

No. 14-1746

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

SD3, LLC and SAWSTOP, LLC,

Plaintiffs-Appellants,

v.

BLACK & DECKER (U.S.), INC., ET AL.,

Defendants-Appellees

On Appeal from the United States District Court
for the Eastern District of Virginia,
Case No. 14-cv-00191-CMH-IDD
The Honorable Claude M. Hilton, United States District Judge

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INTRODUCTION

In a 2001 meeting representatives of virtually all major manufacturers of table saws held a meeting (the “PTI Meeting”) of the Product Liability Committee (the “Committee”) of the Power Tool Institute (“PTI”). A stated purpose of the discussions was to find a way to avoid having to pay a royalty to Plaintiffs. Defendants were also concerned about the product liability implications if less than all of them elected to implement Plaintiffs’ technology.¹

The discussions were open-ended, as “there was a lot of confusion with varying ideas and suggestions as to how the industry, through PTI, should move forward.” Defendants agreed that “a majority vote” would “decide the way the industry proceeds” with respect to SawStop. Peot Testimony, at 113:4-114:3. FAC ¶ 80, A-89-90.

Entire industries are not supposed to “move forward” on anything. The proper response to SawStop was for each industry participant to make an independent evaluation. Instead, Defendants responded collectively and made sure that everybody fell in line and that SawStop was isolated on the margins of the marketplace. The antitrust laws prohibit such conduct.

Ongoing licensing negotiations between Defendants and Plaintiffs were terminated. None of Defendants would ever buy a license from Plaintiffs, and

¹ Peot Testimony, at 125:11-14, A-138.

none would ever implement any AIMT. Defendants continue to rigidly insist that AIMT is still unproven and that their obsolete products are safe (although product liability juries do not believe them). And they continue to cause UL Laboratories to put its seal of approval on their unnecessarily dangerous products that were rendered obsolete by a safety technology now 15 years old.

Mr. Peot's testimony concerning the PTI Meeting would appear to be direct evidence sufficient to defeat summary judgment; for present purposes it will suffice that it "reasonably suggests" that such direct evidence might exist. It is indisputably the sort of "plus factor" or "something more" required to push circumstantial allegations of a conspiracy into the realm of the plausible. Defendants make no serious attempt to argue otherwise.

Defendants also offer no response to the well-pleaded allegations that there is no technical or economic justification for the UL's continuing to approve as "safe" table saws without AIMT. They also do not dispute that they control the body that sets UL table saw standards, and, that the UL does nothing to ensure that they set standards based on objective science, rather than economic self-interest. This is more than enough to state a claim under *Radiant Burners, Inc. v. People's Gas Light & Coke Co.*, 364 U.S. 656 (1961) and its progeny.

The amicus participation by both the National Consumers League (“NCL”) and the American Antitrust Institute (“AAI”) (collectively, the “Amici”)² reflects that this appeal exists at a cross roads where issues safety and product innovation meet, and are both furthered by enforcement of the antitrust laws.

SUMMARY OF THE ARGUMENT

Mr. Peot’s testimony strongly suggests that discovery will reveal direct evidence sufficient to prove Defendants’ conspiracy. Defendants have, at most, suggested alternative interpretations of the testimony, which are impermissible, since the factual allegations are to be construed in the light most favorable to Plaintiffs. *See, infra*, at p. 5.

Defendants have not seriously challenged the fact that Mr. Peot’s testimony provides the “something more” required by *Twombly* to supplement allegations of parallel conduct, and instead, have improperly attempted to dispute, and

² Defendants do not attack the credibility of the NCL, America’s oldest consumer advocacy group (since 1899), whose concern is safety. Instead, Defendants attack the AAI, by reiterating a fact disclosed in AAI’s own brief: that a partner of Plaintiffs’ counsel—who did not take part in either the decision to file, or in the writing of, AAI’s brief—is on the AAI board. Brief Of *Amicus Curiae* American Antitrust Institute And National Consumers League In Support Of Appellants (“Amicus Br.”), at 1 n.1. AAI’s seven person board includes only two plaintiffs’ attorneys, as well as a distinguished law professor, a senior professor of marketing, a former NERA economist and a senior partner in Drinker, Biddle & Reath, LLP, a highly respected law firm that generally counsels defendants. Amicus Br., at 1 n.1. Seth D. Greenstein, Esq., an author of the amicus brief, is an experienced antitrust and intellectual property attorney, with a long career on the defense side at McDermott, Will & Emery. Mr. Greenstein has no connection to plaintiffs or their counsel, and no obligation to AAI.

compartmentalize, the well-pleaded allegations of parallel conduct. *See, infra*, at p. 11.

Defendants have offered no response to the proposition that a horizontal boycott is a *per se* violation of the antitrust laws requiring no showing of market injury, nor have they addressed Plaintiffs' allegations of market injury. *See, infra*, at p. 20.

Defendants fail to address Plaintiffs' well pleaded allegations that (1) there is no plausible technical or economic justification for the UL's continued placement of its seal of approval on deadly and demonstrably obsolete equipment, as alleged in Count II, and (2) that there is no technical justification for a design-specific blade guard standard, addressed in Count III. *See, infra*, at p. 22.

It is not necessary to show a rule violation or other procedural irregularity to prevail on a standard-setting claim, particularly where, as here, the standard setting body is controlled by self-interested parties and there are no procedural protections to ensure that they apply objective technical standards. Defendants do not dispute that they controlled STP 745 (the relevant standard setting body) and no such controls were implemented. *See, infra*, at p. 24.

The exclusion of a product is not necessary to demonstrate market injury. Defendants have not responded to Plaintiffs' allegation that, with respect to Count II, there was an injury to product quality in the marketplace, which has been

recognized by the Supreme Court and many lower courts as a cognizable injury to competition. *See, infra*, at p. 28.

Defendants have not responded to Plaintiffs' contention, with respect to Count III, that Plaintiffs and others were precluded from introducing to the marketplace table saws with alternative and/or superior blade guard designs. *See, infra*, at p. 28.

ARGUMENT

I. PLAINTIFFS PLEADED AN ACTIONABLE BOYCOTT CLAIM IN COUNT I

A. Plaintiffs Satisfied Requirements of *Twombly* With Allegations of Direct Evidence, as Mr. Peot's Testimony Is Sufficient to Raise a Reasonable Expectation that Discovery Will Reveal Direct Evidence of a Conspiracy

Defendants suggest that a plaintiff seeking to satisfy the requirements of *Twombly* with allegations of direct evidence must put the proverbial "smoking gun" on the table, citing *American Chiropractic Association v. Trigon Healthcare, Inc.*, 367 F.3d 212, 226 (4th Cir. 2004) for the proposition that direct evidence must be "explicit and requires no inferences to establish the proposition or conclusion being asserted." *American Chiropractic* is a summary judgment decision. Civil plaintiffs are never required to plead evidence. Rather, "if a plaintiff expects to rely exclusively on direct evidence of conspiracy, its complaint must plead 'enough fact to raise a reasonable expectation that discovery will

reveal' this direct evidence." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 (3d Cir. 2010) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

Defendants take issue with this Court's holding, in *Robertson v. Sea Pines Real Estate Cos., Inc.*, 679 F.3d 278 (4th Cir. 2012), that an antitrust plaintiff may satisfy *Twombly*'s pleading requirements by alleging direct evidence:

Plaintiffs' real contention is that ordinary motion to dismiss standards are either automatically satisfied or do not apply whenever there are "allegations of direct evidence."

Def. Br. at 23. But *Robertson* holds that when sufficient allegations of direct evidence concerning the alleged agreement are pleaded, allegations of "circumstantial evidence sufficient to suggest a preceding agreement" are simply "superfluous," and "*Twombly*'s requirements with respect to allegations of illegal parallel conduct are inapplicable." 679 F.3d at 289-90.

Defendants contend that Mr. Peot's testimony is insufficient to raise a "reasonable expectation" that "discovery will reveal...direct evidence." They argue that Plaintiffs' have alleged nothing more than "participation at trade association meetings." Def. Br. at 21 (citing *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010) for the innocuous proposition that "participation in trade organizations provides no indication of conspiracy.").

Mr. Peot's testimony hardly depicts a routine "trade association meeting." Representatives of substantially all of the major power tool manufacturers convened a meeting to determine how to collectively respond to the threat from a single competitor, as they considered "suggestions as to how the industry, through PTI, should move forward . . . on SawStop." Peot Testimony, at 110:3-8. FAC ¶ 80, A-89-90. Defendants agreed that "a majority vote" would "decide the way the industry proceeds" with respect to SawStop. Peot Testimony, at 113:4-114:3. FAC ¶ 80, A-89-90. Mr. Peot memorialized the meeting in an email entitled "PTI Meeting and SawStop," and minutes were taken.

Defendants contend that Mr. Peot was testifying narrowly about the launching of a joint venture to purportedly attempt to develop AIMT (which would eventually be formed in 2003). However, the discussions clearly were not limited to a possible joint venture, as Mr. Peot wrote in his email that these alleged competitors discussed "varying ideas and suggestions as to how the industry, through PTI, should move forward" as to Saw Stop. The scope of the collaboration could reasonably be interpreted to exceed the scope of the joint venture that was eventually formed two years later.

Even if it were ultimately proven that Mr. Peot's testimony about the upcoming ballot referred to a prospective joint venture, it would not render Defendants' collaboration immune from antitrust scrutiny. According to Mr.

Peot's email, the joint venture would only come into existence if a majority of the industry "voted" to join it (Peot wrote that "A majority vote will decide the way the industry proceeds"). Peot Testimony, at 113:7-9 and 114:4-8; FAC ¶ 80, A-89-90. Members would share exclusive privileges, including access to information relevant to product liability litigation defense, while non-participants would be summarily booted from the PTI's Product Liability Committee (the "Committee") (Committee members not cooperating "will not be able to participate in or share in the information or work done by this committee, including using the information to defend legal action"). Peot Testimony, at 113:9-13; FAC ¶ 82, A-91. This level of collaboration, requiring majority participation, and expelling any non-participating members more closely resembled a cartel than a joint venture.

Mr. Peot memorialized the meeting in an email entitled "PTI Meeting and Saw Stop," minutes of the meeting were taken. Portions of the email were read into the record during questioning by plaintiff's counsel in *Osorio*, and counsel attempted to introduce the minutes into evidence.

Defendants argue the email and minutes are not expressly referred to in the FAC. Def. Br. at 25. But that is of no matter, as a court "may consider documents attached to the complaint, as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic." *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007). See Def. Br. at 40.

Any court may plainly take judicial notice of the fact that Osorio's counsel read from the e-mail, and sought the admission into evidence of the minutes, without considering the truth of any matters asserted therein.

Defendants would devalue Mr. Peot's testimony because some of it consisted of leading questions propounded by opposing counsel, followed by shorter affirmative responses. Def. Br. at 34. But Defendants ignore that the attorney, during the portions of the transcript relied upon by Plaintiffs, was reading from Mr. Peot's email. *See* Peot Testimony, at 106:10-12 ("I'm going to show you...an email you wrote..."), A-135. In any event, at most this bears on the weight of this evidence, which may not be evaluated on a motion to dismiss.

Defendants contend that Mr. Peot definitively denied the existence of a boycott and that a stronger inference could be drawn from his testimony that there was no such agreement. Mr. Peot simply testified on cross-examination only that he, personally, could not "remember" the existence of any "limitations" on the scope of the work of the joint venture formed in 2003. That is hardly a categorical denial.³ No illegal conspiracy is ever enforceable, and conspirators are always

³ And if it can be read to be a categorical denial, the district court improperly considered it for the truth of the matters asserted therein because Plaintiffs did not incorporate it into their complaint. A party that adopts as true, in its pleadings, *some* prior statement(s) of an adverse witness is not somehow stuck with having the entirety of the testimony accepted as true for all purposes. *See Guzell v. Hiller*, 223 F.3d 518, 519 (7th Cir.2000) (Posner, J.) ("[T]he plaintiff's purpose in attaching an exhibit to his complaint determines what assertions if any in the

free, as a matter of law, to head for the exit. *U.S. v. Nunez*, 673 F.3d 661, 664 (7th Cir. 2012).

Defendants ignore that one of the stated purposes of the industry collaboration (and, more specifically, the proposed joint venture) was to avoid paying a royalty to Dr. Gass. Mr. Peot conceded that the participants at the industry discussed “at that meeting, ... how can we, as industry members, develop something like SawStop but not have to pay a royalty fee to Doctor Gass.” Peot Testimony, 110:18 to 111:4, 111:14-17, A-136. *Accord* FAC ¶ 80, A-89-90. It does not make sense that members of a collaboration expressly designed to avoid doing business with Plaintiffs were somehow free to do business with Plaintiffs

Defendants certainly acted as if there were “limitations” on their ability to work with Saw Stop. Defendants pre-announced their intention of seeking ways to

exhibit are facts that the plaintiff has incorporated into the complaint”). *Manning v. Sweitzer*, 891 F. Supp. 2d 961, 964-65 (N.D. Ill. 2012) (holding that “Plaintiff’s complaint adopts some of the facts in the police reports, but it is clear that she did not intend to adopt the reports in their entirety” and accepting only as true those facts adopted by the plaintiff). *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009) is not to the contrary. In that case, the operative complaint did not cite to any specific portions of the relevant transcript. *See* Amended Complaint (Doc No. 138), No. 1:03-cv-30000-PCE (N.D. Ohio Sep. 14, 2007). And the problem was that there simply was nothing in the deposition transcript that supported the proposition for which it was cited in the complaint. Transcript of Testimony of Michael Gunn (Doc. No. 144-4) No. 1:03-cv-30000-PCE (N.D. Ohio Sep. 28, 2007).

avoid paying a royalty to Plaintiffs, and followed through on that stated intention, by not buying or implementing any AIMT.

B. The Circumstantial Allegations Presented by Plaintiffs Were More Than Sufficient to Place Defendants' Parallel Conduct Into a Context that Raises a Suggestion of a Preceding Agreement

An antitrust claim based on circumstantial allegations satisfies the requirements of *Twombly* when it places “allegations of parallel conduct” into “a context that raises a suggestion of a preceding agreement.” *Robertson*, 679 F.3d at 289 (citing *Twombly*, 550 U.S. at 557).

Even if Mr. Peot’s testimony were deemed insufficient to raise a reasonable expectation that discovery will reveal direct evidence, it does not simply get tossed out. The allegations of parallel conduct must be viewed in the context established by the October 2001 PTI meeting because “plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.” *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). “[T]he character and effect of conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.” *Id.* But the district court did not consider whether Mr. Peot’s testimony might be that “something more” to push the allegations of parallel conduct to support a “plausible” inference of a

conspiracy, and “dismembering” the conspiracy allegations is what Defendants are asking this Court to do.

Plaintiffs cited an extensive list of authorities from this Court and others holding that even a single timely communication among competitors about pricing or other terms of competition is a sufficient “plus factor” and/or the “something more” required by *Twombly*. Opening Brief, at 23-24.⁴ Defendants do not even attempt to refute these authorities.

The context provided by the PTI Meeting, revealed by Mr. Peot, is what brought Plaintiffs to court. Plaintiffs agree that the negotiating history, viewed in a vacuum independently from Mr. Peot’s testimony, might “just as easily support an inference of legal unilateral conduct as it could support an inference of concerted anticompetitive behavior.” Defs. Br. at 22. But it cannot be viewed in a vacuum, and must be viewed in tandem with Mr. Peot’s testimony.

Defendants argue that the alleged parallel conduct was not parallel enough. Even at a criminal trial, the evidence need not establish that Defendants acted in perfect lock-step; “while many conspiracies are executed with precision, the fact

⁴ See *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1242 (3rd Cir. 1993) (plus factors include, “[f]or example, have they attended meetings or conducted discussions at which they had the opportunity to conspire . . .”) (quoting William C. Holmes, *1992 Antitrust Law Handbook* § 1.03[3], at 154). See also *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 201 F.3d 436, at *9 (4th. Cir. 1999) (unpublished) (“plus factors” include “opportunity to conspire” and “high level of inter-firm communications”).

that a conspiracy is loosely-knit, haphazard, or ill-conceived does not render it any less a conspiracy-or any less unlawful.” *United States v. Burgos*, 94 F.3d 849, 858 (4th Cir. 1996). In *U.S. v. Foley*, 598 F.2d 1323 (4th Cir. 1979), the Court concluded that there were facts were sufficient to infer the defendants’ criminal liability, despite the fact that defendants did not implement the conspiracy at the same time. *Id.* at 1332-35. If a “loosely knit” or “haphazard” conspiracy that takes shape over time allows a prosecutor to get to a jury in a criminal case, it is also sufficient to permit a civil plaintiff to get to discovery.

Defendants’ parallel conduct, together with the context established by the PTI Meeting, is more than sufficient to satisfy Plaintiffs’ burden of pleading a plausible conspiracy in a civil antitrust action. Over the course of approximately nine months between September 2001 and June 2002, Defendants walked away from their licensing negotiations with Saw Stop, and terminated dialogues with Saw Stop that had been ongoing (with respect to at least some of them) since August 2000. And this happened in the same time frame that they were considering a formal ballot, requiring a majority vote, concerning some sort of collaboration, in response to Saw Stop.

The most conspicuous event was the sudden abandonment of licensing negotiations by Ryobi in January 2002. Plaintiffs have pleaded that, when Plaintiffs requested modest modifications to a substantively agreeable licensing

agreement, “Ryobi’s in-house counsel advised Plaintiffs that they should expect to receive a revised and corrected agreement, but that revised document never came,” and thereafter “Ryobi ceased responding to Plaintiffs about the SawStop Technology.” FAC ¶ 87, A-91. Defendants claim that Plaintiffs themselves simply “refused” to enter the agreement. No matter how many times a defendant proffers its own alternative reality, it simply does not displace what is contained in an operative complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009) (The sole exception to the requirement that a court take all allegations in a complaint as true “lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.”). Plaintiffs’ allegations must be accepted as true, even if Defendants might prefer something else.

Defendants argue that B&D’s “offer” of a 1% licensing fee, saddled with a clause requiring Plaintiffs to indemnify B&D, precludes any possible inference that Defendants had agreed not to license or implement AIMT.

B&D’s offer was disingenuous. Benchmarks for intellectual property licenses in the tool industry and elsewhere are much higher. Royalty rates in the tool industry are more typically at approximately 4-8% of wholesale prices, and those averages encompass scenarios in which the technology is, and is not, under

patent.⁵ Plaintiffs and Ryobi had agreed in principle to a royalty structure starting at 3% (and potentially escalating to 8%), which reflects that the B&D proposal was not serious. A plausible inference could have been drawn, and was required to be drawn in Plaintiffs' favor, that B&D was attempting to cover its tracks out of concern for future product liability and antitrust liability.⁶

Plaintiffs were also entitled to reasonable inferences that (1) Bosch's withdrawal from licensing discussions (barely) predated the PTI Meeting because it chaired the meeting and initiated the discussion, FAC ¶ 79, A-89, and (2) Emerson (not Plaintiffs) had pulled the plug on negotiations in or around February 2002 (at precisely the same time, perhaps not coincidentally, that Ryobi's general counsel stopped returning Plaintiffs' phone calls). FAC ¶ 88-89, A-92.

⁵ Roy Epstein and Paul Malherbe, "Reasonable Royalty Patent Infringement Damages After *Uniloc*," 39 AIPLA Q. J. 3 (Winter 2011) at 15-16 (noting median royalty of 4.6%, and an average of 5.3%, for "machines/tools," as per the RoyaltySource database, which "covers a broad range of intellectual property transactions, including ... transactions that do not pertain to patent rights at all"). *See also, e.g.*, KPMG, Profitability and royalty rates across industries: some preliminary evidence (2012), <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/gvi-profitability-v6.pdf> (graphs depict average royalty rates in the "machines/tools" sector between 5% and 6%).

⁶ Defendants claim that the bogus B&D offer was worth "millions," but this figure is certainly not derived from anything in the FAC. Nonetheless, this mantra is repeated in at least five different places in their brief (Def. Br., at 1, 3, 8, 27, 55). But the B&D license would have been worthless if B&D failed to implement Plaintiffs' AIMT.

Defendants do not address the separate contention that they conspired not to *implement* AIMT. This claim is viable regardless of what the evidence reveals about the licensing discussions. *See* Opening Br., at 38-40.

The gravamen of Defendants' challenge to Plaintiffs' factual allegations is that the reason "that no Defendant ultimately took a license from Plaintiffs—is explained by obvious independent business justifications." Def. Br. at 37. This is just not true. The record should be more than sufficient to sustain Plaintiff's eventual summary judgment burden of presenting evidence that "tends to exclude" alternative benign inferences, in light of the facts that (1) Plaintiffs' AIMT was favorably evaluated to be effective by Defendants themselves, and the technology works, (2) Defendants convened a meeting with the admitted purpose of avoiding paying royalties to Plaintiffs, (3) Defendants orchestrated a remarkable and unprecedented "industry vote" on "how to proceed" as to Saw Stop that required a majority vote, (4) Defendants determined that any industry members who did not join the initiative would be barred from the Committee, and (5) Defendants abandoned all licensing negotiations with Plaintiffs within a matter of months, some in fairly suspicious circumstances.

Because this case is at the pleading stage, Plaintiffs were not required to disprove a possible competing inference that Defendants had valid unilateral

business reasons for declining to pursue AIMT. The district court was simply not permitted to weigh competing inferences at the motion to dismiss stage.

Defendants engage in a spirited defense of the district court's mistaken reliance on summary judgment standards. Defendants characterize the district court's reliance on *Matsushita* as merely a "passing reference." Def. Br. at 23. But that is not what occurred. The district court cited *Matsushita* and *Monsanto* in holding that "A conspiracy must be alleged by either direct or circumstantial evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." Opinion, at 7, A-169. And it applied that standard – as it concluded that "the failure to allege sufficient evidence 'that tends to exclude the possibility that the alleged conspirators acted independently,' *Matsushita*, 475 U.S. at 588 (quotations and citations omitted), results in Plaintiffs' conspiracy allegations failing to cross the line from possible to plausible." Opinion, at 10, A-172. *See also id.* at 12, A-174 ("Plaintiffs' pleading fails to explain why" an inference should not be drawn that Defendants' conduct was "simply the natural, unilateral reaction" to Plaintiffs' technology).

Defendants continue to advance a similarly erroneous interpretation of *Twombly* and Fourth Circuit jurisprudence. Defendants cite *Loren Data Corp. v. GXS, Inc.*, 501 F. App'x 275, 281 (4th Cir. 2012) for the proposition that "where there are unilateral business reasons explaining an alleged refusal to deal, the claim

fails absent plausible allegations of an anticompetitive agreement.” But an antitrust claim *always* fails at the pleading stage when the plaintiff fails to allege factual matter sufficient to support the inference of an anticompetitive agreement. The claim in *Loren* did not fail because of the mere existence of “alternative” plausible explanations —it failed⁷ because the alternative explanations were the *only* plausible explanations. In considering the sufficiency of the allegations, the court simply may not choose between two plausible inferences that may both be drawn from the factual allegations. See *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012). The *only* question is whether a plausible inference of a conspiracy can be drawn, not whether other plausible inferences could *also* be drawn. Plaintiffs are not required to discredit or disprove alternative inferences at this stage of the proceedings.

Defendants further attempt to muddy the waters by relying extensively, before this Court, on summary judgment jurisprudence. In *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 396 (7th Cir. 1993) (cited by the district court), the evidence revealed that four of the eight defendants sold the

⁷ The plaintiff pleaded only that a single defendant refused to do business with it — there was no attempt to plead parallel conduct by multiple industry participants, much less any attempt to plead the “something more” than mere parallel conduct necessary to satisfy the requirements of *Twombly*. In *Loren*, the complaint failed because the factual allegations advanced by the plaintiff were woefully insufficient to support an inference of a conspiracy, not merely because alternative inferences could have been drawn from the allegations.

product that the plaintiff alleged they had refused to sell. Here, in contrast, Plaintiffs have alleged that the Defendants ceased negotiating with the Plaintiffs at the time they joined the conspiracy, and that none of them ever implemented AIMT. *In re Beef Industry Antitrust Litigation*, 907 F.2d 510, 514 (5th Cir. 1990) and *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 54 (3d Cir. 2007) are also summary judgment decisions in which the plaintiffs failed to adduce enough evidence, under *Matsushita*, to “tend to exclude” benign explanations for the Defendants’ conduct – a burden that Plaintiffs do not presently bear.

Defendants cite *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013), but there the claim failed because the only factual matter proffered (beyond parallel conduct) was “two vague references to isolated discussions among only three defendants” in a case against virtually every major investment bank. *Id.* at 140. Here, it is an admitted fact that the Defendants convened a formal meeting in order to devise ways to respond collectively to, and avoid doing business with, the Plaintiffs.

Defendants rely heavily on *Cascades Computer Innovation LLC v. RPX Corp.*, 2013 WL 316023 (N.D. Cal. Jan. 24, 2013). But, in *Cascades*, the plaintiff subsequently filed an amended complaint that was *sustained*. See Case 4:12-cv-01143-YGR (C.D. Cal. Dec. 3, 2013) (Doc. No. 119). With respect to the single defendant who was dismissed, the initial complaint consisted “primarily of

threadbare recitals of conspiracy,” in the “sort of generic pleading” that was “rejected by *Twombly*.” 2013 WL 316023, at *6. The allegations of parallel conduct, which were weak to start with, were not supplemented by any additional indicia of a conspiracy.

C. Plaintiffs Were Not Required to Allege an Injury to Competition With Respect to Count I, But, in Any Event, Did So

Defendants make a half-hearted attempt to contend that Plaintiffs have failed to allege a cognizable injury to competition as to Count I. Def. Br., at 60. But “group boycotts are illegal *per se*.” *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 130 (1998) (citing *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959)). Defendants have no response.

Even if it were necessary to advance such allegations, Plaintiffs’ allegations of market injury are more than sufficient. Plaintiffs have pleaded a boycott in the intellectual property market. FAC ¶¶ 83, 90-91, A-90-93. Plaintiffs have also alleged the AIMT boycott injured competition in the retail table saw market by collectively denying most consumers the choice to purchase a safer saw. FAC ¶¶ 90-91, A-92-93. Defendants do not address these allegations.

Defendants repeat their inaccurate contention Plaintiffs “rejected signed license agreements,” and, as a result, that there is no injury. Def. Br. at 60. But, as discussed in some detail above, there were no “signed license agreements” that were “rejected” by Plaintiffs.

II. PLAINTIFFS HAVE PLEADED ACTIONABLE CLAIMS ARISING FROM DEFENDANTS' STANDARD SETTING CONDUCT

Defendants suggest that it is improper for the courts to scrutinize private standard setting conduct, and repeatedly accuse Plaintiffs and the Amici of labeling such conduct as “inherently suspicious.” Nowhere do Plaintiffs or the Amici make any such blanket statement, and Plaintiffs agree that standard-setting *can* be socially useful, and *can* be procompetitive.

The unqualified assertion that “[s]tandard-setting is procompetitive,” Def. Br. at 3, is also not true. As noted by the Supreme Court in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), “agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products,” and, “[a]ccordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny.” *Id.* at 501 (citing *Radiant Burners* and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986)).

Two factors distinguish standard setting that is permissible from that which is anticompetitive: private associations must (1) “promulgate safety standards based on the merits of objective expert judgments” and (2) do so “through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition.” *Id.*, 486 U.S. at 501. The standard setting at issue in this action failed to comply in both respects.

A. Defendants Do Not Dispute That Plaintiffs Have Sufficiently Alleged that the Standards Were Devoid of Technical Merit

The essence of Plaintiffs' standard-setting claims is straightforward: the standard imposed by the standard-setting organization was devoid of technical merit and designed to injure competition by rewarding the dominant manufacturers at the expense of the plaintiff. Defendants' brief itself is devoid of discussion of any technical merits of UL 987.

1. There is No Plausible Technical or Economic Justification for the UL's Continued Placement of its Seal of Approval on Deadly and Demonstrably Obsolete Equipment, as Alleged in Count II

"Technical merit" means one thing – safety, as the UL is a specialized "safety consulting and certification organization." FAC ¶ 33, A-43. There are approximately 67,300 medically-treated injuries from table saw blade contacts yearly, approximately 8,000 of which result in amputations,⁸ most of which simply would not occur if some form of AIMT were implemented throughout the industry. FAC ¶¶ 125-26, A-102. Plaintiffs' AIMT works on all formats of table saws, which Mr. Peot and his peers in the industry recognized immediately. Peot Testimony, at 112:10-21, A-137.

⁸ FAC ¶¶ 52-53, A-82. *See also* Consumer Product Safety Commission, Table Saw Blade Contact Injuries; Advance Notice of Proposed Rulemaking; Request for Comments and Information (Sept. 14, 2011), <http://www.cpsc.gov/PageFiles/90189/tablesaw.pdf>.

At one time, “safe” automobiles did not include safety belts. But the “state of the art” changes, and safety standards change with it. UL 987 is stuck in 1998. The standard is simply obsolete, and no one can plausibly certify as “safe” a table saw lacking AIMT any more than one could sell an automobile without safety belts.

UL 987 also makes no economic sense. See FAC ¶ 55 (“These costs to society are far greater than the costs to effectively eliminate these injuries.”). In *Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753 (7th Cir. 2013), the court held that the district court erred in not permitting plaintiff’s economist to testify as to the social cost of not implementing the technology, estimated at \$753 per table saw -- an astounding social cost, which far exceeds the cost of implementing the technology, which Dr. Gass estimates at \$50 per saw, and Ryobi concedes is no more than \$150 per saw. *Id.* at 758.)

2. There Is No Technical Justification for a Design-Specific Blade Guard Standard, Addressed in Count III

Plaintiffs have pleaded that Defendants intentionally caused STP 745 to adopt an inferior design-specific guard standard, rather than a performance-based standard, even though it has no performance advantage over other designs.” FAC ¶ 122, A-100. This, too, was a safety standard lacking technical merit, and Defendants offer no explanation why these allegations are deficient, and have articulated no plausible justification for the dismissal of Count III.

B. Defendants Dominated STP 745 and There Were No Procedural Safeguards in Place to Prevent Interested Parties From Imposing a Technically Deficient Standard for Anticompetitive Reasons

Private standard-setting is permitted “on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits” with “meaningful safeguards” that “prevent the standard- setting process from being biased by members with economic interests in stifling product competition.” *Allied Tube*, 486 U.S. at 501, 506-07.

Plaintiffs have pleaded that Defendants, and those under their control, dominated STP 745, had complete voting control over it, and that the UL put no restrictions on their ability to act in their pecuniary interests. FAC, ¶¶ 34-35, 104-107, A-43-44, 96-97.

Defendants argue that “separate unlawful conduct” (*i.e.*, something other than the adoption of a technically deficient standard by interested persons with no procedural safeguards) is required to sustain such a claim, Def. Br., at 42, and argue that a Plaintiff pursuing such a claim must demonstrate that the standard setting organization “strayed from its ordinary procedures.” *Id.* at 52. They claim that Plaintiffs have alleged nothing more “than routine standard-setting activity—namely, a vote within STP 745 on SawStop’s proposal to require AIMT and Plaintiffs’ blade guard on all table saws sold under the UL standard.” *Id.* at 50.

Anticompetitive activities by members of a standard-setting association are not “validated” simply because they conformed to the organization’s rules. *Allied Tube*, 486 U.S. at 509-10. There, the jury found that the defendants had subverted the standard-setting process notwithstanding the lack of any rule violations. In *Radiant Burners*, and *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 577 (1982), similarly, there was no allegation of procedural irregularities. *Accord, e.g., Am. Inst. of Intradermal Cosmetics, Inc. v. Society of Permanent Cosmetic Professionals*, 2013 WL 1685558, *1 (C.D. Cal. Apr. 16, 2013).

There is no requirement of showing a rule violation when the defendants control the standard-setting process, and the rules themselves are insufficient to prevent them from developing a technically meritless standard. See FAC, ¶ 36, A-80 (the UL did not nothing to prevent the defendants from acting in their own pecuniary interests).

Standard setting claims often fail when the defendants lacked such control. In *Plant Oil Powered Diesel Fuel Systems, Inc. v. ExxonMobil Corp.*, 801 F. Supp. 2d 1163 (D.N.M. 2011), a case relied upon heavily by Defendants, the court noted that claims may proceed under *Allied Tube* only “where an ‘economically interested party exercises *decision making* authority in formulating a product standard for a private association that comprises market participants,’” as opposed

to “mere efforts to persuade others to exclude a competitor’s product from a private code.” 801 F. Supp. 2d at 1198 (quoting *Allied Tube*, 486 U.S. at 510 n.13) (emphasis in original). The claim in *Plant Oil* failed because the defendants did not control the standard-setting body, and the plaintiff alleged nothing more than that the defendants participated in drafting the standard.

In *Advanced Technology Corp. v. Instron, Inc.*, 925 F. Supp. 2d 170 (D. Mass. 2013), the defendants constituted a very small minority of the standard-setting body. And they had no reason to conspire to do anything, as the rules of that body were such that that one negative vote would prevent adoption of a standard, so collaboration would be unnecessary. *Id.* at 174-175.

Defendants further contend that their conduct was permissible because they were acting consistently with their economic self-interest. Def. Br. at 54-55. In other contexts, such as a boycott or price fixing claim, this argument would make some sense, as conduct against unilateral economic interests is one factor that can be found to support a circumstantial inference of concerted action where the existence of such action would otherwise be in doubt. But it is inapposite in the context of standard setting conducted by a body controlled by interested persons—as explained by the Supreme Court in *Allied Tube* and *Radiant Burners*, and as acknowledged more recently in *Plant Oil*, the fact that interested persons controlled the standard-setting process renders it more suspect, not less so – in fact,

the claim generally fails when the standard-setting body is *not* controlled by economically interested parties. And Plaintiffs are not relying heavily on inferences to be drawn from circumstantial evidence to piece together some abstract conspiracy – Defendants’ dominance of STP 745, and the concerted action taken as members of STP 745, were generally not concealed and are not disputed.

Defendants stress that the existence of the Blade Contact JV was publicly disclosed venture and never found to constitute an illegal cartel on its face. Def. Br., at 56-57. But Plaintiffs contend that the Blade Contact JV was a fraud, not an antitrust violation, and that it was designed principally to make it appear that the industry was taking AIMT seriously in order to reduce pressure from the CPSC, but also as a means of concealing their pre-existing agreement not to implement AIMT. FAC ¶ 109, A-97-98.

C. A UL Performance Standard Requiring Some Form of AIMT Would Not Give Any Person a Monopoly

Defendants, the dominant manufacturers in the power tool injury, attempt to characterize Plaintiffs (who have never achieved more than a 1% market share) as a prospective monopolist seeking to use the standard-setting process to obtain a monopoly in the table saw market.⁹

⁹ See, e.g., Def. Br. at 3 (“This lawsuit is nothing more than an attempt to obtain the monopoly they failed to impose upon the industry a decade ago”); *Id.* at 44 (Plaintiffs “claim is that the standards body should have forced everyone else to adopt (and pay for) *their* technology”) (emphasis in original).

But Plaintiffs have consistently proposed to STP 745 (and to the CPSC) the adoption of a *performance* standard that requires some form of AIMT, FAC, ¶ 123, A-101, but not for the adoption of any particular design. The adoption of such a standard would not require the Defendants to buy a license from Plaintiffs - they could (1) develop their own AIMT, (2) license the AIMT from a third party person (the adoption of an AIMT performance standard would invigorate quality competition and encourage innovation), or (3) offer less expensive saws that were more dangerous, without the UL seal of approval, appealing to consumers who were thrifty and risk-prone.

D. Plaintiffs Have Pleaded Harm to Competition With Respect to Both Counts II and III

Defendants summarily contend that Plaintiffs' have not adequately pleaded an injury to competition as to Counts II or III.

Defendants have not addressed the contention, and authorities cited, in Plaintiffs Opening Brief that corrupt standard-setting conduct by horizontal competitors should be considered to be a *per se* violation. *See* Opening Brief, at 54-55. A showing of market injury should, accordingly, not be required.

Defendants contend, apparently with respect to Count II, that there is no injury to competition because the standard-setting conduct at issue did not result in the exclusion of one or more products from the marketplace. Def. Br., at 59 ("Nor can Plaintiffs allege their own exclusion"). But, while exclusion of a product from

the marketplace would be a cognizable injury to competition, it is hardly the only possible such injury. As noted in Plaintiffs' opening brief, an injury to quality competition is a cognizable form of market injury, recognized by the Supreme Court and many lower courts.¹⁰ Defendants offer no response to the legal argument that an injury to quality competition is a cognizable market injury, nor to the fact that Plaintiffs have adequately (and quite expressly) pleaded such an injury.

With respect to Count III, Plaintiffs pleaded that equally adequate, and superior, blade guard designs *were* excluded from the marketplace as a result of an unduly restrictive design-specific standard. Defendants do not address this allegation, and, as noted above, have generally ignored Count III and have offered no rationale for its dismissal.

CONCLUSION

For the foregoing reasons, and those articulated in Plaintiffs' Opening Brief, this Court should vacate the district court's order of dismissal.

¹⁰ And, as noted by the Amici:

[C]omplete exclusion from a market is not a necessary prerequisite for antitrust harm. *See U.S. v. Microsoft Corp.*, 253 F.3d 34, 70-71 (D.C. Cir. 2001); 13 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 2234b, p. 432 (2d ed. 2005) ("It should be clear . . . that antitrust injury can refer to loss of technical progressiveness, or innovation, just as much as loss of competitive pricing.").

Amicus Br., at 24.

January 2, 2015

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14-746 **Caption:** SD3, LLC, et al. v. Black & Decker (U.S.) Inc., et al.

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

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(s) Matthew E. Miller

Attorney for Appellants/Plaintiffs

Dated: January 2, 2015

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I certify that on January 2, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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/s/ Matthew E. Miller

Matthew E. Miller