff filed a *pro se* lawsuit alleging that his First Amendment right to petition the government for the redress of grievances was violated when various government officials, including Senator John Glenn and Chief Justice William Rehnquist, failed to respond to his correspondence and to take action upon his requests. *Id.* at 478-79. This Court held that the plaintiff's complaint could be dismissed, without affording the plaintiff an opportunity to amend his complaint, because the plaintiff's claims were so frivolous, attenuated and unsubstantial as to deprive the Court of subject matter jurisdiction. *Id.* at 479. It held that "when a district court is faced with a complaint that appears to be frivolous and unsubstantial in nature, dismissal under Rule 12(b)(1) (as opposed to Rule 12(b)(6)) is appropriate in only the rarest of circumstances where . . . the complaint is deemed totally implausible." *Id.* at 480. Such was the case in *Apple* because the complaint was "founded completely on a mistaken reading" of the First Amendment to "guarantee a response to the petition [to a government official] or the right to compel government officials to act or adopt a citizen's views." *Id.* Thus, on its face, the complaint failed to state a cognizable right.[5]

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[5] This Court has recently distinguished the "utter implausibility" of the plaintiff's claims in *Apple* with a claim that merely appeared to lack factual

(continued…)

In *Newburyport Water Co. v. City of Newburyport*,[6] the Supreme Court found subject matter jurisdiction lacking where the facts pled were wholly inconsistent with the federal right claimed by the plaintiff. 193 U.S. 561, 577, 579 (1904). The plaintiff water company filed suit in federal court alleging that a state statute allowing it to sell a plant to the City of Newburyport, if the water company voluntarily chose to do so, effectuated a deprivation of property without due process in violation of the Fourteenth Amendment and the Contract Clause. The Supreme Court found the claim "so attenuated and unsubstantial as to be absolutely devoid of merit" because, on the face of the complaint, it was clear that the statute conferred a benefit upon the water company, rather than a taking, by

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support. *Wagenknecht v. United States*, 533 F.3d 412, 417-418 (6th Cir. 2008). In *Wagenknecht*, this Court reversed the district court's dismissal under Rule 12(b)(1) where the plaintiff alleged that an IRS levy based on unpaid past civil penalties was improper and alleged only that he "'has reason to believe that the Civil Penalty(s) for 1994, 1995, and 1996 have been paid.'" *Id.* at 418 (citation omitted). This Court held this allegation sufficient under Rule 12(b)(1), finding that "[w]hile this claim may ultimately be found to lack merit, it is not so 'totally implausible, attenuated, unsubstantial, frivolous, devoid of merit, or no longer open to discussion' to warrant *sua sponte* dismissal." *Id.* at 418 (quoting *Apple*, 183 F.3d at 479).

6 The District Court below cited *Newburyport* in its Order for the proposition that "federal courts may not entertain claims otherwise within their jurisdiction if they are so attenuated and unsubstantial as to be absolutely devoid of merit." (R. 93, Order p. 8, Apx. p. 0928.) (internal quotations and citations omitted).

allowing the water company, at its option, to compel the city to purchase the plant. *Id.* at 579. Because the statute did not compel the water company to sell, it was obvious that there was not a taking that could form a colorable federal claim, and the Supreme Court remanded for dismissal for lack of subject matter jurisdiction. *Id.*

In contrast to the outcomes in *Apple* and *Newburyport*, the Supreme Court found an antitrust claim plausible in *Hart v. B.F. Keith Vaudeville Exch.*, 262 U.S. 271 (1923). The plaintiff alleged that owners of various vaudeville theaters had conspired in violation of Section 1 to exclude actors represented by the plaintiff unless the plaintiff complied with particular conditions of the theater owners, including paying exorbitant fees. *Id.* at 272. The plaintiff further alleged that the vaudeville theaters were engaged in interstate commerce because the actors who performed in the theaters traveled from various states and transported the tools necessary for their job in interstate commerce. *Id.* at 272-73.

The district court dismissed the plaintiff's complaint for lack of subject matter jurisdiction on the ground that an actor's performance did not constitute interstate commerce. In the Supreme Court's view, however, the issue of whether interstate commerce existed was an issue to be decided on the merits, rather than a jurisdictional question. The Court observed that "when a suit is brought in a federal court and the very matter of the controversy is federal it cannot be

dismissed for want of jurisdiction however wanting in merit may be the averments intended to establish a federal right." *Id.* at 273-74. The Court further distinguished this rule from jurisdictional dismissals like that in *Newburyport*, when the claim is "absolutely devoid of merit," by "confining the latter to those that are very plain." *Id.* at 274; *see also Binderup v. Pathe Exch.*, 263 U.S. 291, 305 (1923) (reversing lower court's dismissal of an antitrust claim and holding that "[j]urisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven.").

Consistent with the rulings in *Hart* and *Binderup*, Carrier's allegations meet the minimal level of "substantiality" required to support federal subject matter jurisdiction under the Sherman Act. There is nothing apparent from the face of the Complaint that renders Carrier's legal theory implausible like those alleged in *Apple* and *Newburyport*; instead, the District Court's ruling was premised on an inappropriate weighing of the truth of Carrier's allegations, not any question of whether the acts alleged would, if true, violate Section 1. The District Court therefore erred in dismissing Carrier's claims as "wholly insubstantial" under Rule 12(b)(1).

C. The District Court Erred by Failing to Limit its Examination to the Face of Carrier's Complaint and to Presume That the Allegations in the Complaint Are True

In accordance with the precedent discussed above, the question of whether a claim is too insubstantial to establish federal jurisdiction is not a question of whether there are sufficient facts to support the claim, but rather a question only of "whether there is any legal substance to the position the plaintiff is presenting." *Primax Recoveries, Inc. v. Gunter*, 433 F.3d 515, 519 (6th Cir. 2006) (quoting 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3564 (2d ed. 1984)).[7] Therefore, a court may look at only the face of the plaintiff's complaint to determine whether a federal claim is sufficiently substantial to establish federal jurisdiction. *See Giulini v. Blessing*, 654 F.2d 189, 192 (2d Cir. 1981); *Grinter v. Petroleum Operation Support Serv.*, 846 F.2d 1006, 1008 (5th Cir. 1988). The court may neither resort to facts or evidence outside the four corners of the complaint, *see Giulini*, 654 F.2d at 192, nor "prejudge the facts alleged in the complaint" and make its own independent determinations of jurisdictional facts. *See Kulick v. Pocono Downs Racing Ass'n*, *Inc.,* 816 F.2d 895, 898-99 (3d Cir. 1987).

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[7] *Accord Musson Theatrical*, 89 F.3d at 1248 (stating that a plaintiff can survive a challenge to its federal claims as insubstantial as long as there is an arguable basis in law for the claims asserted).

The District Court failed to follow this limited scope of review. It based its conclusion that Carrier's claims were "wholly insubstantial" on its finding that Carrier's allegations were "without any factual basis whatsoever." (R. 93, Order p. 8, Apx. p. 0928.) In making this finding, the District Court disregarded the presumption of truthfulness that applies to a plaintiff's allegations by invoking its power under Rule 12(b)(1) to look beyond the four corners of the complaint to resolve disputed jurisdictional facts. (*Id.* p. 9, Apx. p. 0929) (citing *Rogers v. Stratton Indus.*, 798 F.2d 913, 915-16 (6th Cir. 1986)). By characterizing its inquiry as jurisdictional, it believed it was not bound by Rule 12(b)(6)'s restriction on a court's power to evaluate the evidence in support of a plaintiff's claims at the motion to dismiss stage.

There is good reason, however, to limit the kind of expansive jurisdictional review employed by the District Court. If a court could apply the "wholly insubstantial" standard to question whether the plaintiff's claim alleged a sufficient factual basis, the exception to the *Bell v. Hood* rule of presumed jurisdiction of a federal cause of action would easily swallow the rule. The merits of the case could be resolved as an issue of jurisdiction, precisely the situation *Bell v. Hood* sought to avoid. Indeed, as this Court has recently held, a federal court's power to resolve issues of jurisdictional fact does not extend to facts that would not only establish jurisdiction, but would also support or undermine an element of the plaintiff's

claim. *See Gentek Bldg. Prods., Inc. v. Steel Peel Litig. Trust*, 491 F.3d 320, 330-31 (6th Cir. 2007). Therefore, although a district court is empowered in some situations to make its own determinations of facts to resolve the question of subject matter jurisdiction, a district court may not engage in such fact-finding in the course of determining whether the plaintiff's claims are "wholly insubstantial."

For example, the Third Circuit in *Kulick* reversed the district court for using findings of fact made in a preliminary injunction hearing to conclude that it lacked subject matter jurisdiction over the plaintiff's claim. 816 F.2d at 897-99. In *Kulick*, the plaintiff, a horse owner, sued the Pocono Downs Racing Association under § 1983 and sought a preliminary injunction after the latter expelled the plaintiff from a race track, claiming that Pennsylvania's regulation of horse racing was sufficient to make Pocono Downs a state actor. After holding an evidentiary hearing on the preliminary injunction, the district court dismissed the plaintiff's complaint for lack of subject matter jurisdiction on the grounds that the evidence did not support the plaintiff's state action allegation.

On appeal, the Third Circuit stated that because the state action issue related to the merits of the plaintiff's claim, the district court could dismiss the claim for lack of jurisdiction only if it was wholly insubstantial and frivolous. *Id.* at 898. The Third Circuit concluded that the district court improperly used its findings of fact from the preliminary injunction hearing in dismissing claims on jurisdictional

grounds as "wholly insubstantial," finding that this exception to subject matter jurisdiction does "not permit a court to prejudge the facts alleged in the complaint, . . . for a court may dismiss for lack of jurisdiction only if claims are 'insubstantial on their face.'" *Id.* (quoting *Hagans*, 415 U.S. at 542 n.10). In the Third Circuit's opinion, the complaint was not "legally frivolous," and the district court therefore had subject matter jurisdiction over the claim. *Id.* at 899.

The District Court below made an error similar to that in *Kulick* by prejudging the facts alleged by Carrier in support of its Section 1 claim. And here, unlike *Kulick*, the District Court did not even have the benefit of fact findings from an evidentiary hearing.

Thus, under *Bell v. Hood*, the District Court should have assumed jurisdiction over Carrier's Section 1 claim. Because facts regarding the existence of a United States or global conspiracy are directly relevant to the merits of Carrier's Section 1 claim, the District Court was not permitted to disregard the presumptive truthfulness of Carrier's allegations and make its own factual determinations by characterizing these facts as jurisdictional. *See Gentek*, 491 F.3d at 330-31; *Williamson*, 645 F.2d at 416 n.10. When Carrier's allegations are given the presumption of truthfulness and analyzed under the standard appropriate

under 12(b)(6),[8] it is clear, as explained in Section II *infra*, that Carrier has adequately alleged a violation of Section 1.

II. THE DISTRICT COURT ERRED IN DISMISSING CARRIER'S COMPLAINT PURSUANT TO RULE 12(b)(6)

In its 12(b)(6) ruling, the District Court relied exclusively on the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) – a decision issued after Carrier filed its Complaint and after briefing was complete on Defendants' motions to dismiss. While *Twombly* articulated a "plausibility" requirement at the pleading stage, it did not alter the liberal Rule 8 notice pleading standard. A plaintiff still must allege only "enough factual matter" to give a defendant "'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 1964 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Here, Carrier has set forth allegations of the existence of anticompetitive meetings and agreements among the Defendants and their co-conspirators that caused Carrier to pay supra-competitive prices for ACR Copper Tubing, as well as facts plausibly linking this anticompetitive behavior to a conspiracy that included at

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[8] *Cf.* *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (addressing the question of whether a complaint adequately pled an effect on interstate commerce under the 12(b)(6) standard); *accord Kulick*, 816 F.2d at 898 (citing *McLain* for the proposition that the question of whether anticompetitive activity affects interstate commerce is an element of a Sherman Act claim, even though it relates to Congress' jurisdiction under the Constitution).

least the United States and Europe. These allegations provide Defendants with fair notice as to the basis for Carrier's claims. *Twombly* requires no more. Accordingly, this Court should reverse the District Court's dismissal of Carrier's Complaint.

A. *Twombly* Did Not Impose a Heightened Pleading Standard, But Rather Reaffirmed Rule 8's Notice Pleading Requirements

Twombly made clear that courts are not to apply a "heightened" pleading standard to antitrust complaints and affirmed the basic principle of notice pleading that under Rule 8(a)(2), a complaint must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." 127 S. Ct. at 1973-74 & n.14.

In the wake of *Twombly*, opinions of the Supreme Court and Courts of Appeals – including this Court – have reaffirmed this traditional pleading standard. *See, e.g., Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007) ("Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'") (quoting *Twombly*, 127 S. Ct. at 1964); *Lindsay v. Yates*, 498 F.3d 434, 440 n.6 (6th Cir. 2007) (noting that *Erickson* "reaffirmed" Rule 8(a)'s "short and plain statement" requirement); *Wysong v. Dow Chemical Co.*, 503 F.3d 441, 446 (6th Cir. 2007) (explaining that "a complaint need only provide 'the defendant [with] fair notice of what the . . .

claim is and the grounds upon which it rests.'") (citing *Erickson*, 127 S. Ct. at 2200); *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc,* 525 F.3d 8, 15 & n.3 (D.C. Cir. 2008) ("We conclude that *Twombly* leaves the long-standing fundamentals of notice pleading intact."); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008) ("We also have cautioned, however, that *Bell Atlantic* 'must not be overread'. . . . [T]he Court in *Bell Atlantic* made clear that it did not, in fact, supplant the basic notice-pleading standard.") (citations omitted); *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007) ("*Twombly* did not signal a switch to fact-pleading in the federal courts."). As the Seventh Circuit has concluded, "[t]aking *Erickson* and *Twombly* together, we understand the [Supreme] Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." *Airborne Beepers & Video, Inc.*, 499 F.3d at 667.

The genesis of the *Twombly* plaintiffs' problem in satisfying Rule 8's notice pleading requirement was that the complaint failed to allege *any* particular meetings or communications among the defendants linked to cartel behavior and instead relied "exclusively [on] allegations of parallel conduct." 127 S. Ct. at 1971 n.11; *see also id.* n.10 ("the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies."). Established Supreme Court jurisprudence

recognizes that evidence of "parallel business conduct" among alleged co-conspirators is, by itself, ambiguous because it is "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 1964. The central issue in *Twombly*, therefore, was "whether a §1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical independent action." *Id.* at 1961.

The Supreme Court answered this question by holding that a complaint need not allege evidentiary facts proving its claims, nor even demonstrate that recovery was "probabl[e]." *Id*. Rather, as applied to a Section 1 claim, the Supreme Court adopted a "plausibility" standard that requires a complaint to allege "enough factual matter (taken as true) to suggest that an agreement was made" to create "a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id*. It further explained that "asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage", *id*., and determined that "a well-pled complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" 127 S. Ct. at 1965 (quoting *Scheuer v. Rhodes*, 416 U.S.

232, 236 (1974)). In fact, the Supreme Court repeatedly made clear that it was not imposing a "'heightened' pleading standard." *Id.* at 1973 n.14; *id.* at 1974.

With respect to the particular complaint before it, the Supreme Court determined that "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 1966. Thus, it observed that an "an allegation of parallel conduct . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Id.* (quoting *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999)).

B. Carrier's Complaint Satisfies *Twombly's* Plausibility Standard.

Carrier's Complaint – which is nothing like that in *Twombly* – adequately states a Section 1 claim and satisfies the Rule 8 standard explained in *Twombly*. The Complaint provides sufficient factual context that makes the existence of a cartel plausible and provides Defendants with fair notice of the basis for Carrier's claim, rather than relying on mere allegations of parallel conduct. Carrier has alleged various meetings and communications reflecting the existence of a cartel aimed at large multi-national purchasers like Carrier, and has plausibly demonstrated that this anticompetitive conduct affected Carrier's sales in the

United States through factual allegations that (1) a global market for ACR Copper Tubing exists; (2) major buyers and sellers of ACR Copper Tubing are global companies that make decisions on a global basis, including Defendants' high-level executives who are alleged to have been involved in cartel meetings; and (3) pricing patterns and the cartel participants' market behavior in the United States show that the anticompetitive agreements were not limited to the E.U. Carrier therefore satisfies *Twombly's* requirements.

1. The Complaint Pleads Specific Conspiratorial Meetings for the Purpose of Price Fixing and Market Allocation.

In absolute contrast to the complaint in *Twombly*, Carrier's Complaint provides the Defendants with ample notice of time, place and participants involved in the conspiracy alleged. It contains extensive allegations of specific meetings and communications in furtherance of the cartel. (R. 46, Am. Compl. ¶ 76-96, Apx. pp. 0045-48.) These allegations provide ample details concerning the Defendants' practice of engaging in anticompetitive cartel behavior, rather than lawfully competing, and are the type of factual allegations of cartel activity that were absent from the complaint in *Twombly*. *See In re Hypodermic Prod. Antitrust Litig.,* No. 05-CV-1602, 2007 WL 1959224, at *14 (D.N.J. June 29, 2007) (denying motion to dismiss based on allegations of specific agreements and distinguishing the complaint in *Twombly* as seeking "to demonstrate anti-

competitive agreements based on parallel conduct through *inference*") (emphasis in original).

The District Court may have disregarded these allegations based on its view that the E.C. ACR Decision "nowhere implies that the cartel extended beyond the European market." (R. 93, Order, at 7, Apx. p. 0927.) In doing so, the District Court looked beyond the allegations of the complaint to analyze underlying evidence of cartel activity, which, as discussed in Section I above, is not appropriate under Rule 12(b)(6). *See, e.g., Inge v. Rock Financial Corp.,* 281 F.3d 613, 619 (6th Cir. 2002) (finding that on a motion to dismiss, "[w]e must accept all well-pled factual allegations of the complaint as true and construe the complaint in the light most favorable to the plaintiff") (citing *Turker v. Ohio Dep't of Rehab. & Corr.*, 157 F.3d 453, 456 (6th Cir. 1998)).

Moreover, the District Court drew erroneous conclusions from the E.C. ACR Decision. The E.C. ACR Decision did *not* find that the conspiracy was limited to the E.U., as the District Court determined. (R. 93, Order p. 7, Apx. p. 0927.) That issue was not even before the E.C.; it was concerned only with conduct within its jurisdiction and focused its investigation accordingly. Indeed, as the E.C. unequivocally stated, "[i]nsofar as the activities of the cartel related to sales in countries that are not members of the [E.U.] . . . they lie outside the scope of this Decision." (R 55.4, E.C. ACR Decision, ¶ 229, Apx. p. 0332.)

The District Court also misconstrued Carrier's allegations in finding that they were undermined by the E.C.'s finding that "'[f]rom 1998 onwards, the discussions concerned *only* the 70 largest European customers.'" (R. 93, Order p. 7, Apx. p. 0927.) (emphasis in original). To the contrary, this finding supports the cartel alleged in this case. Because (1) Carrier is one of the largest manufacturers of air-conditioning and commercial refrigeration equipment in Europe, and (2) the E.C. found that the cartel targeted "the 70 largest European customers" and "key customers," simple deduction compels the conclusion that Carrier "was a principal target of the cartel." (R. 46, Am. Compl. ¶ 3, Apx. p. 0021.) But Carrier does not, as the District Court found, contend that this finding *alone* "implies that the cartel extended beyond the European market", (R. 93, Order p. 7, Apx. p. 0927); instead, these findings demonstrate that Carrier was a target of the cartel, and they provide critical context in which to judge Carrier's claim that the conspiracy was not limited to the E.U.

In addition, other findings by the E.C. *do* support an inference that the cartel was not limited to the E.U. Despite its focus on conduct within its jurisdictional reach, the E.C.'s investigation unearthed an internal Outokumpu document that revealed a "global" agreement with respect to customer allocation. It stated: "[…] is 'our client' and will also keep it. If […] goes along with the 'Global Agreement,' we will have to take it." (R.46, Am. Compl., ¶ 4, Apx. p. 0021.)

Carrier respectfully submits, therefore, that the E.C. ACR Decision supports the plausibility of the cartel alleged by Carrier. The E.C.'s factual findings provide ample evidence that the Defendants had the motive, opportunity, and intent to engage in anticompetitive behavior – all of which are "[i]mportant factors to evaluate" in determining whether a conspiracy existed. *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999); *see also Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1168 (6th Cir. 1995) (finding that "product uniformity, exchange of price information and opportunity to meet, and a common motive to conspire or a large number of communications" are "plus factors" to demonstrate the existence of a conspiracy) (citations omitted); *In re Static Random Access Memory ("SRAM") Antitrust Litigation*, 580 F. Supp. 2d 896, 901 (N.D. Cal. 2008) (finding that competitor communications evidencing price information exchanges "support an inference of a conspiracy"). The fact that the E.C. uncovered evidence of a "Global Agreement" only further underscores the plausibility of Carrier's allegations.

Accordingly, the E.C. ACR Decision in no way precludes the plausibility of a conspiracy extending beyond Europe and into the United States.[9]

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[9] The District Court similarly erred to the extent it justified its Rule 12(b)(6) dismissal based on its judgment that the Complaint lacked "credibility" because of its inclusion of allegations regarding cartel activity relating to another different but

(continued…)

2. The Complaint Alleges an ACR Copper Tubing Market in Which Europe and the United States Are Closely Intertwined.

The District Court also erred by failing to consider Carrier's allegations regarding the interrelationship between ACR Copper Tubing sales in the United States and Europe. This global nature of the market further underscores the "plausibility" that Defendants' anticompetitive behavior extended to the United States.

(continued)

related product – copper plumbing tubes. (R. 93, Order p. 7, Apx. p. 0927.) Carrier's allegations with regard to the Mueller's activities in the plumbing tube cartel are relevant to this case. The E.C. found Mueller Industries guilty of cartel participation in its plumbing tube investigation, and *all* of the same companies involved in the ACR Copper Tubing cartel were involved in the plumbing tube cartel. It is entirely reasonable to believe – as Carrier alleges (R. 46, Am. Compl. ¶ 37, Apx. p. 0034) – that Mueller's criminal enterprise was not limited to plumbing tubes because "[d]irect evidence of other crimes, wrongs or acts is admissible to prove motive, opportunity, intent." *United States v. Andreas*, 23 F. Supp. 2d 835, 846 (N.D. Ill. 1998); *see also In re SRAM Antitrust Litig.*, 580 F. Supp. 2d at 903 (finding that evidence that alleged conspirators who marketed two products and admitted price-fixing as to one product "support[ed] an inference" of conspiracy as to the second product). Indeed, "the fact that the government chose to divide the conspiracy into separate parts does not in any way support the defendant's position that there could not have been a single overarching conspiracy." *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 1475705, at *11 n.13 (D.D.C. May 9, 2000) ; *see also id.*, at *11 (observing that "[t]he antitrust statutes expressly recognize that private plaintiffs may allege a conspiracy different in some respects from the conspiracy previously alleged by the government") (citing 15 U.S.C. § 16(i) (2008), and *Leh v. General Petroleum Corp.*, 382 U.S. 54, 65-66 (1965)).

The geographic scope of a relevant market is generally defined by "the area in which the seller operates and to which the purchaser can practically turn for supplies." *United States Steel Corp. v. FTC*, 426 F.2d 592, 596 (6th Cir. 1970); *see also Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768, 782 (6th Cir. 2002). Here, the Complaint alleges that large purchasers like Carrier can practically turn to foreign sources of supply to meet their ACR Copper Tubing needs in the United States and Europe. (*See* R. 46, Am. Compl. ¶¶ 50-51, 59-61, Apx. pp. 0038, 0041-0042.) The Complaint alleges a limited source of supply during the conspiracy period for large purchasers of quality ACR Copper Tubing in the United States and Europe. Three cartel members – Outokumpu, KME and Wieland – were the largest suppliers of ACR Copper Tubing in the world and, at the time, the only practical sources of supply for Carrier. (*Id.* ¶ 5, Apx. p. 0022.) As further alleged in the Complaint, "[t]he 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." (*Id.* ¶ 51, Apx. p. 0038.) The Complaint supports these assertions with specific examples where ACR Copper Tubing was imported and/or purchased from one continent for import into another continent. (*See, e.g., id.* ¶ 22, Apx. pp. 0027-28) (alleging imports by Outokumpu Copper from Finland for sale to customers in the United States); *id.* ¶ 51, Apx. p. 0038) (alleging sales by cartel member Tréfimétaux in

Europe to ICP, a company now part of Carrier, in the United States, and purchases by Carrier France and Carrier Italia from Outokumpu in the United States).) Thus, the Complaint sufficiently pleads a global market. *See United States v. Eastman Kodak Co.*, 63 F.3d 95, 105 (2d Cir. 1995) (finding a worldwide market because foreign producers competed with United States companies, and United States purchasers turned to foreign sources of supply); *Hudson's Bay Co. Fur Sales Inc. v. Am. Legend Coop.*, 651 F. Supp. 819, 837 (D.N.J. 1986) (finding a worldwide market where there existed "a clear cross-elasticity of demand and a reasonable interchangeability among fur pelts produced in the United States and in foreign countries").

Europe – according to Defendants' own admissions in the course of the E.C. investigation – was tainted by the cartel's anticompetitive arrangements for over a decade. In an interrelated marketplace for ACR Copper Tubing, purchasers in Europe would have looked to the United States for sources of supply. Accordingly, for the cartel to succeed, members *had* to engage in conduct across both continents to ensure the success of the illegal arrangement in Europe. As the Complaint alleges, "[p]rice movements in each sales region were inextricably linked to all other regions so that the prices charged to Carrier by Defendants and their co-conspirators in one country had a direct, substantial, and foreseeable effect

on prices charged to Carrier in another country." (R. 46, Am. Compl. ¶ 59, Apx. p. 0041.)

This is precisely the type of plausible cartel allegations envisioned post-*Twombly* by the Second Circuit in *In re Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir. 2007) ("*Elevator*"). The plaintiffs in *Elevator* represented a putative class of direct purchasers of elevators and/or elevator maintenance and repair services who alleged that the defendant elevator companies engaged in a cartel in violation of the Sherman Act, based primarily on public information regarding investigations by competition authorities in Europe. *Id.* at 49. The Second Circuit held, in accordance with *Twombly's* plausibility standard, that "[a]llegations of anticompetitive wrongdoing in Europe," standing alone, are not sufficient to state a conspiracy involving the United States "absent any evidence of linkage between such foreign conduct and conduct here." *Id.* To demonstrate this "linkage," the plaintiffs in *Elevator* generally alleged that the market for elevators and elevator maintenance and repair services was global. *Id.* at 52. But, to survive a motion to dismiss, the Second Circuit expected further contextual allegations about matters such as (1) "global marketing or fungible products," (2) "participants monitor[ing] prices in other markets," or (3) "actual pricing of elevators or maintenance services in the United States or changes therein attributable to defendants' alleged misconduct." *Id.*

These are precisely the type of factual allegations present in Carrier's Complaint. The Complaint alleges specific details and examples of global marketing and fungible products, monitoring of prices in other continents, and pricing and customer allocation in the United States attributable to the cartel's conduct. As recognized in *Elevator,* therefore, these allegations combined with extensive allegations of anticompetitive meetings should satisfy *Twombly's* pleading requirements. The District Court erred in essentially ignoring these well-pled facts.

3. The Complaint Alleges a Market in Which Selling and Purchasing Decisions Are Made on a Global Basis.

The Complaint alleges that major players in the ACR Copper Tubing market – both buyers and sellers – had global operations and generally viewed this market from a global perspective. Many of the largest purchasers of ACR Copper Tubing are multinational corporations that buy product all over the world. (R. 46, Am. Compl. ¶ 59, Apx. p. 0041.) Carrier is the prototypical example. Plaintiff Carrier Corporation, based in Connecticut, is the parent company of a worldwide network of affiliated entities that produce heating, ventilating, and air-conditioning ("HVAC") systems and refrigeration and food service equipment throughout the world. (*Id.* ¶ 15, Apx. p. 0025.) During the conspiracy period, Carrier's Connecticut headquarters in the United States had a centralized, worldwide

purchasing operation that managed purchasing strategy for ACR Copper Tubing on a global basis, looking for the best price possible from wherever product could be obtained. The Connecticut-based purchasing department would collect global pricing data for use in negotiating contracts with suppliers located throughout the world (*Id.* ¶ 60, Apx. pp. 0041-42.)

Defendants, for their part, took the same global approach with regard to their operations. Throughout the conspiracy period, Outokumpu marketed itself as an integrated and unified global copper enterprise. (*Id.* ¶ 29, 31, Apx. pp. 0030-31.) The global business strategy was reflected in a pervasive overlap between Outokumpu's key executives in the United States and Europe. (*Id.* ¶ 27, Apx. pp. 0029-30.) The overlap was so widespread that Carrier itself witnessed Outokumpu's institutional policy of executive rotation, observing over time that key Outokumpu management personnel were rotating between Outokumpu's Finnish and American entities. (*Id.* ¶ 30, Apx. p. 0031.)

Mueller began a similar process of globalizing its business in 1997 when it acquired Wednesbury Tube Company in Great Britain and Desnoyers S.A. in France, whose names Mueller later changed to Mueller Europe Ltd. and Mueller Europe S.A., respectively. (*Id.* ¶ 35, Apx. pp. 0032-33.) Mueller and its two European subsidiaries acted as a single, international enterprise in similar fashion to Outokumpu, sharing information and jointly managing the cartel activities of

Mueller. (*Id.* ¶ 38, Apx. pp. 0034-35.) The E.C.'s decision concerning plumbing tubes further revealed joint complicity of the different Mueller entities and their failure to maintain separate corporate boundaries when it came to cartel activity:

> [T]he Commission considers that the facts demonstrate that Mueller Europe Ltd. (formerly Wednesbury) and Mueller S.A. (formerly Desnoyers) participated jointly in the infringement. Often, they were represented by business leaders of either of the two companies and co-ordinated their participation. Thus, they were necessarily aware of each other's illegal behaviour throughout the entire period of the infringement. When the companies of the same group all manufacture the cartelized product and furthermore participate in the same cartel, it is hardly conceivable that each of them would conduct its own autonomous policy on the market of the product in question and make independent decisions with regard to competitively sensitive issues, in particular, prices, sales and production volumes. This finding is not contested by Mueller.

(*Id.*) U.S.-based Mueller Industries was in firm control of its European subsidiaries. It operated Mueller Europe as an internal operating division, not as an independent subsidiary. (*Id.* ¶ 36, Apx. p. 0033.) Management of Mueller Industries and Mueller Europe are highly intertwined, and officers of Mueller Industries also serve as officers and directors of Mueller Europe. (*Id.*) Mueller Industries was also an active participant in illicit cartel meetings with Outokumpu, Wieland and KME. (*Id.* ¶ 37, Apx. p. 0034.)

Centralized, global coordination of the cartel was ensured by the involvement of executives at the highest level of the parent companies. In

Outokumpu's case, for example, the conspiracy was not confined to participants who only managed their business operations within the E.U. Rather, it was handled in many instances by executives of the parent companies, Outokumpu Oyj and Outokumpu Copper, who had responsibility for Outokumpu's global business operations. (*Id.* ¶¶ 26-27, Apx. pp. 0029-30; *see also* R. 55.4, E.C. ACR Decision ¶ 243, Apx. p. 0335) (finding that "the chief executive officer of Outokumpu Oyj had meetings and contacts with the vice president of Europa Metalli in 1993 to discuss the market situation in copper and copper alloy semis. He also intervened to suggest meetings between [Outokumpu Copper] and Europa Metalli's management."); *id.* ¶¶ 40, 42, Apx. p. 0290 (KME management board was "informed of the outcome of the discussions" at Cuproclima meetings; the board included its Chairman who "has the responsibility of the global business").)

This global market perspective shows that the cartel did not limit its focus only to Europe. Because of the global dynamics of the ACR Copper Tubing market as described in the previous section, it would have been difficult – if not impossible – for Defendants' to do otherwise. The global approach of Carrier and similarly situated victims would have undermined the ability of a cartel to operate only in Europe. Consequently, as Carrier plausibly alleges, the conspirators had to design global account management to assure price continuity across Carrier's worldwide locations, and jointly agree to a global business strategy as to Carrier.

These anticompetitive agreements affected the United States. Again, the District Court failed to account for these well-pled allegations, which further demonstrate the sufficiency of Carrier's claims.

4. The Pattern of Customer Allocation and Price Increases Prevalent in Europe Also Occurred in the United States During the Conspiracy Period.

The Complaint alleges anticompetitive conduct reaching into the United States. The cartel agreed to allocate to Outokumpu Carrier's business in the United States, and to other co-conspirators Carrier's business in the E.U. (*Id.* ¶ 4, Apx. p. 0021.) As a result, Outokumpu accounted for the vast majority of Carrier's ACR Copper Tubing purchases within the United States, and co-conspirators KME and Wieland were Carrier's primary ACR Copper Tubing supplier in Europe. (*Id.* ¶¶ 4, 19, Apx. pp. 0021, 0026-27.) The cartel executed this unlawful market division arrangement by either refusing to bid for Carrier's business or submitting non-competitive proposals when Carrier requested a bid from a supplier that was not allocated Carrier's business. (*Id.* ¶ 4, Apx. p. 0021.) As a prime example, even though Outokumpu comprised one of the largest ACR Copper Tubing manufacturers in Europe (and globally) and had a strong business relationship with Carrier through its extensive business supplying Carrier's ACR Copper Tubing needs in the United States, it failed to compete meaningfully for Carrier's business in Europe during the conspiracy period. (*Id.*) Likewise, capable

suppliers were not meaningfully competing for Carrier's business in the United States even though (absent a cartel) it was in their economic self-interest to do so. (*Id.*)

These allegations reflect a plausible cartel sufficient to state a Section 1 claim. As the Supreme Court observed in *Twombly* itself, "[i]n a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement . . ." 127 S. Ct. at 1972; *see also In re Pressure Sensitive Labelstock Antitrust Litig.,* 566 F. Supp. 2d 363, 372 (M.D. Pa. 2008) (finding that "allegations of observed conduct – actual forbearance from competition for customers, parallel price increases, and excess production capacity – are placed among other factual allegations that plausibly suggest a preceding agreement").

Moreover, the cartel members' market behavior *after* the conspiracy appears to have concluded further demonstrates the existence of anticompetitive agreements affecting the United States. As the Complaint alleges, starting in 2003 – near the time of the issuance of the E.C.'s Decision – an appreciable increase in competition occurred in the United States among the cartel members. Wieland and KME began aggressively and competitively pursuing Carrier's ACR Copper Tubing business in the United States, and Wieland more broadly turned its

attention to the United States through establishment of a joint venture in the United States with Kobe Steel. (R. 46, Am. Compl. ¶ 7, Apx. pp. 0022-23.)

The goal and effect of the cartel was not limited to customer allocation. Rather, it sought to increase prices paid by Carrier in the United States through the elimination of price differentials between prices in Europe and in the United States. (*Id.* ¶ 62, Apx. p. 0042.) As a consequence, prices rose in parallel to the supra-competitive price increases occurring in Europe. (*Id.* ¶ 101(d), Apx. p. 0050.) The parallel pattern of pricing is further indicative of the existence of a cartel not only in Europe but in the United States. (*Id.* ¶ 111, Apx. p. 0055.)

Thus, both pricing data and the cartel member's market behavior indicate that the cartel was not limited to the E.U. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 34 (D.D.C. 2008) (finding that a change in defendants' market behavior consistent with the conspiracy alleged "make the inference that an agreement among defendants occurred . . . even more plausible").

5. Viewed as a Whole, Carrier's Allegations Plausibly Suggest the Existence of the Cartel Alleged.

Put together, Carrier's allegations contain "enough factual matter" to plausibly state a Section 1 claim. *See In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d at 371 (finding as "more than adequate to give fair notice" allegations that the defendants failed to compete for each other's customers in a period of excess industry capacity); *City of Moundridge v. Exxon Mobil Corp.*, 250

F.R.D. 1, 5 (D.D.C. 2008) (finding a plausible Section 1 conspiracy based on "circumstantial evidence" concerning prices and supply in the marketplace, and allegations identifying "the years and locations where the agreement was reached and the defendants who participated").

The Complaint is "not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). And while each individual allegation described above may not alone suffice to state a claim, "[s]eemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place. Evidence can take on added meaning when viewed in context with all the circumstances surrounding a dispute." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 255 (2d Cir. 1987). Here, as "background," we have voluminous evidence of Defendants' illicit meetings held for the purposes of forming a cartel directed at large ACR Copper Tubing purchasers like Carrier. These meetings and their nature are adequately alleged in the Complaint, sharply distinguishing this case from the factual setting in *Twombly*. Moreover, Carrier alleges additional facts, as described above, that demonstrate the plausibility of its Sherman Act claim. *See Hyland v. Homeservices of Am., Inc.*, No. 05-612, 2007 WL 2407233, at *3 (W.D. Ky. Aug. 17, 2007) (denying motion to dismiss because price-fixing claims were

supported by allegations that, *inter alia*, DOJ brought enforcement actions, certain defendants admitted price-fixing, the defendants exchanged price information, and market evidence suggested the existence of a conspiracy); *Behrend v. Comcast Corp.*, No. 03-6604, 2007 WL 2221415, at *5 (E.D. Pa. Aug. 1, 2007) (finding that "factual descriptions of the parties, their roles as competitors in the geographic markets, when the agreements were completed, and how the terms thereof allegedly eliminated competitors" in the relevant geographic markets were sufficient to state a plausible § 1 conspiracy).[10]

Carrier's Complaint therefore satisfies the pleading requirements of *Twombly.* It offers factual allegations that "reference . . . the 'who, what, where, when, how [and] why.'" *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008); *see also In re*

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[10] *See also In re Hypodermic Prod. Antitrust Litig.*, 2007 WL 1959224, at *14 (D.N.J. June 29, 2007) (denying motion to dismiss because, in contrast to the allegations in *Twombly*, the complaint "sets forth allegations of specific anti-competitive agreements [between the alleged conspirators] which the Court deems as providing Defendant with adequate notice of the particular grounds upon which Plaintiffs' claims rest, particularly given the fact that Plaintiffs have not yet had the benefit of discovery"); *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419, at *5 (E.D. Pa. Aug. 3, 2007) (finding that evidence of parallel business conduct by the alleged conspirators "taken in combination with Plaintiffs' explicit allegations of Defendants' agreement to fix prices through [specific public price lists], and their price-fixing discussions during industry events . . . is certainly 'enough to raise a right to relief above the speculative level.'") (quoting *Twombly*, 127 S. Ct. at 1966)).

Southeastern Milk Antitrust Litig., 555 F. Supp. 2d 934, 942 (E.D. Tenn. 2008) (denying motion to dismiss because "[t]he complaints adequately state facts which address the question of who, what, when, and where and gives the Defendants seeking to respond to the allegation an idea where to begin."). Accordingly, the District Court's decision dismissing Carrier's Complaint should be reversed.

C. At a Minimum, Carrier Should Be Granted Leave to Amend Its Complaint.

In the event this Court affirms the District Court's Order, Carrier respectfully requests that this Court exercise its power to permit Carrier to amend its Complaint or remand this action to the District Court for consideration of a motion to amend the Complaint. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 833 (1989); *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002); *Rose v. Bartle*, 871 F.2d 331, 355 n.27 (3d Cir. 1989).

The Supreme Court issued its *Twombly* decision *after* briefing was complete on the motions to dismiss that are the subject of this Appeal. Thus, when Carrier drafted its Complaint, it did not have the benefit of *Twombly's* clarification of the law, but rather was guided by the pleading principles in place at that time, with which Carrier's Complaint plainly complied. *See, e.g., American Copper & Brass, Inc. v. Donald Boliden AB*, No. 04-2771, 2005 WL 1631034, at *6-7 (W.D. Tenn. July 6, 2005) (denying 12(b)(6) motion under the *Conley v. Gibson* standard in an antitrust class action related to copper plumbing tubes: "It is not inconceivable that

knowledge of and participation in the conspiratorial acts existed among the United States and EU affiliated business entities and that such acts extended to the United States market. Though the holding of a foreign tribunal alone does not establish that antitrust activities have occurred under U.S. antitrust laws, the acts alleged are sufficient to state the conspiracy element for purposes of Section 1 . . .").

Carrier should not be held to a standard that was not in operation at the time it drafted its complaint without a chance to conform its pleading to applicable law. Thus, it is in the interests of justice for this court to permit Carrier leave to amend its complaint to allege further detail if this Court agrees with the District Court that further factual detail is necessary to withstand *Twombly's* pleading standard. Courts have not hesitated to give a plaintiff a chance to amend its complaint when a change in law occurred after a complaint was filed. *See Collins v. City of Detroit*, 780 F.2d 583, 584 n.1 (6th Cir. 1986); *Balgowan v. State of New Jersey*, 115 F.3d 214, 217 (3d Cir. 1997); *see also Jackson v. Sok*, No. 01-3893, 2003 WL 21054670, at *2 (6th Cir. May 5, 2003); *Cincinnati Ins. Co. v. Byers*, 151 F.3d 574, 580 (6th Cir. 1998).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Dated: May 1, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)(C)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,486 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.

/s/ David M. Schnorrenberg
David M. Schnorrenberg

ADDENDUM – DESIGNATION OF JOINT APPENDIX CONTENTS

Plaintiffs-Appellees hereby designate 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
European Commission Industrial Tubes Decision	12/6/2006	55.4
Order of Dismissal	7/27/2007	93
Judgment	7/27/2007	94
Notice of Appeal	8/23/2007	95

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May 2009, I caused a copy of the foregoing Brief of Plaintiffs-Appellants to be served via first class mail, electronic mail and/or the Court's Electronic Case Filing ("ECF") system upon the following attorneys:

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