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**

CONTINENTAL BUILDING PRODUCTS, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE HOMEBUILDER PLAINTIFFS' SECOND AMENDED COMPLAINT

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INTRODUCTION AND SUMMARY

The Homebuilder Plaintiffs' Second Amended Complaint (the SAC) sets forth no factual allegations plausibly connecting Continental Building Products, Inc. ("Continental") to the alleged conspiracy to fix the price of gypsum wallboard in the United States. Instead, the SAC simply alleges that Continental "affirmatively" joined an alleged conspiracy when Continental was created at the end of August 2013. (SAC ¶ 9.) This is insufficient. In order to survive a motion to dismiss, the Homebuilder Plaintiffs must, among other things, allege specific facts supporting their implausible claim that Continental joined the alleged conspiracy. Homebuilder Plaintiffs fail to do so.

The theory of Homebuilder Plaintiffs' case is that Continental joined an allegedly existing conspiracy to fix gypsum wallboard prices *eight months after* the first complaints in this multidistrict litigation were filed and the conspiracy allegations had become a matter of public knowledge.[1] The Homebuilder Plaintiffs have not even attempted to support this highly implausible theory with any specific facts.[2] The SAC fails to allege any facts that could reasonably imply *any* connection between Continental and the alleged conspiracy. There is no allegation, for example, that Continental had any communications with other Defendants regarding the alleged conspiracy. The SAC also fails to allege how Continental supposedly joined the alleged conspiracy. The SAC does allege that Continental raised its 2014 and 2015 gypsum wallboard prices in roughly the same time frame as other, much larger, gypsum

[1] *See* Case No. 13-MD-2437, Dkt. No. 1. The matters listed therein were initially filed in the U.S. District Court for the Western District of North Carolina on Jan. 17, 2013, and Jan. 18, 2013, respectively, as well as in the U.S. District Court for the Eastern District of Pennsylvania on Dec. 20, 2012, Dec. 21, 2012, Jan. 2, 2013, and Jan. 15, 2013, respectively.

[2] Homebuilder Plaintiffs' attempts to justify their inclusion of Continental in this action have not improved with age. Even after two attempts at amendment, Continental's inclusion continues to have the appearance of an afterthought: as described *infra*, almost all of the allegations in the SAC relate to the period before Continental was even formed (*see* SAC ¶ 48).

wallboard companies. (*Id.* ¶¶ 216, 219.) The Homebuilder Plaintiffs do not, however, allege any facts connecting these price increases to any unlawful activity. Consequently, these factual allegations amount to nothing more than a contention that Continental acted in parallel with the marketplace—behavior that is perfectly lawful.

All claims in the SAC against Continental should be dismissed. They should also be dismissed *with prejudice*. Continental's previous motions to dismiss the original and First Amended Complaints discussed at length the Homebuilder Plaintiffs' failure to allege any facts in support of their claims against Continental. Their continued failure to allege any factual support for these claims can lead to only one conclusion: there is none. It is therefore time to end this case against Continental and dismiss all claims against Continental with prejudice.[3]

JOINDER

In addition to this motion to dismiss, Continental has joined Certain Defendants' Partial Motion to Dismiss the Second Amended Complaint. All claims in the SAC asserted against Continental should be dismissed for the reasons stated therein as well.

PROCEDURAL HISTORY

The Homebuilder Plaintiffs first filed their original complaint (the "Homebuilder Action") on March, 17, 2015 in the U.S. District Court for the Northern District of California.[4] On April 1, 2015, the U.S. Judicial Panel on Multidistrict Litigation transferred the Homebuilder Action to this district for coordinated pre-trial proceedings with other cases alleging a similar antitrust conspiracy in the U.S. marketplace for gypsum wallboard.[5] While other Defendants

[3] In addition, Continental is not a proper defendant in this case because Continental does not manufacture, sell, or market gypsum wallboard in the United States. Rather, Continental Building Products Operating Company, LLC sells and markets gypsum wallboard. As set forth in this Motion to Dismiss, all of the Homebuilder Plaintiffs' claims against Continental should be dismissed with prejudice and thus this issue should be moot. In the event that these claims are not dismissed and the Homebuilder Plaintiffs do not drop Continental from this case, Continental intends to seek further relief from the Court.

named in the Homebuilder Action were originally named as defendants in other consolidated actions (*e.g.*, the Direct and Indirect Purchaser Actions), Continental is a defendant in only the Homebuilder Action. (*See* Case No. 13-MD-2437, Dkt. Nos. 20-21.)

Continental and other Defendants filed various motions to dismiss the original complaint for failure to state a claim under Rule 12(b)(6) on September 29, 2015. (*See* Case No. 13-MD-2437, Dkt. Nos. 301-04, 307-08.) Two Defendants, TIN Inc. and USG Corporation, also filed Answers. (*See* Case No. 13-MD-2437, Dkt. Nos. 305-06.) Following the filing of Defendants' motions to dismiss, the Homebuilder Plaintiffs elected to amend their complaint rather than oppose the motions to dismiss and filed a First Amended Complaint under seal on October 20, 2015, with a later motion for permission to file under seal filed on October 26, 2015. (Case No. 15-1712, Dkt. Nos. 30, 32.) This Court subsequently denied permission to file under seal on December 1, 2015, and ordered Homebuilder Plaintiffs to file a new amended complaint within 14 days. (Case No. 15-1712, Dkt. No. 37.) Homebuilder Plaintiffs thereafter filed an Unsealed First Amended Complaint (FAC) on December 14, 2015. (Case No. 15-1712, Dkt. No. 38.) In response to the FAC, several defendants, including Continental, filed a joint motion to dismiss (Case No. 15-1712, Dkt. No. 47); Continental also filed a separate motion to dismiss. (Case No. 13-MD-2437, Dkt. No. 343.) Homebuilder Plaintiffs filed a Consolidated Opposition to those motions on March 14, 2016. (Case No. 15-1712, Dkt. No. 51.) Homebuilder Plaintiffs concurrently filed a Motion for Leave to Submit Additional Factual Allegations Under Seal along with an exhibit purporting to contain factual allegations based upon documents covered by the protective order entered in this matter. (Case No. 15-1712, Dkt. Nos. 52-53.) At a status

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[4] The Homebuilder Action is Case No. 3:15-cv-01247-HSG.

[5] *See* Dkt. No. 25 in the original case filed in the U.S. District Court for the Northern District of California (Case No. 3:15-cv-01247-HSG) prior to consolidation in this district.

conference on March 18, 2016, the Court noted that, because the factual allegations described in its Summary Judgment Opinion in the class action cases are public, the Homebuilder Plaintiffs could include those factual allegations in a further amended complaint—and invited the Homebuilder Plaintiffs to do so. (Hr'g Tr. at 41:17-42:3.) Homebuilder Plaintiffs thereafter filed their current Second Amended Complaint on March 25, 2016. (Case No. 15-1712, Dkt. No. 56.)

LEGAL STANDARD

Under Section 1 of the Sherman Act, 15 U.S.C. § 1, Homebuilder Plaintiffs must allege evidentiary facts—not just ultimate facts—that, if true, prove: "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action[] [was] illegal; and (4) that [Homebuilder Plaintiffs] [were] injured as a proximate result of the concerted action." *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 (3d Cir. 2005); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1229 (3d Cir. 1993). Moreover, "Section 1 claims . . . always require the existence of an agreement" and "[t]o allege such an agreement . . . , a plaintiff must allege facts plausibly suggesting a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 254 (3d Cir. 2010) (internal quotation marks and citations omitted); *see also In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 395-96 (3rd Cir. 2015). A complaint must "delineate[] to some sufficiently specific degree that a defendant purposefully joined and participated in the conspiracy." *In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 720 (E.D. Pa. 2011).

For a complaint to meet its obligation to provide sufficient facts, it must do more than provide "labels and conclusions, and a formulaic recitation of the elements of a cause of action."

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); *see also Howard Hess*, 602 F.3d at 258 (same). Rather, the factual allegations must "raise a right to relief above the speculative level," "raise a reasonable expectation that discovery will reveal evidence of illegal agreement[,]" and "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555-56 & 570; *see also Howard Hess*, 603 F.3d at 258 n.10.

ARGUMENT

The SAC fails to allege any facts showing that Continental joined or actively participated in the alleged conspiracy. In fact, the entire premise of the Homebuilder Plaintiffs' claims against Continental is implausible. Continental did not even exist when the alleged gypsum wallboard price-fixing conspiracy is alleged to have commenced. Moreover, Continental was not formed until after several class action suits and this MDL proceeding were commenced, and price-fixing allegations against the other Defendants, identical to those in the SAC, were public knowledge.[6] Consequently, in order to believe the Homebuilder Plaintiffs' claims against Continental are true, one would have to believe—without any supporting facts—that Continental elected to join a price-fixing conspiracy at the same time that onerous and expensive antitrust litigation concerning the exact same alleged conspiracy had already commenced against Continental's alleged co-conspirators. (*See* SAC ¶¶ 21, 142, 201, 215.)

In order to survive a motion to dismiss, among other things, the Homebuilder Plaintiffs must plead specific facts to overcome the implausibility of their claims. *See Total Benefits*

[6] As described in Continental's Form S-1 filed with the U.S. Securities and Exchange Commission, included with Continental's prior Motion for Judicial Notice (Case No. 13-MD-2437, Dkt. No. 302), Continental was originally formed as a company called LSF8 Gypsum Holdings Co., LLC ("LSF8") on July 26, 2013, for the purposes of acquiring Lafarge North America, Inc.'s gypsum operations and business. Continental had no operations prior to that acquisition. That acquisition took place on August 30, 2013, and LSF8 thereafter converted into a Delaware corporation and renamed itself Continental. Continental has always been a holding company, with actual gypsum wallboard sales and marketing performed, and related assets held, by a separately operated subsidiary.

Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 436 (6th Cir. 2008) (noting that pleading "without specifics as to the role each [defendant] played in the alleged conspiracy, was specifically rejected by *Twombly*"). Nonetheless, the SAC continues to make only two factual allegations that could conceivably apply to Continental: (1) that it "affirmatively" joined the Conspiracy when it was created—through employees allegedly attending certain trade group meetings in 2013-2015 and by issuing price-increase notices in 2013 and 2014—and (2) that it somehow "stepped into the shoes" of Lafarge when it acquired Lafarge's North American gypsum operations and allegedly retained certain unidentified employees. (SAC at ¶¶ 109, 112, 215-16, 219, 234.) As discussed below, these allegations do not come close to supporting Homebuilder Plaintiffs' conclusory assertion, much less any inference, that Continental "join[ed] the conspiracy in 2013 when it acquired [Lafarge's] gypsum business." (*Id.* ¶¶ 212, 215.)[7]

The alleged attendance of unnamed Continental employees at trade group events is insufficient to show that Continental agreed or intended to violate the Sherman Act *or* that Continental acted other than independently. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 349 (3d Cir. 2010). The Homebuilder Plaintiffs' generic allegations regarding Defendants' collective attendance or conduct at such events do not provide any facts that even suggest that Continental specifically joined or actively participated in any unlawful agreement or conspiracy. *See Howard Hess*, 602 F.3d at 254-55; *In re Processed Egg Prods.*, 821 F. Supp. 2d at 719 ("a complaint must plausibly suggest that the *individual defendant* actually joined and participated in the conspiracy" (emphasis added)). The failure to allege such facts is fatal to the Homebuilder

[7] Continental assumes that the allegation in ¶ 212 of the SAC that Continental "acquired Lafarge" is a typographical error; the allegation, in any event, is inaccurate. As noted above, in August 2013 Continental acquired Lafarge's former North American gypsum operations and business.

Plaintiffs' claims. Homebuilder Plaintiffs' additional allegations regarding Continental's price announcements to its customers are insufficient to resuscitate their claims against Continental because the allegations contain no facts that would support any inference of coordinated, as opposed to merely parallel, conduct between Continental and any other Defendant. *See In re Ins. Brokerage*, 618 F.3d 300, 322-23 ("Plaintiffs relying on circumstantial evidence of an agreement must [show] . . . something more than merely parallel behavior, something plausibly suggestive of (not merely consistent with) agreement."(internal quotation marks and citations omitted)).

Homebuilder Plaintiffs' threadbare allegation that Continental joined the conspiracy merely through its acquisition of Lafarge's former gypsum assets is similarly lacking. The SAC fails to allege any facts identifying the employees Homebuilder Plaintiffs allege transferred to Continental, or even that those employees had any link to the alleged conspiracy. (*See* SAC ¶ 234.) Homebuilder Plaintiffs' generic allegation that Continental "stepped into the shoes" of Lafarge is nothing more than a legal conclusion, unavailing in response to a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("we are not bound to accept as true a legal conclusion couched as a factual allegation." (*quoting Twombly*, 550 U.S. at 555)).

Without supporting facts, the SAC's conclusory and implausible allegation that Continental joined the alleged conspiracy is merely "[a] general allegation of conspiracy . . . [and] an allegation of a legal conclusion . . . insufficient of itself to constitute a cause of action." *Fuentes v. S. Hills Cardiology*, 946 F.2d 196, 201-02 (3rd Cir. 1991) (*quoting Black & Yates v. Mahogany Ass'n*, 129 F.2d 227, 231-32 (3rd Cir. 1942)). Accordingly, Claim One of the SAC must be dismissed to the extent it is directed at Continental. Claim Two is based on the same price-fixing allegations as Claim One, and should therefore be dismissed for the same reasons in addition to those described in Section II of Certain Defendants' Partial Motion to Dismiss the

Second Amended Complaint. Claims Three and Four of the SAC, alleging violations of various state laws, must also be dismissed to the extent that they apply to Continental because they are predicated on the Homebuilder Plaintiffs' identical unsupported claim that Continental participated in the alleged gypsum wallboard price-fixing conspiracy.

A. Homebuilder Plaintiffs Fail to Allege Facts Supporting Their Claim That Continental "Affirmatively Joined" Any Alleged Conspiracy.

1. Homebuilder Plaintiffs' Allegations Regarding Defendants' Participation in Industry Meetings Are Insufficient.

The Homebuilder Plaintiffs' theory of the alleged conspiracy is that conspirators met at meetings of the Gypsum Association (GA), Association of the Wall & Ceiling Industry (AWCI), and the Drywall Finishing Council (DWFC), where they agreed to set the price of gypsum wallboard. (SAC ¶¶ 13, 109.)[8] The earliest such trade group meeting alleged in the SAC is a GA meeting in February 2011 (*id.* ¶¶ 104, 280); Continental could not have attended that meeting because Continental did not exist at that time. (*Id.* ¶¶ 48, 214.) In fact, Continental did not exist when practically all of the meetings that Homebuilder Plaintiffs allege provided an *opportunity* to collude took place.[9] (*See, e.g.*, *id.* ¶¶ 109-13.)

The *only* meetings alleged in the SAC that Continental could possibly have attended are certain 2013-2015 meetings of the GA, AWCI, and DWFC—those occurring after Continental began operating. (*Id.* ¶¶ 14, 48, 109, 112.)[10] The Homebuilder Plaintiffs do not allege, however, that Continental specifically, as opposed to "Defendants" generally, participated in those

[8] Homebuilder Plaintiffs also include an allegation that generic "Defendants" communicated though "industry analysts," but the SAC is devoid of any factual allegation that Continental or any of its employees participating in such communications. (*See* SAC ¶¶ 13, 196-98.)
[9] As a further example, SAC ¶ 109 asserts that Continental is a member of the DWFC and that "Defendants attended [meetings] which provided an opportunity for Defendants to collude and conspire[,]" before listing a string of meetings, most of which predate Continental's existence.
[10] The SAC references only one GA meeting, in May 2015, occurring after the creation of Continental. (*See, e.g.*, SAC ¶ 104.)

meetings. (*See, e.g.*, *id.* ¶¶ 109-12 ("[S]ome Defendants belong to a trade association known as Drywall & Interior System Contractors Association, which provided yet another opportunity for Defendants to collude.").) The collective use of the term "Defendants" however, cannot reasonably be construed to mean that the SAC alleges that Continental employees were actually present at any of the trade association meetings at issue. The SAC uses that collective term even when it is clear that the SAC could not possibly be including Continental within its scope. For example, in describing a September 2011 AWCI Executives' Conference meeting, the SAC alleges, as did the other complaints before it, that *all* Defendants attended the meeting. (*Id.* ¶ 112.) Of course, no Continental employee attended that meeting since Continental did not exist at that time.[11]

The Homebuilder Plaintiffs' failure to specify which Defendants they allege attended each meeting and what the Defendants allegedly did to conspire fails to adequately inform Continental of what it is alleged to have done. General allegations regarding "Defendants" do not satisfy the pleading requirements of *Twombly*. As this court has previously explained:

> Simply using the global term 'defendants' to apply to numerous parties without any specific allegations that *would tie each particular defendant to the conspiracy is not sufficient*." . . . Conclusory, collective language is too convenient, too undisciplined, and too unfocused in light of exposures to litigation expense and disruption (even without ultimate liability) that are so great in antitrust (and other) cases.

In re Processed Egg Prods., 821 F. Supp. 2d at 720 (emphasis added) (citations omitted); *see also Total Benefits*, 552 F.3d at 436 ("Generic pleading, alleging misconduct against defendants without specifics as to the role each played in the alleged conspiracy, was specifically rejected by *Twombly*.").

[11] It is also implausible that an alleged antitrust conspiracy would be created or discussed at a meeting of the AWCI, of which Continental *is not a member*, because that organization is sponsored by and consists of both direct and indirect gypsum wallboard *customers*.

Moreover, the SAC does not allege any facts regarding the topics of discussion at those meetings allegedly attended by unspecified "Defendants," the participants in those discussions, or even whether the discussions actually related to the alleged "conspiracy" at all. (*See, e.g.*, SAC ¶¶ 109-12.) While they allege on "information and belief" that certain topics were discussed "at one or more" of a long list of meetings—the majority of which predate Continental's existence—Homebuilder Plaintiffs fail to allege whether those discussions *actually occurred* at any meeting Continental could have attended.[12] (*Id.* ¶ 111.) The only thing that the Homebuilder Plaintiffs allege about any of those trade group meetings at which Continental could conceivably have been present is that they provided *opportunities* for collusion. For example:

- "Meetings involving the [DWFC] provided another *opportunity* for Defendants to communicate . . . ." (*Id.* ¶ 109 (emphasis added).)
- "Among the DWFC events that Defendants attended and which provided an *opportunity* for Defendants to collude and conspire include . . . ." (*Id.* (emphasis added).)
- "[S]ome Defendants belong to a trade association known as Drywall & Interior System Contractors Association, which provided yet another *opportunity* for Defendants to collude." (*Id.* ¶ 110 (emphasis added).)

[12] Indeed, the SAC's allegation that these discussions included "elimination of competitive job quotes" and "restriction of gypsum wallboard supply" demonstrates that, even taking Homebuilder Plaintiffs' allegations at face value, these alleged discussions must have occurred before Continental existed. (SAC ¶ 111.) As discussed *infra*, Homebuilder Plaintiffs themselves state that alleged agreements about job quotes and supply restrictions predate Continental's existence.

- "Each of these industry meetings, in which Defendants customarily stay at the same hotel, provided further *opportunities* for Defendants to discuss their collusive activities and plans." (*Id.* ¶ 112 (emphasis added).)

"[A] mere opportunity to conspire does not, standing alone, plausibly suggest an illegal agreement . . . ." *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 911 (6th Cir. 2009). More is required, and merely "attending trade group meetings, even those meetings where key facets of the conspiracy allegedly were adopted or advanced, [is] not enough on [its] own to give rise to the inference of agreement to conspiracy." *In re Processed Egg Prods.*, 821 F. Supp. 2d at 722; *see also In re Ins. Brokerage*, 618 F.3d at 349 ("allegations [of membership in a trade group and adoption of the group's suggestions] indicate that the brokers had an opportunity to conspire, they do not plausibly imply that each broker acted other than independently"); *Schuylkill Health Sys. v. Cardinal Health 200, LLC*, Civ. A. No. 12-7065, 2014 WL 3746817, at *7 (E.D. Pa. July 30, 2014) ("The fact that the Defendants are members of a trade association that hosts annual conferences does not transform Defendants' parallel conduct into a conspiracy. . . . [Plaintiff] merely asserts these conferences 'provide opportunities for Defendants to collude.'" (citation omitted)). Rather, a potential conspirator must actively seek to join the conspiracy and take affirmative action to participate. *See In re Processed Egg Prods.*, 821 F. Supp. at 723 ("active participation, rather than merely passive presence, becomes key in inferring agreement to the conspiracy").

The SAC does not plead any facts purporting to show that Continental actually agreed to any concerted action, much less a specific agreement on pricing. Even after amendment, nowhere in the SAC do the Homebuilder Plaintiffs identify a specific agreement that Continental allegedly reached at any trade association meeting with any of the other Defendants. The SAC is

similarly devoid of facts supporting Homebuilder Plaintiffs' "information and belief" allegation as to what any Defendant present at trade group meetings allegedly did at "one or more" such meetings. (SAC ¶ 111.) Instead, Homebuilder Plaintiffs rely on an improper inference that Continental joined the alleged conspiracy merely because the opportunity to do so existed. (*See, e.g., id.* ¶¶ 109-10, 112.) Even assuming for the sake of argument that such an opportunity existed, Continental would have had to act on it. Nowhere does the SAC allege facts showing that Continental took such action. The Homebuilder Plaintiffs, therefore, fail to properly plead the existence of an agreement that would unlawfully restrain competition, an essential element of a claim under Section 1 of the Sherman Act against Continental.[13] *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999).

2. Homebuilder Plaintiffs' Allegations Regarding Notices of Price Increases Are Insufficient.

Even after the amendment of their complaint, the only specific actions that Homebuilder Plaintiffs attribute to Continental are two price-increase announcements: (1) one on September 30, 2013 that stated "effective with orders shipped on and after Wednesday, January 1st, 2014, the price of our products will be increased by . . . 20%"; and (2) one on October 20, 2014 that stated "effective with orders shipped on or after Thursday, January 1st, 2015, the price of our products will be increased by the following amount: ALL WALLBOARD PRODUCTS 20%." (SAC ¶¶ 216, 219.) These allegations are insufficient to demonstrate "active participation" in an alleged conspiracy. *See In re Chocolate*, 383 F.3d at 397 ("parallel pricing . . . is lawful under the Sherman Act"); *Superior Offshore Int'l, Inc. v. Bristow Grp. Inc.*, 738 F. Supp. 2d 505, 510 (D. Del. 2010) ("evidence of parallel business conduct is ambiguous in that it may be 'consistent

[13] As noted above, those elements are "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action." *Howard Hess*, 602 F.3d at 253.

with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy . . . .'" (*quoting Twombly*, 550 U.S. at 554)).

Continental's price increases can hardly be described as "simultaneous and coordinated" with alleged price increases from other gypsum wallboard manufacturers; 2014 price increase announcements took place over an eight-month period and 2015 price increase announcements took place over a six-month period. (SAC ¶¶ 216, 219.) Moreover, even if, for the sake of argument, the meaning of "simultaneous" is sufficiently stretched to encompass periods of many months, there is still no allegation in the SAC supporting an inference that Continental's increases—in a marketplace that Homebuilder Plaintiffs allege is "highly concentrated by any measure" (*id.* ¶ 85)—were anything other than parallel behavior. *See In re Ins. Brokerage*, 618 F.3d at 321 & n. 19 ("evidence of parallel conduct by alleged co-conspirators is not sufficient to show an agreement[,] . . . common reaction[s] of firms in a concentrated market . . . with respect to price and output decisions [are] not in [themselves] unlawful" (internal quotation marks omitted)); *In re Baby Food*, 166 F.3d at 122 ("In an oligopolistic market, meaning a market where there are few sellers, interdependent parallelism can be a necessary fact of life but be the result of independent pricing decisions."). Homebuilder Plaintiffs' allegations are insufficient to create an inference of agreement or active participation. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Superior Offshore*, 738 F. Supp. 2d at 511 ("allegations of [parallel] conduct, standing alone, are not sufficient to state a plausible contract, combination, or conspiracy in violation of the Sherman Act § 1").

In order to plausibly allege that Continental's price-increase announcements constituted evidence of an alleged conspiracy, the Homebuilder Plaintiffs *must* allege sufficient "plus factors" to demonstrate that the allegedly parallel price increases show that Continental

specifically intended to join the alleged conspiracy. *See In re Chocolate*, 801 F.3d at 398 (such plus factors commonly include "(1) evidence that the defendant had a motive to enter into a price-fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy" (internal quotation marks and citation omitted)); *see also In re Ins. Brokerage*, 618 F.3d at 322 (describing some of the "plus factors" recognized by courts). The Homebuilder Plaintiffs fail to even attempt this.[14]

In addition, "allegations of conspiracy are deficient if there are 'obvious alternative explanation[s]' for the facts alleged." *In re Ins. Brokerage*, 618 F.3d at 322-23 (*quoting Twombly*, 550 U.S. at 567). Here, Homebuilder Plaintiffs' own allegations regarding the oligopolistic nature of the gypsum wallboard marketplace provide just such a ready explanation. (SAC ¶ 85.) Continental's price increases, particularly as a new company coming into an allegedly oligopolistic marketplace, at most demonstrate "rational, interdependent decision-making, as opposed to unlawful concerted action." *In re Chocolate*, 801 F.3d at 397. The Homebuilder Plaintiffs do not allege any facts to indicate that Continental was acting other than in its own independent self-interest when it announced price increases that were similar to those historically occurring across the marketplace.

B. Homebuilder Plaintiffs Fail to Allege Facts Supporting Their Claim That Continental "Stepped into the Shoes" of Lafarge or Assumed Any Role in Any Alleged Conspiracy.

As an apparent alternative basis to allege that Continental joined the alleged conspiracy, Homebuilder Plaintiffs make the conclusory assertion that "Continental effectively stepped into the shoes of Lafarge" as a member of the alleged conspiracy. (SAC ¶ 215.) The SAC fails to

[14] Even if they had, Homebuilder Plaintiffs' allegation that the gypsum wallboard marketplace is an oligopoly (SAC ¶ 85) means that allegations of motive and action contrary to interests would be "neither necessary nor sufficient . . . [here] where the claim is price fixing among oligopolists." *In re Chocolate*, 801 F.3d at 398.

allege any evidentiary facts supporting this legal conclusion. As also described in Certain Defendants' Partial Motion to Dismiss the Second Amended Complaint, at Section I, there is no factual support for the Homebuilder Plaintiffs' allegation that there was an ongoing conspiracy when Continental came into existence in 2013, much less the patently implausible allegation that an alleged conspiracy continued from then to the present. Indeed, the SAC fails to allege any evidentiary facts showing that Lafarge participated in the alleged conspiracy after the filing of the initial complaints underlying this MDL; in other words, there were no "shoes" for Continental to step into.

The SAC's only allegation that could conceivably support Homebuilder Plaintiffs' theory is that certain employees "continued their employment under Continental's ownership after the acquisition." (*Id.* ¶ 234.) The Homebuilder Plaintiffs fail, however, to allege any facts that demonstrate why this is relevant. For example, there is no allegation that these unidentified employees had *any* pricing authority or were connected in any way to the alleged conspiracy. This alone is fatal to Homebuilder Plaintiffs' apparent theory. *See In re Baby Food*, 166 F.3d at 125 ("Evidence of sporadic exchanges of shop talk among [employees] who lack pricing authority is insufficient to survive summary judgment."). Therefore, the Homebuilder Plaintiffs' allegation that Continental joined the alleged conspiracy upon its creation is unsupported and Homebuilder Plaintiffs' claims must be dismissed.

C. Homebuilder Plaintiffs Make No Factual Allegations Plausibly Connecting Continental to Any Alleged Conspiracy.

1. Homebuilder Plaintiffs Do Not Allege Any Facts Supporting Their Claim That Continental Refused to Offer "Job Quotes."

Homebuilder Plaintiffs allege that Continental "continued . . . to refuse to offer job quotes." (SAC ¶ 234.) That threadbare allegation is wholly inconsistent, however, with Homebuilder Plaintiffs' unambiguous allegations that the job quote system was "eliminated" by

September 2011. (*See, e.g.*, *id.* ¶¶ 9-10, 14, 17, 90, 105-06, 113, 123, 136, 129, 139, 155, 161-64, 167, 169.) This was at least two years before Continental even existed. (*Id.* ¶¶ 9, 48, 214, 234.) By the time that Continental came into existence, according to the Homebuilder Plaintiffs, the job quote system had already been out of use in the marketplace for approximately two years. There is no way that Continental could have agreed to discontinue, or refused to perpetuate, job quotes when Continental did not exist at the time. As the Homebuilder Plaintiffs allege, at the time Continental began operating, standard practice in the industry was to no longer provide job quotes. (*Id.* ¶ 174.)

Homebuilder Plaintiffs also fail to allege that any job quote was ever *requested* from Continental. The lack of any such allegation makes sense, as it is implausible that anyone would request a job quote when that system had been "eliminated" at least two years prior to Continental's existence. Homebuilder Plaintiffs' inability to allege that Continental actually refused to supply any requested job quote is fatal.

2. Homebuilder Plaintiffs Do Not Allege That Continental Agreed to Impose Supply Restrictions.

Homebuilder Plaintiffs allege that certain supply restrictions were in effect "[i]n the fall of 2011, and then again in the fall of 2012 . . . ." (SAC ¶ 20; *see also, e.g.*, *id.* ¶¶ 123, 176-77, 180-81, 208.) Yet again, there is not—and indeed could not plausibly be—any allegation that Continental participated in an alleged agreement to restrict supplies of gypsum wallboard since Continental did not exist at that time.

D. Homebuilder Plaintiffs' Related State Law Causes of Actions Should Also Be Dismissed.

1. Homebuilder Plaintiffs' State Law Causes of Action Are Based on the Same Insufficient Allegations as Their Sherman Act Claims and Should Therefore Be Dismissed.

In addition to their antitrust conspiracy claim, Homebuilder Plaintiffs' Third and Fourth Claims allege violations of various state antitrust, restraint of trade, consumer protection, and unfair competition laws should be dismissed.[15] These claims are based on the same allegations and suffer from the same lack of adequately pled evidentiary facts as Homebuilder Plaintiffs' claims under the Sherman Act. (S*ee, e.g.*, *id.* ¶¶ 273, 292, 381, 392.) The Third and Fourth Claims should therefore be dismissed for the reasons described above and because none of the alleged actions taken by Continental are unlawful or anticompetitive.

2. In the Alternative, the Court Should Decline to Exercise Its Pendent Jurisdiction over the State Law Claims.

In the alternative, the Court should decline to exercise supplemental jurisdiction over Homebuilder Plaintiffs' state law claims against Continental after dismissing the Sherman Act Claims (Claims One and Two). Complete diversity does not exist between the Homebuilder Plaintiffs and Defendants.[16] Accordingly, this Court's jurisdiction over those state law claims is merely supplemental. (*See id.* ¶ 26; 28 U.S.C. § 1367.) Because the Homebuilder Plaintiffs' Sherman Act claims against Continental should be dismissed, this Court must "decline to decide

[15] Specifically, the antitrust laws referred to in the Homebuilder Plaintiffs' Third Claim are those of: California, Illinois, North Carolina, Arizona, the District of Columbia, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, Oregon, Tennessee, West Virginia, and Wisconsin. The consumer protection laws referred to in the Homebuilder Plaintiffs' Fourth Claim are those of: California, Colorado, the District of Columbia, Florida, Georgia, Nevada, New Mexico, North Carolina, South Carolina, and Virginia.

[16] For example, Homebuilder Plaintiffs Beazer Homes Holdings Corp., CalAtlantic, Inc., Hovnanian Enterprises, Inc., KB Home, Toll Brothers, Inc., and TRI Pointe Homes, Inc. are all incorporated in the state of Delaware, as are Defendants USG Corporation, New NGC, Inc., Continental, CertainTeed Corp., American Gypsum Co., LLC, and TIN Inc. (SAC ¶¶ 32-33, 35-36, 41-43, 46, 48-51.)

the pendent state claims." *Borough of W. Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995) (noting that when the only claim over which there is original jurisdiction is dismissed, a court must decline to exercise pendent jurisdiction unless "judicial economy, convenience, and fairness" dictate otherwise). No factors weigh in favor of the Court exercising its supplemental jurisdiction: "[t]here is no judicial economy in trying the state claims here because the case is in its early stages, an answer has not been filed, and trial has not been scheduled. Nor do[] [Homebuilder Plaintiffs] suffer any prejudice or unfairness since [they] may transfer [their] claims to state court." *SigmaPharm, Inc. v. Mut. Pharm. Co.*, 772 F. Supp. 2d 660, 677 (E.D. Pa. 2011). Accordingly, Homebuilder Plaintiffs' state law claims against Continental should be dismissed.

E. Homebuilder Plaintiffs' Claims Against Continental in the Second Amended Complaint Should Be Dismissed with Prejudice.

Homebuilder Plaintiffs' inability to allege any facts supporting their claims against Continental in the SAC, despite notice of their previous complaints' failures from Defendants' prior motions to dismiss, demonstrate that no such facts exist and further amendment would be futile. "Where [amendment] would be futile, that alone is sufficient ground to deny leave to amend." *Kanter v. Barella*, 489 F.3d 170, 181 (3rd Cir. 2007). A court may also dismiss claims with prejudice where "the plaintiff was put on notice as to the deficiencies in his complaint, but chose not to resolve them" or "further amendment would be futile." *U.S. ex rel. Schumann v. Astrazeneca Pharm. L.P.*, 769 F.3d 837, 849 (3rd Cir. 2014). Further amendment "[is] futile when the complaint, as amended, would fail to state a claim upon which relief [can] be granted." *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1332 (3rd Cir. 2002) (internal quotation marks & citation omitted).

Here, Homebuilder Plaintiffs have twice elected to amend their complaint in response to Continental's (and other Defendants') motions to dismiss. (*See* Case No. 15-1712, Dkt. Nos. 30, 38, 47; Case No. 13-MD-2437, Dkt. No. 343.) Despite the notice provided by Continental's previous motions to dismiss, Homebuilder Plaintiffs have been unable to allege any facts connecting Continental to an alleged conspiracy in the SAC (or, for that matter, in their earlier amended complaint filed under seal). In fact, rather than allege evidentiary facts connecting Continental to the alleged conspiracy, Homebuilder Plaintiffs have deleted allegations that were contrary to their claims against Continental. In their initial complaint, the Homebuilder Plaintiffs alleged that "even non-conspirators were able to increase prices without fear of competition." (Compl. ¶ 126.) Continental pointed out in its initial motion to dismiss that the Homebuilder Plaintiffs did not differentiate Continental from other "non-conspirators." (Case No. 13-MD-2437, Dkt. No. 301 at 11-12.) The Homebuilder Plaintiffs' solution to this glaring deficiency in their original complaint was to merely delete this allegation. (*See* Compl. ¶ 126, SAC ¶ 142.)

Given the numerous opportunities the Homebuilder Plaintiffs have had to address the lack of any factual support for their claims, the only conclusion the Court can now draw is that there is none. As the Third Circuit Court of Appeals has previously declared "if [Homebuilder Plaintiffs] could plead such facts [they] would have already done so." *Ex rel Schumann*, 769 F.3d at 849. Accordingly, further amendments would be futile and the SAC should be dismissed with prejudice as to Continental.

CONCLUSION

Homebuilder Plaintiffs do not and cannot allege facts capable of demonstrating or giving rise to an inference that Continental joined and participated in a conspiracy to fix the price of gypsum wallboard. Continental did not exist during the time that Homebuilder Plaintiffs' alleged conspiracy was allegedly formed. Moreover, it is simply implausible that Continental

would join and participate in an ongoing alleged conspiracy that was already the subject of significant litigation. The SAC contains no allegations allowing a plausible inference that Continental was anything other than a rational self-interested participant in a marketplace that the Homebuilder Plaintiffs themselves allege is an oligopoly. Because Homebuilder Plaintiffs have failed to allege sufficient facts even after amendment, all of the SAC's claims against Continental should be dismissed with prejudice.

Respectfully Submitted,

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