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

IN RE:	:	**CIVIL ACTION**
	:	
GRAPHITE ELECTRODES	:	
ANTITRUST LITIGATION	:	**NO. 10-md-1244**

SAUDI IRON AND STEEL CO.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
UCAR INTERNATIONAL, INC., et al.	:	**NO. 00-5414**

MEMORANDUM & ORDER

Norma L. Shapiro, S.J. **January 16, 2007**

This is an antitrust action alleging price-fixing conspiracy in the global graphite electrodes[1] market. Plaintiff, a Saudi Arabian corporation, is a purchaser of graphite electrodes. Defendants, American and German companies,[2] are manufacturers and distributors of graphite electrodes. Plaintiff alleges defendants' participation in the worldwide price-fixing conspiracy caused plaintiff injury, i.e., plaintiff purchased defendants' graphite electrodes in the *foreign* market at artificially inflated prices. Plaintiff does not allege it has purchased any graphite electrodes in the United States domestic market, or that prices for graphite electrodes in the foreign market were set by prices or practices in the domestic market. Before the court is defendants' motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).[3]

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[1] Graphite electrodes are used to conduct electricity in steel mill furnaces.

[2] The defendants are UCAR International, Inc. and UCAR Carbon Company, Inc., American corporations, SGL Carbon AG, a German corporation, and SGL Carbon LLC, an American company and subsidiary of SGL AG.

[3] In the alternative, SGL Carbon AG moves to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2).

I. Procedural History

Plaintiff filed its complaint in 2000. This action was assigned to the Honorable Charles R. Weiner, who was presiding over several related actions as part of the multidistrict Graphite Electrodes Antitrust Litigation, C.A. 10-md-1244. In 2001, Judge Weiner dismissed most claims in two Graphite Electrodes actions: Ferromin Int'l Trade Corp., et al. v. UCAR Int'l, Inc., et al., C.A. 99-693, and BHP New Zealand, Ltd., et al. v. UCAR Int'l, Inc., et al., C.A. 99-4772. The Ferromin and BHP plaintiffs were foreign companies that purchased graphite electrodes in the foreign market at allegedly fixed, artificially inflated prices. Judge Weiner decided that under the plain language of the Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA"),15 U.S.C.A. §6(a), plaintiffs' injuries must stem from the effect of higher prices for graphite electrodes in the United States; therefore, Judge Weiner granted defendants' motion to dismiss under Rule 12(b)(1) as to all claims alleging injury arising from wholly-foreign transactions (i.e., graphite electrodes neither purchased nor invoiced in the United States), but denied defendants' motion to dismiss as to remaining claims alleging injury arising from transactions with some connection to the United States market (i.e., graphite electrodes invoiced in the United States). Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc., 153 F. Supp.2d 700, 705-706 (E.D. Pa. 2001) (consolidated opinion for Ferromin and BHP, hereinafter referred to as "Ferromin."). Plaintiff's claims here are identical to the Ferromin claims dismissed by Judge Weiner.

The Ferromin plaintiffs appealed the dismissal of their wholly-foreign claims. They argued Judge Weiner incorrectly interpreted the FTAIA as imposing jurisdictional limits for Sherman Act price-fixing claims made by foreign plaintiffs by requiring the anticompetitive effect on the domestic marketplace to give rise to their injuries. Because of the similarity with

Ferromin, this action was not decided by Judge Weiner pending the outcome of the Ferromin appeal.[4] Later, the Court of Appeals stayed Ferromin pending the Supreme Court's decision in F. Hoffman-La Roche Ltd. v. Empagran, S.A., 542 U.S. 155, 162 (2004) ("Empagran I"), an action involving factual and legal issues closely related to those in Ferromin.

In Empagran I, plaintiffs were foreign and domestic purchasers of vitamins who claimed defendants had engaged in a price-fixing conspiracy raising the price of vitamin products to customers in the United States and foreign countries. The district court dismissed the wholly foreign purchasers, but the Court of Appeals for the District of Columbia reversed. The Supreme Court reversed and concluded that Congress did not intend the Sherman Act FTAIA domestic injury exception to apply if the plaintiff's claim rested solely on independent foreign harm.

After the Supreme Court's decision in Empagran I, our Court of Appeals lifted the stay in Ferromin and remanded to the district court for reconsideration in light of Empagran I. On Judge Weiner's death in 2005, the remaining active cases from the Graphite Electrodes multidistrict litigation (Ferromin, Arbed, S.A., et al. v. Mitsubishi Corp., et al., C.A. 02-822, and the instant action) were reassigned to this judge. Defendants in Ferromin, Arbed, and this action subsequently filed motions to dismiss for lack of subject matter jurisdiction, but Ferromin and Arbed have since settled. This action is the sole remaining action in the Graphite Electrodes multidistrict litigation.

II. Standard of Review

A complaint must be dismissed if the court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The plaintiff bears the burden of alleging facts establishing subject matter

[4]Judge Weiner dismissed this action without prejudice, but stated it was "still considered **ACTIVE**." 6/30/01 Order.

jurisdiction. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991); see also Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). A challenge to subject matter jurisdiction under Rule 12(b)(1) may be a "facial" or "factual" attack. Turicentro v. American Airlines, Inc., 303 F.3d 293, 300 n.4 (3d Cir. 2002); see also Gould Elecs., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). In a facial attack, the court looks only at the allegations in the pleadings and does so in the light most favorable to plaintiff. United States ex.rel. Atkinson v. Pa. Shipbldg. Co., No 04-3374, 2007 WL 79483, at *5 (3d Cir. Jan. 12, 2007), citing Mortensen, 549 F.2d at 891. If it is a factual attack, it is permissible for a court to review evidence outside the pleadings. U.S. ex.rel. Atkinson v. Pa. Shipbldg., 2007 WL 79483, at *5, citing Gould, 200 F.3d at 176.

Defendants contend they have made a facial attack, Defs.' Br. at 6, but the attack is more accurately characterized as a factual one. In Pa. Shipbuilding, our Court of Appeals analyzed whether a motion to dismiss a False Claims Act claim was a facial or a factual attack. It held that where the defendants' challenge went to the actual facts supporting the jurisdictional requirements of the statute, not merely how those facts were pled, the district court was entitled to consider and weigh evidence outside the pleadings and properly placed the burden of establishing jurisdiction on the plaintiff. Id., 2007 WL 79483, at *5-6. As in that action, the court here is required to determine whether the jurisdictional requirements of a statute are met, here by ascertaining whether the domestic effect of the misconduct gives rise to a Sherman Act claim. In doing so, the court has considered the allegations of plaintiffs' complaint but also the absence of certain invoices and plaintiffs' counsel's statement concerning those invoices. This consideration is permissible when a factual attack is involved.

III. Discussion

Section 1 of the Sherman Act broadly prohibits all restraints of trade or commerce, including price-fixing agreements.[5] Congress enacted the FTAIA to clarify the scope of the Sherman Act. Under the FTAIA, the Sherman Act does not apply to export conduct or wholly-foreign conduct unless two jurisdictional requirements are met: (1) the conduct must have a "direct, substantial, and reasonably foreseeable effect" on United States domestic commerce; and (2) the domestic effect must "give rise" to the plaintiff's Sherman Act claim.[6] Id.; Empagran I,

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[5] Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. "Foreign nations" include commercial entities located abroad. See, e.g., CSR Limited v. CIGNA Corp., 405 F. Supp.25 526, 538 (D.N.J. 2005) (citing Turicentro, 303 F.3d at 301-02).

[6] The FTAIA states:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect--
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a. The term "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations" covers both export trade or commerce and wholly-foreign transactions. See, e.g., Empagran I, 542 U.S. at 161. The proviso relating to paragraph (1)(B) is not relevant in this action.

542 U.S. at 162.

In Empagran I, the Supreme Court considered anticompetitive price-fixing, in significant part foreign, that causes some domestic antitrust injury and independently causes separate foreign injury. It concluded that: 1) such conduct falls within the FTAIA's general rule excluding the Sherman Act's application because such price-fixing activity involves trade or commerce with foreign nations; and 2) the conduct does not fall within the domestic injury exception if plaintiff's claim rests solely on the independent foreign harm. If the adverse foreign effect is independent of any adverse domestic effect, the FTAIA exception and the Sherman Act do not apply.

The Court reached that conclusion for two stated reasons: 1) under the rule of prescriptive comity, ambiguous statutes are ordinarily construed to avoid unreasonable interference with the sovereign authority of other nations. This construction rule reflects principles of customary international law Congress ordinarily seeks to follow. Application of United States antitrust laws is only reasonable and consistent with prescriptive comity when reflecting a legislative effort to redress *domestic* antitrust injury, not independent foreign harm giving rise to the plaintiff's claim; and 2) the FTAIA's language and legislative history "suggest that Congress enacted the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce." Empagran I, 542 U.S. at 169.

The Court's decision in Empagran I was premised on the fact that the motion was to dismiss claims for *foreign* purchases by distributors who bought vitamins from defendants for *delivery* outside the United States; i.e., the relevant transactions were "wholly foreign" and occurred entirely outside United States commerce. It was assumed that the foreign effect, a

higher price outside the United States, was independent of the domestic effect, a higher domestic price. Because the lower court had decided that lack of connection did not matter, the Court remanded for the Court of Appeals to decide if the anticompetitive conduct did in fact cause independent foreign injury; that is, the conduct's domestic effects did not help to bring about the foreign injury (if that argument had been preserved below).

On remand, the Court of Appeals rejected plaintiffs' "global indivisibility" theory of jurisdiction and held that maintenance of super-competitive prices of vitamin products in the United States by foreign manufacturers, which may have facilitated foreign manufacturers' charging super-competitive prices abroad, did not give rise to the claimed injuries of foreign purchasers and did not bring their Sherman Act claims within the FTAIA exception. The district court's dismissal for lack of jurisdiction was affirmed. Empagran S.A., et al. v. F. Hoffman-LaRoche, Ltd., et al., 417 F.3d 1267, 1270-71 (D.C.Cir. 2005) ("Empagran II")

In this action, defendants admit that plaintiff has alleged facts sufficient to show defendants' anticompetitive conduct had a "direct, substantial, and reasonably foreseeable effect" on United States domestic commerce. Plaintiff alleges defendants "participat[ed] in meetings and conversations" with other graphite electrode producers and distributors "to discuss the prices and volume of Graphite Electrodes sold world-wide, including the United States." Compl. ¶ 34(a). Plaintiff alleges defendants conspired "to eliminate discounts" on graphite electrodes in the global market, "including the United States," id. ¶ 34(b), and "to charge prices at certain levels and otherwise to increase and maintain prices of Graphite Electrodes sold world-wide, including the United States," id. ¶ 34(c). Plaintiff alleges defendants agreed to "exchang[e] sales and customer information for the purpose of monitoring and enforcing adherence" to the global conspiracy, id. ¶ 34(i), and "issu[e] price announcements and price quotations in accordance

with" the unlawful agreement, id. ¶ 34(j). However, defendants argue plaintiff has failed to establish that the domestic effects of the worldwide conspiracy, i.e., higher prices for graphite electrodes in the United States market, "give rise" to plaintiff's alleged injury abroad. See Empagran I, 542 U.S. at 174.

Plaintiff alleges it "directly purchased Graphite Electrodes manufactured by Defendants and/or their co-conspirators" at a time when prices were inflated due to the worldwide price-fixing conspiracy. Compl. ¶ 9. Three of the four defendants are American companies located in the United States, id. ¶¶ 10-12, but plaintiff does not allege it purchased graphite electrodes in the United States market. See 4/3/06 Hr'g Tr. at 117-18 (plaintiff's counsel has stated, "we don't have the invoices in the United States...but there are invoices from SGL A.G. from Wiesbaden, Germany to Saudi Iron and Steel. Although it was sourced from different places, but the invoices are not from the United States."). Plaintiff does not allege that prices for graphite electrodes it purchased in the foreign market were set by prices in the domestic market.[7] See Ferromin, 153 F. Supp.2d at 705-706 (jurisdiction exists over claims based on foreign plaintiffs' purchase of allegedly price-fixed graphite electrodes invoiced (i.e., prices set) in the United States). Plaintiff merely alleges that, in light of the low transportation costs of graphite electrodes, Compl. ¶ 25, and the potential for arbitrage[8] because of their fungibility, price-fixing of graphite electrodes in the United States market sustained price-fixing in the foreign market, id. ¶ 26, where plaintiff's

[7] Plaintiff alleges the worldwide pricing of graphite electrodes by defendant UCAR International, Inc., "the largest producer," "was controlled centrally by UCAR officials in the United States," but does not allege that the location of these executives influenced how they set global prices or that the domestic market played any role in their determination of those prices. Compl. ¶ 27.

[8] Arbitrage is the "simultaneous purchase in one market and sale in another of a security or commodity in hope of making a profit on price differences in the different markets." Black's Law Dictionary 104 (6th ed. 1990).

injuries were caused, id. ¶ 36.[9]

Most courts addressing this issue have concluded that such allegations, describing a "single, unified, global [price-fixing] conspiracy" that could not be maintained without price-fixing in the United States market, do not satisfy the FTAIA's jurisdictional requirement that the conspiracy's domestic effect "give rise" to the plaintiff's alleged injury. Den Norske Stats Oljeselskap AS v. Heeremac VOF, 241 F.3d 420, 427 n.24 (5th Cir. 2001). Although the Supreme Court left this precise issue open in Empagran I, 542 U.S. at 175 (by assuming that the anticompetitive conduct there *independently* caused foreign injury), and our Court of Appeals has

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[9] Paragraph 25 of the complaint states:

> Due to the low cost of transportation, Graphite Electrodes are sold in a world-wide market. Defendants and their co-conspirators all look worldwide for Graphite Electrode suppliers.

Paragraph 26 states:

> Because of the ready flow of Graphite Electrodes among manufacturers and purchasers through the world-wide market, Defendants and their co-conspirators would not have been able to sustain a conspiracy to fix prices and divide markets in the United States without participating in a world-wide conspiracy joined by manufacturers of Graphite Electrodes located throughout the world.

Paragraph 36 states:

> 36. The unlawful contract, combination or conspiracy has had the following effects, among others:
>
> a. Prices charged by Defendants and their co-conspirators to Plaintiff for Graphite Electrodes were maintained at artificially high and non-competitive levels; and
>
> b. Plaintiff had to pay more for Graphite Electrodes than it would have paid in a competitive marketplace, unfettered by Defendants' and their co-conspirators' collusive and unlawful price-fixing.

not yet squarely addressed this issue, the Court of Appeals for the District of Columbia has rejected the argument that 'global indivisibility' establishes jurisdiction under § 6a(2) of the FTAIA. See Empagran II, 417 F.3d at 1270-71; see also Sniado v. Bank Austria AG, 378 F.3d 210, 213 (2d Cir. 2004) (on remand from the Supreme Court, the Second Circuit rejected plaintiff's claim that jurisdiction under § 6a(2) of the FTAIA existed because the domestic component of the alleged "worldwide conspiracy" was necessary for the conspiracy's overall success).

The Court of Appeals for the District of Columbia explained:

> The appellants' [foreign plaintiffs] theory in a nutshell is as follows:
>
> Because the appellees' [defendants] product (vitamins) was fungible and globally marketed, they were able to sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well. Otherwise, overseas purchasers would have purchased bulk vitamins at lower prices either directly from U.S. sellers or from arbitrageurs selling vitamins imported from the United States, thereby preventing the appellees from selling abroad at the inflated prices. Thus, the super-competitive pricing in the United States "gives rise to" the foreign super-competitive prices from which the appellants claim injury.
>
> The appellants paint a plausible scenario under which maintaining super-competitive prices in the United States might well have been a "but-for" cause of the appellants' foreign injury. As the appellants acknowledged at oral argument, however, "but-for" causation between the domestic effects and the foreign injury claim is simply not sufficient to bring anti-competitive conduct within the FTAIA exception.

Empagran II, 417 F.3d at 1270-71.

The Court of Appeals then equated the FTAIA's term "give rise to" to proximate cause for two reasons:

(1) the statutory language "indicates a direct cause relationship . . . not satisfied by the mere but-for nexus" advanced by the foreign plaintiffs; and

(2) this interpretation "accords with principles of 'prescriptive comity' – 'the respect sovereign nations afford each other by limiting the reach of their laws,' [citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J.,

> dissenting)] – which require that we 'ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations' [citing Empagran I, 542 U.S. at 163]."

Empagran II, 417 F.3d at 1271.

The court's opinion in Empagran II is logical as a matter of statutory interpretation and follows from the Supreme Court's discussion of the importance of "prescriptive comity" in Empagran I.

> No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.

Empagran I, 542 U.S. at 165 (emphasis in original).

Other district courts considering plaintiff's global indivisibility jurisdictional theory under § 6a(2) of the FTAIA after the Empagran II decision have rejected it: In Re Intel Microprocessor Antitrust Litigation, 452 F.Supp. 2d 555 (D.Del. 2006); In re Dynamic Random Access Memory Antitrust Litig., Nos. 02-1486 & 05-3026, 2006 WL 515629 (N.D. Cal. Mar. 1, 2006); In re Monosodium Glutamate Antitrust Litig., No. 00-MDL-1328, 2005 WL 2810682 (D. Minn. Oct. 26, 2005); Latino Quimica-Amtex S.A. v. Akzo Nobel Chems. B.V., No. 03-10312, 2005 WL 2207017 (S.D.N.Y. Sept. 8, 2005); eMag Solutions LLC v. Toda Kogyo Corp., No. 02-1611, 2005 WL 1712084 (N.D. Cal. July 20, 2005).

Plaintiff urges the court to reject the reasoning in Empagran II and the district court opinions following it, but Empagran II is consistent with the comity considerations enunciated by the Supreme Court in Empagran I – the only controlling precedent. Plaintiff argues its global indivisibility jurisdictional theory under § 6a(2) of the FTAIA is supported by MM Global

Servs., Inc. v. Dow Chem. Co., 329 F. Supp.2d 337, 342 (D. Conn. 2004) (motion to dismiss for lack of jurisdiction under FTAIA denied where there was sufficient showing of antitrust effect in United States that injured resellers). MM Global precedes Empagran II and is factually distinguishable; it did not involve the wholly-foreign transactions at issue here.

Plaintiff also relies on Industria Siciliana Asfalti, Bitumi S.p.A. v. Exxon Research & Eng'g Co., No. 75-5828, 1977 WL 1353, at *10-11 (S.D.N.Y. Jan. 18, 1977) (jurisdiction where plaintiff's foreign injury "inextricably bound up with the domestic restraints of trade." Id. at * 11). But Industria Siciliana precedes the FTAIA and is factually distinguishable because the "inextricabl[e]" intertwining of the foreign injury and the domestic market was the result of an alleged direct reciprocal tying agreement between foreign plaintiff and domestic defendants. Here, no tying agreement or any transaction between the parties is present. The court will follow the reasoning set forth in Empagran I and Empagran II, and the district court opinions following them, and grant defendants' motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1).[10]

The court will also deny plaintiff's request for leave to amend its complaint. "While Rule 15(a) provides that leave to amend should be 'freely given,' a district court has discretion to deny a request to amend if it is apparent from the record that . . . the amendment would be futile." Hill v. City of Scranton, 411 F.3d 118, 134 (3d Cir. 2005). Amendment would be futile because: (1) plaintiff has not identified any new facts it will allege if permitted to amend, see Pl.'s Br. at 16-17, n.6; 4/3/06 Hr'g Tr. at 112-121; and (2) plaintiff has admitted that it has not purchased any graphite electrodes in the United States market, see 4/3/06 Hr'g Tr. at 117 ("[W]e

[10]Because the court will grant defendants' collective motion to dismiss under Rule 12(b)(1), there is no need to address SGL Carbon AG's alternative motion to dismiss under Rule 12(b)(2).

don't have . . . invoices in the United States . . . .").[11]

The court also need not grant leave to amend where plaintiff had "ample notice of possible deficiencies in [its] complaint," but "made no attempt to amend before the District Court ruled on the motion to dismiss." Turicentro, S.A. v. American Airlines, Inc., 303 F.3d 293, 306 (3d Cir. 2002). Plaintiff's complaint was originally filed on October 25, 2000, and this action was stayed from July 30, 2001 to February 9, 2006, pending disposition of the Ferromin and Empagran appeals. Empagran II was decided on June 28, 2005; at that time, plaintiff had notice of possible deficiencies in its complaint and could have requested the court to lift the stay and grant plaintiff leave to amend. Plaintiff failed to do so, and also failed to request leave to amend during the time between February 9, 2006 (when the stay was lifted) and February 28, 2006 (when defendants filed their motion to dismiss). The parties were also given the opportunity to "submit a joint stipulation explaining the relationship of plaintiff's claim to United States commerce on or before February 14, 2006," but the parties did not submit a stipulation. 2/9/06 Order. It is within the court's discretion to deny plaintiff's request to amend its complaint.

IV. Conclusion

The court will grant defendants' motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction under the FTAIA. An appropriate order follows.

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[11] Plaintiff suggests that, if permitted to conduct jurisdictional discovery, it might be able to locate some U.S. invoices to satisfy the second jurisdictional requirement of the FTAIA. See Pl.'s Br. at 2; Ferromin, 153 F. Supp.2d at 705-706 (jurisdiction exists under § 6a(2) of the FTAIA where foreign plaintiffs purchased graphite electrodes invoiced in the United States). But such invoices are just as likely to be in the possession of plaintiff as defendants; plaintiff, knowing of their significance, had ample opportunity to produce them before admitting their non-existence at oral argument on this motion.

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GRAPHITE ELECTRODES	:	
ANTITRUST LITIGATION	:	**NO. 10-md-1244**

SAUDI IRON AND STEEL CO.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
UCAR INTERNATIONAL, INC., et al.	:	**NO. 00-5414**

ORDER

AND NOW, this 16th day of January, 2007, upon consideration of defendants' motion to dismiss plaintiff's complaint, and plaintiff's opposition thereto, following a hearing and oral argument at which counsel for all parties were heard, for the reasons stated in the accompanying memorandum, it is **ORDERED** that:

1. Defendants' motion to dismiss (paper # 9) is **GRANTED**.

2. The clerk is directed to mark this action **CLOSED**.

/s/ Norma L. Shapiro

S.J.