No. 15-2130

In The United States Court Of Appeals For The Sixth Circuit

ENERGY CONVERSION DEVICES LIQUIDATION TRUST,
BY AND THROUGH ITS LIQUIDATING TRUSTEE, JOHN MADDEN
PLAINTIFF-APPELLANT,

V.

TRINA SOLAR LIMITED; TRINA SOLAR (U.S.), INC.; YINGLI GREEN ENERGY HOLDING CO., LTD.; YINGLI GREEN ENERGY AMERICAS, INC.; SUNTECH POWER HOLDINGS CO., LTD.; SUNTECH AMERICA, INC.
DEFENDANTS-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 OF DEFENDANTS-APPELLEES

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MARCH 2, 2016

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, Appellee Trina Solar Limited 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:

Trina Solar Limited is a publicly held company traded on the New York Stock Exchange. Trina Solar Limited does not have a parent corporation. Platinum Investment Management Limited and Franklin Resources, Inc. each own more than ten percent of Trina Solar Limited outstanding shares.

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:

Platinum Investment Management Limited and Franklin Resources, Inc. each own more than ten percent of Trina Solar Limited outstanding shares.

/s/ Daniel E. Laytin Dated: March 2, 2016
Daniel E. Laytin, P.C.

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, Appellee Trina Solar (U.S.), Inc. 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:

Trina Solar (U.S.), Inc. is a wholly owned subsidiary of Trina Solar (U.S.) Holding Inc., which is a wholly owned subsidiary of Trina Solar (Switzerland) Ltd., which is a wholly owned subsidiary of Trina Solar (Luxembourg) Holdings S.A.R.L., which is a wholly owned subsidiary of Trina Solar (Singapore) Pte. Ltd., which is a wholly owned subsidiary of Trina Solar Limited. Trina Solar Limited is a publicly held company traded on the New York Stock Exchange. It does not have a parent corporation. Platinum Investment Management Limited and Franklin Resources, Inc. each own more than ten percent of Trina Solar Limited outstanding shares.

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:

Platinum Investment Management Limited and Franklin Resources, Inc. each own more than ten percent of Trina Solar Limited outstanding shares.

/s/ Daniel E. Laytin Dated: March 2, 2016
Daniel E. Laytin, P.C.

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, Appellee Yingli Green Energy Holding Company Limited 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:

Yingli Green Energy Holding Company Limited is a publicly held company traded on the New York Stock Exchange. Yingli Power Holding Company Ltd. owns approximately 28.75% of Yingli Green Energy Holding Company Limited's outstanding shares. Yingli Power Holding Company Ltd. is wholly owned by the family trust of Mr. Liansheng Miao, CEO and chairperson of Yingli Green Energy Holding Company Limited's board of directors.

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:

No.

/s/ Matthew J. Reilly Dated: March 2, 2016
Matthew J. Reilly

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, Appellee Yingli Green Energy Americas, Inc. 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:

Yingli Green Energy Americas, Inc. is a wholly owned subsidiary of Yingli Green Energy (International) Holding Company Limited, which is a wholly owned subsidiary of Yingli Green Energy Holding Company Limited. Yingli Green Energy Holding Company Limited is a publicly held company traded on the New York Stock Exchange, and also a party in the above-captioned appeal.

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:

No.

/s/ Matthew J. Reilly Dated: March 2, 2016
Matthew J. Reilly

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, Appellee Suntech America Inc. 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:

Yes. Suntech America, Inc. is a subsidiary of Suntech Power Holdings Co., Ltd., its parent corporation.

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

Yes. Suntech Power Holdings Co., Ltd., as the indirect equity owner of Appellee Suntech America, Inc., has a financial interest in the outcome of this appeal.

/s/ Jerome S. Fortinsky Dated: March 2, 2016
Jerome S. Fortinsky

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STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees (hereinafter, "Defendants") do not believe that oral argument is necessary in this case, which involves a straightforward application of controlling law. Defendants, however, gladly will appear for oral argument if the Court so requests.

STATEMENT OF THE CASE

Plaintiff-Appellant Energy Conversion Devices Liquidation Trust (hereinafter, "ECD") filed its complaint on October 4, 2013. (Complaint, R.E. 1, Page ID 1–37.) Energy Conversion Devices "was a manufacturer of solar panels based in Auburn Hills, Michigan." (*Id.* at Page ID 7, ¶ 15.) Defendants also manufacture and sell photovoltaic solar panels. (*Id.* at Page ID 7–11, ¶¶ 17–22.) ECD's complaint alleges a counter-intuitive conspiracy that Defendants conspired to lower prices, rather than raise them. (*Id.* at Page ID 2–3, ¶ 1.) Importantly, the complaint does *not* allege that Defendants stand to yield any gains in the form of supracompetitive profits from this conspiracy to purportedly sell solar panels below cost and to lose money. The district court thus granted Defendants' motion to dismiss for ECD's failure to plead recoupment, a necessary element of an antitrust claim premised on low prices. (Dismiss Opinion, R.E. 40, Page ID 440–54.)

The relevant procedural history for this case starts before ECD filed its complaint. As ECD explained when seeking to transfer this action to the Northern District of California, "this action is nearly identical" to "related and earlier-filed litigation" that was "already pending in California." (Mot. to Transfer, R.E. 16, Page ID 83.) Plaintiffs and Defendants are represented by the same lead counsel in both actions. The procedural history of the California case explains the factual context and ECD's strategic decisions that compelled the dismissal of its claims below, and why this Court should affirm the dismissal of those claims.

The California plaintiff, the Solyndra Residual Trust ("Solyndra"), brought suit against Defendants roughly a year before ECD did so. (*Solyndra LLC v. Suntech Power Holdings Co., Ltd., et al.*, N.D. Cal. Case No. 4:12-cv-05272-SBA, Dkt. ("*Solyndra* Dkt.") No. 1.)[1] Solyndra's original complaint purported to assert claims under both Section 1 and Section 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

[1] The Court may take judicial notice of the Solyndra filings in evaluating a motion to dismiss. *See Buck v. Thomas M. Cooley Law Sch.*, 597 F.3d 812, 816 (6th Cir. 2010); *Lyons v. Stovall*, 188 F.3d 327, 332 n.3 (6th Cir. 1999) ("[I]t is well-settled that '[f]ederal courts may take judicial notice of proceedings in other courts of record.'"). The Court may also take judicial notice of facts supported by documents not included in the record on appeal. *See United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012) (quoting Fed. R. Evid. 201(f) advisory committee's note ("'[J]udicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal.'")). While Defendants in this brief refer to several facts for which the Court may take judicial notice, the district court orders below can and should be affirmed regardless of whether the Court takes judicial notice of those facts.

(*Id.* ¶¶ 195–204, 236–47.) The thrust of Solyndra's claims, like ECD's claims here, was that three solar panel manufacturers and their U.S. subsidiaries conspired to charge consumers low prices to drive their rivals out of business. Solyndra's original complaint alleged (albeit insufficiently) that, after Defendants' rivals exited the market, Defendants would recoup their earlier losses by charging supracompetitive prices to consumers. For example:

- "Defendants are already beginning to recoup their investment. . . ." (*Solyndra* Dkt. No. 1 ¶ 152.)
- "Defendants' future recoupment will be further guaranteed because of the significant barriers to entry into the solar manufacturing market . . . ." (*Id.* at ¶ 156.)
- "By eliminating Solyndra and its proprietary technology that otherwise would have made recoupment difficult, Defendants have moved to ensure they recover their investment." (*Id.* at ¶ 156.)
- "Defendants are on the verge of completing their plan to dominate the United States solar market and will be in a position to recoup their losses . . . ." (*Id.* at ¶ 160.)

Before Defendants responded to the original Solyndra complaint, Solyndra amended its complaint, removed its Section 2 claim, and deleted any mention of recoupment, including those examples listed above. (*Compare Solyndra* Dkt. No. 1 *with Solyndra* Dkt. No. 70.)

ECD filed its complaint in the Eastern District of Michigan on October 4, 2013, after Solyndra filed its amended complaint. ECD's complaint was a "near-identical version" of the *amended* Solyndra complaint (Br. at 47), containing no

Section 2 claim and no reference to Defendants' potential for recoupment. (*See generally* Complaint, R.E. 1, Page ID 1–37; *see also* Mot. to Transfer, R.E. 16, Page ID 85 (ECD's "claims mirror the claims made in the Solyndra Litigation").)

Defendants moved to dismiss Solyndra's complaint for, among other things, failing to allege recoupment. (*See Solyndra* Dkt. No. 74.) That motion was pending when ECD filed its complaint in Michigan. On March 31, 2014, the *Solyndra* court denied Defendants' motion to dismiss. (*Solyndra* Dkt. No. 87.) Seventeen days later, ECD moved to transfer its own case to the *Solyndra* court's district. (Mot. to Transfer, R.E. 16, Page ID 83.) The district court below denied the transfer motion, finding that "the timing of Plaintiff's transfer motion leads the court to suspect that it filed its transfer motion in [an] attempt to forum shop," and that "Plaintiff's 'obviously improper motivations provide an adequate basis for denying the motion in its entirety.'" (Transfer Opinion, R.E. 33, Page ID 216 (citation omitted).) ECD does not appeal the transfer motion ruling.

Following briefing, the district court below granted Defendants' motion to dismiss ECD's complaint on October 31, 2014 (Dismiss Opinion, R.E. 40, Page ID 441, 453)—less than three months after the motion was fully briefed.

ECD's first post-dismissal maneuvering was not to attempt to file an amended complaint, but rather, on November 14, 2014, to seek reconsideration of the dismissal order, arguing that the district court decision contained a "palpable

defect" in requiring ECD to plead recoupment. (*See* Mot. for Recons., R.E. 42, Page ID 457, 461–76.) ECD did not move to file an amended complaint until November 26, 2014. (Mot. to Amend, R.E. 45, Page ID 509–24.)

On August 14, 2015, the district court provided notice of a hearing on ECD's motion to amend. (Not. of Hr'g, R.E. 50, Page ID 795.) Nearly nine months after ECD first sought to amend its complaint, but just four days after the district court noticed that hearing, ECD filed yet another motion for leave to file a "new version" of its proposed amended complaint. (Mot. for Leave, R.E. 52, Page ID 797–802.) Still, the Court considered ECD's belated filing and provided ECD a full and fair hearing.

The district court heard ECD's motions on August 20, 2015. (Hr'g Tr., R.E. 60, Page ID 964–97.) It issued an order denying ECD's motion for reconsideration following the hearing. (Recons. Opinion, R.E. 56, Page ID 941–48.) The district court issued an order denying ECD's motion to amend or alter judgment and for leave to file an amended complaint and denying ECD's motion for leave to file a new version of its proposed amended complaint on September 4, 2015. (Amend Opinion, R.E. 57, Page ID 949–58.) ECD filed its notice of appeal on September 21, 2015. (Not. of Appeal, R.E. 58, Page ID 959–62.)

SUMMARY OF ARGUMENT

ECD's principal argument on appeal is that it need not allege recoupment because it brings a Section 1 conspiracy to restrain trade claim and not a Section 2 monopolization claim. (*See* Br. at 19.) But ECD's claim of a low-price conspiracy is the very theory analyzed by the Supreme Court in *Matsushita*, which explained in no uncertain terms that "this is a Sherman Act § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584–85 n.8 (1986). ECD's claims mirror those in *Matsushita*. In *Matsushita*, "**the gist of this *conspiracy* was a scheme to . . . *fix and maintain low prices* for television receivers exported to and sold in the United States**." *Id.* at 578 (internal quotation marks and citation omitted and emphasis added). Here, ECD asserted nearly identical allegations that Defendants "**agreed to *fix prices, and coordinated among themselves* a plan to sell solar panels in the American market *at unreasonably low and/or below-cost prices***." (Complaint, R.E. 1, Page ID 2 ¶ 1 (emphasis added).)

Matsushita imposed a recoupment requirement on Section 1 low-price conspiracy claims. As *Matsushita* explained, "[t]he success of *any* predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." 475 U.S. at 589 (first emphasis added). The Supreme Court has invoked *Matsushita* in requiring recoupment when plaintiffs seek to punish low prices under the antitrust laws. The

Supreme Court in *Brooke Group*, albeit considering a Robinson-Patman Act claim, imported the recoupment "prerequisite" directly from *Matsushita* and thus from Section 1:

> The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.

Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (citing *Matsushita*, 475 U.S. at 589).

Matsushita's dictate notwithstanding, ECD opted not to plead recoupment. ECD's choice was deliberate; its complaint mirrored the "nearly identical" *amended* complaint in the sister Solyndra action, rather than the *original* complaint in the Solyndra action that—at least in conclusory fashion—attempted to plead recoupment. If ECD could have pled recoupment, there was no reason for it not to do so—it could have argued in the alternative that recoupment was not required.

ECD may have opted against pleading recoupment to sidestep its Rule 11 dilemma. In ECD's final 10-K filed with the SEC before bankruptcy, ECD explained that "[t]he solar energy market is intensely competitive," and that the "number of solar energy product manufacturers is rapidly increasing" due to, among other things, "relatively low barriers to entry." (Energy Conversion

Devices, Inc. 10-K for FY ended June 30, 2011 at 10.[2]) ECD reiterated these points when it filed for bankruptcy, submitting to the bankruptcy court in its first-day filings that "[t]he solar energy market has grown intensely competitive" and that "[m]any competitors . . . have entered the market selling products with lower cost and higher conversion efficiency . . . ." (*In re Energy Conversion Devices, Inc.*, Case No. 12-43166 (Bankr. E.D. Mich.), Dkt. No. 10 at 10 ¶ 30.) ECD included in its complaint a similar assertion: that "many solar companies, including Defendants, recently entered the solar panel industry in the past ten to fifteen years." (Complaint, R.E. 1, Page ID 16 ¶ 42.) These assertions are incompatible with plausible recoupment.

Recoupment is doubly implausible because alleged conspirators Suntech America, Inc. and Suntech Power Holdings Co., Ltd. filed for bankruptcy just like ECD. (*See* Suntech Suggestion of Bankruptcy, R.E. 55, Page ID 920–21; *In re Suntech Power Holdings Co., Ltd.*, Bankr. S.D.N.Y. Case No. 14-10383 (SMB); *In re Suntech America, Inc., et al.*, Bankr. D. Del. Case No. 15-10054 (CSS)).[3] And Yingli stated in its 2014 Annual Report filed with the SEC that there

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[2] *Available at* http://www.sec.gov/Archives/edgar/data/32878/000095012311079926/k50674e10vk.htm.

[3] Suntech Power Holdings Co. Ltd., was never served in this matter and is therefore not an appellee. Suntech America, Inc., however, is an appellee. On

was substantial doubt about the company's ability to continue as a going concern. (2014 Yingli Green Energy Holding Co. Ltd. 20-F, at 20.[4]) These are not firms poised to command supracompetitive prices by dominating the market. (*See* Hr'g Tr., R.E. 60, Page ID 987 at 24:20–23 (discussing Suntech's bankruptcy and Yingli's going concern note).)

Regardless of ECD's motives, it deliberately decided not to allege recoupment in a low-price conspiracy case, despite Supreme Court precedent requiring it to do so. This Court recently confirmed the recoupment requirement in Section 1 cases, inferring that recoupment is among the "elements in a § 1 predatory pricing claim." *Superior Prod. P'ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 320 (6th Cir. 2015). As this Court reasoned, "*Matsushita* clearly considered both below-cost pricing and the likelihood of recoupment to impact, if not fully determine, the plausibility of a predatory pricing conspiracy." *Id.*

On appeal, ECD continues to argue it was not required to plead recoupment for its Section 1 claim. Then ECD pivots to argue that it could have pled recoupment, but wasn't "on notice" that it needed to do so until its case was

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January 14, 2016, the U.S. Bankruptcy Court for the District of Delaware, for purposes of this appeal only, lifted the automatic bankruptcy stay.

[4] *Available at* http://www.sec.gov/Archives/edgar/data/1394029/000110465915038741/a15-6390_120f.htm.

dismissed. (Br. at 47–49.) ECD never attempted to amend its complaint until after judgment was entered against it, and ECD offers no reason for its delay except for its misreading of well-established law. Given ECD's unexplained delay and gamesmanship in waiting to file an amended complaint until it lost on the merits and then moved for reconsideration on the merits, the district court was well within its broad discretion to deny ECD, as the district court put it, "a third bite at the apple." (Amend Opinion, R.E. 57, Page ID 957.)

In any event, ECD's new allegations cannot establish recoupment. All ECD can muster in support of its newfound "recoupment" allegations is that Defendants' prices supposedly "have stabilized and even increased." (Br. at 50.) These allegations say nothing about whether Defendants (one which declared bankruptcy and another which issued a going concern notice in its recent SEC filings) are reaping or soon might reap supracompetitive profits. And ECD cannot demonstrate high barriers to entry that would make recoupment plausible, particularly in light of the constraints imposed on its pleadings by statements it made in its complaint, to the investing public, and to the bankruptcy court describing a "rapidly increasing" number of competitors and "relatively low barriers to entry." These statements foreclose ECD's antitrust claims.

The district court opinions dismissing ECD's claims and denying ECD's post-judgment motions should be affirmed.

ARGUMENT

I. ECD FAILED TO STATE A CLAIM BY FAILING TO PLEAD RECOUPMENT.

Supreme Court and this Circuit's authority required ECD to allege that Defendants could recoup their losses in order to state a Section 1 claim. Recoupment is indispensable to ECD's low-price conspiracy claims for two reasons: *first,* alleging recoupment is part of establishing that a low-price conspiracy is plausible, which is essential to surviving a motion to dismiss under *Twombly*; and *second*, recoupment is essential to establishing antitrust injury. As explained below, ECD's failure to allege recoupment, and its choice instead to plead allegations inconsistent with recoupment, forecloses its Section 1 claim for both reasons.[5]

The district court correctly held that ECD's claim must be dismissed for its failure to plead recoupment.[6] (Dismiss Opinion, R.E. 40, Page ID 447–54.) This

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[5] ECD also advanced a claim under the Michigan Antitrust Reform Act (MARA) § 445.772 (*see* Complaint, R.E. 1, Page ID 29–30, ¶¶ 90–98), which fails for the same reasons as its Section 1 claim. *See Partner & Partner, Inc. v. ExxonMobil Oil Corp.*, 326 F. App'x 892, 898 (6th Cir. 2009).

[6] The district court held both that "Plaintiff is required to allege recoupment," (Dismiss Opinion, R.E. 40, Page ID 447–50), and that ECD's complaint did not allege recoupment, (*id.* at Page ID 450–52). ECD only challenges the first holding on appeal; ECD does not argue that its original complaint pled recoupment, and it thus has waived the argument. *Bidwell v. Univ. Med. Ctr., Inc.*, 685 F.3d 613, 617 (6th Cir. 2012).

Court reviews *de novo* a district court's dismissal for failure to state a claim.[7] *Begala v. PNC Bank, Ohio, Nat'l Ass'n*, 214 F.3d 776, 779 (6th Cir. 2000) (citing *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996)).

A. RECOUPMENT IS NECESSARY TO PLEAD A PLAUSIBLE LOW-PRICE CONSPIRACY, WHETHER UNDER SECTION 1 OR ANY OTHER ANTITRUST LAW.

To survive a motion to dismiss, a plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). *Twombly* itself examined a Section 1 claim and required at the pleading stage "a plausible suggestion of conspiracy." *Id.* at 566. *Twombly* emphasized that "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id.* at 558 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1216, at 233–34 (3d ed. 2004)).

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[7] ECD also appeals from the district court's denial of its motion for reconsideration, which was premised on the argument that the district court decision contained a "palpable defect" by requiring recoupment. (Mot. for Recons., R.E. 42, Page ID 464–76; Recons. Opinion, R.E. 56, Page ID 941, 947). This Court reviews denial of a motion for reconsideration under an abuse of discretion standard. *Curry v. Scott*, 249 F.3d 493, 503 (6th Cir. 2001). Because the district court properly required ECD to plead recoupment, as explained herein, it also properly denied ECD's motion for reconsideration.

Recoupment is the *sine qua non* of a *plausible* predatory pricing conspiracy because low-price conspiracies are "self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the conspirators." *Matsushita*, 475 U.S. at 595. Thus, "predatory pricing schemes are rarely tried, and even more rarely successful," and companies have "every incentive *not* to engage" in predatory pricing, "for its likely effect would be to generate losses for [the conspirators] with no corresponding gains." *Id.* at 589, 595.

Because predatory pricing is costly and self-deterring, the Supreme Court observed that "[t]he success of *any* predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *Id.* at 589 (first emphasis added). Put simply, "[t]he alleged predatory scheme makes sense only if petitioners can recoup their losses." *Id.* at 592 n.16.

Accordingly, in order to advance a *plausible* predatory pricing conspiracy, whether brought under Section 1 or Section 2, a plaintiff must allege recoupment. This Court in *Superior Production* just addressed this very question, finding it "best to infer these same elements [below-cost pricing and recoupment] in a § 1 predatory pricing claim." 784 F.3d at 320. As this Court explained, the Supreme Court in *Matsushita*—a Section 1 case brought on the same legal theory ECD

advances here—"clearly considered both below-cost pricing and the likelihood of recoupment to impact, if not fully determine, the plausibility of a predatory pricing conspiracy." *Id.* (citation omitted). ECD itself acknowledges that "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." (Br. at 31.)

Here, without an allegation of recoupment, the conspiracy ECD alleges makes no sense, providing no plausible economic explanation as to why Defendants would conspire to lose money for years without any likelihood of future gain in the form of supracompetitive profits. The conspiracy is facially implausible for failing to plead recoupment; and its implausibility is underscored by the fact that ECD's allegations reduce to parallel conduct and opportunities to conspire[8]—doing nothing to place the allegations "in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 557; *see also In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d at 908 (affirming dismissal of complaint where "defendants' conduct was not only compatible with, but indeed was more

[8] "As the Supreme Court explained in *Twombly* . . . even conscious parallelism, a common reaction of firms in a concentrated market, . . . is not itself unlawful." *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 903 (6th Cir. 2009) (quoting *Twombly*, 550 U.S. at 554) (internal quotation marks omitted). And "allegations aver[ring] only an opportunity to conspire . . . do[] not . . . support an inference of illegal agreement." *Id.* at 905.

likely explained by, lawful, unchoreographed free-market behavior") (internal quotation marks and citation omitted).

The implausibility of the conspiracy alleged in ECD's complaint requires its dismissal under the standards set forth in *Twombly* and *Matsushita*—both landmark Section 1 cases requiring that antitrust plaintiffs complain of a plausible conspiracy in order for their claims to proceed.

B. RECOUPMENT IS REQUIRED TO DEMONSTRATE ANTITRUST INJURY IN A LOW-PRICE CONSPIRACY CASE.

In addition to "impact[ing], if not fully determin[ing], the plausibility of a predatory pricing conspiracy," *Superior Prod.*, 784 F.3d at 320, recoupment is required in any low-price conspiracy case in order to demonstrate antitrust injury. A court "not only may—but . . . must—reject claims under Rule 12(b)(6) when antitrust standing is missing." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007) (*en banc*). As this Court has explained, "antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [the court] must dismiss it as a matter of law—lest the antitrust laws become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be." *Id.* at 450. Without allegations of recoupment in a low-price conspiracy claim, ECD lacks

antitrust standing because it cannot demonstrate antitrust injury, and its claims must be dismissed.

"Far from being 'a mere technicality,' antitrust standing 'is the glue that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws,' by claimants seeking to halt the strategic behavior of rivals that increases, rather than reduces, competition." *NicSand*, 507 F.3d at 449-50; *cf. Matsushita*, 475 U.S. at 594 ("[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one [a low-price conspiracy] are especially costly, because they chill the very conduct the antitrust laws are designed to protect."). Likewise, "[t]he antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990). Antitrust injury is a "necessary, but not always sufficient" condition of antitrust standing. *NicSand*, 507 F.3d at 450 (internal quotation marks and citation omitted). The fact that ECD alleged "a *per se* illegal restraint of trade does not obviate the need to . . . adequately allege[] antitrust injury." *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 909 n.15 (6th Cir. 2003); *see also Atl. Richfield*, 495 U.S. at 344 ("The need for this showing is at least as great under the *per se* rule as under the rule of reason.").

Both below-cost pricing and recoupment are necessary to demonstrate antitrust injury when a plaintiff complains of low prices. As *Brooke Group* explained, "[t]hese prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury." *Brooke Grp.*, 509 U.S. at 226; *see also Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 451 (2009) ("To avoid chilling aggressive price competition, [the Supreme Court has] carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low."); *id.* at 457 ("*Brooke Group* holds that low prices are only actionable under the Sherman Act when the prices are below cost and there is a dangerous probability that the predator will be able to recoup the profits it loses from the low prices.") (citing *Brooke Grp.*, 509 U.S. at 222–24).

Under *Brooke Group*, the recoupment requirement is determinative as to whether antitrust injury exists because "[w]ithout [recoupment], predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers." *Id.* at 224. Recoupment is indispensable because "the substantive evil that antitrust reprehends is not the injury to rivals, but the subsequent injury to consumers. The recoupment

requirement enables the tribunal to determine whether a particular price cut is calculated to injure only rivals, or consumers as well." 3A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application § 726a (4th ed. 2015); *see also Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1245 (11th Cir. 2002) ("The ability of a price discrimination scheme to drive competitors from the market through below-cost pricing does not alone constitute an antitrust injury. Crucial to the determination of an antitrust injury is whether the predator has a rational expectation of later recouping its losses.") (citing *Matsushita*, 475 U.S. at 589).

Because ECD does not allege recoupment, it has not sustained antitrust injury, lacks antitrust standing, and its claims must (not may) be dismissed. *NicSand*, 507 F.3d at 449.

C. CONTROLLING AND PERSUASIVE AUTHORITY HOLDS THAT RECOUPMENT IS REQUIRED FOR LOW-PRICE SECTION 1 CONSPIRACIES.

Following the Supreme Court authority set out above, the courts of appeals that have considered the question hold that low-price conspiracies brought under Section 1 require recoupment. This Court recently joined this consensus, "think[ing] it best to infer these same elements [below-cost pricing and recoupment] in a § 1 predatory pricing claim." *Superior Prod.*, 784 F.3d at 320 (citation omitted).

The Seventh Circuit decision in *Wallace v. Int'l Bus. Machs. Corp.*, 467 F.3d 1104 (7th Cir. 2006) (Easterbrook, J.), is instructive. "As the *Wallace* case illustrates, there can be no predatory pricing with harm to consumers if recoupment is not even a part of the strategy." *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 726a. In *Wallace*, the Seventh Circuit affirmed dismissal of a Section 1 claim on a motion to dismiss and explained that when "recoupment is improbable even if some producers give up the market, there is no antitrust problem."[9] 467 F.3d at 1106.

In *Wallace*, the district court dismissed a Section 1 complaint alleging a low-price-fixing scheme. *Wallace v. Int'l Bus. Machs. Corp.*, No. 1:05-cv-678 RLY-VSS, 2006 WL 1344055 at *2 & n.2 (S.D. Ind. May 16, 2006), *aff'd* 467 F.3d 1104 (7th Cir. 2006). The court dismissed the complaint because the plaintiff had "not identified an anticompetitive effect," and thus "has failed to allege a cognizable antitrust injury." *Id.* at *2. The Seventh Circuit affirmed on the specific grounds that plaintiff "does not contend that [the purported conspiracy] will lead to monopoly prices in the future," explaining that "[i]f a manufacturer

[9] ECD repeatedly contends that the district court was the first and only court in history to dismiss a Section 1 complaint for failing to plead recoupment. *See* Br. at 16, 20, 22, 28, 47. As *Wallace* demonstrates, ECD's bald assertion is wrong.

cannot make itself better off by injuring consumers through lower output and higher prices, there is no role for antitrust law to play." *Wallace*, 467 F.3d at 1107.

The holdings of this Court and the Seventh Circuit are in line with the other circuit courts that have considered whether recoupment is required for Section 1 claims. *See Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1548–49 (10th Cir. 1995) ("To establish a Section 1 violation, [plaintiff] must show a conspiracy to engage in short-term price cutting to secure long-term monopoly profits.") (citation omitted); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1444 (9th Cir. 1995) ("To show antitrust injury under Sherman Act § 1, a plaintiff must show that the predator has market power."); *id*. ("[F]or the same reasons that we stated in our analysis of [plaintiff's] claim under Sherman Act § 2, [plaintiff's] evidence is insufficient for a jury reasonably to conclude that [defendant] possesses market power, or is dangerously close to obtaining it, under § 1. In light of this conclusion, any injury-in-fact suffered . . . as a result of [defendant's] alleged predatory maximum price fixing does not constitute antitrust injury.").

The majority of district court decisions also so hold.[10] *See*, *e.g.*, *Traffic Scan Network, Inc. v. Winston*, No. 92-2243, 1995 WL 317307, at *12 (E.D. La. May

[10] ECD identifies only two district court cases holding or suggesting otherwise (Br. at 47–48): *Solyndra Residual Trust v. Suntech Power Holdings Co., Ltd.*, 62 F. Supp. 3d 1027 (N.D. Cal. 2014), and *Fricke–Parks Press, Inc. v. Fang*,

24, 1995) (holding that "the absence of evidence of below-cost pricing and of the ability to recoup" defeats a § 1 claim); *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 35 F. Supp. 2d 597, 600 (S.D. Ohio 1999) ("Under . . . § 1, . . . the Supreme Court has required that a plaintiff alleging unfair competition based upon a competitor's low pricing of a product show that such below-cost-pricing was reasonably intended to drive out competitors, creating subsequent market conditions in which a defendant could raise prices and recoup the losses incurred . . . ."); *Lifschultz Fast Freight, Inc. v. Consol. Freightways Corp.*, 805 F. Supp. 1277, 1288 (D.S.C. 1992), *aff'd*, 998 F.2d 1009 (4th Cir. 1993) ("'[A] conspiracy, which could not hope to recoup its expenses incurred from alleged below-cost pricing and [is] therefore economically senseless, [does] not violate the antitrust laws.'") (quoting *Liggett Grp., Inc. v. Brown & Williamson Tobacco Corp.*, 964 F.2d 335, 339 (4th Cir. 1992) (citing *Matsushita*, 475 U.S. at 597–98)).

II. ECD'S ARGUMENTS THAT IT NEED NOT PLEAD RECOUPMENT ARE UNAVAILING.

Despite the well-established principles and weight of binding and persuasive authority requiring any antitrust plaintiff complaining of a competitor's low prices to allege recoupment, ECD advances a view to the contrary. ECD's arguments that it need not plead recoupment as a Section 1 claimant are meritless.

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149 F. Supp. 2d 1175 (N.D. Cal. 2001). Both courts are in the Northern District of California, the district to which ECD sought to transfer its case.

A. BOTH SECTION 1 AND SECTION 2 CLAIMANTS MUST DEMONSTRATE RECOUPMENT.

1. *Matsushita*, a Section 1 case, required recoupment.

ECD contends that it was not required to plead recoupment because it brings a Section 1 restraint of trade case rather than a Section 2 monopolization case. (*See, e.g.*, Br. at 19.) *Matsushita* forecloses this argument.

ECD attempts to distinguish its claims from those in *Matsushita*, a Section 1 case, by contending that its claims supposedly do not involve a conspiracy to monopolize. (*See* Br. at 29 ("But *Matsushita*, at bottom, considered a conspiracy to monopolize.") This is a distinction without a difference; ECD's allegations are indistinguishable from those asserting a conspiracy to monopolize and those considered in *Matsushita*:

- "ECD alleges that Defendants agreed among themselves . . . that **they would undertake to dominate the market for solar panels in the United States**." (Complaint, R.E. 1, Page ID 2 ¶ 1 (emphasis added); *see also id.*, Page ID 3 ¶ 4 (referring to "Defendants' plan to dominate the American solar market").)
- "Defendants dumped artificially low-priced products on the American market for an illegal purpose—namely **to eliminate legitimate competition and to gain controlling power over the market**." (Complaint, R.E. 1, Page ID 29 ¶ 94) (emphasis added).)

ECD also tries to sidestep the plain applicability of *Matsushita* to its case by arguing that the district court "inaccurately and repeatedly characterize[d] ECD's claim as a predatory pricing claim." (Br. at 28.) Here, ECD faces a catch-22, but loses either way. If ECD is attempting to state a claim for predatory pricing, then

its claim is just like the one in *Matsushita*, and *Matsushita* required recoupment. And even a cursory read of ECD's complaint reveals that it was attempting to advance a predatory pricing claim, albeit without the necessary recoupment component:

- "The Defendants sold Chinese-manufactured solar panels at unreasonably low and/or **predatory prices**." (Complaint, R.E. 1, Page ID 17 ¶ 45 (emphasis added); *see also id.*, Page ID 26 ¶ 81 ("Defendants' imported solar panels dramatically reduced prices in a sustained effort that dumped their product at unreasonably low and/or **predatory prices** to destroy and injure competitors, and over time, all competition.") (emphasis added).)
- "Defendants knowingly and intentionally combined and conspired with each other . . . with the specific intent to fix prices of Defendants' solar panels at unreasonably low and/or **predatory levels** in the American market, to dump their products in the American market, for the purpose of destroying fair competition in the American market." (*Id.*, Page ID 29 ¶ 92 (emphasis added).)
- "**Defendants' intent in pricing their products at unreasonably low and/or below cost levels was predatory.**" (*Id.*, Page ID 29 ¶ 94 (emphasis added).)

But because ECD has disavowed that it is bringing a predatory pricing claim in order to distinguish its case from *Matsushita*, its claim also fails, because the resulting claim is inactionable. As *Matsushita* explained, when plaintiffs complain of low prices, *only* "predatory pricing" conspiracies have the potential to yield antitrust injury: "[e]xcept for the alleged conspiracy to monopolize the American market through predatory pricing, [other] alleged conspiracies could not have caused respondents to suffer an 'antitrust injury.'" 475 U.S. at 586. And "predatory pricing," by definition, occurs "when a company foregoes short-term

profits in order to develop a market position such that the company can later raise prices and recoup profits." *D.E. Rogers Assocs., Inc. v. Gardner-Denver Co.*, 718 F.2d 1431, 1436 (6th Cir. 1983) (internal quotation marks and citation omitted); *Superior Prod.*, 784 F.3d at 324 ("[A] firm only acts as a 'predator' to the extent that it sells at prices below an appropriate measure of costs and stands to recoup its losses through later supracompetitive profits.") (citation omitted).

This Court, *en banc*, examined a similar scenario in *NicSand*, and affirmed dismissal at the pleading stage of low-price allegations where the plaintiff disclaimed that its action complained of predatory pricing: "[Plaintiff] concedes that [Defendant] did not engage in any form of predatory pricing—it concedes in other words that [Defendant] did not sell automotive sandpaper below cost with the goal of recouping its losses by charging monopolistic prices later . . . . Given this concession and given the realities of the market, [Defendant's conduct] do[es] not show antitrust injury." 507 F.3d at 452. ECD likewise has sealed its own fate by complaining of low prices but not alleging predatory pricing or recoupment, a necessary element of predatory pricing.

2. The Supreme Court has rejected ECD's reasoning that differences between Section 1 and Section 2 yield different predatory pricing requirements.

ECD also argues that "Section 1 and Section 2 are [f]undamentally [d]ifferent [s]tatutes," and suggests that the latter requires recoupment while the

former does not. (Br. at 24–26.) But in *Atlantic Richfield*, the Supreme Court rejected the basic argument that ECD advances here—that the differences between Section 1 of the Sherman Act and Section 2 yield different requirements and obviate the need for a Section 1 plaintiff to demonstrate "predatory pricing." 495 U.S. at 338–41. The respondent in *Atlantic Richfield* "argue[d] that it is inappropriate to require a showing of predatory pricing before antitrust injury can be established when the asserted antitrust violation is an agreement in restraint of trade illegal under § 1 of the Sherman Act, rather than an attempt to monopolize prohibited by § 2," noting "that the two sections of the Act are quite different." *Id.* at 338. The respondent argued that because in a Section 1 case, the price agreement itself is illegal, "all losses flowing from such an agreement must by definition constitute 'antitrust injuries.'" *Id.* at 338–39.

The Supreme Court "reject[ed] respondent's argument," holding that "[a]lthough a vertical, maximum-price-fixing agreement [was then] unlawful under § 1 of the Sherman Act, it does not cause a competitor antitrust injury unless it results in predatory pricing." The Court explained that "[a]ntitrust injury does not arise . . . until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect." *Id.* at 339–40. Notably, the Supreme

Court emphasized that it has "adhered to this principle regardless of the type of antitrust claim involved."[11] *Id.* at 340.

3. This Court requires recoupment for Section 1 claims.

ECD's arguments to escape this Court's decision in *Superior Production* are equally futile. ECD attempts to cabin *Superior Production* to being a summary judgment opinion—implying that the case does not apply at the pleading stage. (Br. at 17, 30.) ECD's argument is contrary to well-established pleading requirements.

In *Superior Production*, this Court found it "best to infer" the below-cost pricing and recoupment "elements in a § 1 predatory pricing claim." 784 F.3d at 320. And it is hornbook law that at the pleading stage, "'[t]o state a valid claim, a complaint must contain direct or inferential allegations respecting all the material elements under some viable legal theory.'" *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 615 F.3d 496, 502 (6th Cir. 2010) (quoting *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 336–37 (6th Cir. 2007)). By failing to plead recoupment, ECD failed to allege the material elements of any viable legal theory and has not stated a valid claim.

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[11] ECD's attempt to distinguish *Atlantic Richfield* because it considered a vertical rather than horizontal conspiracy (Br. at 26 n. 9) thus is unavailing. Indeed, courts plainly require recoupment for horizontal predatory pricing conspiracies. *See, e.g. Matsushita*, 475 U.S. at 584–85; *Superior Prod.*, 784 F.3d at 320.

Likewise, a plaintiff on a motion to dismiss has an "obligation to provide the 'grounds' of his 'entitle[ment] to relief,'" and its "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation omitted). If ECD cannot now *plead* recoupment, there is no basis to suggest that ECD at summary judgment can create a genuine issue of material fact as to recoupment. *Cf. id.* ("[S]omething beyond the mere possibility of [relief] must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.") (internal quotation marks and citation omitted); *NicSand*, 507 F.3d at 458 (explaining that *Twombly* "set out to eliminate this kind of loose antitrust pleading," and that "speculations [that] show at most the 'possibility' of an entitlement to relief" are "just what [*Twombly*] said would not suffice at the pleading stage") (citations omitted).

This Court has echoed the Supreme Court's concerns that "[g]iven the limited 'success of judicial supervision in checking discovery abuse' and 'the threat [that] discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings,' the federal courts have been 'reasonably aggressive' in weeding out meritless antitrust claims at the pleading stage." *NicSand*, 507 F.3d at 450 (citations omitted); *see also id.* ("[O]ur court has dismissed numerous lawsuits for lack of antitrust standing under Rule 12(b)(6).").

And courts are particularly inclined to dispose of purported low-price conspiracies because "unlike predatory pricing by a single firm, *successful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation." *Matsushita*, 475 U.S. at 595.

If ECD is unable to plead recoupment, it has not alleged a material element of a cognizable claim, it cannot provide the grounds of its entitlement to relief, it cannot allege a plausible conspiracy, it cannot demonstrate antitrust injury, and its case should be dismissed.

B. ECD'S PROPOSED "EXCEPTIONS" TO THE RECOUPMENT REQUIREMENT ARE NOT FOUNDED, AND WOULD READ THE RECOUPMENT REQUIREMENT OUT OF THE LAW.

1. There is no exception to the recoupment requirement because ECD alleges that Defendants have foreign headquarters.

ECD acknowledges that "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." (Br. at 31.) But it contends that "[t]his 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." (*Id.*) For this assertion, ECD relies on two inapposite publications, neither of which support its argument—both relate to the economies of Central and Eastern Europe and were authored more than 20

years ago (by Solyndra's economic expert). (*Id.* at 31–32.) ECD cites no case law to support its theory that the recoupment requirement disappears when Defendants have foreign headquarters and some foreign management. *See Matsushita*, 475 U.S. at 577 (alleged conspiracy involving Japanese manufacturers and American retailers controlled by Japanese parents). In any event, ECD alleges that both Trina and Yingli are listed on the New York Stock Exchange, and Suntech America is owned by a U.S. publicly-listed company (Complaint, R.E. 1, Page ID 7–9 ¶¶ 17, 19, 22)—and thus are publicly-owned by shareholders and managed by boards of directors with fiduciary duties. ECD provides no explanation for how or why companies headquartered or managed in China would seek or agree to sell products at a loss, over a sustained period, with no hope of ever recouping those losses. ECD simply seeks to read the recoupment requirement out of the law, and hopes that anti-Chinese protectionist sentiment can fill the void.

Regardless, as explained further in Section III.B.1, *infra*, ECD's allegations that "[f]or Defendants, increasing employment and market share was more important than earning a profit," (Br. at 32), merely confirm that ECD cannot plead or prove recoupment. (*See* Complaint, R.E. 1, Page ID 4 ¶ 5 ("[I]nstead of seeking profitability, Defendants sold their solar panels at any cost necessary to support full employment in the Chinese manufacturing facilities. . . ."). This Court has described the type of "inept predation" ECD alleges as being a boon to consumers

and of no moment to the antitrust laws: "When a would-be predator sets its prices too low but later finds that it cannot recoup those losses, consumers have gained. Antitrust law should not pose an obstacle to this sort of inept predation." *Superior Prod.*, 784 F.3d at 324 n.5 (citing *Brooke Grp.*, 509 U.S. at 223–24); *see also Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1200 (3d Cir. 1995) ("Predatory pricing schemes that fail at the recoupment stage may injure specific competitors . . . but do not injure competition (i.e. they do not injure consumers) and so produce no antitrust injury. Such futile below-cost pricing effectively bestows a gift on consumers, and the Sherman Act does not condemn such inadvertent charity.") (citation omitted).

2. There is no exception to the recoupment requirement because ECD purports to allege loss of consumer choice and innovation.

ECD also argues that it can demonstrate antitrust injury without recoupment by alleging loss of consumer choice and innovation. (Br. at 33–45.) This is just another end run around the Supreme Court's recoupment requirement. Moreover, if a plaintiff complaining of low prices could demonstrate antitrust injury simply by contending that firms were forced to exit the market, the recoupment requirement would be rendered a nullity. Every time a competitor exited the market, it could allege a self-centered loss of innovation or consumer choice. As the district court correctly explained, the argument that ECD can show antitrust injury through reduced consumer choice or innovation "is just another way of

arguing that Plaintiffs need not allege recoupment to state a claim of an unlawful predatory pricing scheme in violation of § 1 of the Sherman Act." (Recons. Opinion, R.E. 56, Page ID 943.)

Unsurprisingly, ECD's antitrust injury case law suggesting that loss of consumer choice or innovation can suffice involves allegations of boycott or refusal to deal, not low prices.[12] (Br. at 42–43.) *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 469–70 (1982) ("The complaint alleged that [defendants] had engaged in an unlawful conspiracy in violation of § 1 . . . to exclude and boycott clinical psychologists from receiving compensation . . . ."); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 783, 789 (6th Cir. 2002) (exclusionary

[12] In any event, ECD does not actually allege loss of consumer choice or innovation. ECD's only relevant factual (*i.e.*, non-conclusory) allegation is that "[a]t least twelve domestic manufacturing plants have been shut down and ten other companies have declared bankruptcy." (Complaint, R.E. 1, Page ID 17 ¶ 46.) Not one of those companies is among the many that ECD listed as its "principal competitors" in the final 10-K it filed with the SEC before its bankruptcy. (*Compare* Energy Conversion Devices, Inc. 10-K for FY ended June 30, 2011 at 2, *available at* http://www.sec.gov/Archives/edgar/data/32878/000095012311079926/k50674e10vk.htm, *with* Complaint, R.E. 1, Page ID 17–18 ¶ 47.) Indeed, First Solar, one of ECD's "principal competitors" (*id.*) and a U.S. company, remains "the **world's largest** thin-film PV solar module manufacturer and one of the world's largest PV solar module manufacturers," (First Solar, Inc. 10-K for FY ended December 31, 2014, at 2, *available at* http://www.sec.gov/Archives/edgar/data/1274494/000127449415000006/fslrdec1410-k.htm (emphasis added)), continuing to offer consumers a thin-film option like the one ECD provided. (*See* Complaint, R.E. 1, Page ID 3 ¶ 2 (alleging that ECD was the "world's *second* largest thin-film solar company") (emphasis added).)

conduct, resulting in *higher* prices); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1001 (6th Cir. 1999) (boycott/refusal to deal); *Full Draw Prods. v. Easton Sports, Inc.*, 182 F.3d 745, 755 (10th Cir. 1999) (boycott/refusal to deal); *Amarel v. Connell*, 102 F.3d 1494, 1509 (9th Cir. 1997) (ECD cites the case for the proposition that "[a]nother form of antitrust injury is 'coercive activity that prevents its victims from making free choices between market alternatives,'" which arises in the context of allegations that "defendants boycotted [plaintiff], refusing to sell it rice, in an effort to undermine [plaintiff's] ability to sell rice to Korea").

In contrast, cases evaluating low-price Section 1 cases repeatedly affirm that rivals exiting the market during the "below-cost" pricing phase of a "predatory pricing" scheme (the second phase being recoupment) is not a concern of the antitrust laws because their exit does not amount to antitrust injury. *See Superior Prod.*, 784 F.3d at 324 n.5; *Rebel Oil*, 51 F.3d at 1433 ("Though rivals may suffer financial losses or be eliminated as a result of below-cost pricing, injury to rivals at this stage of the predatory scheme is of no concern to the antitrust laws."); *Wallace*, 467 F.3d at 1106 (explaining that when "recoupment is improbable even if some producers give up the market, there is no antitrust problem"); *Advo*, 51 F.3d at 1200; *cf. Brooke Grp.*, 509 U.S. at 224 ("That below-cost pricing may

impose painful losses on its target is of no moment to the antitrust laws if competition is not injured.").

Because exit from the market is insufficient to demonstrate antitrust injury, loss of consumer choice and innovation as a result of the exit also is insufficient. The question reduces to whether exit alone is sufficient, and the cases above hold plainly that it is not.

3. There is no exception to the recoupment requirement because solar cells imported from China are subject to antidumping tariffs.

ECD's reliance on the Department of Commerce ("DOC") and International Trade Commission's trade investigations involving solar cells imported from China is misplaced for many reasons. ECD hopes to fashion a private antitrust case from a trade dispute, and its theory would convert every DOC antidumping tariff into a prima facie antitrust violation.[13] ECD provides no authority holding that trade-law findings can serve as as a basis for antitrust liability.

The trade laws are tools of foreign policy and are designed to be protectionist, deliberately favoring domestic companies. *See* Harvey M. Applebaum, *The Interface of the Trade Laws and the Antitrust Laws*, 6 GEO.

[13] For context, there are over 400 products presently subject to antidumping or countervailing duties from approximately 45 countries. *See* International Trade Association, Scope Information by Country, http://web.ita.doc.gov/ia/CaseM.nsf/136bb350f9b3efba852570d9004ce782?OpenView (last visited February 29, 2016).

MASON L. REV. 479, 479–80 (1998) ("The general objective of U.S. trade law is to protect domestic producers, industries, and workers from foreign competition."). Trade laws are therefore at odds with antitrust laws, which are "generally concerned with protecting the competitive process, but not individual domestic producers or industries." *Id.* at 480. There are many other material differences between trade and antitrust law, including that "[t]he antitrust laws manifestly have much higher standards of injury and causation." *Id.* at 482.

To the extent that ECD complains of "dumping," its claim is not cognizable. While a private right of action for dumping used to exist, Congress repealed it in 2004. *See* Antidumping Act of 1916, 15 U.S.C. § 72 (Repealed by Pub. L. 108-429, Dec. 3, 2004); *see also Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 434 F.3d 1081, 1083 n.1 (8th Cir. 2006) (discussing the Antidumping Act of 1916 and noting its repeal). Congress specifically foreclosed private complaints of "dumping" like ECD's here because the private imposition of liability for trade infractions violated the United States' international obligations. As one court explained: "if Plaintiffs' true gripe is that they are the victims of dumping, then they have no remedy under federal law":

> In 1916, Congress passed the Anti-Dumping Act, 15 U.S.C. § 72. This provided a private cause of action for persons injured by dumping. In 2004, however, Congress repealed this statute because of its desire to implement the decision of the . . . World Trade Organization ("WTO") . . . . The WTO concluded that "Article VI:2 of GATT 1994 require[s] that U.S. antidumping laws allow only the

> implementation of antidumping duties as a remedy for illegal dumping." . . . This Court will not countenance a private cause of action the effect of which would circumvent the United States' international obligations when Congress has clearly manifested its intention to comply with those international obligations.

S/N Precision Enterprises, Inc. v. Axsys Technologies, Inc., No. 1:05-CV-0371, 2005 WL 2614776, at *3 (N.D.N.Y. Oct. 14, 2005) (citations omitted).

Moreover, the DOC findings are inapposite because they apply to an entire nation's industry. (*See* International Trade Administration Fact Sheet[14] (investigations directed at "imports of crystalline silicon photovoltaic cells . . . from the People's Republic of China").) In the findings upon which ECD relies, there were over sixty Chinese solar cell exporters assigned dumping margins. (*Id.*) Nothing distinguishes Defendants in this case from those other exporters, and ECD does not and cannot suggest that every Chinese solar cell manufacturer engaged in a vast predatory pricing conspiracy. Likewise, the DOC findings on their face applied to solar *cells* (*id.*)—not solar *panels*—even though in this litigation ECD complains of Defendants' prices for solar *panels* (which are comprised of solar cells but are a distinct product). (*See* Complaint, R.E. 1, Page ID 2 ¶ 1.)

Thus, the trade cases and the findings therein do not bear at all on the issues presented here. In fact, to the extent they do, the trade cases cut in Defendants'

[14] *Available at* http://ia.ita.doc.gov/download/factsheets/factsheet_prc-solar-cells-ad-cvd-finals-20121010.pdf.

favor. ECD pleads that as a result of the trade investigations, the DOC issued "massive duties" against Defendants. (*Id.*, Page ID 4 ¶ 7.) This allegation only makes future recoupment more implausible, as Defendants would have to recoup not only their purported losses from the low-price stage of their alleged conspiracy, but they would have to recoup an excess sufficient to make up for the "massive" duties purportedly levied against them.

III. THE DISTRICT COURT CORRECTLY DISMISSED ECD'S COMPLAINT WITH PREJUDICE AND DENIED ECD'S MOTION TO AMEND.

For the reasons explained above, dismissal of ECD's complaint for failure to plead recoupment not only was warranted but was mandated by controlling law. As explained below, the district court appropriately exercised its discretion in dismissing the complaint with prejudice and denying ECD leave to amend.

A. ECD'S FAILURE TO AMEND PRIOR TO DISMISSAL WARRANTED DISMISSAL WITH PREJUDICE.

ECD did not seek to amend its complaint until after its original complaint was dismissed and the district court entered judgment in Defendants' favor. This Court has cautioned that "[i]f a permissive amendment policy applied after adverse judgments, plaintiffs could use the court as a sounding board to discover holes in their arguments, then reopen the case by amending their complaint to take account of the court's decision." *Leisure Caviar LLC v. U.S. Fish and Wildlife Serv.*, 616 F.3d 612, 616 (6th Cir. 2010) (internal quotation marks and citation omitted).

Such a result "would sidestep the narrow grounds for obtaining post-judgment relief under Rules 59 and 60, make the finality of judgments an interim concept and risk turning Rules 59 and 60 into nullities." *Id*.

Thus, "[w]hen a party seeks to amend a complaint after an adverse judgment, it . . . must shoulder a heavier burden. Instead of meeting only the modest requirements of Rule 15, the claimant must meet the requirements for reopening a case established by Rules 59 or 60." *Id.* at 616 (internal quotation marks and citation omitted). A court may alter a judgment based on: "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Id.* at 615. ECD can demonstrate none of the above.[15]

The district court thus properly denied ECD's motion to amend or alter judgment and for leave to file an amended complaint (Mot. to Amend, R.E. 45, Page ID 509–25) and ECD's motion for leave to file a new version of its amended

[15] ECD's reliance on *United States v. Bledsoe*, 342 F.3d 634, 644 (6th Cir. 2003), is misplaced. This Court has explained that *Bledsoe* involved "extenuating circumstances justifying a departure from the principle that 'it is not the district court's role to initiate amendments.'" *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 844 (6th Cir. 2012) (citing *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 438 (6th Cir. 2008)). Whereas "*Bledsoe* was an unusual case because the district court's final order gave plaintiff notice, for the first time, that a heightened pleading standard applied to his claims," *id*., here, ECD had plentiful notice that recoupment was required for its claims and yet did not seek to amend until after the district court entered judgment against it.

complaint (Mot. for Leave, R.E. 52, Page ID 797–802). (Amend Opinion, R.E. 57, Page ID 949–57.) "A district court, generally speaking, has considerable discretion in deciding whether to grant either type of motion [to alter the judgment or amend a complaint], and as a result [the appellate court] review[s] these types of decisions for abuse of discretion." *See Leisure Caviar*, 616 F.3d at 615. The district court was entirely within its discretion to deny ECD's amendment.

In circumstances where a plaintiff seeks to amend its complaint after judgment against it, a court "ought to pay particular attention to 'the movant's explanation for failing to seek leave to amend prior to the entry of judgment.'" *Id.* at 616; *see also id.* at 617 ("A claimant who seeks to amend a complaint *after* losing the case must provide a compelling explanation . . . for granting the motion.") (emphasis in original). Here, ECD has no excuse for not pleading recoupment, other than that ECD believed its faulty interpretation of the law to be correct until the Court ruled in Defendants' favor. (*See* Br. at 47 (arguing only that "ECD was not on notice that its complaint was deficient").) ECD does not claim in its appellate brief that it discovered new facts[16] or that there was any other reason it waited until after judgment to seek to amend.

[16] Nor could ECD establish any new facts. While ECD halfheartedly argued before the district court that it discovered "new evidence" in support of recoupment, (*see* Mot. to Amend, R.E. 45, Page ID 516–20), it does not advance that argument on appeal, and thus waived it. *Bidwell*, 685 F.3d at 617. In any event, ECD conceded that the "new evidence" it purportedly discovered

In fact, ECD's decision not to plead recoupment was a deliberate and strategic choice, albeit a choice constrained by the circumstances of the solar panel market and ECD's prior admissions. ECD advanced in its complaint and throughout its motion to dismiss briefing before the trial court, just as it continues to now advance, a theory that Section 1 low-price conspiracy claims do not require recoupment. In the sister *Solyndra* litigation, Solyndra first advanced allegations of recoupment but then withdrew them in its amended complaint. ECD opted in its complaint to mirror the Solyndra complaint that removed the recoupment allegations. And in both the *Solyndra* motion to dismiss briefing and in the *ECD* motion to dismiss briefing, Defendants argued that the claims were deficient for failure to plead recoupment. ECD could have amended to attempt to cure this deficiency once Defendants raised it in their motion to dismiss.[17] (*See* Fed. R. Civ. P. 15(a)(1)(B) ("A party may amend its pleading once as a matter of course within . . . 21 days after service of . . . a motion under Rule 12(b) . . . .").) Or, ECD could have pled recoupment in the alternative—there was no harm in doing so.

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was available "around the time of [ECD's] response to the motion to dismiss." (Hr'g Tr., R.E. 60, Page ID 8 at 8:23–24.)

[17] Defendants specifically requested dismissal with prejudice (Mot. to Dismiss, R.E. 17, Page ID 97, 133), and ECD did not request dismissal without prejudice or leave to amend in its response brief (Opp'n to Dismiss, R.E. 38, Page ID 354–89).

Instead, ECD opted to test its theory that Section 1 claims do not require recoupment. In fact, ECD went so far as to seek reconsideration on the legal question, arguing that the district court's decision had a "palpable defect," before ECD sought to amend. (Mot. for Recons., R.E. 42, Page ID 457, 461–76.) Now, having lost the battle on the legal question, ECD should not be permitted to revive the alternative legal theory that it purposely did not advance.

NicSand is instructive. There, this Court, *en banc*, held an antitrust plaintiff to its concession that it was not bringing a predatory pricing claim, rather than affording the plaintiff an opportunity to amend and bring the claim it disavowed: "When a party concedes that it is not bringing a claim . . . no purpose of Rule 12(b)(6) is served by overlooking the concession . . . . The plaintiff remains the master of its complaint, and when it says that it is not bringing a predatory-pricing claim, we should take it at its word." *NicSand*, 507 F.3d at 458.

Nor has this Court looked favorably on plaintiffs seeking to amend after using their initial complaint to elicit an advisory opinion in which the Court identifies deficiencies that plaintiffs then are free to correct. But ECD effectively concedes that it is attempting to do just that. At the district court hearing, ECD argued that "given the law, we did not believe that we needed to allege recoupment to prove antitrust injury. And it was only after the Court's decision, which would have required us to do that, that, you know, we amended to add in those allegations

that would cure the defect, alleged defect identified by the Court." (Hr'g Tr., R.E. 60, Page ID 971–72 at 8:25–9:5; *see also id*. Page ID 975–76 at 12:23–13:2 ("[T]hat was information [about entry barriers] that we did not believe we needed to allege, given our view of the state of the law. And that's why it was not presented in our original complaint and was only presented after the Court entered its motion to dismiss order.").)

In *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013), this Court affirmed the district court's denial of a motion to amend where the plaintiff filed his motion to amend "well after [the] motion to dismiss had been filed and fully briefed, and one month after the magistrate recommended granting it." *Id*. at 458. The district court concluded that "permitting a plaintiff to . . . test out his pleading and discover defects before seeking to amend them away . . . . would encourage delay and bad faith on the part of plaintiffs and prejudice defendants who would have wasted time and expense attacking a hypothetical complaint." *Id.* at 458–59. This Court agreed and affirmed. *Id.* at 459. Likewise, this Court affirmed and approvingly quoted a district court decision denying a post-judgment attempt to amend in *Begala v. PNC Bank, Ohio, Nat. Ass'n*, 214 F.3d 776 (6th Cir. 2000), which explained that "Defendant was entitled to a review of the complaint as filed pursuant to Rule 12(b)(6). *Plaintiffs were not entitled to an advisory opinion from*

the Court informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies." *Id.* at 784 (emphasis in original).

From the day it filed its original complaint on October 4, 2013 to the day the Court dismissed that complaint more than a year later on October 31, 2014, ECD made no attempt to amend its complaint. After ECD's complaint was dismissed, it sought reconsideration, doubling down on its flawed legal theory, only later seeking to amend as a fallback position. (*See* Mot. for Recons., R.E. 42, Page ID 456–77, Mot to Amend, R.E. 45, Page ID 509–25.) Under such circumstances, the district court was well within its discretion to deny ECD what it rightly termed a "third bite at the apple." (Amend Opinion, R.E. 57, Page ID 956–57.)

B. AMENDMENT WOULD HAVE BEEN FUTILE.

Finally, amending ECD's complaint would have been, and is, futile. The essential problem with ECD's original complaint was not that it pled too little (although that also is true), but that it pled too much—effectively pleading itself out of court by pleading facts demonstrating that recoupment is implausible. ECD now seeks to amend its complaint (through conclusory allegations) in a way that would contradict its earlier allegations, its prior judicial admissions, and statements it made to the investing public in SEC filings. Yet at bottom, the allegations in ECD's proposed amended complaint *still* do not suggest that recoupment is plausible.

1. ECD's affirmative allegations and its prior admissions render recoupment implausible.

ECD advanced several allegations that effectively pled it out of court by demonstrating that recoupment is implausible. "While [a court] must accept all of a claimant's allegations as true at [the pleading] stage of a case, that does not mean [a court] must *ignore* those allegations when they defeat the claim and when they show the claimant is doing nothing more than invoking the antitrust laws to protect a competitor, not competition." *NicSand*, 507 F.3d at 457 (emphasis in original); *see also id.* at 458 ("When the complaint itself gives reasons to doubt plaintiff's theory, and when later pleadings confirm those doubts, it is not our task to resuscitate the claim but to put it to rest. Nothing prevents a plaintiff from pleading itself out of court . . . .") (internal quotation marks and citation omitted).

Among other things, ECD alleged that "many companies, including Defendants, recently entered the solar panel industry in the past ten to fifteen years." (Complaint, R.E. 1, Page ID 16 ¶ 42.) As the district court observed, "the ability of 'many' companies to enter the market in recent years makes it implausible that Defendants would be able to recoup their alleged losses." (Dismiss Opinion, R.E. 40, Page ID 452.) The district court reasoned, citing *Matsushita*, that "'[w]ithout barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time' in order for conspirators to recoup their losses (including interest) from their below-cost prices. In the absence

of barriers to entry, '[i]f the defendants should try to raise prices [to high enough prices to recoup losses from below-cost pricing], they would attract new competition.'" (*Id.* at Page ID 451 (quoting *Matsushita*, 475 U.S. at 591 n.15).) *See also Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 824 (6th Cir. 1982) ("[O]nly where such [high entry] barriers exist will there be incentive to price predatorily. For where entrance barriers are low, a firm may depress prices and drive competitors from the field only to find its market invaded by a host of new competitors."); *id.* (explaining that a "number of new companies continually entering the market" evidences "relatively low" entrance barriers).[18]

ECD's allegation was no fluke: it is consistent with multiple similar statements ECD made in a variety of contexts—of which the Court can take judicial notice[19]—showing that ECD cannot now assert (within the bounds of Rule

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[18] ECD now asserts in conclusory fashion, without explanation, and in contradiction of its earlier admissions and statements, that there are "significant barriers to entry which would discourage new entrants from attempting entry to take advantage of the higher prices." (Br. at 52.) ECD's undeveloped argument on this point concedes the point. *See Batuyong v. Gates*, 337 F. App'x 451, 457 (6th Cir. 2009); *see also Burger v. Woods*, 515 F. App'x 507, 509 (6th Cir. 2013) (explaining that an "undeveloped, bare-bones assertion does not suffice to make, much less preserve, an appellate argument").

[19] *See Helwig v. Vencor, Inc.*, 210 F.3d 612, 618–19, n.10 (6th Cir. 2000) *reh'g en banc granted, opinion vacated on other grounds*, 222 F.3d 268 (6th Cir. 2000) *and on reh'g en banc*, 251 F.3d 540 (6th Cir. 2001) ("In reaching the conclusion that the plaintiffs have failed to state a claim upon which relief can be granted, we have considered not only those documents referenced in the plaintiffs' complaint, but also documents filed with the SEC. We believe that it

11) anything other than robust competition in the solar industry, myriad new entrants, and low barriers to entry that would prevent rather than suggest recoupment.

In its final 10-K filed with the SEC before bankruptcy, ECD explained that "[t]he solar energy market is intensely competitive and rapidly evolving. The number of solar energy product manufacturers is rapidly increasing due to the growth of actual and forecast demand for solar energy products and the relatively low barriers to entry." (10-K for FY ended June 30, 2011 at 10.)

ECD reiterated these points when it filed for bankruptcy. Before the bankruptcy court, ECD's Executive Vice President and Chief Financial Officer filed a declaration in support of ECD's first-day motions that stated, among other things, that: "The solar energy market has grown intensely competitive and is rapidly evolving. Many competitors manufacturing predominantly crystalline silicon solar modules have entered the market selling products with lower cost and higher conversion efficiency . . ." (*In re Energy Conversion Devices, Inc.*, Case No. 12-43166 (Bankr. E.D. Mich.), Dkt. No. 10 at 10 ¶ 30.)

Beyond its allegations and concessions describing robust competition and low barriers to entry, ECD also alleged that Defendants are not motivated by profit

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is appropriate to take judicial notice of public documents and that our consideration of these documents does not require conversion of defendants' motion to dismiss to a motion for summary judgment.").

and instead hope to maximize Chinese employment and executive compensation. (*See* Br. at 32 ("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.") (emphasis added); *id.* at 31 (suggesting that Defendants' primary goals may be "market share, employment, or executive compensation").) If Defendants have "little interest in making a profit," then they simply are providing low-priced products to consumers benignly—which is of no moment to antitrust law. *Superior Prod.*, 784 F.3d at 324 n.5; *Advo*, 51 F.3d at 1200.

2. The structure of the solar panel marketplace renders recoupment implausible.

This Court, in affirming dismissal of meritless antitrust claims at the pleading stage, has emphasized that "we cannot ignore the demands of the marketplace in which these agreements arose. 'Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue.'" *NicSand*, 507 F.3d at 454 (citation omitted). Here, the structure of the solar panel market renders recoupment implausible. *See* Areeda & Hovenkamp § 724b ("Any claim of predatory pricing must be dismissed once it appears that the structural requirements for successful predation are absent. . . . If structural factors indicate that monopoly or oligopoly prices could not be maintained for a significant time

after the predation campaign has destroyed or disciplined rivals, then such 'recoupment' is not possible, and the claim must be dismissed.").

As a matter of common sense and basic economics, because solar panels compete with a wide variety of alternative sources of energy, many which for the foreseeable future are less expensive than solar, Defendants have no hope of commanding supracompetitive prices. ECD acknowledged in its bankruptcy filings that "[t]he entire solar energy industry . . . faces price competition from conventional energy . . . and non-solar renewable energy providers." (*In re Energy Conversion Devices, Inc.*, Case No. 12-43166 (Bankr. E.D. Mich.), Dkt. No. 10 at 10 ¶ 31.) There is no demand for solar panels unless prices for solar panels are in line with prices for other forms of energy, and specifically traditional forms of energy. If Defendants were to attempt to raise prices to supracompetitive levels, consumers simply would revert to carbon-based energy sources. Recoupment thus is not possible in the structure of the market.

In addition, public record facts make clear that Defendants are not recouping and have no plausible hope of recouping. Suntech—both its holding company and its U.S. subsidiary—filed for bankruptcy. (Suntech Suggestion of Bankruptcy, R.E. 55, Page ID 920–40; *In re Suntech Power Holdings Co., Ltd.*, Bankr. S.D.N.Y. Case No. 14-10383(SMB); *In re Suntech America, Inc.*, Bankr. D. Del. Case No. 15-10054 (CSS).) And Yingli, in its 2014 Annual Report, stated that there was

substantial doubt about the company's ability to continue as a going concern. (2014 Yingli Green Energy Holding Co., Ltd. 20-F, at 20.) These are not companies poised to take over the market. Indeed, the 2014 National Renewable Energy Laboratory (NREL) Renewable Energy Data Book published by the U.S. Department of Energy[20] estimated that Trina Solar accounted for 6% of global solar module production in that year while Yingli Green Energy Solar accounted for 4%.[21] In this posture, Defendants are nowhere near having the market power needed to be able to hike prices or reduce output.

3. ECD's proposed amended complaint does not come close to pleading plausible recoupment.

For the reasons articulated above, ECD cannot plead recoupment and indeed ECD fails to do so in its proposed amended complaint. ECD argues in conclusory fashion that "Defendants' prices have stabilized and even increased—meaning that

[20] *Available at* http://www.nrel.gov/docs/fy16osti/64720.pdf, page 68. In 2013, NREL estimated that Yingli accounted for 6.6% of global production and Trina accounted for 6.4%—meaning that both companies' share declined in the interim. *See* 2013 NREL Renewable Energy Data Book at 66, *available at* http://www.nrel.gov/docs/fy15osti/62580.pdf.

[21] The Court may consider these statistics as matters of public record on a motion to dismiss. *See Amini v. Oberlin Coll.*, 259 F.3 493, 502 (6th Cir. 2001) ("In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account.") (internal quotation marks and citation omitted); *United States v. Neal*, 577 F. App'x 434, 452 n.11 (6th Cir. 2014) *cert. denied*, 135 S. Ct. 987 (2015) ("[C]ourts may take judicial notice of government statistics . . . .").

there are factual issues going to the probability of recoupment." (Br. at 50.) But assertions of stabilized or even increased prices are utterly inapposite to recoupment, because they say nothing about whether prices are supracompetitive and whether there are sufficient barriers to entry to keep prices at a supracompetitive level. (*See* Hr'g Tr., R.E. 60, Page ID 992 at 29:11–13 (ECD counsel acknowledging "the definition of recoupment would be that prices have increased to a supra-competitive level"); *see also Brooke Grp.*, 509 U.S. at 225 ("The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.").)

And in this case, allegations of stable pricing, if anything, suggest that prices remain low, since ECD alleged that Defendants had "unreasonably low and/or below-cost prices" through at least 2011 (Proposed Am. Compl., R.E. 52-1, Page ID 804–05 ¶ 1), that this trend "continued past 2011," (*id.* at Page ID 825 ¶ 56), and that Defendants sustained "dramatic" losses at least through 2012. (*Id.* Ex. A at Page ID 851 ¶ 16; *see also id.* Page ID 828, 838 ¶¶ 66, 104 (alleging decline from roughly $1/watt in November 2011 to $.66/watt in mid-2014); *id.* at Page ID 806, 820–21 ¶¶ 5, 45 (alleging that the conspiracy began in 2008 and that Defendants reduced prices by 75% over a 5-year period).) In fact, apparently

forgetting that it is now trying to plead recoupment rather than pleading below-cost pricing, ECD argued in its appellate brief that "[i]n 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.," and that "[t]he DOC determined that . . . Defendants' illegal dumping persisted." (Br. at 13.) This assertion of continued low pricing is wholly incompatible with supracompetitive pricing.

ECD's actual allegations in its proposed amended complaint (rather than its characterization of those allegations in its brief) fare even worse. ECD's proposed allegations are not even that *Defendants'* prices have stabilized or gone up, but that "[p]ricing for Tier-1 Chinese producers (in which Defendants are the primary players) has flat-lined, and in some instances, increased, since early 2013." (Proposed Am. Compl., R.E. 52-1, Page ID 837–38 ¶ 104.) ECD extrapolates this trend from five data points: a purported average selling price (ASP) for "Chinese Top-Tier Manufacturers" of $0.66 in Q2 2013; $0.69 in Q3 2013; $0.63 in Q4 2013; $0.64 in Q1 2014; and $0.66 in Q2 2014. (*Id.*) Alleging minor variations in pricing for "Chinese Top-Tier Manufacturers" (in which the starting and ending prices are exactly the same) does not come close to alleging that Defendants are able to command supracompetitive prices. *Cf. NicSand*, 507 F.3d at 458 ("[A] price increase by retailers, without more, does not suggest anticompetitive behavior by suppliers. [Plaintiff's] speculations show at most the 'possibility' of an

entitlement to relief, which is just what [*Twombly*] said would not suffice at the pleading stage.") (citation omitted).

The other proposed allegations that ECD points to in saying it can now plead recoupment (Br. at 51) do not move the needle. Those allegations relate to Defendants' purported plans and predictions, which on their face are utterly irrelevant to supracompetitive pricing and to recoupment.

Indeed, ECD seemingly concedes that there is not any *actual* probability of recoupment, arguing instead that "there is a dangerous probability that Defendants *intended* to recoup their losses in the long run." (Br. at 50–51 (emphasis added).) This argument distorts the relevant legal standard and is utterly irrelevant under it. *Superior Prod.*, 784 F.3d at 324 n.5 ("[I]n the case of predatory pricing, intent to harm competition itself can often accrue to the benefit of consumers. When a would-be predator sets its prices too low but later finds that it cannot recoup those losses, consumers have gained. . . . Antitrust law should not pose an obstacle to this sort of inept predation.") (citation omitted); *see also Rebel Oil Co. v. Atl. Richfield Co.*, 146 F.3d 1088, 1097 (9th Cir. 1998) ("In *Brooke Group*, the Supreme Court made it clear that predatory intent alone . . . cannot substitute for a plaintiff's failure to demonstrate a reasonable prospect of recoupment.") (citation omitted).

In sum, ECD waited too long and waited for the wrong reasons before trying to plead recoupment, and cannot plead recoupment in any event. The district court thus properly denied ECD's post-judgment motions.

CONCLUSION

For the foregoing reasons, the district court's order granting Defendants' motion to dismiss should be affirmed, and the district court's orders denying Plaintiff's post-judgment motions also should be affirmed.

MARCH 2, 2016

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

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Daniel E. Laytin, P.C., 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 12,833 words and therefore complies with the type-volume limitation of Rule 32(a)(7)(B) and (C).

Dated: March 2, 2016

/s/ Daniel E. Laytin
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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2016, I electronically filed the foregoing **Brief of Defendants-Appellees** with the United States Court of Appeals for the Sixth Circuit via the Court's ECF system, which will provide electronic copies to:

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DESIGNATION OF RELEVANT DISTRICT-COURT DOCUMENTS

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

Docket Entry	Description	Page ID Range
1	Complaint	1-37
16	Plaintiff's Motion to Transfer Case	80-95
17	Defendants' Joint Motion to Dismiss Plaintiff's Complaint	96-134
33	Opinion and Order Denying Plaintiff's Motion to Transfer Case	212-218
38	Plaintiff's Opposition to Defendants' Joint Motion to Dismiss Plaintiff's Complaint	354-430
39	Defendants' Reply in Support of Their Joint Motion to Dismiss Plaintiff's 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
46	Sealed Exhibit 1 to Plaintiff's Motion to Amend or Alter Judgment and for Leave to File an Amended Complaint	N/A
47	Defendants' Opposition to Plaintiff's Motion for Reconsideration	752-784
48	Plaintiff's Motion for Leave to Request Oral Argument	785-790
49	Defendants' Joint Notice of Supplemental Authority	791-794

Docket Entry	Description	Page ID Range
50	Notice of Hearing on Motion to Seal, Motion to Amend or Alter Judgment and for Leave to File an Amended Complaint	795
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
53	Sealed Exhibit A to 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	N/A
55	Suggestion of Bankruptcy by Suntech America, Inc.	920-940
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
60	Transcript of Motion Hearing held on 8/20/15	964-997