IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DOMESTIC DRYWALL ANTITRUST LITIGATION	**MDL No. 2437** **13-MD-2437**
THIS DOCUMENT RELATES TO: **Ashton Woods Holdings, L.L.C. et al. v. USG Corporation et al., Case No. 2:15-cv-01712 MMB (E.D. Pa.)**	**Honorable Michael M. Baylson**

CERTAINTEED GYPSUM'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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INTRODUCTION

After nearly three years of intensive litigation and the development of a comprehensive factual record, this Court recently dismissed class plaintiffs' claims against CertainTeed Gypsum, Inc. ("CertainTeed"), finding that the plaintiffs had not mustered a triable issue that CertainTeed participated in the conspiracy claimed in this MDL proceeding. The Court's decision was based not just on a failure of proof as to CertainTeed, but also on the affirmative facts reflecting CertainTeed's independent deliberations with regard to the challenged price increases, and the fact that every CertainTeed employee identified by class plaintiffs as attending industry meetings (trade shows and the like) submitted under-oath declarations swearing that they participated in no conspiracy and acted independently. Mem. re: Defs.' Mots. for Summ. J. ("Summary Judgment Mem.") at 17, 150-54, Feb. 18, 2016, ECF No. 351. In all, CertainTeed submitted at least 90 such no-collusion declarations, including from employees of CertainTeed affiliates (*e.g.*, roofing) who attended such events. *Id.* at 17, 153.

The plaintiffs in the instant action – twelve homebuilding firms proceeding on an individual, not a class basis ("Homebuilder Plaintiffs" or "Homebuilders") – have made clear that they assert exactly "the same alleged conspiracy" as the class plaintiffs. Pls.' Opp'n to Defs.' Mot. to Dismiss Unsealed Am. Compl. ("Plaintiffs' Prior Opposition") at 1, *Ashton Woods Holdings L.L.C. v. USG Corp.*, No. 2:15-cv-01712 (E.D. Pa. Mar. 14, 2016), ECF No. 51. At the March 18, 2016 status conference following its summary judgment ruling, this Court gave Homebuilders the opportunity to amend their prior complaint to include additional facts, including from its summary judgment decision. Tr. at 41-42, ECF No. 365 (hereinafter "Tr."). The Court queried whether Homebuilders would continue to claim that CertainTeed conspired and encouraged Homebuilders to "come up with other facts" as to CertainTeed. *Id.* at 42. Despite having access to the complete summary judgment record, Homebuilders' Second

Amended Complaint (the "Complaint" or "SAC") alleges *nothing* new or different as to CertainTeed. Homebuilders instead merely recycle the same allegations already deemed insufficient by this Court, *i.e.*, generalized contentions that the "Defendants" conspired, that CertainTeed employees attended trade shows and other industry events, that CertainTeed occasionally received widely published analyst reports, and that CertainTeed made price announcements consistent with commonplace follow-the-leader pricing.

The *Twombly-Iqbal* line of cases teaches that the plausibility of a claim should be evaluated at the motion to dismiss stage using common sense in light of the context in which the motion is considered. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("[D]etermining whether a complaint states a plausible claim [is] a *context-specific* task that requires the reviewing court to draw on its *judicial experience* and *common sense*.") (emphasis added). The plausibility of Homebuilders' latest complaint must be assessed against the context that Homebuilders are not starting from square one: they have had access to all of the produced documents, the summary judgment record, and expert materials and depositions, among other things – to frame their claims against CertainTeed. The fact that they are able to identify nothing new as to CertainTeed speaks volumes. In *this* context, Homebuilders cannot make their claims plausible by asserting, as they do, that because CertainTeed had opportunities to conspire and made price and job quote announcements similar to those of the other manufacturers, CertainTeed must have conspired. This is particularly so because Homebuilders' own Complaint concedes, SAC ¶ 89, that CertainTeed made its price announcements only *after* one or both of the large manufacturers did so – conduct that Homebuilders admit is "typical" follow-the-leader behaviour in an oligopoly. Such allegations do not come close to making plausible that CertainTeed was part of a "preceding agreement" rather than engaged in "merely parallel conduct that could just as well

[have been] independent action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

Dismissal of CertainTeed is also consistent with principles of *stare decisis* and judicial economy, which provide that, absent good reason, "a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." *Wilson v. Vaughn*, 533 F.3d 208, 214 (3d Cir. 2008). Homebuilders' Complaint offers no reason why there should be a different result as to CertainTeed than in the class actions. It merely repeats the same arguments that this Court considered before determining that CertainTeed engaged in no wrongdoing. *Stare decisis* thus provides an independent ground for dismissal as to CertainTeed.

As far as the additional 2014-15 price increases are concerned (and particularly in light of the Court's summary judgment ruling), Homebuilders face the insurmountable task of establishing that after all of the parties were before this Court in early 2013, at that instant CertainTeed *began to participate* in a conspiracy. Homebuilders plead no facts to bridge this plausibility chasm in their case.

The Supreme Court made clear in *Twombly* that implausible conspiracy claims should be dismissed at the pleading stage before subjecting defendants to the "unusually high cost of discovery in antitrust cases." 550 U.S. at 558-59. CertainTeed has already been subjected to enormous expense and distraction in these cases. Seeking to add to that burden, Homebuilders recently served substantial discovery requests on CertainTeed and may seek to depose additional CertainTeed employees, including executives who have already given depositions in the class cases. Homebuilders' Complaint justifies no such further discovery as to CertainTeed and the claims against CertainTeed should be dismissed with prejudice.[1]

[1] A ruling that Homebuilders' have not plausibly alleged a conspiracy as to CertainTeed mandates dismissal of every count in the Complaint. All of Homebuilders' claims, including the state consumer

BACKGROUND[2]

Beginning in late 2012, multiple plaintiffs filed purported class actions alleging a nationwide conspiracy to fix drywall prices (the "Class Actions"). *See, e.g.*, Class Action Compl. and Demand for Jury Trial, *Janicki Drywall, Inc. v. CertainTeed Corp.*, No. 2:12-cv-07106 (E.D. Pa. Dec. 20, 2012), ECF No. 1. Those cases were consolidated in this Court in May 2013. *See* Pretrial Order No. 3 – Case Management, May 7, 2013, ECF No. 11; *see also* Direct Purchasers' Consol. Am. Class Action Compl. & Demand for Jury Trial, ECF No. 20; Class Action Compl., ECF No. 21.

In March 2015, Homebuilder Plaintiffs filed a lawsuit alleging "the same alleged conspiracy" as had the plaintiffs in the Class Actions ("Class Plaintiffs"), appearing literally to copy large swaths of the Class Plaintiffs' complaints. *See* Pls.' Prior Opp'n at 1; *see also id.* at 7 ("[T]he Homebuilders filed an individual action based on the same alleged price-fixing conspiracy as in the Class Actions."), 22 ("The Homebuilders' allegations are based on the same overarching alleged conspiracy as in the Class Actions."); Notice of Pendency of Other Action or Proceeding at 2, *Ashton Woods Holdings L.L.C. v. USG Corp.*, No. 2:15-cv-01712-MMB (E.D. Pa. Apr. 2, 2015), ECF No. 1-18 (Homebuilders stating their claims are "based on the same alleged price-fixing conspiracy" "against the same defendants").

On February 18, 2016, after years of fact and expert discovery in the Class Actions, this Court granted summary judgment to CertainTeed. The Court held, after a systematic review of the evidence, that "a jury could not reasonably make the inference that CertainTeed participated in an agreement in restraint of trade." Summary Judgment Mem. at 154. At the March 18, 2016

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protection claims, are based on the proposition that CertainTeed entered into the claimed price-fixing conspiracy. If that conspiracy is not plausible (and it is not), the predicate for all of the claims disappears.

[2] CertainTeed incorporates the facts in Certain Defendants' Memorandum of Law in Support of Their Partial Motion to Dismiss the Second Amended Complaint ("Certain Defendants' Memorandum").

status conference, the Court asked Homebuilders to file an amended complaint and encouraged that, as to CertainTeed, Homebuilders "come up with other facts" than those on which the Class Plaintiffs had relied. Tr. at 42.

On March 25, 2016, Homebuilders filed their Second Amended Complaint. Second Am. Compl., ECF No. 364. However, Homebuilders' new Complaint contains not one new "fact" as to CertainTeed, despite the Homebuilders' access to the extensive summary judgment record in the litigation.

I. HOMEBUILDERS FAIL TO STATE A PLAUSIBLE CLAIM THAT CERTAINTEED JOINED "THE SAME ALLEGED CONSPIRACY" AS IN THE CLASS ACTIONS

The Homebuilders' SAC alleges exactly "the same alleged conspiracy" as did the Class Plaintiffs – a conspiracy to raise drywall prices beginning in 2012 and to discontinue job quotes – based on the same comprehensive factual record developed by the Class Plaintiffs. That conspiracy was rejected by this Court as to CertainTeed. The Homebuilders also allege, in conclusory fashion, that the claimed conspiracy continued even after this MDL litigation commenced, into 2014 and 2015, asserting that price moves by Defendants in those years were conspiratorial. SAC ¶¶ 211-21. These claims fail utterly as to CertainTeed.

A. Homebuilders Fail to Allege Facts Plausibly Linking CertainTeed to "the Same Alleged Conspiracy" as in the Class Actions, Particularly in Light of the Extensive Record to Which They Have Had Access

As the Court is well aware, in these cases Class Plaintiffs amassed an exceedingly thorough discovery record concerning "the same alleged conspiracy." *See* Pls.' Prior Opp'n at 1; *see also* SAC ¶ 23 ("same factual record"). CertainTeed alone produced voluminous documents regarding its pricing decisions, participation in trade shows, and interactions (or lack thereof) with competitors and securities analysts; CertainTeed's key executives, including every executive involved in the price increases at issue here, were deposed; CertainTeed gave a

30(b)(6) deposition focused on its contacts, if any, with competitors; and CertainTeed retained its own expert, who was subjected to an exhaustive deposition. The other defendants also produced comprehensive discovery to Class Plaintiffs.

Homebuilders' counsel had access to an extensive summary judgment record, including the parties' briefing and this Court's opinion on the summary judgment motions, to frame their Complaint here. Thus, Homebuilders were hardly starting from square one in their latest attempt to plead a viable conspiracy against CertainTeed.

While Homebuilders' Complaint adds more detail as to the other Defendants (tracking the Court's summary judgment decision), it adds *no facts* making plausible that CertainTeed's pricing decisions were conspiratorial, and not lawful, follow-the-leader pricing. The Complaint even acknowledges that follow-the-leader pricing – with smaller firms following price announcements of larger competitors – is "*typical* in highly concentrated markets," SAC ¶ 89 (emphasis added), and on its face shows that CertainTeed only announced price increases after USG or National Gypsum, the two largest manufacturers, had announced. Homebuilders then set forth facts showing that CertainTeed's pricing was consistent with this non-collusive paradigm in every year in question:

- 2012: CertainTeed announced 2012 price increases on October 3, 2011, only ***after*** USG and National Gypsum made price announcements (on September 28, 2011 and September 30, 2011, respectively; and two weeks after American Gypsum's announcement on September 20, 2011), SAC ¶ 138;

- 2013: CertainTeed announced 2013 price increases on September 13, 2012, only ***after*** National Gypsum made a price announcement (on September 6, 2012; the first price increase announcement by American Gypsum was weeks earlier on August 22, 2012), SAC ¶ 204;

- 2014: CertainTeed announced 2014 price increases on September 10, 2013, only ***after*** National Gypsum made a price announcement (on September 6, 2013; American Gypsum had announced a price increase five months earlier on April 5, 2013), SAC ¶ 216;

- 2015: CertainTeed announced 2015 price increases on September 25, 2014, only ***after***

National Gypsum made a price announcement (on September 5, 2014; four months prior, American Gypsum announced a price increase on May 9, 2014), SAC ¶ 219.

The Complaint thus admits key facts:

- Admits that the alleged conspiracy is "based upon the same factual record" as the "related class action litigation," SAC ¶ 23;
- Admits that price-following is "typical in highly concentrated markets," SAC ¶ 89;
- Admits that CertainTeed was at all relevant times a price follower, SAC ¶¶ 138, 204, 216 and 219;
- Admits that CertainTeed made its price announcements at a considerable distance in time after the first competitor's price announcement:
    - CertainTeed according to the Complaint waited 13 days and 21 days to announce its 2012 and 2013 price increases, SAC ¶¶ 138, 204, deliberations analyzed extensively in the Court's summary judgment decision; and
    - For 2014 and 2015 price increases (announced in 2013 and 2014), CertainTeed mulled its announcements even longer, delaying its response by *more than 5 months* in 2013, and by *four-and-a-half months* in 2014, SAC ¶¶ 216, 219.
- Admits that in *each year*, CertainTeed *only* followed price increase announcements after USG or National Gypsum – "larger market share" firms, SAC ¶ 150 – had announced to its customers, SAC ¶¶ 138, 204, 216 and 219; and
- Admits that for the announcement of the end of job quotes, CertainTeed was also a follower: CertainTeed made no announcement on job quotes until after large market share competitors USG and National Gypsum had already done so. SAC ¶ 168.

The law is clear that non-collusive follow-the-leader pricing is expected in an oligopoly, and that more is needed to plausibly infer a conspiracy from such conduct – most significantly, traditional evidence that the decision-makers at competitors communicated with each other on the subject matter of the conspiracy. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 321-24 (3d Cir. 2010) (parallel pricing is insufficient); *see also, e.g., In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124-32 (3d Cir. 1999) (affirming summary judgment despite significant price-related conversations among employees of competitors without pricing authority); *Superior Offshore Int'l, Inc. v. Bristow Grp., Inc.*, 490 F. App'x 492, 499-500 (3d Cir. 2012) (affirming

summary judgment where there was insufficient evidence of price-related conversations among employees of competitors); Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 Antitrust L.J. 719, 780 (2004) ("[A]n agreement should not be inferred absent some evidence of communications of some kind among the defendants through which an agreement could have been negotiated."). The Homebuilders allege no evidence that CertainTeed communicated with any other manufacturer regarding prices or job quote strategy.

Merely pointing to opportunities to conspire is not sufficient. *See, e.g.*, *Ins. Brokerage*, 618 F.3d at 349 ("Proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place" (quoting *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1242 n. 15 (3d Cir. 1993)). Nor will "economic evidence" alone, *i.e.*, evidence that the industry is concentrated and/or that a price increase was not entirely supported by supply and demand conditions. *See, e.g.*, *Ins. Brokerage*, 618 F.3d at 322 ("[C]are must be taken with the first two types of evidence [economic evidence of a motive to conspire and actions against interest], each of which may indicate simply that the defendants operate in an oligopolistic market, that is, may simply restate the (legally insufficient) fact that market behavior is interdependent and characterized by conscious parallelism."); *see also In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 399-400 (3d Cir. 2015) (no inference of conspiracy where defendants' prices did not correlate with costs and demand).

Despite having access to the full summary judgment record, the Homebuilders' *factual* allegations against CertainTeed reduce to little more than the following:

- CertainTeed announced price increases for 2012, 2013, 2014 and 2015, but in each case only after one or both of the two "larger market share," SAC ¶ 150, manufacturers – USG and National Gypsum – had made earlier customer announcements, *see* SAC ¶¶ 138, 204,

216, 219;[3]

- CertainTeed announced the discontinuation of job quotes on October 3, 2011, but did so only after both of the "larger market share" firms, SAC ¶ 150, – USG and National Gypsum – had done so first, *see* SAC ¶ 168;

- CertainTeed employees attended trade shows, customer buying group meetings, and other industry events – and thus had opportunities to conspire, *see* SAC ¶¶ 102, 109, 133, 202;

- CertainTeed occasionally received published reports from securities analysts TRG and Longbow, though the Complaint does not attempt to allege (nor could it) that CertainTeed ever had a substantive communication with either analyst, let alone about the challenged price increases, *see* SAC ¶¶ 196, 197;

- Plainly referring to summary judgment Exhibit 1269 from the Class Actions, the notes of a conversation between an employee of Lafarge and a Longbow analyst, that CertainTeed was "implicated" – that is, referred to – when the Lafarge employee speculated about competitors' reactions if USG did not announce a price increase for 2012, *see* SAC ¶¶ 198, 228, 233.

These allegations do nothing more than recite that CertainTeed followed the "big guys" (as is natural), had opportunities to conspire (as all businesses do), and was referenced in a conversation between a competitor and a securities analyst (meaningless). Such allegations, without more, are hardly sufficient to move a claim that CertainTeed conspired from the *possible* to the *plausible*, particularly when Homebuilders assert "the same alleged conspiracy" as the dismissed Class Actions. *See* Pls.' Prior Opp'n at 1.

The Supreme Court in *Twombly* held dismissal appropriate where, as here, the plaintiff alleged parallel conduct, but no facts making plausible that the defendants' conduct was the result of "preceding agreement" as opposed to "merely parallel conduct that could just as well [have been] independent action." 550 U.S. at 557; *see also id.* at 553 (noting that conscious parallelism is a "common reaction of 'firms in a concentrated market'" and is not alone unlawful

[3] To be sure, Homebuilders emphasize that neither National Gypsum nor USG made the first announcement in September 2011, but rather American Gypsum, a smaller manufacturer. But Homebuilders *admit* that CertainTeed's decision – to wait to see if the big players made a customer announcement before deciding on its course, SAC ¶¶ 138, 204, 216, 219, follows a "typical" non-conspiratorial paradigm, SAC ¶ 89.

(quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993))); *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541-42 (1954) (conscious parallelism does not suffice to show conspiracy).

The Supreme Court also found the claims there implausible where the complaint itself revealed "an obvious alternative [i.e., non-conspiratorial] explanation." *Twombly*, 550 U.S. at 567. As noted, the Complaint admits that, as to every challenged price increase, CertainTeed announced its price changes only *after* the larger firms – National Gypsum and/or USG – had made earlier customer announcements, and admits that such follow-the-leader pricing is "typical." *See* SAC ¶ 89. This is an "obvious alternative explanation" based on Homebuilders' own Complaint, and they allege not one fact making it plausible that CertainTeed engaged in such typical "following" conduct due to a pre-existing agreement with competitors. *See, e.g.*, *In re Travel Agent Commission Antitrust Litig.*, 583 F.3d 896, 908 (6th Cir. 2009) (affirming dismissal where complaint alleged conduct that "was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior" (quoting *Iqbal*, 556 U.S. at 680)).

Homebuilders' failure is more striking given that they were not starting from an evidentiary blank slate as most plaintiffs do. Here Homebuilders had full access to the entire summary judgment record in the Class Actions in order to frame their latest Complaint, including produced documents, deposition transcripts, and expert reports. Given this access to three years of discovery and documents, Homebuilders' failure to plead anything suggesting that CertainTeed engaged in even a questionable conversation with a competitor (or TRG or Longbow), let alone one suggesting a price-fixing agreement, only reinforces the need for dismissal as to CertainTeed.

Iqbal teaches that a complaint's plausibility is "context-specific" and must be viewed in light of the court's "experience and common sense." 556 U.S. at 679; *see also Ins. Brokerage*, 618 F.3d at 361. Moreover, as the Court is aware from the summary judgment proceedings, the discovery record includes other indisputable evidence refuting the notion that CertainTeed conspired with anyone – evidence that also forms part of the context against which this motion must be decided. To take just a few examples from the Court's Summary Judgment Memorandum:

- Documented Independent Decision-Making. Extensive contemporaneous evidence reflecting that CertainTeed "engage[d] in a documented decision-making process" before deciding how to react to American Gypsum's September 20, 2011 price increase announcement. Summary Judgment Mem. at 153. For example, the day after American's announcement, CertainTeed President John Donaldson asked the company's Vice President of Sales for his "urgent recommendation on our approach." *Id.* at 59.[4] These contemporaneous decision-making documents are (1) *inconsistent* with the notion that CertainTeed was part of any "agreement" on prices and (2) *consistent* with CertainTeed's status as a long-time price follower.

- Undisputed evidence showing that CertainTeed's deliberations over 2012 prices "did not conclude until late December [2011]." *Id.* at 18.[5] Such deliberations would be unnecessary if CertainTeed had entered an agreement on pricing, but make perfect sense for a firm pursuing a non-conspiratorial follow-the-leader strategy.

- Price Follower of Larger Market Share Firms USG and National Gypsum. Undisputed evidence demonstrating that CertainTeed had been a price follower for years before the challenged price increases. Summary Judgment Mem. at 99 (in the seven price increases announced prior to September 2011, USG or National Gypsum "would lead typically the increase"). Thus CertainTeed's decision to follow the two large producers in 2012 and 2013 can hardly be said to represent a suspicious change in approach for CertainTeed.

[4] After about a week of deliberations, CertainTeed President Donaldson reported to a parent company executive that, in CertainTeed's view, a price increase announcement by a small player such as American Gypsum had "limited credibility" and that CertainTeed instead would wait to see if either of the "majors" – USG and National Gypsum – announced to customers a similar 2012 price increase and/or discontinuation of job quotes. CertainTeed Gypsum Inc.'s Mem. Supp. Summ. J. at 12, May 12, 2015, ECF No. 208. And CertainTeed did just that.

[5] The undisputed evidence also disclosed that even after CertainTeed had made its announcements as to 2012 prices and job quotes, it was uncertain about the reaction of other manufacturers and was making contingency plans in the event other manufacturers did not raise prices. CertainTeed Gypsum Inc.'s Mem. Supp. Summ. J. at 3.

- 90+ No-Collusion Declarations Covering the Entire Period of the Complaint. The fact that at least 90 employees of CertainTeed and its affiliates who attended industry events identified by Class Plaintiffs (as providing opportunities to conspire) submitted sworn statements that they did not conspire with anymore. *Id.* at 17.

- No Evidence of Any Competitor Communications at All Prior to Taking Actions. The fact that the record lacks any evidence "allowing an inference that CertainTeed spoke with a competitor shortly before making a major price decision" or evidence that CertainTeed "provided the type of information to [securities] analysts" that some other manufacturers provided. *Id.* at 154.

Experience and common sense here say that if there were facts in the record inculpating CertainTeed in "the same alleged conspiracy" as the "related" Class Actions, Homebuilders would have alleged them – especially after this Court warned them to "come up with other facts" as to CertainTeed. Tr. at 42.

This Court thus should dismiss Homebuilders' claims against CertainTeed for the Complaint's complete failure to allege facts plausibly suggesting that CertainTeed's price increases were due to a preceding agreement, rather than the typical follow-the-leader pricing that the Complaint itself recites.

B. Dismissal of Homebuilders' Claims Against CertainTeed is Also Supported by Principles of *Stare Decisis* Because They Are Based on "the Same Alleged Conspiracy" as the Class Actions

Not only is Homebuilders' complaint as to CertainTeed deficient in its own right (as shown above), dismissal is also supported by principles of *stare decisis* in light of this Court's grant of summary judgment to CertainTeed in the Class Actions asserting the "same alleged conspiracy" – a decision rendered after a painstaking review of the extensive evidentiary record.

In short, where a court has rendered a decision based on a full record, *stare decisis* principles counsel that that decision is entitled to respect in any subsequent case involving the same facts, even if the parties are different and even where issue preclusion does not apply. This can come up, for example, where a class action dispute is decided against plaintiffs on a full

record, but then a subsequent plaintiff pursues the same claim on an individual basis. While the outcome of the subsequent case is not dictated by collateral estoppel, the prior decision nonetheless has persuasive force and the subsequent plaintiff asserting the same claim must offer a plausible reason why its case should result in a different outcome. As Judge Easterbrook explained in *Premier Electric*:

> To say that issue preclusion does not apply [to the subsequent case] is not to say that [that case] must follow the dreary course of many antitrust matters and bury the court under mountains of documents, followed by an interminable trial. Preclusion is not an all or nothing matter. There are degrees. The doctrine of *stare decisis* supplies same of the lesser degrees . . . . *[The prior decision] is not authoritative . . . but it is entitled to respect, both because of its persuasive power and because it involves the same facts.*

Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 367 (7th Cir. 1987) (emphasis added); *see also, e.g.*, *Vaughn*, 533 F.3d at 214 ("a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different"). "[O]nly the gravest reasons should lead the court in the [subsequent] suit to come to a conclusion that departs from that in the class suit." *Id.* at 367-68.

Homebuilders here assert the *same* alleged wrongdoing based on the *same* record. *See* Pls.' Prior Opp'n at 1 (the "same alleged conspiracy"); SAC ¶ 23 ("based on the same factual record"). In such a situation, Judge Easterbrook held, "If the class wins, the [subsequent] plaintiff should expect to win for the same reasons that convinced the first court. If the class loses, the opting-out plaintiff should expect to meet the same fate." *Premier Elec.*, 814 F.2d at 367. If the subsequent plaintiff chooses to continue its case, the court should focus on the "differences," if any, between its case and the earlier-decided one. *Id.* That is exactly what this Court urged Homebuilders to do as to CertainTeed – to identify new facts plausibly suggesting a different outcome as to CertainTeed. Tr. at 42. Their complaint utterly fails in this regard. Homebuilders' Complaint offers no reason – let alone a "grave" one – justifying a different

result here. *Id.*; *see also, e.g.*, *Travel Agent*, 583 F. 3d at 908 n.8 (grant of summary judgment in a class action "is something [a court] should at least consider [when analyzing the plausibility of an opt-out complaint] both for its persuasive power and because it involves the same facts").

Courts in this Circuit have not hesitated to dismiss complaints where plaintiffs were unable to plausibly allege that the result in their case was likely to be different than an earlier court decision involving similar facts. For example, in *In re Lipitor Antirust Litigation*, the court found that antitrust plaintiffs had not plausibly alleged that defendant pharmaceutical manufacturer had committed fraud on the U.S. Patent and Trademark Office ("PTO") in procuring a patent. *In re Lipitor Antitrust Litig.*, No. 3:12-cv-2389, 2013 U.S. Dist. LEXIS 126468, at *76-77 (D.N.J. Sept. 5, 2013). The court found that the plaintiffs merely repeated allegations that had been (1) rejected by a district court in a prior patent litigation (not involving the antitrust plaintiffs) after a full trial, and (2) rejected by the PTO itself in a later proceeding to reissue the allegedly fraudulent patent. *Id.*; *see also id.* at *67 ("Plaintiffs' [fraud] claims fail because the allegations are implausible in light of the results of the previous litigations and proceedings before the PTO.").

In *CBS Outdoor, Inc. v. N.J. Transit Corp.*, the court dismissed a complaint in which an advertiser, plaintiff CBS Outdoor, operated billboards on property owned by New Jersey Transit Corporation ("NJ Transit"). *See* No. 06-2428, 2007 U.S. Dist. LEXIS 64155 (D.N.J. Aug. 30, 2007). The suit arose out of NJ Transit's decision to award a contract to manage billboards to a different company. *Id.* at *5-12. CBS Outdoor protested NJ Transit's decision in part by alleging bias, but NJ Transit denied the protest, and the Superior Court of New Jersey, Appellate Division, affirmed NJ Transit's decision. *Id.* at *11-12. In dismissing the claims in federal court, the judge noted that "CBS Outdoor's allegations regarding bias were sharply rejected" by

the state court, and "[w]hile the state appellate court's opinion was issued in a different context and is not controlling here, this Court is loath to ignore the considered findings of the state court on this matter of state concern." *Id.* at 50-51.

This Court's decision dismissing CertainTeed after a detailed review of the extensive summary judgment record likewise brings into play principles of *stare decisis*, and Homebuilders' failure to allege something new or different renders their copy-cat claims implausible, providing an independent basis for dismissal.

Homebuilders no doubt will argue that they are entitled to take yet more discovery in hopes they can dredge up evidence that Class Plaintiffs were unable to elicit after years of discovery. But *Twombly* and its progeny require that a plaintiff allege facts making its claim plausible *before* it gets the opportunity to subject a defendant to the notoriously expensive and burdensome discovery associated with a treble damage antitrust case. *See Twombly*, 550 U.S. at 558-59; *Travel Agent*, 583 F.3d at 909 ("district courts must assess the plausibility of [a complaint] *before* parties are forced to engage in protracted litigation and bear excessive discovery costs"); *Ins. Brokerage*, 618 F.3d at 370 (warning against ignoring "*Twombly's* interest in 'insist[ing] upon some specificity in pleading *before* allowing a potentially massive factual controversy to proceed' to an 'inevitably costly and protracted discovery phase'") (emphasis added) (quoting *Twombly*, 550 U.S. at 558)). Such principles apply with special force here, where CertainTeed has *already* been subjected to massive discovery and expert expenses – not to mention attorneys' fees and witness distraction – in the Class Actions. Homebuilders should not be allowed a do-over under these circumstances without coming forward with *facts*, not speculation or legal conclusions, making plausible that a different result will obtain. Their Complaint does not come close to doing so here.

C. Homebuilders' Claims That CertainTeed Conspired After 2012 Are Completely Implausible, Particularly Conclusory and Must Be Dismissed

As noted, Homebuilders claim that the "Defendants" conspired with other drywall manufacturers as to price increases in 2014 and 2015. These allegations are particularly implausible as to CertainTeed for at least the following reasons:

First, as discussed above, Homebuilders allege conduct that is consistent with lawful, follow-the-leader pricing by CertainTeed in 2014 and 2015 – their own Complaint alleges that CertainTeed's price announcements in both years came only *after* one or both of USG or National Gypsum announced increases to their customers (and after American Gypsum had issued customer announcements as well). *See supra* 6-7. Strikingly, in a case where the Class Actions were found meritless against CertainTeed where CertainTeed's price announcements for 2012 and 2013 were delayed several weeks for deliberations, SAC ¶¶ 138, 204, the Complaint admits that for 2014 and 2015 pricing, CertainTeed waited *more than four months* to respond to the first price increase announcement. *See* SAC ¶¶ 216 (five months later), 219 (four and a half months later).

But beyond reciting the timing of CertainTeed's announcements, SAC ¶¶ 216, 219, Homebuilders plead only legally insufficient opportunities to conspire, *id.* ¶¶ 104, 109, before concluding that CertainTeed must have conspired. Such conclusory allegations are deficient. *See, e.g.*, *Twombly*, 550 U.S. at 556, 567 n.12, 570 (holding "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice" and dismissing complaint despite allegations of trade association membership); *In re Musical Instruments and Equip. Antitrust Litig.*, 798 F.3d 1186, 1194-98 (9th Cir. 2015) (affirming dismissal of complaint alleging parallel conduct and participation in trade association); *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 227, 233 (3d Cir. 2011) (affirming dismissal of price-fixing claims and noting that "[p]arallel conduct in

itself is insufficient to state a plausible claim"); *Travel Agent*, 583 F.3d at 900, 910-11 (affirming dismissal of price-fixing claims despite allegations of parallel conduct and attendance at trade association meetings).

Second, the Class Actions began in December 2012 and were well under way by the time any Defendant announced a price increase for 2014. In this context, it is implausible that Defendants would brazenly *begin (or even continue) a conspiracy* in early 2013 under the nose of the Court and aggressive plaintiffs' counsel. *See* Certain Defs.' Mem., at § 1.B. The sole references in the SAC dealing with the Class Actions and the conspiracy simply assert: "These collusive price hikes were announced and implemented despite class action litigation challenging Defendants' anticompetitive conduct." SAC ¶ 21; *see also* id. ¶¶ 210-11.

Finally, the post-2012 claims are particularly implausible as to CertainTeed, which has already been found by this Court not to have conspired as to 2012 and 2013 prices. Summary Judgment Mem. 154. Conspiracies rely on furtive conduct. Under the klieg lights of depositions and full documentary discovery, it is inconceivable that CertainTeed would have joined the conspiracy. The SAC is silent on what economic motives or conduct would plausibly lead CertainTeed to join a conspiracy subject to federal court scrutiny. No plausible scenario for CertainTeed to join is pleaded. The notion that CertainTeed would *join* a conspiracy after treble damage lawsuits had been initiated is not remotely plausible. And no facts are found in SAC ¶ 21 or anywhere in the SAC to even permit such an implausible set of events involving CertainTeed.

Homebuilders' claims against CertainTeed regarding post-2012 pricing must be dismissed.

II. HOMEBUILDERS' COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE

CertainTeed has endured more than three years of litigation in these cases at tremendous

cost to the company and burden to its employees. Because Homebuilders have failed to state a claim against CertainTeed despite having had two opportunities to amend their Complaint, including with the benefit of the summary judgment record, their Complaint should be dismissed with prejudice as to CertainTeed. *See, e.g.*, *Gandhi v. Sitara Capital Mgmt., LLC*, 721 F.3d 865, 870 (7th Cir. 2013) (dismissing with prejudice appropriate where plaintiffs failed to state claim "[d]espite having the benefit of discovery"); *Pension Benefit Guar. Corp. ex rel. Saint Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 709 (2d Cir. 2013) (affirming dismissal of complaint and noting that, "[a]lthough [plaintiff] . . . was in a position to plead its claims with greater factual detail than is typically accessible to plaintiffs prior to discovery . . . the Amended Complaint fails to plead sufficient, nonconclusory factual allegations"); *Henry v. City of Allentown*, No. 12-1380, 2014 U.S. Dist. LEXIS 130791, at *14 (E.D. Pa. Sept. 17, 2014) ("Plaintiff has had ample opportunity to amend this claim, and the Court's dismissal will now be with prejudice."); *Straight Path IP Grp., Inc. v. Vonage Holdings Corp.*, No. 14-502, 2014 U.S. Dist. LEXIS 92626, at *10 n.2 (D.N.J. July 7, 2014) ("A dismissal with prejudice is appropriate because Plaintiff has had several opportunities to amend its complaint." (citing *Holmes v. Gates*, 403 F. App'x 670, 674 (3d Cir. 2010))); *Summers-Wood LP v. Wolf*, No. 3:08-CV-847, 2009 U.S. Dist. LEXIS 103612, at *12 (D. Conn. Nov. 6, 2009) (dismissing complaint because "notwithstanding the discovery [plaintiffs] were permitted in the [related] case, the [c]omplaint in this case fails to allege any facts at all to support the Plaintiffs' claim").

CONCLUSION

For all of the above reasons, Homebuilder Plaintiffs' claims against CertainTeed in their Second Amended Complaint should be dismissed with prejudice.

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Respectfully Submitted,

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