No. 15-2130

In the United States Court of Appeals for the Sixth Circuit

ENERGY CONVERSION DEVICES LIQUIDATION TRUST,
APPELLANT,

v.

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

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

BRIEF FOR APPELLANT ENERGY CONVERSION DEVICES LIQUIDATION TRUST

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

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

EDWARD L. FOOTE
ROBERT B. PRINGLE

Winston & Strawn LLP
OF COUNSEL

Counsel for Appellant Energy Conversion Devices Liquidation Trust

CORPORATE DISCLOSURE STATEMENT

Sixth Circuit Case #: 15-2130

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

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

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

   No

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

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

/s/ W. Gordon Dobie Dated: January 29, 2016

W. Gordon Dobie

TABLE OF CONTENTS

Page

STATEMENT IN SUPPORT OF ORAL ARGUMENT 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 2

STATEMENT OF THE CASE.....4

I. Background.....4

A. The Parties. 4

B. Defendants Conspired To Fix Prices And Dump Products In The U.S. 6

C. The U.S. Government Sanctioned Defendants For Their Illegal Pricing Practices. 10

D. Competition Was Injured As A Result Of Defendants' Conspiracy. 13

II. Procedural History 15

SUMMARY OF ARGUMENT 18

STANDARD OF REVIEW 20

ARGUMENT 22

I. The District Court Erred In Requiring Section 2 Recoupment to be Pled in a Section 1 Restraint of Trade Case. 22

A. ECD Has Pled A Section 1 Claim. 22

B. ECD, As A Section 1 Plaintiff, Is Not Required To Plead Section 2 Elements. 24

1. Section 1 And Section 2 Are Fundamentally Different Statutes. 24

2. A Predatory Pricing Claim of Monopolization Under Section 2 Requires A Dangerous Probability Of Recoupment At The Time of The Events In Question. 27

C. Matsushita Does Not Require A Section 1 Plaintiff To Plead Recoupment. 28

D. Because Defendants Are Not Motivated Purely By Profit, Their Alleged Conspiracy Is Plausible Without Regard To Recoupment. 31

II. The District Court Erred in Holding that ECD Failed to Allege Antitrust Injury. 33

A. Antitrust Injury Occurs When Competition Is Harmed. 34

B. ECD Alleged That Defendants' Conspiracy Harmed Competition. 37

C. ECD Alleged That Defendants Harmed Consumers By Causing Loss Of Consumer Choice And Innovation. 42

III. The District Court Erred In Dismissing ECD's Complaint with Prejudice. 45

A. ECD Was Not On Notice That Its Complaint Was Deficient. 47

B. ECD Had No Opportunity At All To Amend Its Complaint. 49

C. None Of The Reasons Counseling Against Amendment Are Present Here. 49

1. Amendment Would Not Have Been Futile. 50

2. None Of The Other Reasons to Deny Amendment Exist Here. 53

IV. The District Court Erred in Not Altering its judgment and granting ecd leave to amend its complaint. 55

A. ECD's Amendment Would Not Have Been Futile. 55

B. ECD's Motion Was Timely. 56

C. ECD Should Be Permitted to Amend to Prevent A Manifest Injustice. 58

CONCLUSION 59

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Needle, Inc. v. Nat'l Football League,
560 U.S. 183 (2010).....passim

Amarel v. Connell,
102 F.3d 1494 (9th Cir. 1997).....43

Arizona v. Maricopa Cty. Med. Soc'y,
457 U.S. 332 (1982).....27, 36, 39

Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,
459 U.S. 519 (1983).....35, 36

Atlantic Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990).....26, 27, 28

Bagsby v. Gehres,
225 F. App'x 337 (6th Cir. 2007).....56, 57

Beech Aircraft Corp. v. Rainey,
488 U.S. 153 (1988).....42

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....24, 28

Berrington v. Wal-Mart Stores, Inc.,
696 F.3d 604 (6th Cir. 2012).....21

Blue Shield of Va. v. McCready,
457 U.S. 465 (1982).....42

Bridgeport Music, Inc. v. Dimension Films,
410 F.3d 792 (6th Cir. 2005).....54

Broadcom Corp. v. Qualcomm Inc.,
501 F.3d 297 (3d Cir. 2007).....37, 45, 52

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993).....25, 26, 27

Cargill, Inc. v. Monfort of Colorado, Inc.,
479 U.S. 104 (1986).....38

Catch Curve, Inc. v. Venali, Inc.,
519 F. Supp. 2d 1028 (C.D. Cal. 2007).....43

Changzhou Trina Solar Energy Co. v. U.S. Int'l Trade Comm'n,
100 F. Supp. 3d 1314 (Ct. Int'l Trade 2015).....13

Conwood Co. v. U.S. Tobacco Co.,
290 F.3d 768 (6th Cir. 2002).....42

Copperweld Corp. v. Independence Tube Corp.,
467 U.S. 752 (1984).....23, 38

Corley v. United States,
556 U.S. 303 (2009).....28

Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.,
691 F.2d 241 (6th Cir. 1982).....41

Eastman Kodak Co. v. Image Tech. Servs., Inc.,
504 U.S. 451 (1992).....33

EEOC v. Ohio Edison Co.,
7 F.3d 541 (6th Cir. 1993).....47

Fisher v. Roberts,
125 F.3d 974 (6th Cir. 1997).....45, 58

Foman v. Davis,
371 U.S. 178 (1962).....45, 57

Freeman v. San Diego Ass'n of Realtors,
322 F.3d 1133 (9th Cir. 2003).....36

Fricke-Parks Press, Inc. v. Fang,
149 F. Supp. 2d 1175 (N.D. Cal. 2001).....48

Full Draw Prods. v. Easton Sports, Inc.,
182 F.3d 745 (10th Cir. 1999) 43

Gen. Indus. Corp. v. Hartz Mountain Corp.,
810 F.2d 795 (8th Cir. 1987) 38, 51, 52, 56

Harris v. Amgen, Inc.,
573 F.3d 728 (9th Cir. 2009) 46

Hayduk v. Lanna,
775 F.2d 441 (1st Cir. 1985).....53

In re Cardizem CD Antitrust Litig.,
332 F.3d 896 (6th Cir. 2003) 33, 36

In re Se. Milk Antitrust Litig.,
739 F.3d 262 (6th Cir. 2014) 37

In re Suntech America, Inc.,
No. 15-10054, Dkt. No. 8 (Bankr. Del. 2015).....6

Jackson v. Sedgwick Mgmt. Servs., Inc.,
731 F.3d 566 (6th Cir. 2013) 21

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,
340 U.S. 211 (1951), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).....39

Kostrzewa v. City of Troy,
247 F.3d 633 (6th Cir. 2001) 56

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
551 U.S. 877 (2007).....27

Libretti v. Woodson,
600 F. App'x 367 (6th Cir. 2015).....53

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986).....28, 29, 30, 31

Mid-Mich. Radiology Assocs., P.C. v. Cent. Mich. Comm'ty. Hosp.,
No. 94-cv-10057-BC, 1995 WL 239360 (E.D. Mich. Feb. 14, 1995) 41

Miller v. Currie,
50 F.3d 373 (6th Cir. 1995) 56

Morse v. McWhorter,
290 F.3d 795 (6th Cir. 2002) .....passim

Paramount Famous Lasky Corp. v. United States,
282 U.S. 30 (1930).....35

Perceptron, Inc. v. Sensor Adaptive Machs., Inc.,
221 F.3d 913 (6th Cir. 2000) 23

Re/Max Int'l, Inc. v. Realty One, Inc.,
173 F.3d 995 (6th Cir. 1999) 42

Richter Concrete Corp. v. Hilltop Concrete Corp.,
691 F.2d 818 (6th Cir. 1982) 26

Shane v. Bunzl Distrib. USA, Inc.,
200 F. App'x 397 (6th Cir. 2006).....57

Solyndra Residual Trust v. Suntech Power Holdings Co.,
62 F. Supp. 3d 1027, 1044 (N.D. Cal. 2014).....15, 39, 43, 47

Solyndra Residual Trust v. Suntech Power Holdings Co.,
No. 12-cv-005272 (N.D. Cal. 2012).....54

Southwell v. Summit View of Farragut, LLC,
494 F. App'x 508 (6th Cir. 2012).....50

Spirit Airlines, Inc. v. Nw. Airlines, Inc.,
431 F.3d 917 (6th Cir. 2005) 33

Superior Production Partnership v. Gordon Auto Parts Co.,
784 F.3d 311 (6th Cir. 2015) .....passim

Tefft v. Seward,
689 F.2d 637 (6th Cir. 1982) 46

Thurmond v. Cnty. of Wayne,
447 F. App'x 643 (6th Cir. 2011).....40

United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.,
342 F.3d 634 (6th Cir. 2003) .....passim

United States v. Am. Airlines,
743 F.2d 1114 (5th Cir. 1984) 37, 51, 52, 56

United States v. Am. Linseed Oil Co.,
262 U.S. 371 (1923).....35

United States v. Colgate & Co.,
250 U.S. 300 (1919).....35

United States v. E.I. du Pont de Nemours & Co.,
351 U.S. 377 (1956).....27, 29

United States v. Socony-Vacuum Oil Co.,
310 U.S. 150 (1940).....39

Volunteer Energy Servs., Inc. v. Option Energy, LLC,
579 F. App'x 319 (6th Cir. 2014).....58

W. Concrete Structures Co. v. Mitsui & Co. (U.S.A.), Inc.,
760 F.2d 1013 (9th Cir. 1985) 25, 29

Westerfield v. United States,
366 F. App'x 614 (6th Cir. 2010).....59

Winget v. JP Morgan Chase Bank, N.A.,
537 F.3d 565 (6th Cir. 2008) 50

Ziegler v. IBP Hog Market, Inc.,
249 F.3d 509 (6th Cir. 2001) 58

STATUTES

11 U.S.C. § 362.....6

15 U.S.C. § 1.....passim

15 U.S.C. § 2.....passim

15 U.S.C. § 15.....1

28 U.S.C. § 1291.....1

28 U.S.C. § 1331 1

28 U.S.C. § 1332 1

28 U.S.C. § 1337 1

28 U.S.C. § 1367 1

Mich. Antitrust Reform Act § 445.772 ..... 1, 15

OTHER AUTHORITIES

5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216 (3d ed. 2004) 46

77 Fed. Reg. 31309 (Dep't of Commerce, May 25, 2012) 32

80 Fed. Reg. 8592 (Dep't of Commerce, Feb. 18, 2015) 6

80 Fed. Reg. 8596 (Dep't of Commerce Feb. 18, 2015) 12

80 Fed. Reg. 40998 (Dep't of Commerce July 14, 2015) 12, 13

80 Fed. Reg. 41003 (Dep't of Commerce July 15, 2015) 13

2 James Wm. Moore, et al., *Moore's Federal Practice* § 8.10[2] (3d ed. 2015) 46

21 CONG. REC. 2569 (1890) 34, 40

21 CONG. REC. 4100 (1890) 40

FED. R. CIV. P. 1 57

FED. R. CIV. P. 16 15

FED. R. CIV. P. 59(e) 21, 53

FED. R. EVID. 803(8) 3, 42

FED. R. EVID. 803(8)(A)(iii) 42

James Langenfeld & Dennis Yao, *Competition Policy During the Transition of Central and Eastern Europe to a Market Economy: An Organizational Perspective*, in *Government and Markets: Establishing a Democratic*

Order and a Market Economy in Former Socialist Countries, 195-218 (Blommestein & Steunenberg, eds., 1994).....31

James Langenfeld and Marsha Blitzer, *Is Competition Policy the Last Thing Central and Eastern Europe Need?*, 6 *Am. U. Int'l L. Rev.*, 347, 362, 366 (1991).....31

MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES (ABA, ed., 2005).....23

Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 NW. U. L. Rev. 137 (1962) 36

William Holmes & Melissa Mangiaracina, Antitrust Law Handbook § 1:2, Westlaw (database updated Nov. 2015) 30

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant Energy Conversion Devices Liquidation Trust ("ECD") respectfully requests oral argument. As detailed below, this appeal involves important legal questions regarding the requirements for pleading a Sherman Act Section 1 case, as distinct from a Section 2 case. Accordingly, ECD respectfully submits that the Court's decisional process would be significantly aided by oral argument.

JURISDICTIONAL STATEMENT

This appeal is from a final judgment by the United States District Court for the Eastern District of Michigan in an action under Section 1 of the Sherman Act and section 445.772 of the Michigan Antitrust Reform Act ("MARA"). The District Court had jurisdiction over ECD's Sherman Act claim pursuant to 15 U.S.C. § 15 and 28 U.S.C. §§ 1331, 1337. The District Court had supplemental jurisdiction over ECD's MARA claim pursuant to 28 U.S.C. § 1367 because that claim is so related to the federal claim that it forms part of the same case or controversy. Additionally, the District Court had jurisdiction over ECD's MARA claims pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds $75,000 and there is diversity of citizenship among the parties.

ECD filed a timely notice of appeal on September 21, 2015. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether recoupment is a necessary element of a Section 1 claim (as opposed to a Section 2 conspiracy to monopolize claim) that, as here, alleges a *per se* horizontal price-fixing and dumping conspiracy, including but not limited to:
    a. Whether the District Court improperly required ECD to allege recoupment by reading into Section 1 the recoupment element of a Section 2 conspiracy to monopolize through predatory pricing claim, thereby merging two distinct causes of action in contravention of the plain language of the Sherman Act and the associated Congressional intent supporting its enactment.
2. Whether the District Court erred in determining that the requirement of antitrust injury can only be satisfied through proof of recoupment, including but not limited to:
    a. Whether ECD's allegations of a price-fixing conspiracy where Defendants jointly (i) cut prices by 70% in tandem, (ii) sold below their total costs, (iii) damaged ECD's business, and (iv) eliminated ECD and dozens of competitors from the market were sufficient to demonstrate harm to competition at the pleadings stage; and
    b. Whether the District Court erred in ignoring the findings of the International Trade Commission and Department of Commerce (each

of which is admissible under Federal Rule of Evidence 803(8)), which specifically found "that the solar panel industry in the United States has been materially injured by reason of the subsidized Chinese solar panels sold at less than fair value";

c. Whether the District Court erred in requiring ECD to plead recoupment in light of ECD's well-pled allegations that Defendants were motivated by factors other than profit maximization;

d. Whether the District Court erred in ignoring the injury to ECD's "business or property" and limiting Clayton Act Section 4 injury to only consumer injury, contrary to Supreme Court precedent which provides standing exists when damage to competitors is inextricably intertwined with the restraint of trade;

e. Whether the District Court erred in finding that consumers were not worse off even when Defendants' conduct resulted in (i) a loss of innovation, (ii) less consumer choice, and (iii) the elimination of ECD and dozens of other American manufacturers from the industry.

3. Whether the District Court erred in dismissing ECD's complaint on a with prejudice basis, without allowing leave to amend to address the alleged deficiencies.

4. Whether the District Court erred in not allowing ECD to amend its

complaint to add allegations of Defendants' likelihood of recoupment of their losses and other allegations set forth in ECD's proposed amended complaint.

5. Whether the District Court erred in denying ECD's motion to reconsider on an issue that Defendants never argued or briefed—that ECD's conspiracy was not "plausible" under Section 1 because it failed to allege Defendants' recoupment.

STATEMENT OF THE CASE

I. BACKGROUND

Defendants agreed, combined, and/or conspired, in violation of Section 1 of the Sherman Act and MARA, to fix prices in the U.S. solar market and to dump their product in the United States. Defendants' conspiracy drove multiple U.S. solar panel manufacturers, including ECD, into bankruptcy. The conspiracy eliminated nearly all of Defendants' competitors in the U.S., increased Defendants' market share, and reduced consumer choice and technological innovation by locking in Defendants' first-generation solar technology.

A. The Parties.

Plaintiff ECD was a Michigan-based solar panel manufacturer that operated for nearly 30 years before Defendants' conspiracy forced it into bankruptcy on February 14, 2011. (Compl., R.E. 1, Page ID 2, 7, ¶¶ 1, 15-16.) ECD was hugely successful with its innovative thin-film technology and achieved more than $1

billion in sales internationally and across the United States. (*Id.*) Unlike most solar panel manufacturers, including Defendants, ECD designed, developed, and manufactured its own production equipment using proprietary process technologies. (*Id.*, Page ID 7, ¶ 16.) This technology was unique to ECD and was the only such process in use at the time ECD was forced into bankruptcy. (*Id.*, Page ID 7, 16, ¶¶ 16, 40.) The solar panels produced on ECD's equipment presented several benefits to the end consumer over Defendants' first-generation panels, including generating electricity earlier in the day and later into the evening and performing better in diffused light and at higher temperatures. (*Id.*) They were also lighter weight and easier to install, resulting in lower balance of system costs. (*Id.*, Page ID 16, ¶ 41.) Ultimately, ECD lost hundreds of millions of dollars and was forced into bankruptcy as a direct result of Defendants' illegal restraint of trade. (*Id.*, Page ID 1, 5, ¶¶ 1, 8.)

Appellee Trina Solar Limited is a Chinese company and a leading manufacturer of photovoltaic solar panels. (*Id.*, Page ID 7, ¶ 17.) It is incorporated in the Cayman Islands and has offices around the world. (*Id.*, Page ID 7-8, ¶ 17.) Appellee Trina Solar (U.S.), Inc. is a wholly owned subsidiary of Trina Solar Limited, and has its principal place of business in San Jose, California. (*Id.*, Page ID 8, ¶ 18.)

Appellee Yingli Green Energy Holding Company also is a Chinese company

and a leading manufacturer of photovoltaic solar panels. (*Id.*, Page ID 8-9, ¶ 19.) It is incorporated in the Cayman Islands and has offices around the world. (*Id.*) Appellee Yingli Green Energy Americas, Inc. is a wholly owned subsidiary of Yingli Green Energy Holding Company, and has its principal place of business in San Francisco, California. (*Id.*, Page ID 9, ¶ 20.)[1]

B. Defendants Conspired To Fix Prices And Dump Products In The U.S.

Threatened by ECD's innovative technology and driven by aspirations of U.S. market domination and full employment in their Chinese factories, Defendants agreed, combined, and/or conspired to fix prices for solar panels sold in the U.S., to dump their products in the U.S., and to eliminate their U.S. competition, including ECD. (*Id.*, Page ID 17-19, ¶¶ 45-48.)

As ECD alleged: [redacted]

[1] ECD's complaint also named Suntech Power Holdings Co., Ltd., and Suntech America, Inc., as defendants in this action. (*See* Compl., Page ID 1, 10-11, ¶¶ 21-22.) However, these companies filed for bankruptcy, allegedly because of DOC-imposed tariffs on their panels that they did not account for or expect. (*See* Statement of the Case, Section I.C *infra*.) They are subject to an automatic stay imposed by 11 U.S.C. § 362 and thus are not parties to this appeal. (*See* Robert Moon Decl., *In re Suntech America, Inc.*, No. 15-10054, Dkt. No. 8 (Bankr. Del. 2015) ¶¶ 26-27.) According to the ITC, Suntech's Chinese successor continues to import to and dump in the U.S. under the Suntech brand. *See* Crystalline Silicon Photovoltaic Products from China, 80 Fed. Reg. 8592, 8595 (Feb. 18, 2015) (final dumping and countervailing duty order).

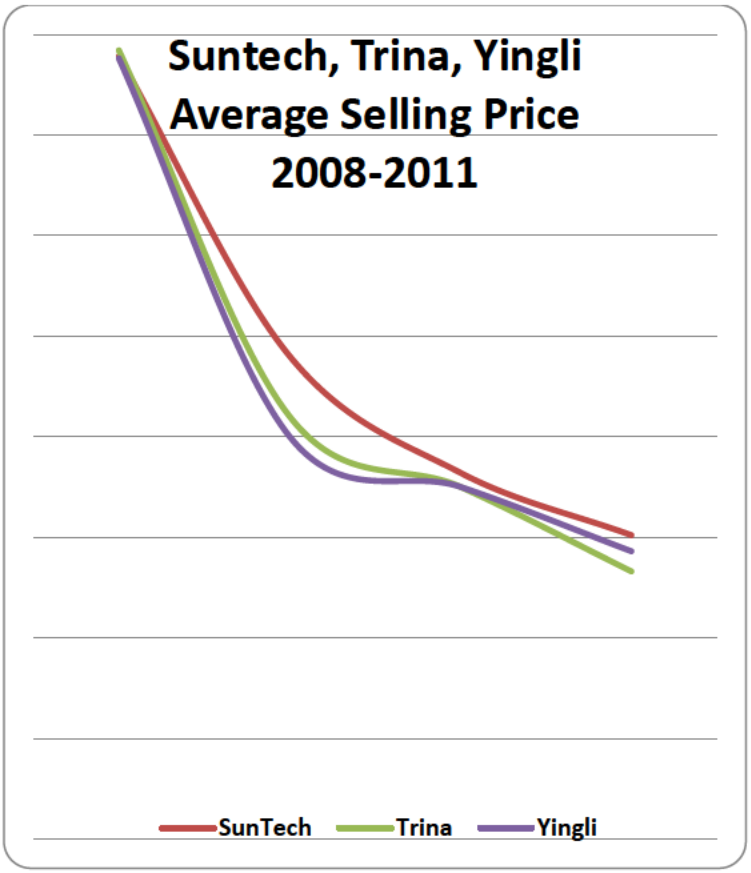
[redacted] (Am. Compl., R.E. 53, ¶ 87.)[2] Importantly, [redacted]. (*Id.*, ¶ 91.) [redacted] (*Id.*, ¶¶ 87-88.) Doing so allowed Defendants to more closely match prices. As another example, [redacted]. (*Id.*, ¶¶ 85, 90.) [redacted] (*Id.*, ¶ 86.)

In addition to the communications described above, Defendants utilized their trade association, the China New Energy Chamber of Commerce, to regularly communicate regarding their conspiracy. (Compl., R.E. 1, Page ID 11, ¶¶ 23-25.) China New Energy is unlike a traditional American trade association; its stated goal is to "encourage a spirit of cooperation and collective assistance amongst our members." (*Id.*, Page ID 23, ¶ 63.) And, contrary to American business practice where trade meetings are attended by mid-level managers, Defendants sent their top executives, including their Chairmen and CEOs, to China New Energy

[2] ECD filed its proposed amended complaint under seal and it is available to the Court at Record Entry 53.

meetings where they discussed "cooperation and collaborative efforts" among themselves, both before and after formal meetings. (*Id.*, Page ID 23, ¶ 64.) They were successful in this—for example, [redacted]. (Am. Compl., R.E. 53, ¶ 76.) [redacted]. (*Id.*, ¶ 81.)

Consistent with their conspiracy, Defendants alone were the market leaders, collectively setting prices much lower than the rest of the market. These prices were below Defendants' costs and well below what economists and well-seasoned analysts predicted based on market conditions—including a huge rise in market demand. (Compl., R.E. 1, Page ID 20-22, ¶¶ 54-59; Compl. Ex. A, R.E. 1-1, Page ID 36, ¶¶ 18-22; Am. Compl., R.E. 53, ¶¶ 65-66.) Defendants are alleged to have collectively (not oligopoly pricing involving the rest of the market) slashed prices in tandem by more than 60%, as shown below. (Compl., R.E. 1, Page ID 19-20, ¶¶ 53-55.)



These prices were also below Defendants' costs. (*See, e.g.*, *id.*, Page ID 4, 22, 26, ¶¶ 4, 61, 80.) Even Suntech's CEO admitted that "Suntech, to build market share, is selling solar panels on the American market for less than the cost of materials, assembly, and shipping." (*Id.*, Page ID 3-4, ¶ 4.) And, according to an informant, Trina had a detailed process for selling solar panels below cost. (*Id.*, Page ID 22, ¶¶ 61-62.) In light of ECD's allegations, including but not limited to those above, the District Court had no problem finding that ECD had alleged that Defendants sold panels at below-cost prices. (Mot. Dismiss Order, R.E. 40, Page ID 446-47.)

The Defendants also each adopted a collective goal of exporting over 95%

of their solar panel production. (Compl., R.E. 1, Page ID 25, ¶ 77.) They achieved this goal despite huge unmet Chinese energy needs and demand for clean energy in China—one of the most polluted countries on the planet. (*Id.*)

Instead of selling their solar panels at home in China, Defendants sought to export to and dominate the United States market in order to maintain and increase Chinese employment and manufacturing at the expense of American employment and manufacturing. (*Id.*, Page ID 27, ¶¶ 83-84.) Defendants' horizontal restraint of trade was successful in forcing ECD and much of the American solar industry into bankruptcy. (*Id.*, Page ID 17-18, ¶¶ 46-47.)

C. The U.S. Government Sanctioned Defendants For Their Illegal Pricing Practices.

The DOC and the International Trade Commission ("ITC") investigated Defendants' illegal pricing practices and ruled that Defendants' conduct was unlawful and injurious to American competition. (*Id.*, Page ID 18-19, ¶¶ 49-53.)

In the fall of 2011, the ITC and DOC investigated whether Defendants received illegal subsidies and illegally dumped solar panels in the United States to the material injury of American manufacturing (i.e., Defendants' competition) (the "2011 Investigation"). (Compl. Ex. A, R.E. 1-1, Page ID 32, ¶ 1.) In this investigation, Defendants—represented by high-powered U.S. law firms—provided extensive evidence about their companies' capacity, production, shipments within China, exports to the United States, inventory, corporate

structure, business practices, and quantity and volume of sales. (*Id.*, Page ID 32, ¶ 3.) Defendants, through their counsel, also submitted lengthy briefs in support of their business practices. (*Id.*, Page ID 33, ¶ 5.) Finally, the ITC and DOC held two full hearings, at which Defendants' top executives testified and their counsel presented lengthy argument. (*Id.*)

After this in-depth investigation, the DOC found that Defendants dumped their solar panels in the U.S. at less than fair value and ordered a dumping margin against the companies of up to 31%.[3] (*Id.*, Page ID 33, ¶ 7.) The DOC also determined that Defendants' costs were "subsidized" (by banks, polysilicon suppliers, and others) by as much as 15% of their costs. (*Id.*, Page ID 34-35, ¶¶ 12-14.)

The ITC determined that the solar manufacturing industry in the U.S. was "materially injured" by Defendants' illegal conduct and prices. (*Id.*, Page ID 35-37, ¶¶ 17-25.) The ITC specifically explained that Defendants' "pervasive underselling" allowed them "to gain market share at the expense of the domestic industry." (*Id.*, Page ID 36, ¶ 20.) As a result, "the solar manufacturing industry in the United States has been materially injured by reason of the subsidized

[3] The European Commission conducted a similar investigation and reached the same conclusion: "The simple question we have been asked to examine is whether Chinese companies are dumping solar panels which end up being sold at lower prices than it costs to produce them in the first place. The answer is simple: Yes." (*Id.*, Page ID 37, ¶ 26.)

Chinese solar panels that are sold at less than fair value in the United States." (*Id.*, Page ID 35, ¶ 17.) In short, there was a final, litigated decision that Defendants' dumping of panels "materially injured" American competition.

Nevertheless, and following this decision, Defendants began to "work-around" the DOC decision. Because the duties were imposed only on Defendants' panels that used Chinese-manufactured solar cells, Defendants began sourcing cells from Taiwan (which were outside the scope of the 2011 Investigation) and using those cells to assemble complete panels in China. Thereafter, Defendants continued dumping these panels that used Taiwan-made cells into the U.S.—flouting the ITC and DOC's rulings. *See* Crystalline Silicone Photovoltaic Products from Taiwan, 80 Fed. Reg. 8596 (Dep't of Commerce Feb. 18, 2015) (antidumping duty order). [redacted]. (*See* Am. Compl., R.E. 53, ¶ 90.) In 2014, Defendants' cheating eventually came to light in a second investigation, which held that Defendants' "work-around" practice was unlawful and that Defendants' panels were still being sold at less than fair value to the material injury of U.S. competitors. *See* Crystalline Silicon Photovoltaic Cells from China, 80 Fed. Reg. 40998 (Dep't of Commerce July 14, 2015) (final admin. review).

In July 2015, the DOC conducted a further review of the 2011 Investigation to determine if Defendants were still illegally dumping their products in the U.S. *Id.* The DOC determined that, despite two determinations telling Defendants that such conduct was unlawful, Defendants' illegal dumping persisted. *Id.* The DOC also found that Defendants were still being illegally subsidized by as much as 21%. Crystalline Silicon Photovoltaic Cells from China, 80 Fed. Reg. 41003 (Dep't of Commerce July 15, 2015) (final results).[4]

D. Competition Was Injured As A Result Of Defendants' Conspiracy.

Defendants' conspiracy significantly reduced competition in the American market. As explained above, the ITC determined that Defendants' illegal conduct "materially injured" American industry (i.e., American competitors). It also drove out ECD and nearly all American competitors—necessarily reducing competition. (Compl., R.E. 1, Page ID 3, 17-18, 26-27, ¶¶ 1, 46-47, 80-84.) Nearly a dozen American companies shuttered their doors as a result of Defendants' illegal price-fixing and dumping conspiracy, and many European companies with American

[4] In 2015, the Court of International Trade affirmed the conclusions of the 2011 Investigation. *See Changzhou Trina Solar Energy Co. v. U.S. Int'l Trade Comm'n*, 100 F. Supp. 3d 1314 (Ct. Int'l Trade 2015). Plainly, these matters were heavily litigated.

operations were similarly forced to close plants, end operations, and layoff their U.S. workforce. (*Id.*, Page ID 17-18, ¶¶ 46-47.)[5]

In addition, because Defendants' conspiracy drove ECD out of business, consumers were deprived of the technological innovation of ECD's products. (*Id*., Page ID 26-27, ¶¶ 80-84.) ECD's technology, and the process by which it was manufactured, represented a revolutionary and innovative solar panel technology; it, too, was lost. ECD's technology presented several benefits over Defendants' first-generation panels. For example, ECD's panels generated electricity earlier in the day and later into the evening than Defendants' panels. (*Id*., Page ID 7, ¶ 16.) They performed better in diffuse light conditions and at higher temperatures. (*Id*.) Further, because ECD's solar panels were self-adhering, installation did not require costly and time-consuming installation equipment and processes, resulting in lower balance-of-system costs for the end consumer (even if the prices of individual panels were higher). (*Id*., Page ID 16, ¶ 41.) They were also lighter weight and

[5] ECD alleged that the following large American solar companies declared bankruptcy as a result of Defendants' illegal scheme: Energy Conversion Devices Inc., Solyndra, LLC, SpectraWatt, Inc., Evergreen Solar, Inc., Abound Solar, Hoku Solar Inc., Signet Solar, EPV Solar, Stirling Energy Systems, Satcon Technology Corp. (Compl., R.E. 1, Page ID 17-18, ¶ 47.) Similarly, ECD alleged that a dozen other companies closed existing U.S.-based operations or plants between 2010 and 2012 as a result of Defendants' horizontal restraint of trade, including BP Solar, Solasta Inc., Senergen Devices, Ampulse, GreenVolts, Global Solar Energy, Sencera Solar, Skyline Solar, Solon Corporation, Solar World, and Amonix, and that Global Watt cancelled plans to build a Michigan-based plant. (*Id.*)

were able to withstand higher winds as compared to Defendants' panels. (*Id.*) Now, consumers are left without any choice—only Defendants' technologically inferior, first-generation, commoditized panels. (*Id.*, Page ID 26-27, ¶¶ 80, 82,)

II. PROCEDURAL HISTORY

ECD filed this suit in the United States District Court for the Eastern District of Michigan on October 4, 2013, asserting violations of Section 1 of the Sherman Act and section 445.772 of MARA. (*Id.*, Page ID 28-30.) ECD alleged that Defendants' horizontal conspiracy to fix prices for solar panels and to dump those panels in the U.S. constitutes a *per se* restraint of trade under Section 1 of the Sherman Act. (*Id.*, Page ID 28, ¶ 88.) ECD did not plead a Section 2 claim of monopolization (or attempted monopolization) through predatory pricing. (*See generally* Compl., R.E. 1.) Contrary to Federal Rule of Civil Procedure 16's mandate that the judge "***must*** issue the scheduling order as soon as practicable," the District Court never issued a scheduling order, never set a deadline for the parties to amend their pleadings, and never held a single in-person conference prior to dismissing ECD's complaint—a year later.[6] From when ECD filed the complaint in October 2013 until August 2015, the parties never once saw the judge. It was not until nearly ten months after ECD was dismissed that the judge

[6] There was one brief conference call concerning a possible motion to transfer to consolidate ECD's case with the *Solyndra Residual Trust v. Suntech Power Holdings Co.* case pending in the Northern District of California. (Notice, R.E. 22.) That request was ultimately denied.

held an in-person conference. (*See* Re-Notice Hr'g, R.E. 51.)

The District Court granted Defendants' motion to dismiss without a hearing. It erroneously found that ECD lacked antitrust standing because it did not allege recoupment (i.e., Defendants' eventual ability to raise prices or otherwise recover the losses they suffered from selling at such low prices). (Mot. Dismiss Order, R.E. 40, Page ID 446, 450-51.) In reaching this conclusion, the District Court became the first court in United States history to dismiss a Section 1 plaintiff for failing to plead recoupment—a Section 2 element. The District Court dismissed ECD's complaint with prejudice, depriving ECD of an opportunity to cure the alleged defects—and even though Defendants had only recently run ECD and other American solar companies out of business. (*See* Judgment, R.E. 41.) The District Court also found that ECD had adequately alleged that Defendants had "engaged in below-cost pricing." (Mot. Dismiss Order, R.E. 40, Page ID 446.)

ECD filed a timely Motion for Reconsideration on November 14, 2014, and a timely Motion to Amend or Alter Judgment and for Leave to File an Amended Complaint on November 26, 2014. (Mot. Recons., R.E. 42; Mot. Alter Judgment, R.E. 45.) After nearly a month of silence from the District Court, ECD filed a motion for leave to request oral argument on its pending briefs. (Mot. Leave Req. Oral Arg., R.E. 48.) ECD's request went unanswered for eight months, until Friday, August 14, 2015, when the District Court set a hearing for the following

Wednesday, nearly ten months after ECD filed its motions. (*See* Notice Hr'g, R.E. 50.) Because ECD's lead counsel was out of the country and other counsel was on trial, ECD requested a one-week continuance, which was unopposed by Defendants. The District Court refused to grant a continuance and an associate from ECD's legal team appeared for the one and only in-person conference before the District Court (five partners were present for Defendants). (*See* Re-Notice Hr'g, R.E. 51.)

Within hours of the hearing, the District Court issued an eight-page decision denying ECD's Motion for Reconsideration. (Mot. Recons. Order, R.E. 56.) The District Court acknowledged that it was not bound by controlling precedent to require ECD to plead recoupment. (*Id.*, Page ID 943.) But, citing this Court's decision in *Superior Production Partnership v. Gordon Auto Parts Co.*, the District Court nevertheless required ECD to plead recoupment and refused to reconsider its prior unfounded order. (*Id.*, Page ID 945-47.) But, in *Superior Production*, this Court, in reviewing the grant of a motion for summary judgment, expressly ***refused*** to require that a Section 1 plaintiff prove recoupment as a separate element of its claim, and instead suggested only that the plaintiff must "grapple" with those issues in proving the **plausibility** of its conspiracy ***at summary judgment***. *Superior Prod.*, 784 F.3d 311, 319 (6th Cir. 2015). ECD was never afforded an opportunity to brief the impact of *Superior Production*, which was issued after the

briefing of its motion.

The District Court then denied ECD's Motion to Amend or Alter Judgment and for Leave to File an Amended Complaint. (Mot. Alter Judgment Order, R.E. 57.) The District Court denied this motion on the basis that ECD had not moved to amend its complaint prior to the District Court's order dismissing its complaint, even though ECD could not have known that this would be the first court in the United States to dismiss a Section 1 plaintiff for failing to plead recoupment. (*See id.*, Page ID 956.)

Thus, ECD's attempt to seek redress for Defendants' unlawful conduct ended with a single motion to dismiss. And an innovative Michigan-based solar company with a billion dollars of sales was run out of business, its complaints of unlawful conspiracy to fix prices and dump products dismissed with prejudice—despite strong evidence of an unlawful horizontal conspiracy, and prior determinations against Defendants that their unlawful conduct materially injured the entire U.S. solar industry.

ECD filed a timely notice of appeal on September 21, 2015. (Notice Appeal, R.E. 58.)

SUMMARY OF ARGUMENT

Appellant ECD filed suit to redress the horizontal conspiracy among Defendants aimed at, and ultimately succeeding in, driving ECD and dozens of

other American solar manufacturers out of business. ECD was a thriving, innovative company, with a billion dollars in sales, until Defendants' scheme forced it, along with the rest of the American solar manufacturing industry, to shutter its doors.

The District Court made three distinct errors that necessitate the current appeal. *First*, despite ECD pleading all the required elements of a Section 1 claim, the District Court improperly dismissed ECD's complaint for failing to prove recoupment—a Section 2 element. ECD brought suit ***only*** under Section 1 for Defendants' illegal contract, combination, and/or conspiracy to restrain trade; it did not bring suit under Section 2 for monopolization, attempted monopolization, or a conspiracy to monopolize. No court has ever gone as far as the District Court did in this case in dismissing a Section 1 plaintiff for failure to plead the elements of a Section 2 claim. In so doing, the District Court improperly eliminated from the Sherman Act any independent grounds to establish a violation of price fixing under Section 1.

Second, the District Court also erred in taking an impermissibly narrow view of antitrust injury. Defendants' horizontal price-fixing and dumping conspiracy eliminated not just a single competitor—but nearly the entire American solar manufacturing industry. The International Trade Commission, after a lengthy investigation which Defendants themselves participated in, found that Defendants'

illegal practices had, in fact, "materially injured" American competition. The District Court ignored this finding in holding that only high prices are sufficient to prove antitrust injury. Although high prices might be an indicator of antitrust injury, they are not the only way that antitrust injury can be pled. Antitrust injury occurs when competition is reduced—and Defendants' collective dumping below-cost did just that. It also occurs when technological innovation and consumer choice are reduced. These are the antitrust injuries pled by ECD. All of this resulted in harm to consumers *and* competitors.

Third, the District Court erred when it dismissed ECD's complaint with prejudice and then refused to alter the judgment to allow ECD to amend its complaint to plead recoupment. The District Court dismissed ECD's complaint because it failed to plead recoupment when no other court in the history of American jurisprudence had *ever* dismissed a Section 1 case for so failing. Instead of allowing ECD to amend its complaint to address this newly minted pleading element, the District Court foreclosed ECD completely from relief. The District Court doubled down on its error when it refused to alter the judgment to allow ECD to amend its complaint to add allegations that Defendants had increased prices and thus were beginning to recover their losses.

STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss *de novo*,

using the same standards employed by the District Court. *Berrington v. Wal-Mart Stores, Inc.*, 696 F.3d 604, 607 (6th Cir. 2012). When reviewing an order granting a motion to dismiss, the Court "must construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Jackson v. Sedgwick Mgmt. Servs., Inc.*, 731 F.3d 566, 562 (6th Cir. 2013) (citation omitted).

Review of the District Court's denial of a motion for leave to amend a complaint is governed by an abuse of discretion standard, unless that motion was denied because an amended complaint could not withstand a motion to dismiss, in which case it is reviewed *de novo*. *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002). The abuse of discretion standard also governs the Court's review of the District Court's denial of the motion to alter or amend judgment under Rule 59(e), unless the Court is reviewing a legal conclusion, in which case it is also reviewed *de novo*. *Id.* The District Court's decision to dismiss with prejudice is reviewed for an abuse of discretion. *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 644 (6th Cir. 2003).

ARGUMENT

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

The District Court improperly required ECD—a Section 1 claimant—to plead recoupment—a Section 2 element. (Recons. Order, R.E. 56, Page ID 947 (describing prior order as requiring ECD "to plead a dangerous probability of recoupment in order to state a claim of predatory pricing in violation of § 1 of the Sherman Act").) ECD did not plead a Section 2 claim of monopolization (or attempted monopolization) through predatory pricing. (*See generally* Compl., R.E. 1.) In spite of well-established, hornbook law on the differences between Sections 1 and 2 of the Sherman Act, the District Court improperly conflated these two separate and distinct statutes. No court—not the Supreme Court, the Sixth Circuit, or any other court—has dismissed a Section 1 plaintiff for failure to allege Section 2 monopolization elements at the pleadings stage.

A. ECD Has Pled A Section 1 Claim.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. It bans any conspiracy that restrains trade, regardless of its outcome. *See Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191 (2010) ("§ 1 prohibits any concerted action in restraint of trade or commerce, even if the action

does not threate[n] monopolization.") (internal quotation and citations omitted). Section 1 treats horizontal conspiracies "sternly" because "concerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." *Id.* at 190-91 (internal quotation and citations omitted); *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984) ("Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2 . . . Concerted activity inherently is fraught with anticompetitive risk."). When a plaintiff alleges a horizontal violation of Section 1 of the Sherman Act, the plaintiff must only prove: (1) an agreement, (2) affecting interstate commerce, (3) that unreasonably restrains trade. 15 U.S.C. § 1; *Perceptron, Inc. v. Sensor Adaptive Machs., Inc.*, 221 F.3d 913, 918 (6th Cir. 2000); *see also* MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, A-3 (ABA, ed., 2005). Recoupment is *not* an independent element of a Section 1 claim. *See, e.g., Superior Prod.*, 784 F.3d at 320 (stating, in dicta on review of summary judgment, that a plaintiff must only "grapple" with recoupment, but expressly refusing to require recoupment as an independent element of a Section 1 claim).

ECD has more than sufficiently alleged the required elements of a Section 1 price-fixing claim. As set forth in greater detail above, Defendants agreed to price in tandem and well below the rest of the market (and below their costs), when

demand was rising and companies were exiting the market. (Compl., R.E. 1, Page ID 19-25, ¶¶ 50-79; *see also* Statement of the Case, Section I.B *supra*.) Defendants further agreed to export over 95% of their production in a similar fashion and at virtually the same time, despite the massive need for energy in China. (*Id.*, Page ID 25, ¶ 77.) Further, they met and collaborated frequently through regular and ad hoc meetings and communications, as noted above. (Am. Compl., R.E. 53, ¶¶ 83, 87-91; *see also* Statement of the Case, Section I.B *supra*.) These allegations, in addition to other "plus factors" described above (Statement of the Case, Section I.B *supra*), are more than sufficient to "nudge" the alleged Section 1 violation from "conceivable to plausible." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); (*see also* Opp'n Mot. Dismiss, R.E. 38, Page ID 366-73 (describing plus factors alleged in ECD's complaint.)[7]

B. ECD, As A Section 1 Plaintiff, Is Not Required To Plead Section 2 Elements.

1. Section 1 And Section 2 Are Fundamentally Different Statutes.

In contrast to Section 1, Section 2 makes liable "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize." 15 U.S.C. § 2. This is a fundamentally different statute from Section 1 and prohibits fundamentally different behavior, as

[7] Defendants only challenged the existence of the first element. (*See generally* Mot. Dismiss, R.E. 17; *see also* Opp'n Mot. Dismiss, R.E. 38, Page ID 374.)

the Supreme Court explained in *American Needle*—the only unanimous Section 1 decision by the Supreme Court in the last 30 years.

> The meaning of the term "contract, combination . . . or conspiracy" is informed by the "basic distinction" in the Sherman Act "between concerted and independent action" that distinguishes § 1 of the Sherman Act from § 2. Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action "monopolize[s]," or "threatens actual monopolization," a category that is narrower than restraint of trade.

560 U.S. at 190 (citations omitted). Thus, Section 1 encompasses ***all*** horizontal conspiracies that restrain trade, regardless of whether a conspiracy achieves a monopoly (and, accordingly, regardless of whether it achieves the power to recoup). On the other hand, Section 2 encompasses all action (whether concerted or independent) that monopolizes, or attempts to monopolize, a market. *See id.*; *see also* 15 U.S.C. §§ 1, 2; *W. Concrete Structures Co. v. Mitsui & Co. (U.S.A.), Inc.*, 760 F.2d 1013, 1017-18 (9th Cir. 1985) (predatory pricing under Section 2 "differs from [Section] 1, which requires a conspiracy, but does not require monopolizing or attempting to monopolize . . . Attempt to monopolize and actual monopolization involve, among other things, intentional predatory or anticompetitive conduct").

The District Court ignored these important differences between Sections 1 and 2 and relied on *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* in requiring that ECD prove a Section 2 element to sustain its Section 1 claim. (*See*

Mot. Dismiss Order, R.E. 40, Page ID 446.) But, as the District Court expressly recognized, *Brooke Group* discussed a ***Section 2*** claim, not a Section 1 horizontal price-fixing claim.[8] (*Id.*) Indeed, the very language that the District Court excerpted from *Brooke Group* refers only to a ***single, individual business rival or competitor***, not a group of would-be competitors ***collectively agreeing***—under Section 1—to fix prices and dump product to eliminate nearly all American competition. (*See* Mot. Dismiss Order, R.E. 40, Page ID 446 ("[T]he Supreme Court set forth two prerequisites for a plaintiff to recover on a claim for predatory pricing under § 2 of the Sherman Act: a plaintiff must show that (1) 'the prices complained of are below an appropriate measure of its rival's costs' and (2) 'the competitor had . . . a dangerous probability of recouping its investment in below-cost prices.") (emphasis added) (quoting *Brooke Group*, 509 U.S. at 222-24); *see also id*. ("'Predatory pricing differs from healthy competitive pricing in its motive: a predator by his pricing practices seeks to impose losses on other firms, not garner gains for itself.'") (quoting *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 823 (6th Cir. 1982)) (emphasis added).)[9]

[8] Indeed, even this characterization is a stretch—*Brooke Group* actually involved a Robinson-Patman Act claim, which is only "of the same general character" as a Section 2 monopolization claim. *See* 509 U.S. 209, 221-22 (1993).

[9] Nor is *Atlantic Richfield Co. v. USA Petroleum Co.* any more persuasive. 495 U.S. 328 (1990). Although Defendants argued that *Atlantic Richfield* required dismissal of ECD's horizontal conspiracy (*see* Mot. Dismiss, R.E. 17, Page ID

2. A Predatory Pricing Claim of Monopolization Under Section 2 Requires A Dangerous Probability Of Recoupment At The Time of The Events In Question.

When a plaintiff alleges a Section 2 attempt to monopolize through predatory pricing, courts require that the plaintiff allege a dangerous probability of recoupment. *See Superior Prod.*, 784 F.3d at 318-19 ("The Supreme Court's second prerequisite to liability [under Section 2 of the Sherman Act] is 'a demonstration that the competitor had . . . a dangerous probability, of recouping its investment in below-cost prices.'") (citing *Brooke Group*, 509 U.S. at 224). Obviously, such an inquiry raises factual issues inappropriate for consideration on a motion to dismiss. (*See* Argument, Section II.B *infra*.) A predatory pricer under Section 2 recoups his losses when he is able to raise prices to a supracompetitive level—the same ability that is the hallmark of a monopolist. *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control prices or exclude competition."). In other words, a prerequisite for recoupment is monopolization. Monopolization—the power to control prices—is the concern of Section 2, not Section 1. *Am. Needle*, 590 U.S. at

---

115), the Supreme Court made clear in that case that it was addressing only a ***vertical*** conspiracy among a distributor and its supplier. *Atl. Richfield*, 495 U.S. at 331, 332, 335, 339. The Court has emphasized that its "recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007); *see also Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 348, n.18 (1982) ("[H]orizontal restraints are generally less defensible than vertical restraints.").

190.

The District Court simply ignored the fact that ECD's complaint alleges a *per se* Section 1 horizontal price-fixing and dumping conspiracy, not a Section 2 predatory pricing claim, (Compl., R.E. 1, Page ID 28-29, ¶¶ 87-89), inaccurately and repeatedly characterizing ECD's claim as a predatory pricing claim. (*See* Mot. Dismiss Order, R.E. 40, Page ID 446, 449-50; Recons. Order, R.E. 56, Page ID 943-46; Mot. Alter Judgment Order, R.E. 57, Page ID 951.) The District Court ignored the important differences between a restraint of trade and a monopoly and improperly eliminated Section 1 as a distinct cause of action. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (describing the basic canon of statutory interpretation that "[a] statute should be construed [to give effect] to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (citation omitted)).

C. *Matsushita* Does Not Require A Section 1 Plaintiff To Plead Recoupment.

Recognizing these very important differences between Section 1 and 2 claims, no court has ever dismissed a Section 1 plaintiff for failure to plead recoupment. In fact, the Supreme Court has had at least three opportunities to expressly require a Section 1 plaintiff to plead and prove recoupment, but in each instance has declined to do so. *See Twombly*, 550 U.S. at 548; *Atl. Richfield*, 495 U.S. at 331; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-

85 (1986).

Nonetheless, the District Court required ECD to plead and prove recoupment, citing *Matsushita*. (*See* Mot. Dismiss Order, R.E. 40, Page ID 450.) But *Matsushita*, at bottom, considered a conspiracy to monopolize. The Section 2 claims addressed in *Matsushita* were "functionally indistinguishable from the Section 1 claims" because they involved predatory pricing as part of a conspiracy to ***monopolize***; the Court found that the Section 2 conspiracy to monopolize was the ***only*** viable claim. *Matsushita*, 475 U.S. at 579. Thus, the Court's analysis of "recoupment" was tied to the conspiracy to monopolize claim (a claim that ECD does not make).[10] The analysis in *Matsushita* does not apply to a Section 1 restraint of trade for price fixing because there is no requirement in Section 1 restraint of trade cases to prove Section 2 monopoly power. *See Superior Prod.*, 784 F.3d at 321 (noting that *Matsushita* did not "expressly lay out a recoupment requirement" and refusing to require one); *see also W. Concrete*, 760 F.2d at 1017 (noting that predatory pricing under Section 2 "differs from [Section] 1, which requires a conspiracy, but does not require monopolizing or attempting to monopolize"). Nor did *Matsushita* address the issue in connection with a motion

[10] This ruling does not change or add to existing monopoly law, which requires that the monopolist control prices. By definition, the monopolist has the power to recoup because the monopolist has the power to control and fix prices, whether exercised or not. *See du Pont*, 351 U.S. at 391.

to dismiss, but instead considered extensive evidence developed through discovery and presented at summary judgment. *Matsushita*, 475 U.S. at 576, 579.

In fact, this Court already explained that *Matsushita* does not require proof of recoupment: *Matsushita* did not "expressly lay out a recoupment requirement" for Section 1 claims.[11] *Superior Prod.*, 784 F.3d at 320. And this Court expressly declined to require recoupment as a separate and independent element of a Section 1 claim. *Id.* Rather, the Court explained, at the summary judgment stage, that a Section 1 plaintiff must only "grapple" with the issue of the probability of recoupment. *Id.*

The District Court went far beyond the boundaries this Court established in *Superior Production* when it required ECD—a Section 1 plaintiff—to plead (and ultimately prove) recoupment—a Section 2 element. (*See* Recons. Order, R.E. 56, Page ID 945.) The District Court improperly expanded the *Superior Production* ruling—requiring not just that ECD "grapple" with issues of recoupment at summary judgment, but that ECD actually plead (and ultimately prove) recoupment as an independent element of its claim.

[11] Notably, the Antitrust Law Handbook's most recent update only cites *Superior Production* in connection with Section 2. *See* William Holmes & Melissa Mangiaracina, Antitrust Law Handbook §§ 1:2, 3:5, Westlaw (database updated Nov. 2015).

D. Because Defendants Are Not Motivated Purely By Profit, Their Alleged Conspiracy Is Plausible Without Regard To Recoupment.

When courts have addressed the issue of recoupment in Section 1 claims, such as in *Matsushita* and *Superior Production*, they have done so because of their belief that a firm in a market-based economy would not sacrifice profitability in the short run unless it could make profits in the long run. *See, e.g.*, *Matsushita*, 475 U.S. at 589-90; (*see also* Recons. Order, R.E. 56, Page ID 946). For this reason, courts have suggested that a conspiracy to set low prices is not plausible unless the conspiring firms can recover their losses by setting supracompetitive prices (i.e., "recouping" their losses). *See, e.g.*, *Matsushita*, 475 U.S. at 589-90.

This reasoning is not applicable to firms operating in a non-market economy, like Defendants, that may be primarily motivated by other goals—for example, market share, employment, or executive compensation. *See, e.g.*, James Langenfeld & Dennis Yao, *Competition Policy During the Transition of Central and Eastern Europe to a Market Economy: An Organizational Perspective*, in *Government and Markets: Establishing a Democratic Order and a Market Economy in Former Socialist Countries*, 195-218 (Blommestein & Steunenberg, eds., 1994); James Langenfeld and Marsha Blitzer, *Is Competition Policy the Last Thing Central and Eastern Europe Need?*, 6 *Am. U. Int'l L. Rev.*, 347, 362, 366

(1991).[12]

That is exactly what ECD alleged in its complaint—that Defendants operated in a non-market economy and had little interest in making a profit, but instead manufactured solar panels in gross excess of demand to eliminate American competition and maintain full employment in Chinese factories. (Compl., R.E. 1, Page ID 3-4, 17-19, 22, 25-27, ¶¶ 3-6, 45-53, 59-62, 74-84.) For Defendants, increasing employment and market share was more important than earning a profit, and [redacted]. (Am. Compl., R.E. 53, ¶¶ 23-24.) To achieve this goal, Defendants, subsidized by their co-conspirators unlawfully, jointly cut their prices by 61% to 66% between 2008 and 2011, sold below their costs, and jointly exported more than 95% of their production, contrary to market-based economic behavior. (Compl., R.E. 1, Page ID 19-20, ¶¶ 50-56; Am. Compl., R.E. 53, ¶¶ 54-55, 67, 69.) Nor is this just an allegation that ECD ***believed*** would be borne out by the evidence—this was affirmatively proven before the DOC and has been affirmed twice. (*See* Statement of the Case, Section I.C *supra*.)

[12] The DOC has repeatedly recognized that China has a non-market economy and has treated China accordingly in its determinations. *See e.g.*, Crystalline Silicone Photovoltaic Products from China, 77 Fed. Reg. 31309-10 (Dep't of Commerce, May 25, 2012) (prelim. dumping order).

Given the allegations in this case, requiring proof of a dangerous probability of recoupment is simply illogical. *See Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 931 (6th Cir. 2005) (recognizing that antitrust claims are best resolved "on a case-by-case basis, focusing on the particular facts disclosed by the record") (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 467 (1992)). At the very least, ECD has "grappled" with the issue of recoupment and shown that the conspiracy is plausible even absent an express allegation (in ECD's initial complaint) that Defendants have begun to recoup their losses.

II. THE DISTRICT COURT ERRED IN HOLDING THAT ECD FAILED TO ALLEGE ANTITRUST INJURY.

The District Court erred in holding that ECD did not plead antitrust injury as required for a private plaintiff bringing suit under Section 1 of the Sherman Act. "Antitrust injury is (1) an injury of the type the antitrust laws were intended to prevent and (2) that flows from that which makes the defendants' act unlawful." *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 909 (6th Cir. 2003). This "ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Id.* (emphasis in original). There can be no doubt that this second element of antitrust injury was alleged by ECD. (*See, e.g.*, Compl., R.E. 1, Page ID 28, ¶¶ 85-86.)

Defendants' view of antitrust injury—which was wrongly endorsed by the District Court—hinges on two principles that fail to account for the full scope of

antitrust injury: (1) that antitrust laws ***only*** protect consumers and (2) that there is no antitrust claim if the illegal conduct—including a horizontal agreement to dump and fix prices among competitors—results in low prices. (*See* Mot. Dismiss, R.E. 17, Page ID 117.) But this view of antitrust law is impermissibly narrow. Antitrust law was enacted in the first instance to protect competitors and competition. The result of that protection is frequently the protection of consumers and the guarantee of lower prices. But when, as here, a horizontal price-fixing and dumping conspiracy eliminates nearly all competitors in the wake of Defendants' below-cost sales, eliminates technological innovation, and leaves consumers with only one commoditized offering, there can be no doubt that consumers are injured, Section 1 of the Sherman Act has been violated, and antitrust liability lies against those who collectively restrained trade.

A. Antitrust Injury Occurs When Competition Is Harmed.

The Sherman Act was enacted to protect competition. Phil E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles & Their Application, ¶ 101, IntelliConnect (database updated Aug. 2015) ("Although drafters of the Sherman Act were concerned about injury to consumers, they were significantly more concerned about various kinds of injury to competitors."); *see also* 21 CONG. REC. 2569 (1890) (statement of Sen. Sherman) (explaining that

courts should intervene to prevent combinations which "will sell their product at a loss or give it away in order to prevent competition").

Courts around the country have certainly recognized this purpose—contrary to the District Court's conclusion. *See, e.g.*, *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983) ("[O]ur prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market."); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 45 (1930) ("The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.") (internal citations omitted); *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 388 (1923) ("The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies, and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain."); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to

engage, in trade and commerce—in a word to preserve the right of freedom to trade.").

Antitrust injury recognizes the primary characteristic of a free-market economy embodied in Section 1 of the Sherman Act: "that competitive markets offer sufficient incentives and resources for innovation, and that cartel pricing leads not to a dedication of newfound wealth to the public good but to complacency and stagnation." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1152 (9th Cir. 2003); *see also Maricopa Cnty.*, 457 U.S. at 351 ("The *per se* rule 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.'") (alteration in original) (quoting Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 NW. U. L. Rev. 137, 142 (1962)); *Assoc. Gen. Contractors*, 459 U.S. at 528 ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions."); *In re Cardizem*, 332 F.3d at 909 (explaining that any pro-competitive effect of the horizontal illegal agreement between defendants is immaterial because of the "anticompetitive potential inherent in all price-fixing agreements") (internal quotation and citation omitted).

B. ECD Alleged That Defendants' Conspiracy Harmed Competition.

Despite this well-established, controlling law, the District Court took an impermissibly narrow view of antitrust injury—wrongly holding that antitrust injury can ***only*** be shown through proof of recoupment, i.e., higher prices for consumers. (*See* Mot. Dismiss Order, R.E. 40, Page ID 447-52.) Thus, although Section 2 law would only require ECD to show a "dangerous probability of recoupment"—a factual issue—the District Court held that ECD's suit filed in 2013 should be dismissed with prejudice just a year later for lack of an allegation of Defendants' recoupment.[13] That is, under the District Court's order, if Defendants started recouping their losses in 2016, ECD would never have had a jury even consider whether Defendants had such a probability at the time of the events at issue, much less that they actually were recouping. Antitrust injury is not so limited—it allows a plaintiff to recover where a loss stems from any competition-reducing aspect or effect of a defendant's behavior, not just an increase in prices. *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 284 (6th Cir. 2014); *see also United States v. Am. Airlines*, 743 F.2d 1114, 1118 (5th Cir. 1984) ("When evaluating the element of dangerous probability of success, we do not rely

[13] Recoupment is a factual issue best left for the jury. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 318 (3d Cir. 2007) (reversing dismissal at pleadings stage for failure to plead recoupment because it is a "particularly fact-intensive inquiry").

on hindsight but examine the probability of success at the time the acts occur."); *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 807 (8th Cir. 1987) ("Dangerous probability, therefore, should be evaluated as of when the alleged anticompetitive events occurred.").

But, in finding that antitrust injury could only be shown through recoupment, the District Court also refused to consider that competition could be harmed in still other ways besides higher prices. As the Supreme Court observed in *American Needle*, concerted action between competitors "'deprives the marketplace of independent centers of decision-making that competition assumes and demands.'" 560 U.S. at 190 (quoting *Copperweld*, 467 U.S. at 768-69). In other words, *American Needle* observes that independent decision-making by competitors is what competition is all about; when competitors act in concert, they deprive consumers of this independence and thus damage competition.

This holding is consistent with the Court's earlier decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*, where the Court defined "predatory pricing" and antitrust injury as the elimination of competitors:

> Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run. It is a practice that harms both competitors *and* competition. In contrast to price cutting aimed simply at increasing market share, ***predatory pricing has as its aim the elimination of competition***. Predatory pricing is thus a practice inimical to the purposes of [the antitrust] laws, and one capable of inflicting antitrust injury.

479 U.S. 104, 118-19 (1986) (emphasis added) (citation and quotation omitted); s*ee also Solyndra Residual Trust v. Suntech Power Holdings Co.*, 62 F. Supp. 3d 1027, 1044 (N.D. Cal. 2014) (finding that a horizontal agreement to fix prices has the requisite anticompetitive effect to cause an antitrust injury).

That Defendants engaged in a low-price, rather than a high-price, conspiracy does not insulate Defendants' conduct. The Supreme Court has consistently reiterated that a maximum-price fixing conspiracy among competitors is subject to the same strictures as an agreement to set minimum prices. *See, e.g.*, *Maricopa Cnty.*, 457 U.S. at 348 ("Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices. [Precedent] place[s] horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices."). As the Court explained: "The *per se* rule 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.'" *Id.* (citation omitted); *see also Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951) (holding that maximum price-fixing agreements "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment"), *overruled on other grounds by Copperweld*, 467 U.S. 752; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-22 (1940) ("***Any***

combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.") (emphasis added).

Further, the legislative history of the Sherman Act also makes clear that Congress never intended to suggest that a conspiracy to reduce prices is harmless. In fact, Congress addressed this very issue:

> ***Some say that the trusts have made products cheaper***, have reduced prices; but if the price of oil, for instance, is reduced to 1 cent a barrel, ***it would not right the wrong done to the people of this country by the 'trusts' which have destroyed legitimate competition*** and drive honest men from legitimate business enterprises.

21 CONG. REC. 4100 (1890) (statement of Rep. Mason) (emphasis added); *see also* 21 CONG. REC. 2569 (1890) (statement of Sen. Sherman); Areeda & Hoevenkamp, Argument, Section II.A *supra*.

ECD alleged competition-reducing effects of Defendants' behavior sufficient to establish antitrust injury—allegations that the District Court improperly ignored. *See Thurmond v. Cnty. of Wayne*, 447 F. App'x 643, 653 (6th Cir. 2011) (reversing grant of motion to dismiss where district court failed to account for allegations in plaintiff's complaint). Specifically, ECD's allegations—

that Defendants [redacted]—were sufficient to demonstrate harm to competition at the pleadings stage. (*See* Am. Compl., R.E. 53, ¶¶ 44, 46-48, 66, 95.) Unlike the cases where there was a simple interchange of one competitor for another, *see, e.g.*, *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 243 (6th Cir. 1982); *Mid-Mich. Radiology Assocs., P.C. v. Cent. Mich. Comm'ty. Hosp.*, No. 94-cv-10057-BC, 1995 WL 239360, at *4 (E.D. Mich. Feb. 14, 1995), here, Defendants wiped out an ***entire industry***. (*See, e.g.*, Compl., R.E. 1, Page ID 4, 17-18, ¶¶ 6, 46-47.) For example, ECD alleged that Defendants' conspiracy was "directed at destroying competition in the United States" and that at least 12 domestic manufacturing plants have been shut down and 10 other American companies declared bankruptcy as a result of Defendants' conspiracy. (*Id.*, Page ID 17-18, ¶ 47; Opp'n Motion Dismiss, R.E. 38, Page ID 377, 379-80.)

The U.S. Government has already determined, following extensive litigation, that Defendants' behavior has detroyed competition in the United States: "the solar manufacturing industry in the United States has been materially injured by reason of the subsidized Chinese solar panels that are sold at less than fair value in the United States." (Compl., R.E. 1, Page ID 19, ¶ 50.) The District Court erred

in ignoring this finding entirely.[14]

C. ECD Alleged That Defendants Harmed Consumers By Causing Loss Of Consumer Choice And Innovation.

Even if Defendants were correct that antitrust laws were enacted ***only*** to protect consumers, it is clear that Defendants' illegal conduct caused consumers substantial injury. In addition to the destruction of the entire American industry, Defendants' conduct resulted in reduced consumer choice and loss of innovation, as alleged in ECD's complaint.

This Court and others have recognized that antitrust injury can also be shown by a reduction in consumer choice and the loss of innovation. *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 484 (1982) (holding that denying consumer choice of seeing a psychiatrist or a psychologist was an injury that "flow[ed] from that which makes the defendants' acts unlawful" and thus was sufficient to show antitrust injury); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 789 (6th Cir. 2002) (explaining that "reduced consumer choice [is] harmful to competition"); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1023 (6th Cir.

[14] These findings are admissible under Federal Rule of Evidence 803(8). *See* FED. R. EVID. 803(8)(A)(iii); *see also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) ("As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report"). At the pleading stage at least, the District Court had no reason to question, or resolve any factual issues about, the trustworthiness of the DOC and ITC's conclusion that Defendants' illegal pricing and export practices caused a material injury to the American solar industry.

1999) (finding antitrust injury where the alleged wrongful conduct "imped[ed] an innovative competitors' access to the market"); *Full Draw Prods. v. Easton Sports, Inc.*, 182 F.3d 745, 755 (10th Cir. 1999) (finding antitrust injury where "consumers suffer[ed] because the market make-up changed" through "means other than the economic freedom of participants"); *see also Amarel v. Connell*, 102 F.3d 1494, 1509 (9th Cir. 1997) ("Another form of antitrust injury is 'coercive activity that prevents its victims from making free choices between market alternatives.' Such conduct 'is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect.' This category of antitrust injury includes agreements to restrain trade.") (internal citations omitted); *Solyndra*, 62 F. Supp. 3d at 1044 (finding that "[t]he elimination of market alternatives may also be considered a form of antitrust injury."); *Catch Curve, Inc. v. Venali, Inc.*, 519 F. Supp. 2d 1028, 1035-36 (C.D. Cal. 2007) (finding allegations that defendants' conduct "rendered competitors less competitive" and had a "dangerous probability of stifling innovation" sufficient to allege antitrust injury).

Defendants' conspiracy reduced solar innovation, reduced incentives for domestic and foreign firms to invest in innovation, eliminated competition—particularly more innovative, next-generation companies like ECD—and effectively locked in Defendants' first-generation technologies. (*See* Compl., R.E.

1, Page ID 7, 26-27, ¶¶ 16, 80-84; *see also* Am. Compl., R.E. 53, ¶¶ 96-103; Statement of the Case, Sections I.A & I.D *supra*.) Unlike Defendants, ECD manufactured its own production equipment and used a revolutionary production process—ECD was the only company using such process when it filed for bankruptcy. (Compl., R.E. 1, Page ID 7, 15-16, 27, ¶¶ 16, 38-41, 82.) This innovation has been lost as a result of Defendants' conspiracy. (*Id.*, Page ID 26-27, ¶¶ 80-84.) Further, many consumers preferred ECD's panels to those sold by Defendants because, among other benefits, they generated electricity earlier in the day and later in the evening, performed better in diffused light and at higher temperatures, were easier and less expensive to install, weighed less, and ultimately reduced the balance of system costs of the panels compared to Defendants' offerings. (*Id.*, Page ID 7, 16, ¶¶ 16, 40-41; *see also* Statement of the Case, Section I.A *supra*.) But, Defendants' price-fixing and dumping conspiracy eliminated ECD's technologically superior panels from the market. (*See id.*, Page ID 17, ¶¶ 43-44.) Therefore, "consumers are left without any choice in the . . . market—only Defendants' inferior panels." (*See id.*, Page ID 4, ¶ 6.)

What the District Court also failed to address is that while consumers may have benefited in the short term from Defendants' conspiracy and dumping in the form of lower prices, they have been harmed in the long term through the denial of product choice and solar product innovation (which stimulates future solar use).

Consumers are far worse off due to Defendants' conspiracy. This was not a mere reshuffling of competition or one competitor being replaced by another, but the total elimination of an entire innovative American business sector. At a minimum, these are factual issues inappropriate to resolve on a motion to dismiss. Instead, and in failing to recognize that Defendants' below-cost pricing harmed competition, the District Court essentially sanctioned Defendants' illegal, horizontal restraint of trade.

III. THE DISTRICT COURT ERRED IN DISMISSING ECD'S COMPLAINT WITH PREJUDICE.

The District Court erred when it dismissed ECD's complaint with prejudice. The District Court identified no affirmative matter (such as immunity, statute of limitations, or res judiciata) that would prohibit ECD from ***ever*** stating a claim—rather the issue was a new Section 1 element for ECD, which in any event is a question better left for the jury. (*See* Mot. Dismiss Order, R.E. 40, Page ID 452;) *see also Broadcom*, 501 F.3d at 318.

The clear preference is for cases to be tried on their merits. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."); *Fisher v. Roberts*, 125 F.3d 974, 977-78 (6th Cir. 1997) ("We have recognized that it is necessary to permit the liberal amendment of complaints in order to adhere to the principle that cases should be

tried on their merits rather than on technicalities of pleading.") (internal quotation and citation omitted); *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982) ("The thrust of Rule 15 is to reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings."); *Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009) ("Dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment.") (internal quotation and citation omitted); 2 James Wm. Moore, et al., *Moore's Federal Practice* § 8.10[2] (3d ed. 2015) ("When pleadings fail to comply with the requirements of Rule 8, the court has the power either to dismiss the pleading or strike improper material. Dismissal will usually be without prejudice, so that pleaders will be given an opportunity to amend the defective pleading under Rule 15.") (citations omitted); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216 (3d ed. 2004) ("Of course, if the requisite allegations are not in the complaint and a motion to dismiss for failure to state a claim upon which relief may be granted is made under Rule 12(b)(6), the pleader should be given the opportunity to amend the complaint, if she can, to show the existence of the missing elements.").

A dismissal with prejudice stands in the way of that mandate and thus "'where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses

the action with prejudice.'" *Bledsoe*, 342 F.3d at 644 (quoting *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993)). Courts look to two issues: (1) "whether [plaintiff] had sufficient notice that [its] complaint was deficient" and (2) "whether [plaintiff] had an adequate opportunity to cure the deficiencies." *Id*. It is clear in this case that the answer to both of these inquiries is "no."

A. ECD Was Not On Notice That Its Complaint Was Deficient.

ECD was not on notice that its complaint was deficient until the District Court entered its order granting Defendants' motion to dismiss. The District Court was the first court to ever grant a motion to dismiss a Section 1 claim for failure to plead recoupment, a Section 2 element. Indeed, just before Defendants filed their motion to dismiss, another district court (properly) determined that a near-identical version of ECD's complaint validly stated a Section 1 claim. *Solyndra*, 62 F. Supp. 3d at 1042. The court there explained:

> In view of the fundamental distinctions between § 1 and § 2 of the Sherman Act, the Court is not persuaded by Defendants' contention that Plaintiff's claim under § 1 of the Sherman Act is subject to dismissal for failing to plead a likelihood of recoupment. The recoupment requirement derives directly from the Supreme Court's insistence that § 2 claims be supported by a showing of monopolization or the dangerous threat of monopolization. As such, a defendant's recoupment of losses resulting from its below cost pricing need not be alleged to state a claim under § 1.

Id. at 1042 (internal citations omitted).

And, in a decision issued well before ECD even filed its complaint, a

different district court held that recoupment is not required for a Section 1 case. *Fricke-Parks Press, Inc. v. Fang*, 149 F. Supp. 2d 1175, 1183 (N.D. Cal. 2001). The court explained:

> [E]lements crucial in monopoly and price discrimination claims are not required for a claim under Section 1. Indeed, so long as [plaintiff] can establish that injury to competition has occurred. . . , [plaintiff] need not prove that the underlying objective of the alleged conspiracy between [defendants] is likely to succeed through ultimate recoupment. . . .

Id. In other words, the law existing when the District Court dismissed ECD's Section 1 complaint for failure to plead recoupment did not require recoupment in a Section 1 claim. The District Court's order dismissing ECD's complaint "constituted its first communication" to ECD that (1) it was required to plead recoupment and (2) it failed to do so. *See Bledsoe*, 342 F.3d at 644.

At best, the law was "unsettled" regarding what a Section 1 plaintiff, like ECD, must plead to prove a horizontal conspiracy to eliminate all competition through an agreement to sell at low prices. *See, e.g., Superior Prod.*, 784 F.3d at 318 (noting that the law under Section 2 is "significantly clearer" than under Section 1). Even the District Court admitted that "Supreme Court precedent had [not] explicitly established that a plaintiff alleging predatory pricing under § 1 of the Sherman Act was required to allege recoupment in order to state a claim." (Mot. Recons. Order, R.E. 56, Page ID 943.) But "unsettled" law is insufficient to

put the plaintiff on notice that his complaint may be deficient. *Bledsoe*, 342 F.3d at 645.

B. ECD Had No Opportunity At All To Amend Its Complaint.

The second part of the *Bledsoe* inquiry is also satisfied here. It is undisputed that ECD had no opportunity to amend its complaint—and the District Court never even set deadlines for amendment. The District Court—in contravention of the well-established liberality of allowing amendment—dismissed ECD's first and only complaint with prejudice, thus foreclosing ECD's opportunity to cure the identified deficiencies. In other words, as in *Bledsoe*, the ruling that identified the defects in ECD's claim was the "very same ruling [that] denied [plaintiff] the opportunity to correct the defects of which [it] had just been informed." *See Bledsoe*, 342 F.3d at 644.

C. None Of The Reasons Counseling Against Amendment Are Present Here.

To be sure, there are times when amendment should be not allowed, but none of those situations are present here. For example, when there is "'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment,'" denial of the right to amend might be appropriate. *See Bledsoe*, 342 F.3d at 644 (quoting *Morse*, 290 F.3d at 600).

1. Amendment Would Not Have Been Futile.

ECD's amendment would not have been futile. The District Court dismissed ECD's complaint with prejudice because it had not pled an element of a Section 1 claim that had never before been required at the motion to dismiss stage. Given the opportunity to further develop factual allegations to support this new legal requirement, ECD would have been able to state a dangerous probability of recoupment at the time of the events at issue. This case is unlike those where a legal defect in the plaintiff's complaint made amendment futile. *See e.g.*, *Southwell v. Summit View of Farragut, LLC*, 494 F. App'x 508, 513 n.4 (6th Cir. 2012) (finding amendment of claims "dismissed as a result of legal defects, as opposed to a lack of factual development" would be futile); *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 573 (6th Cir. 2008) ("Futility is certainly the case here; [plaintiff's] claims were not dismissed for lack of specificity, failure to allege an element of a claim, or other deficiencies. Rather, [plaintiff's] claims were dismissed because they were either barred by res judicata or were premature.").

ECD's proposed amended complaint alleged that [redacted]—meaning that there are factual issues going to the probability of recoupment. (*See* Am. Compl., R.E. 53, ¶¶ 104-11.) ECD further amended its allegations regarding the dangerous probability of recoupment at the time of the events at issue:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

Thus, if given the opportunity, ECD can plead facts from which a jury could conclude that there is a dangerous probability that Defendants intended to recoup their losses in the long run. *See Am. Airlines*, 743 F.2d at 1118; *Gen. Indus.*, 810 F.2d at 807.

It is true that ECD alleged that between approximately 1999 and 2013, there were numerous entrants in the marketplace. (*See* Compl., R.E. 1, Page ID 16, ¶ 42.) That was the good news for competition. But ECD went on to plead that thereafter a dozen U.S. businesses had to shutter plants and ten more filed bankruptcy ***after*** Defendants' illegal dumping and conspiracy began. (*Id*., Page ID 17-18, ¶¶ 46-47.) The District Court attempted to use the fact that there were new

[15] ECD also provided additional allegations regarding the [redacted]. (*See* Am. Compl., R.E. 53, ¶¶ 109-10.)

entrants ***before*** Defendants' conspiracy to support its conclusion that ECD did not allege antitrust injury. (*See* Mot. Dismiss Order, R.E. 40, Page ID 452.) But this ignores that there were few entrants after Defendants' dumping scheme took effect, and that instead, Defendants destroyed the U.S. market as pled by ECD and determined by the ITC. [16] (*See* Statement of the Case, Sections I.C & I.D *supra*.) In its proposed amended complaint, ECD further clarified its allegations about the timing of entry into and exit from the market to eliminate any basis for the District Court's confusion. (*See* Am. Compl., R.E. 53. ¶ 42; *see also id.*, ¶ 116 (quoting 2015 Congressional Research Service report explaining that in recent years there have been "numerous bankruptcies and manufacturing consolidations among solar firms").) This, too, was rejected. (*See* Mot. Alter Judgment Order, R.E. 57, Page ID 957.)

In fact, given ECD's allegations, as well as the significant barriers to entry which would discourage new entrants from attempting entry to take advantage of the higher prices, it is clear that ECD can plead that, at the very least, Defendants had a dangerous probability of recouping at the time Defendants entered into the conspiracy.[17] *See Am. Airlines*, 743 F.2d at 1118; *Gen. Indus.*, 810 F.2d at 807.

---

[16] Not only did the District Court ignore the import of the Complaint, it also inappropriately made factual findings relating to Defendants' dangerous probability of recoupment. *See Broadcom*, 501 F.3d at 318.

[17] Further, to the extent that the District Court's decision rested on an alleged

2. None Of The Other Reasons to Deny Amendment Exist Here.

There was no undue delay, bad faith, or dilatory motive on the part of ECD. ECD filed its motion within the time period proscribed by the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 59(e). Further, ECD did not violate any scheduling order setting forth a deadline for amendment of the pleadings. As soon as ECD was on notice that its claims were deficient under the District Court's newly minted theory, it timely sought leave to amend its complaint.

Nor has ECD repeatedly failed to cure defects through repeated amendments. The District Court dismissed ECD's ***original*** complaint with prejudice—ECD has not filed multiple defective complaints or failed to learn from its mistakes. *Cf. Libretti v. Woodson*, 600 F. App'x 367, 373 (6th Cir. 2015) (affirming dismissal of motions to bring second, third, fourth, and sixth amended complaints); *Hayduk v. Lanna*, 775 F.2d 441, 445 (1st Cir. 1985) (affirming dismissal with prejudice when plaintiffs had been given two prior opportunities to

---

failure to plead a plausible conspiracy, (*see* Mot. Recons. Order, R.E. 56, Page ID 944-45), ECD's proposed amended complaint incorporates newly acquired evidence proving the existence of Defendants' conspiracy to restrain trade in violation of Section 1 of the Sherman Act, such as [redacted] (*See, e.g.*, Am. Compl., R.E. 53, ¶¶ 55-56, 65-91.) Further, ECD's proposed amended complaint contains additional allegations that Defendants [redacted] (*See, e.g.*, *id.*, ¶¶ 109-11; *see also* Argument, Section I.D *supra*.)

amend their complaint and were on notice that their initial allegations were insufficient to state a claim).

Nor was there any prejudice to Defendants. Defendants not only were on notice of the claims against them, *c.f. Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 807 (6th Cir. 2005) (denying motion to amend because defendant would be prejudiced by new claims based on new facts), they were already litigating those very claims in a similar lawsuit brought by a different plaintiff—and had, for example, agreed on Defendants' production of documents for both cases. *See Solyndra Residual Trust v. Suntech Power Holdings Co.*, No. 12-cv-005272 (N.D. Cal. 2012); (*see also* O'Neil Decl., R.E. 45-1, Page ID 527.) The only identifiable prejudice was that Defendants would actually be required to litigate ECD's claims.[18] This is insufficient. *See Morse*, 290 F.3d at 800 (recognizing that defendant "will be inconvenienced by another round of motion practice," but finding that "such inconvenience does not rise to the level of prejudice that would warrant denial of leave to amend.").

[18] Any delay resulted not from ECD's dilatory tactics in pursuing its right to amend, which was timely made, but from the District Court's refusal to rule on the motion for nearly 10 months. (*Compare* Mot. Alter Judgment, R.E. 45, *with* Mot. Alter Judgment Order, R.E. 57.)

IV. THE DISTRICT COURT ERRED IN NOT ALTERING ITS JUDGMENT AND GRANTING ECD LEAVE TO AMEND ITS COMPLAINT.

The District Court compounded its error in dismissing ECD's complaint when it denied ECD's motion to alter its judgment and for leave to file an amended complaint. In denying this motion, the District Court stated that ECD's amended allegations regarding Defendants' increased prices "would have minimal, if any, impact on whether [ECD] could plead a dangerous probability of recoupment—that is, the intention and capability of maintaining supracompetitive prices—particularly in light of the fact that [ECD] already had access to average sales information as well as all of the allegations set forth in the original complaint." (Mot. Alter Judgment Order, R.E. 57, Page ID 956.) But, both of these reasons are faulty.

A. ECD's Amendment Would Not Have Been Futile.

As explained above (*see* Argument, Section III.C.1 *supra*), ECD's amendment would not have been futile. ECD's proposed amended complaint specifically cured the alleged deficiencies identified by the District Court. (*Compare* Mot. Dismiss Order, R.E. 40, Page ID 451-52 *with* Am. Compl., R.E. 53, ¶¶ 104-18.) Accordingly, amendment would not have been futile.

In determining that ECD's proposed amendment would have been futile, the District Court improperly overstepped its bounds. It is axiomatic that the District

Court, in deciding a motion to dismiss, must accept all well-pled allegations as true, must construe all allegations in favor of the plaintiff, and must not weigh evidence or make any factual findings.[19] *Kostrzewa v. City of Troy*, 247 F.3d 633, 640 (6th Cir. 2001); *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). But, as noted above, the District Court failed to construe the allegations in favor of ECD, and instead provided its own factual opinion that ECD could not have alleged recoupment (despite allegations to the contrary) and that there was not a dangerous probability of recoupment at the time of Defendants' acts at issue. *See, e.g.*, *Am. Airlines*, 743 F.2d at 1118; *Gen. Indus. Corp.*, 810 F.2d at 807; (s*ee also* Mot. Dismiss Order, R.E. 40, Page ID 451-52.)

B. ECD's Motion Was Timely.

The District Court also erred in finding that ECD's motion to amend was untimely. (*See* Mot. Alter Judgment Order, R.E. 57, Page ID 957.) As an initial matter, "delay alone does not justify denial of leave to amend." *Morse*, 290 F.3d at 800. It is only when that delay places an "unwarranted burden on the court" or "become[s] 'prejudicial,' placing an unfair burden on the opposing party," that it alone may be sufficient. *See id.* Here, there was no undue delay—ECD amended its complaint within the time prescribed by the Federal Rules, and the District

[19] When considering whether amendment would be futile, the standard to be employed is whether the proposed amended complaint could withstand a motion to dismiss. *See Bagsby v. Gehres*, 225 F. App'x 337, 355 (6th Cir. 2007).

Court never provided any schedule for this case—let alone a deadline for amendment of pleadings.[20] (*See* Argument, Section III.C.2 *supra*.)

Nor is the District Court's reliance on the finality of judgment sufficient to sustain its holding. (*See, e.g.*, Mot. Alter Judgment Order, R.E. 57, Page ID 951-52.) In focusing solely on this argument, the District Court ignored the equally powerful mandate from the Supreme Court that is embodied in the Federal Rules of Civil Procedure that a plaintiff "ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182; FED. R. CIV. P. 1. The District Court also ignored the mandate that "a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *Bledsoe*, 342 F.3d at 644.

Courts also allow a judgment to be amended or altered for the interests of justice, despite concerns about finality.[21] *See*, *e.g.*, *Bagsby*, 225 F. App'x at 356 (reversing district court's denial of motion to amend following adverse summary judgment ruling); *Shane v. Bunzl Distrib. USA, Inc.*, 200 F. App'x 397, 406 (6th Cir. 2006) (reversing district court's order denying third amended complaint where proposed amendment "directly respond[ed] to the district court's reasons for

[20] As explained above (*see* Argument, Section III.C.2 *supra*), none of the other justifications frequently invoked by courts support the District Court's intransigence.

[21] If finality alone were enough, a defendant could always argue for the sanctity of the resulting judgment.

dismissing [the claims]"); *Morse*, 290 F.3d at 800-01 (reversing denial of motion to amend judgment following adverse motion to dismiss ruling); *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 519 (6th Cir. 2001) (reversing district court's denial of motion to amend after an adverse judgment on 12(c) motion); *Fisher*, 125 F.3d at 977 (reversing district court's dismissal with prejudice after summary judgment ruling).

C. ECD Should Be Permitted to Amend to Prevent A Manifest Injustice.

Finally, the District Court's denial of ECD's motion was a manifest injustice. ECD's proposed amended complaint presents substantial, compelling evidence—including hard evidence from discovery and verdicts from the ITC and DOC—that Defendants were dumping their solar panels in the United States to the material injury of American competition. The District Court effected a manifest injustice on ECD when it dismissed ECD's claim with prejudice merely because ECD filed its complaint before Defendants' price fixing conspiracy entered the recoupment phase and without regard for the inherently factual examination into the dangerous probability of recoupment by Defendants at the time they undertook the events at issue. *See Volunteer Energy Servs., Inc. v. Option Energy, LLC*, 579 F. App'x 319, 330-31 (6th Cir. 2014) (allowing amendment of judgment to prevent a manifest injustice); *Westerfield v. United States*, 366 F. App'x 614, 620 (6th Cir. 2010) (reversing district court's denial of plaintiff's Rule 59 Motion because it

rendered a manifest injustice on the plaintiff).

CONCLUSION

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

Respectfully submitted,

/s/ W. Gordon Dobie

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

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

EDWARD L. FOOTE
ROBERT B. PRINGLE

Winston & Strawn LLP
Of Counsel

Counsel for Appellant Energy Conversion Devices Liquidation Trust

January 29, 2016

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

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Kathryn W. Bayer, an attorney, certify that I have complied with the above-referenced rule. The brief was printed using a 14-point proportional Times New Roman font. According to the word processor used to prepare this brief, Microsoft Word, this brief contains 13,800 words and therefore complies with the type-volume limitation of Rule 32(a)(7)(B) and (C).

Dated: January 29, 2016

/s/ Kathryn W. Bayer
Kathryn W. Bayer

CERTIFICATE OF SERVICE

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

Daniel Laytin Leonid Feller James Hileman KIRKLAND & ELLIS LLP 300 N. LaSalle St. Chicago, IL 60654 *Attorneys for Trina Solar Limited and Trina Solar (U.S.), Inc.* Catherine Dobrowitsky RIVENOAK LAW GROUP, P.C. 101 W. Big Beaver Rd. Troy, Michigan 48084 Mikael Abye SHEARMAN & STERLING LLP 4 Embarcadero Center San Francisco, California 94111 Jerome Fortinsky SHEARMAN & STERLING LLP 599 Lexington Avenue New York, New York 10022 *Attorneys for Suntech America, Inc.*	Patrick Gerard Seyferth Susan McNeil McKeever BUSH, SEYFERTH & PAIGE 3001 W. Big Beaver Rd. Suite 600 Troy, MI 48084 Jonathan C. Sanders SIMPSON, THACHER & BARTLETT 2475 Hanover Street Palo Alto, California 94304 Karen Michelle Gift SIMPSON, THACHER & BARTLETT 900 G Street, NW Washington DC 20001 *Attorneys for Yingli Green Energy Holding Co. Ltd. and Yingli Green Energy Americas, Inc.*

Dated: January 29, 2016

/s/ W. Gordon Dobie
W. Gordon Dobie

DESIGNATION OF RELEVANT DISTRICT-COURT DOCUMENTS

Per Sixth Circuit Rules 28(b) and 30(g), Appellant hereby designates the following portions of the record on appeal:

Docket Entry	Description	PageID Range
1	Complaint	1-37
17	Defendants' Joint Motion to Dismiss Plaintiff's Complaint	96-134
38	Plaintiffs' Opposition to Defendants' Joint Motion to Dismiss Plaintiffs' Complaint	354-430
39	Defendants' Reply In Support of Their Joint Motion to Dismiss Plaintiffs' Complaint	431-439
40	Opinion and Order Granting Defendants' Joint Motion to Dismiss Plaintiff's Complaint	440-454
41	Judgment	455
42	Plaintiff's Motion for Reconsideration	456-477
45	Plaintiff's Motion to Amend or Alter Judgment and For Leave to File an Amended Complaint	509-706
47	Defendants' Opposition to Plaintiff's Motion for Reconsideration	752-784
48	Plaintiff's Motion for Leave to Request Oral Argument	785-790
52	Plaintiff's Motion for Leave to File a New Version of Exhibit A to Plaintiff's Motion to Amend or Alter Judgment and for Leave to File an Amended Complaint	797-855

Docket Entry	Description	PageID Range
56	Opinion and Order Denying Plaintiff's Motion for Reconsideration	941-948
57	Opinion and Order Denying Plaintiff's Motion to Amend or Alter Judgment and For Leave to File an Amended Complaint and Denying Plaintiff's Motion for leave to File a New Version of Exhibit A	949-958
58	Notice of Appeal	959-962