

ANTITRUST LAW

Unit 6: Conspiracy and Dispositive Motions

Procedure Version

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Introduction

THE LAW OF ANTITRUST CONSPIRACY

Section 1 of the Sherman Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, is declared to be illegal.”¹ A violation of Section 1 requires a showing of four distinct elements: (1) a plurality of actors with the legal capacity to conspire with one another, (2) an agreement among these actors, and (3) a restraint of trade or commerce as the object of the agreement that (4) is unreasonable within the meaning of the antitrust laws.

This section introduces the first two elements of a Section 1 violation: plurality and agreement. By its terms, Section 1 applies only to concerted action, and concerted action requires plurality as a predicate. Section 1 has no application to unilateral conduct. Notably, the essence of any Section 1 violation is the illegal agreement itself, not any overt acts performed in furtherance of it.²

Plurality

The plurality element requires that the actors have the legal capacity to conspire within the meaning of the antitrust laws. Essentially, the idea is that the actors should be legally independent persons and not part of a single enterprise. As the Supreme Court observed in *Copperweld Corp. v. Independence Tube Corp.*,³ to have the capacity to conspire the entities must be capable to “depriv[ing] the marketplace of independent centers of decisionmaking that competition assumes and demands” by coordinating their behavior, which is “inherently is fraught with anticompetitive risk.”⁴ *Copperweld* stressed that “substance, not form” should determine whether decision-making within an entity or enterprise is collective and hence subject to Section 1 scrutiny or unilateral and therefore outside the scope of Section 1.⁵

Under the *Copperweld* test, because an “internal ‘agreement’ to implement a single, unitary firm’s policies does not raise the antitrust dangers that § 1 was designed to police,” officers or employees of the same firm usually do not constitute independent centers of decision-making and hence lack the capacity to conspire.⁶ Likewise, a parent company and its wholly-owned subsidiary lack the capacity to conspire with one

1. 15 U.S.C. § 1.

2. *United States v. Kissel*, 218 U.S. 601, 606-07 (1910); *accord Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991).

3. 467 U.S. 752 (1984).

4. *Copperweld*, 467 U.S. at 768-69; *accord American Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2212 (2010); *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 284 (4th Cir. 2012); *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 706 (7th Cir. 2011).

5. *Copperweld*, 467 U.S. at 773 n.21; *accord American Needle*, 130 S. Ct. at 2211.

6. *Copperweld*, 467 U.S. at 769.

another,⁷ as do two subsidiaries each wholly owned by the same parent company.⁸ More generally, companies within a corporate group lack the capacity to conspire with one another if they are directly or indirectly subject to common control and act as a single enterprise, even if there are minority interests outside of the group.⁹

The cases suggest two separate ways that a single legal entity and its constituent parts constitute “independent centers of decision-making” in the marketplace and so have the capacity to conspire with one another.

First, courts have found that a legal entity and its constituent parts have the capacity to conspire with one another when each have separate and distinct interests and use the entity’s decision making to eliminate actual or potential competition between them. This was the situation the Supreme Court found in 2010 in *American Needle, Inc. v. Nat’l Football League*.¹⁰ The 32 NFL teams formed National Football League Properties (NFLP), a corporate joint venture, to which they delegated the right to exploit their intellectual property in the NFL brand, their respective individual team logos, and the like. After 20 years of production, American Needle lost its right to manufacture and sell headgear with the trademarks of the NFL and its member teams when the NFLP’s member teams authorized the NFLP to grant an exclusive license to Reebok International Ltd. American Needle then sued the NFL, NPFL, the individual NFL teams, and Reebok, alleging that the exclusive license violated Section 1. The district court granted summary judgment to the defendants, and the Seventh Circuit affirmed, on the grounds that NFLP and its member teams constitute a single economic enterprise and so lacked the capacity to conspire.¹¹ The Supreme Court reversed and remanded. The Court found that, although the NFLP is an incorporated entity, the teams act through the NFLP governance mechanism, and common interests in the NFL brand partially unite their economic interests, the NFLP and its member teams are not a “single economic enterprise” when engaged in the licensing of each team’s separately owned intellectual property.¹² Rather, the Court found the NFL teams when operating through the NFLP “are not like the components of a single firm that act to maximize the firm’s profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP’s financial well-being.”¹³ Since the teams were either actual or potential competitors in the licensing of their respective intellectual property, the consolidation of this decision-making in the NFLP deprived the marketplace of their independent decisionmaking and so gave

7. *Copperweld*, 467 U.S. at 777.

8.

9.

10. 560 U.S. 183 (2010).

11. *American Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941 (N.D. Ill. 2007), *aff’d*, 538 F.3d 736 (7th Cir. 2008), *rev’d and remanded*, 560 U.S. 183 (2010).

12. *Id.* at 2215. Interestingly, the Court did not address whether the same result would hold with respect to the licensing of the commonly-owned NFL intellectual property.

13. *Id.* at 2215; *see Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 285 (4th Cir. 2012) (“The MLS enabled the individual brokerages to make collective decisions about pricing and services that they otherwise would have made independently.”).

the teams—and presumably the NFLP¹⁴—the capacity to conspire with one another with respect to the challenged NFLP licensing activities.¹⁵

Second, courts have found that an entity and its constituent parts have the capacity to conspire with one another when the parts use the entity’s decision making to restrain competition from third parties. In *Robertson v. Sea Pines Real Estate Cos.*,¹⁶ purchasers of real estate brokerage services in South Carolina brought a class action against two incorporated multiple listing services (MLS) alleging that the real estate brokerages serving as board members conspired to restrain competition by having the service promulgate membership rules that excluded innovative, lower-priced competitors (including internet-based brokerages) and hence insulated the defendant-brokerages from this competition. On an interlocutory appeal following a denial of the defendants’ motion to dismiss for lack of plurality, the Fourth Circuit agreed that the plaintiffs pleaded the requisite plurality. Like the NFL teams in *American Needle*, the defendant brokerages were separately incorporated and competed with one another, but unlike the case in *American Needle* the brokerages allegedly used the MLS to restrain competition with third parties rather than with one another. The court concluded that even if the defendants had a common interest in the promulgation of the allegedly anticompetitive rules, “that commonality of interest exists in every cartel” and did not negate the capacity of the brokerages to conspire with one another.¹⁷ The Fourth Circuit also noted that the defendants’ alleged efforts to exclude innovative competitors conflicted with the service’s interest to admit additional dues-paying members and to expand its database of property listings. But one could easily imagine a situation where this conflict did not exist, and it is unlikely that courts would find that plurality did not exist when otherwise independent and competing firms used a common entity to eliminate third-party competition.

Finally, the requirement that courts focus on substance, not form, in the plurality analysis means that an entity and its constituent parts may be a single enterprise for some purposes but not others. *American Needle*, for example, carefully limited its finding that the NFLP and the teams had the capacity to conspire to activities involving

14. See *Robertson*, 679 F.3d at 286 n.1 (finding an incorporated MLS service to have the capacity to conspire with its member real estate agents).

15. *Id.* at 2213. The Seventh Circuit in its opinion acknowledged that the NFL teams “could have competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition,” 538 F.3d at 743, presumably on the basis of some evidence in the summary judgment record. Although the Supreme Court did not address the question, the technical grounds for the reversal of the grant of summary judgment must have been the existence of sufficient evidence in the record to raise a genuine issue of fact on whether the NFL teams used NFLP to eliminate actual or potential competition among them.

For other examples of courts subjecting a single formal legal entity to Section 1 scrutiny, see *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *National Collegiate Athletic Ass’n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Terminal Railroad Ass’n of St. Louis*, 224 U.S. 383 (1912); *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278 (4th Cir. 2012) (MLS and its member real estate agents).

16. 679 F.3d 278 (4th Cir. 2012).

17. *Robertson*, 679 F.3d at 286 (quoting *American Needle*, 560 U.S. at 201).

licensing decisions regarding each team’s separately owned intellectual property. This suggests that plurality may not exist in connection with the NFLP’s licensing of commonly-owned intellectual property (such as the NFL brand).

Agreement

The second element of a Section 1 violation requires that the entities with a legal capacity to conspire with at least so other alleged coconspirators in fact entered into a contract, combination, or conspiracy within the meaning of Section 1. Although Section 1 employs three different terms for agreement—contract, combination, and conspiracy—this is an artifact of the early English common law and U.S. courts have not distinguished among them. Modern courts tend collect all three under the rubric of conspiracy, agreement, or concerted action.

The Sherman Act draws a fundamental distinction between conduct undertaken as a result of agreement and conduct pursued unilaterally.¹⁸ Because Section 1 of the Sherman Act does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy,¹⁹ the “crucial question” is whether the challenged anticompetitive conduct “stemmed from independent decision or from an agreement, tacit or express.”²⁰ Agreements within the scope of Section 1 are often classified as *horizontal*, that is, agreements between competitors at the same level in the market, or *vertical*, that is, agreements between firms at different levels in the chain of manufacture and distribution.²¹ Some agreements involved both competitors as well as firms at different levels, and some are both horizontal and vertical.²²

The agreement element of a Section 1 violation requires some concerted action among the actors, often described as “a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement”²³ or a “conscious

18. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775-76 (1984) (“Indeed, this Court has recognized that § 1 is limited to concerted conduct at least since the days of *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919).”); *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954).

19. *Copperweld*, 467 U.S. at 775; *accord Twombly*, 550 U.S. at 553.

20. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954); *accord Twombly*, 550 U.S. at 553.

21. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972).

22. *See, e.g., Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (alleging a conspiracy of ten national manufacturers of household appliances and Broadway-Hale, a retailer, not to sell to Klor’s, a competitor or Broadway-Hale).

23. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). For applications, see, for example, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772 (1984); *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 706 (7th Cir. 2011); *Howard Hess Dental Labs, Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 254 (3d Cir. 2010); *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 219 (3d Cir. 2008); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 204 (4th Cir. 2002); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999).

commitment to a common scheme designed to achieve an unlawful objective.”²⁴ Section 1 does not reach unilateral decisions, even if they lead to the same anticompetitive result as an actual agreement among the market participants.²⁵ Concerted action does not require a formal agreement; any agreement within the meaning of Section 1 may be tacit and achieved without any verbal communications among the parties.²⁶ Mere conscious parallelism, where competitors knowingly act in parallel ways, however, as a matter of law does not constitute agreement for Sherman Act purposes.²⁷

Concerted action may be proved by either direct evidence or circumstantial evidence. Direct evidence is evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.²⁸ Direct evidence of a conspiracy demonstrates on its face an understanding between the alleged conspirators.²⁹ Accordingly, an admission—through a guilty plea otherwise—by a defendant that it agreed with others to fix their prices is direct evidence of conspiracy.³⁰ Likewise, a document memorializing an illegal agreement or an anticompetitive rule promulgated by a joint venture with the participation of its

24. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). For applications, see, for example, *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011); *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010); *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009); *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 271 (5th Cir. 2008); *United States v. Beaver*, 515 F.3d 730 (7th Cir. 2008); *Tunica Web Advertising v. Tunica Casino Operators Ass’n, Inc.*, 496 F.3d 403, 409 (5th Cir. 2007); *Miles Distribs., Inc. v. Specialty Constr. Brands, Inc.*, 476 F.3d 442, 450 (7th Cir. 2007); *Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249, 1257 (10th Cir. 2006); *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 508 (2d Cir. 2004); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004); *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 17 (1st Cir. 2004); *Viazis v. American Ass’n of Orthodontists*, 314 F.3d 758, 763 (5th Cir. 2002); *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 281 (4th Cir. 2002); *Spectators’ Comm’n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 220 (5th Cir. 2001); *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 233 (2d Cir. 1999); *Re/Max Int’l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999).

25. *White v. R.M. Packer Co.*, 635 F.3d 571, 575 (1st Cir. 2011); see *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627 (7th Cir. 2010) (Posner, J.) (observing that Section 1 “does not require sellers to compete; it just forbids their agreeing or conspiring not to compete.”).

26. See *United States v. Gen. Motors Corp.*, 384 U.S. 127, 142-43 (1966).

27. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

28. See, e.g., *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999); *accord Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 706 (7th Cir. 2011); *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 271 (5th Cir. 2008); *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1083 (10th Cir. 2006); *In re Citric Acid Litig.*, 191 F.3d 1090, 1093-94 (9th Cir. 1999); but cf. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661-62 (7th Cir. 2002) (criticizing distinction between direct and indirect evidence).

29. See, e.g., *Tunica Web Advertising v. Tunica Casino Operators Ass’n*, 496 F.3d 403, 409 (5th Cir. 2007); *Viazis v. Am. Ass’n of Orthodontists*, 314 F.3d 758, 762 (5th Cir. 2002); *Southway Theatres, Inc. v. Ga. Theatre Co.*, 672 F.2d 485, 493 n.8 (5th Cir. 1982).

30. See *High Fructose*, 295 F.3d at 654; *accord Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 706 (7th Cir. 2011).

members is direct evidence of concerted action.³¹ Many courts hold that if a complaint includes non-conclusory factual allegations of direct evidence of an agreement, nothing else is needed to establish the sufficiency of the complaint on the element of concerted action.³²

But direct evidence of many illegal antitrust conspiracies—especially horizontal price fixing or horizontal division of markets—can be hard to uncover,³³ and the existence of concerted action often must be proven through inferences drawn from circumstantial evidence, usually market conditions and the behavior of the alleged conspirators.³⁴ Proof of agreement through circumstantial evidence only is perfectly acceptable. When agreement is to be shown only by circumstantial evidence, however, the evidence must tend to exclude the possibility of unilateral action. “[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.”³⁵ As a matter of law, a showing of parallel conduct by the defendants (“conscious parallelism”), by itself, is not enough to provide the foundation for drawing a permissive inference of concerted action.³⁶ Most courts emphasize pleading and proof of conduct against unilateral interest when the existence of conspiracy is to be established through only circumstantial evidence.³⁷

31. See *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 289 (4th Cir. 2012); see *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3d Cir. 1987) (memorandum produced by a defendant conspirator detailing the discussions from a meeting of a group of alleged conspirators).

32. See *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 98, 99 (3d Cir. 2010); *TruePosition, Inc. v. LM Ericsson Tel. Co.*, 844 F. Supp. 2d 571, 593 (E.D. Pa. 2012).

33. See, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 34 (D.D.C. 2008); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1096 (N.D. Cal. 2007).

34. See, e.g., *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162 (2d Cir. 2012);

35. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

36. *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954); *accord Bell Atlantic v. Twombly*, 550 U.S. 544, 553-54 (2007); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

37. See, e.g., *In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 62 (2d Cir. 2012); *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 321-22 (3d Cir. 2010); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000); *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1301, 1303 (11th Cir. 2003); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 134-35 (3d Cir. 1999); *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 570 (11th Cir. 1998); *Cayman Exploration Corp. v. United Gas Pipe Line, Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978).

Dispositive Motions

DISPOSITIVE MOTIONS

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b): Motions to dismiss

Rule 12(c): Motion for judgment on the pleadings

Rule 56: Summary judgment

Rule 50: Motion for judgement as a matter of law in a jury trial (JMOL)

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

- (a) *Time to Serve a Responsive Pleading.*
- (1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:
- (A) A defendant must serve an answer:
- (i) within 21 days after being served with the summons and complaint; or
 - (ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.
- (B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.
- (C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.
- (2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.
- (3) *United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.
- (4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

- (A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or
- (B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) *How to Present Defenses.* Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) *Motion for Judgment on the Pleadings.* After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) *Result of Presenting Matters Outside the Pleadings.* If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) *Motion for a More Definite Statement.* A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) *Motion to Strike.* The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

- (1) on its own; or
- (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) *Joining Motions.*

- (1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

- (2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.
- (h) *Waiving and Preserving Certain Defenses.*
 - (1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)-(5) by:
 - (A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or
 - (B) failing to either:
 - (i) make it by motion under this rule; or
 - (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.
 - (2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:
 - (A) in any pleading allowed or ordered under Rule 7(a);
 - (B) by a motion under Rule 12(c); or
 - (C) at trial.
 - (3) *Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.
- (i) *Hearing Before Trial.* If a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Rule 56. Summary Judgment

- (a) *Motion for Summary Judgment or Partial Summary Judgment.* A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.
- (b) *Time to File a Motion.* Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.
- (c) *Procedures.*
 - (1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
 - (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for

purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) *When Facts Are Unavailable to the Nonmovant.* If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

(e) *Failing to Properly Support or Address a Fact.* If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or
- (4) issue any other appropriate order.

(f) *Judgment Independent of the Motion.* After giving notice and a reasonable time to respond, the court may:

- (1) grant summary judgment for a nonmovant;
- (2) grant the motion on grounds not raised by a party; or
- (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) *Failing to Grant All the Requested Relief.* If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) *Affidavit or Declaration Submitted in Bad Faith.* If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

**LOCAL RULES OF THE UNITED STATES DISTRICT COURTS
FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK**

**Local Civil Rule 56.1 Statements of Material Facts on Motion for
Summary Judgment**

(a) Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.

(b) The papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried.

(c) Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

(d) Each statement by the movant or opponent pursuant to Rule 56.1(a) and (b), including each would be admissible, set forth as required by Fed. R. Civ. P. 56(c).

**Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a
New Trial; Conditional Ruling**

(a) Judgment as a Matter of Law.

(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) *Renewing the Motion after Trial; Alternative Motion for a New Trial.* If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed

motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

- (1) allow judgment on the verdict, if the jury returned a verdict;
- (2) order a new trial; or
- (3) direct the entry of judgment as a matter of law.

(c) **Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.**

- (1) *In General.* If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.
- (2) *Effect of a Conditional Ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) *Time for a Losing Party's New-Trial Motion.* Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) *Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal.* If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

More on Motions to Dismiss

1. Deciding Motions to Dismiss

**IN RE LITHIUM ION BATTERIES ANTITRUST LITIG.
NO. 13–MD–2420 YGR, 2014 WL 309192 (N.D. CAL. JAN. 21, 2014)
(EXCERPT)**

YVONNE GONZALEZ ROGERS, United States District Court Judge

. . .

B. Sufficiency of Allegations of Conspiracy

1. Legal Standard

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199–1200 (9th Cir. 2003). “Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). All of a plaintiff’s well-pleaded allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. *Daniels–Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). The court need not, however, “accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Id.*

To withstand a motion to dismiss, a plaintiff must not merely allege conduct that is conceivable but must instead allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citing *Twombly*, 550 U.S. at 556). In the antitrust context, plausibility is evaluated “in light of basic economic principles.” *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 662 (9th Cir.2009) (citing *Twombly*, 550 U.S. at 556).

Pleading an antitrust conspiracy further “requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.” *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 556–57). For purposes of Section 1 of the Sherman Act, an unlawful agreement consists of a “conscious commitment to a common scheme designed to achieve an unlawful objective.” *Toscano v. Prof’l Golfers Ass’n*, 258 F.3d 978, 983 (9th Cir. 2001) (quoting *Monsanto Co. v. Spray–Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). “Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement

[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.” *Kendall*, 518 F.3d at 1047 (quoting *Twombly*, 550 U.S. at 556–57). Rather, a complaint must state facts “plausibly suggesting (not merely consistent with) agreement” among the purported co-conspirators. See *Twombly*, 550 U.S. at 557. “[T]he complaint must allege facts such as a ‘specific time, place, or person involved in the alleged conspiracies’ to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin.” *Kendall*, 518 F.3d at 1047 (quoting *Twombly*, 550 U.S. at 565 n.10). The expense of antitrust discovery authorizes district courts “to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” *Twombly*, 550 U.S. at 558 (quoting *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

...

2. Standard of review on appeal

IN RE ADDERALL XR ANTITRUST LITIG.
754 F.3D 128 (2D CIR. 2014)
(EXCERPT)

Before: JACOBS, SACK, and LOHIER, Circuit Judges.

SACK, Circuit Judge:

...

“We review de novo a district court’s dismissal of a complaint under Rule 12(b)(6).” *Mayor & City Council of Balt., Md. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir.2013). In doing so, “we accept all factual allegations as true and draw every reasonable inference from those facts in the plaintiff’s favor.” *Id.* But this indulgence does not relieve the plaintiff from alleging “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotation marks omitted).

SD3, LLC v. BLACK & DECKER (U.S.) INC.
801 F.3D 412, 422 (4TH CIR. 2015)
(EXCERPT)

Before: WILKINSON, AGEE, and WYNN, Circuit Judges.
AGEE, Circuit Judge:

II. Standard of Review

“We review the district court's grant of the defendants' motion to dismiss de novo.” *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 706 (4th Cir.2015). “[W]e accept as true all well-pled facts in the complaint and construe them in the light most favorable to [SawStop].” *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 632 n. 1 (4th Cir. 2015). We do not, however, “accept as true a legal conclusion couched as a factual allegation.” *Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 198 (4th Cir. 2014). Nor do we accept “unwarranted inferences, unreasonable conclusions, or arguments.” *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014). We can further put aside any “naked assertions devoid of further factual enhancement.” *Id.*

IN RE PRE-FILLED PROPANE TANK ANTITRUST LITIG.
860 F.3D 1059, 1063 (8TH CIR. 2017)

This court reviews de novo the grant of a motion to dismiss. *Christiansen v. West Branch Cmty. Sch. Dist.*, 674 F.3d 927, 933-34 (8th Cir. 2012). To survive a motion to dismiss for failure to state a claim, the complaint must show the plaintiff “is entitled to relief,” Fed. R. Civ. P. 8(a)(2), by alleging “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007). A plausible claim must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*, quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955. “The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*, citing *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.*, quoting *Twombly*, 550 U.S. at 555, 557, 127 S. Ct. 1955 (citation omitted). Rather, the facts alleged “must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955.

A NOTE ON MOTIONS TO DISMISS IN ANTITRUST CASES

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a claim may be dismissed on the pleadings for “failure to state a claim upon which relief can be granted.”¹ The purpose of Rule 12(b)(6) is to allow the defendant to test the legal sufficiency of the complaint. A complaint is sufficient if it gives the defendant fair notice of the plaintiff’s claims, adequately indicates the grounds upon which they rest, and states claims upon which relief could be granted.² Conversely, a Rule 12(b)(6) motion should be granted if (1) there is no cognizable legal theory to support the claims made, (2) the facts alleged are insufficient to state a claim under a cognizable legal theory, or (3) on the face of the complaint there is an insurmountable bar to relief.³

In deciding a Rule 12(b)(6) motion to dismiss, the court must accept as true the factual allegations in the complaint⁴ and draw all reasonable inferences from these allegations in favor of the plaintiff.⁵ Indeed, courts must accept nonconclusory factual allegations as true, even if seemingly incredible.⁶ The court, however, should ignore raw legal conclusions, unwarranted inferences, and factual allegations that are

1. FED. R. CIV. P. 12(b)(6).

2. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

3. *See SmileCare Dental Group v. Delta Dental Plan of Calif., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, No. C-07-5944-SC, 2013 WL 4505701, at *2 (N.D. Cal. Aug. 21, 2013); *Colonial Med. Group, Inc. v. Catholic Healthcare West*, No. C-09-2192 MMC, 2010 WL 2108123, at *2 (N.D. Cal. May 25, 2010); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1183 (N.D. Cal. 2009); *Stewart Glass & Mirror, Inc. v. U.S.A. Glas, Inc.*, 940 F. Supp. 1026, 1030 (E.D. Tex. 1996).

4. *E.g.*, *Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1, 4 (2010); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

5. *E.g.*, *Christopher v. Harbury*, 536 U.S. 403, 406 (2002); *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.* 753 F.3d 395 (2d Cir. 2014); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.* 648 F.3d 452, 456-57 (6th Cir. 2011); *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 440 (4th Cir. 2011); *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 91 (3d Cir. 2010); *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 693 (2d Cir. 2009).

6. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (“To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (noting that a court may not disregard properly pled factual allegations, “even if it strikes a savvy judge that actual proof of those facts is improbable”); *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012); *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (“Non-conclusory factual allegations in the complaint must then be treated as true, even if seemingly incredible.”).

in essence legal conclusions.⁷ While legal conclusions can provide the framework of a complaint, they are not entitled to a presumption of truth at the motion to dismiss stage and instead must be supported by factual allegations.⁸ In addition, the court must not “assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged”⁹ nor should it consider factual assertions in a brief in opposition that were not included in the complaint.¹⁰ If the allegations are sufficient to state a claim, the complaint should not be dismissed even if the court has serious doubts that the plaintiff will be able to prove the allegations. The question on a Rule 12(b)(6) motion is not whether the plaintiff will prevail on the merits, but rather whether the plaintiff is entitled to present evidence to the trier of fact to support the claims in the complaint.¹¹ There is no probability requirement at the pleading stage.¹² A court must sustain a well-pleaded complaint even if the court believes that the likelihood of the plaintiff succeeding on its claim is very remote.¹³

In *Bell Atlantic Corp. v. Twombly*,¹⁴ the Court clarified the extent to which the factual basis for a claim must be alleged in a complaint.¹⁵ Acknowledging that material allegations must be accepted as true and construed in the light most favorable to the nonmoving party, the Court nevertheless held that a complaint “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”¹⁶ While the complaint “does not need detailed factual allegations,”¹⁷ the factual allegations, if assumed to be true, “must be enough to raise a right to relief above the speculative level, on the assumption that all

7. See *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (holding that, on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”); *accord Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

8. *Iqbal*, 556 U.S. at 664.

9. *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

10. *Olde Monmouth Stock Transfer Co., Inc. v. Depository Trust & Clearing Corp.*, 485 F. Supp. 2d 387, 393 (S.D.N.Y. 2007).

11. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

12. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). *But see* *TruePosition, Inc. v. LM Ericsson Tel. Co.*, 844 F. Supp. 2d 571, 584 (E.D. Pa. 2012) (“We find that *Twombly* requires a level of factual detail that makes it more likely that the Defendants’ conduct was the result of an unlawful agreement rather than some other independent and lawful explanation and that such requirement is not a ‘probability’ requirement.”).

13. *Twombly*, 550 U.S. at 556 (“[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court’s assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.”).

14. 550 U.S. 544 (2007).

15. At least one case has held that *Twombly* applies only in civil cases and is inapposite to the sufficiency of criminal indictments. See *United States v. Northcutt*, No. 07-60220-CR, 2008 WL 162753, at *2 (S.D. Fla. Jan. 16, 2008).

16. *Twombly*, 550 U.S. at 555.

17. *Id.*

the allegations in the complaint are true (even if doubtful in fact),”¹⁸ and sufficient “to state a claim for relief that is plausible on its face.”¹⁹

The Court emphasized that requiring enough factual allegations to make a claim plausible does not impose a probability requirement; rather “it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”²⁰ The lack of a probability requirement appears straightforward: a set of factual allegations, if accepted as true, may make the claim *plausible*, that is, sufficiently likely with the realm of common experience to merit investigation and consideration, without making the claim *probable*, that is, more likely than not to be meritorious.

The requirement that the factual allegations should “raise a reasonable expectation that discovery will reveal evidence” of a claim requires more interpretation, although a sensible reading in context is that discovery around the factual allegations—as opposed to more widespread discovery—will likely reveal whether or not the claim has merit. The Court found that the factual allegations of the *Twombly* complaint only described the defendants’ actions as parallel. As such, the allegations were doctrinally consistent with lawful conduct and hence insufficient as a matter of law to give rise to a permissible inference of conspiracy, and so could not predicate a plausible claim of illegal agreement. Moreover, the complaint’s conclusory allegation on information and belief that the observed conduct was the product of a conspiracy was not the product of either factual allegations or reasonable inferences from factual allegations, and so could not make the claim plausible.²¹

In *Ashcroft v. Iqbal*,²² decided in 2009, the Court made clear that *Twombly*’s “facial plausibility” standard applies to all civil suits in federal courts.²³ The *Iqbal* Court further explained that “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”²⁴ The plausibility analysis is a

18. *Id.*

19. *Id.* at 570; see *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.”).

20. *Twombly*, 550 U.S. at 556 (footnote omitted).

21. *Twombly*, 550 U.S. at 555-57, 564-66; accord *Iqbal*, 556 U.S. at 679; see *In re Darvocet, Darvon, and Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917, 931 (6th Cir. 2014) (“The mere fact that someone believes something to be true does not create a plausible inference that it is true.”); but see *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) ((noting the *Twombly* plausibility standard does not prevent a plaintiff from pleading facts “upon information and belief” where the facts are peculiarly within the control of the defendant).

22. 556 U.S. 662 (2009).

23. *Id.* at 684.

24. *Iqbal*, 556 U.S. 662, 678 (citing *Twombly*, 550 U.S. at 556); accord *Ethypharm S.A. France v. Abbott Labs.*, 707 F.3d 223, 231 n.14 (3d Cir. 2013); *Simon v. KeySpan Corp.*, 694 F.3d 196, 201 (2d Cir. 2012); *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 182 (2d Cir. 2012) (noting that to be plausible a complaint “must allege facts that would be sufficient to permit a reasonable inference that the defendant has engaged in culpable conduct”); *Robertson v. Sea Pines*

“context-specific task that requires the reviewing court to draw on its judicial experience and common sense,”²⁵ although what precisely this means as yet to be satisfactorily explained.²⁶ Some courts, at least, require the inferences to be reasonable in light of basic economic principles.²⁷ In any event, the pleading of facts that are “merely consistent with” the defendant’s liability and that “do not permit the court to infer more than the mere possibility of misconduct” is insufficient to withstand a motion to dismiss.²⁸ The Court has emphasized, however, that asking for plausible grounds to rest a claim does not impose a probability requirement at the pleading stage²⁹ nor does it impose a heightened pleading standard in antitrust cases.³⁰ Indeed, a well-pleaded complaint may proceed even if it appears “that a recovery is very remote and unlikely.”³¹

As a consequence of *Twombly*, a complaint must allege not only each and every element of the plaintiff’s prima facie case but also a sufficient factual basis to make the allegation of the element plausible.³² Conclusory allegations, unsupported by

Real Estate Cos., 679 F.3d 278, 287 (4th Cir. 2012); *FTC v. Watson Pharms., Inc.*, 677 F.3d 1298, 1306 (11th Cir. 2012); *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225 (3d Cir. 2011); *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650, 660 (7th Cir. 2011); *Howard Hess Dental Labs, Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 246 (3d Cir. 2010); *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 321 (2d Cir. 2010).

25. *Iqbal*, 556 U.S. at 679.

26. *See* *McCauley v. City of Chicago*, 671 F.3d 611, 625 (7th Cir. 2011) (Hamilton, J., dissenting in part) (noting that “*Iqbal*’s reliance on ‘judicial experience and common sense’ invites the highly subjective and inconsistent results that have been observed”).

27. *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009); *High Tek USA, Inc. v. Heat & Control, Inc.*, No. 12-CV-00805 YGR, 2012 WL 2979051, at *2 (N.D. Cal. July 18, 2012).

28. *Iqbal*, 556 U.S. at 678, 679.

29. *Twombly*, 550 U.S. at 545; *accord Iqbal*, 556 U.S. at 678 (“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”).

30. *Twombly*, 550 U.S. at 570; *accord West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 98 (3d Cir. 2010) (holding that it is “it is inappropriate to apply *Twombly*’s plausibility standard with extra bite in antitrust and other complex cases”); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (“‘Plausibility’ in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not.”); *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010); *Wampler v. Southwestern Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010).

31. *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

32. *See, e.g., New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011); *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 903 (6th Cir. 2009) (holding that to survive a motion to dismiss, the “the complaint must contain either direct or inferential allegations respecting all material elements” of the offense) (internal quotation marks omitted); *Mendiondo v. Centinela Hosp. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (noting Rule 12(b)(6) dismissal appropriate where the complaint lack “sufficient facts to support a cognizable legal theory”); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047-48 (9th Cir. 2008) (affirming dismissal of complaint where plaintiff alleged “only ultimate facts” and “legal conclusions,” rather than “evidentiary facts”); *but see Coleman v. Maryland Court of Appeals*,

factual allegations, are given no weight.³³ So, for example, in *Twombly* itself, the Court found that the complaint's allegation that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry and . . . ha[d] agreed not to compete with one another" was a legal conclusion and not entitled to a presumption of truth, and that the factual allegation of parallel conduct, while consistent with an unlawful agreement, was equally consistent with nonconspiratorial conduct and so did not give rise to a reasonable inference of conspiracy.³⁴ On the other hand, since the courts have held that plausibility is a lower standard than probability, a given set of circumstantial evidence may yield divergent inferences and interpretations, each of which is plausible.³⁵ In ruling on a motion under Rule 12(b)(6), it is not the function of the court to choose between plausible inferences drawn from the factual allegations of the complaint; as long as at least one plausible interpretation meets the *Twombly* standard, the complaint is sufficient and should be sustained.³⁶

In addition to conspiracy, courts have applied the *Twombly* plausibility requirement to other elements of the plaintiff's prima facie case, including market definition,³⁷ market power,³⁸ foreclosure,³⁹ predatory pricing,⁴⁰ specific intent,⁴¹ the

626 F.3d 187, 190 (4th Cir. 2010) (noting that "a plaintiff is not required to plead facts that constitute a prima facie case in order to survive a motion to dismiss").

33. See *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 182 (2d Cir. 2012) ("This Rule [8] does not countenance pleadings that are conclusory; it requires factual allegations that are sufficient to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'") (quoting *Twombly*, 550 U.S. at 555 (internal quotation marks omitted)).

34. *Twombly*, 550 U.S. at 555, 565-66; accord *Iqbal*, 556 at 680; but cf. *Anderson News*, 680 F.3d at 189-90 (finding that "[t]he view of the district court here that 'it is plausible that each of the publisher Defendants unilaterally stopped shipping magazines to Anderson rather than pay the Surcharge,' 732 F. Supp. 2d at 400 (emphases added), was thus not a proper basis for finding that Anderson had not pleaded a claim that was plausible").

35. *Anderson News*, 680 F.3d at 184, 189-90.

36. *Anderson News*, 680 F.3d at 184 ("A court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible.").

37. See, e.g., *City of New York v. Group Health Inc.*, 649 F.3d 151, 155 (2d Cir. 2011); *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. 10-15978, 2011 WL 1898150, at *1 (9th Cir. May 19, 2011) (unpublished); *Total Benefits Planning Agency v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008); *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044-45 (9th Cir. 2008); *High Tek USA, Inc. v. Heat & Control, Inc.*, No. 12-CV-00805 YGR, 2012 WL 2979051, at *4 (N.D. Cal. July 18, 2012); *Shred-It Am., Inc. v. MacNaughton*, CV No. 10-00547 DAE-KSC, 2011 WL 1842997, at *3, *5-6 (D. Haw. May 13, 2011); *In re ATM Fee Antitrust Litig.*, No. C 04-2676 CRB, 2010 WL 2557519, at *5 (N.D. Cal. June 21, 2010); *Colonial Med. Group, Inc. v. Catholic Healthcare West*, No. C-09-2192 MMC, 2010 WL 2108123, at *3 (N.D. Cal. May 25, 2010); *Integrated Sys. & Power, Inc. v. Honeywell Int'l, Inc.*, 713 F. Supp. 2d 286, 298 (S.D.N.Y. 2010); *Bayer Schera Pharma AG v. Sandoz, Inc.*, Nos. 08 Civ. 03710(PGG), 08 Civ. 08112(PGG), 2010 WL 1222012, at *3 (S.D.N.Y. Mar. 29, 2010); *Conte v. Newsday, Inc.*, 703 F. Supp. 2d 126, 142 (E.D.N.Y. 2010); *Sun Microsystems, Inc. v. Versata Enters., Inc.*, 630 F. Supp. 2d 395, 403 (D. Del. 2009); *Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009 WL 1635931, at *13 (N.D. Cal. Jun. 5, 2009); *Spahr v. Leegin Creative Leather Prods., Inc.*,

connection between a conspiracy and an act allegedly in furtherance of that conspiracy,⁴² an individual defendant's participation in a conspiracy,⁴³ injury to competition,⁴⁴ antitrust injury,⁴⁵ dangerous probability of success,⁴⁶ and the nexus between the defendants' conduct and interstate commerce,⁴⁷ among other elements.⁴⁸ For example, if the plaintiff's prima facie case requires proof of a

No. 2:07-CV-187, 2008 WL 3914461, at *9 (E.D. Tenn. Aug. 20, 2008); *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1198-99 (N.D. Cal. 2008); *see also McCagg v. Marquis Jet Partners, Inc.*, No. 05 CV 10607 PAC, 2007 WL 2454192 (S.D.N.Y. Mar. 29, 2007) (holding pre-*Twombly* that McCagg did not allege facts that made the proposed "25-hour Jet Card" market plausible), *on reconsideration*, 2007 WL 2161786 (S.D.N.Y. Jul. 27, 2007); *but cf. In re Southeastern Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 946 (E.D. Tenn. 2008) (finding market definition allegations adequate "[b]ecause definition of the relevant market is a highly fact based inquiry and because plaintiffs clearly allege relevant product and geographic markets").

38. *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 595 (7th Cir. 2008); *Colabella v. American Inst. of Certified Public Accountants*, No. 10-cv-2291 (KAM)(ALC), 2011 WL 4532132, at *20 (E.D.N.Y. Sept. 28, 2011); *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 341 (D. Vt. 2010); *In re ATM Fee Antitrust Litig.*, No. C 04-2676 CRB, 2010 WL 2557519, at *10-11 (N.D. Cal. Jun 21, 2010); *Colonial Med. Group, Inc. v. Catholic Healthcare West*, No. C-09-2192 MMC, 2010 WL 2108123, at *5 (N.D. Cal. May 25, 2010); *Sum Microsystems.*, 630 F. Supp. 2d at 403; *McCabe Hamilton & Renny, Co., Ltd. v. Matson Terminals, Inc.*, Civ. No. 08-00080 JMS/BMK, 2008 WL 2437739, at *8 (D. Haw. Jun. 17, 2008); *Korea Kumho Petrochemical v. Flexsys Am. LP*, No. C07-01057 MJJ, 2008 WL 686834, at *9 (N.D. Cal. Mar.11, 2008); *Cimline, Inc. v. Crafcro, Inc.*, Civ. No. 07-3997 (RHK/JSM), 2007 WL 4591957, at *5 (D. Minn. Dec. 28, 2007).

39. *Midwest Agency Servs., Inc. v. JP Morgan Chase Bank, N.A.*, No. 2: 09-165-DCR, 2010 WL 935450at *6 (E.D. Ky. Mar.. 11, 2010).

40. *Affinity LLC v. GfK Mediamark Research & Intelligence, LLC*, No. 12 Civ. 1728(RJS), 2013 WL 1189317, at *3 (S.D.N.Y. Mar. 25, 2013); *Astra Media Group, LLC v. Clear Channel Taxi Media, LLC*, 679 F. Supp. 2d 413, 422, 424-25 (S.D.N.Y. 2009) (pricing below cost in a predatory pricing case), *aff'd in relevant part*, 414 F. App'x 334 (2d Cir. Feb. 15, 2011) (unpublished).

41. *Advanced Ion Beam Tech., Inc. v. Varian Semiconductor Equipment Assocs., Inc.*, 721 F. Supp. 2d 62, 83 (D. Mass. 2010).

42. *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus.*, 648 F.3d 452, 458 (6th Cir. 2011).

43. *In re Fresh and Process Potatoes Antitrust Litig.*, No. 4:10-MD-2186-BLW, 2012 WL 3067580, at *3-5 (D. Idaho July 27, 2012).

44. *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012) ("Thus, a complaint's allegation of a practice that may or may not injure competition is insufficient to 'state a claim to relief that is plausible on its face.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

45. *Tamburo v. Dworkin*, 601 F.3d 693, 699 (7th Cir. 2010); *CBC Cos., Inc. v. Equifax, Inc.*, 561 F.3d 569, 572 (6th Cir. 2009); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (en banc); *In re Southeastern Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 944 (E.D. Tenn. 2008).

46.

47. *Gulf Coast Hotel-Motel Ass'n v. Mississippi Gulf Coast Golf Course Ass'n*, 658 F.3d 500, 504 (5th Cir. 2011).

48. *E.g.*, *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046 (6th Cir. 2011) (control of a distribution in order to establish two sales by a manufacturer for Robinson-Patman Act purposes); *In re marchFIRST, Inc.*, 589 F.3d 901, 905 (7th Cir. 2009) (equitable tolling of statute of

relevant market, the complaint must allege both the dimensions of the relevant market and sufficient facts to make the alleged relevant market plausible.⁴⁹ Moreover, in a conspiracy case, the complaint must contain enough factual allegations to make each defendant's participation in the conspiracy plausible, either directly⁵⁰ or as the alter ego of a parent company-conspirator.⁵¹ Additional support submitted in a brief or at oral argument opposing a motion to dismiss on the pleadings will not "amend" the complaint, although they may provide some grounds for the court to permit the plaintiff to amend the complaint.⁵² Once a claim has been stated adequately, it may be supported at trial by any evidence consistent with the allegations in the complaint.⁵³ Since the Federal Rules of Civil Procedure govern the adjudication of state claims in federal court, the *Twombly* standard applies to such state claims as well as to federal claims.⁵⁴

Twombly rejected the prior standard, set forth in *Conley v. Gibson*,⁵⁵ which held that a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁵⁶ *Conley* all but made an antitrust complaint immune from dismissal when there was some possibility that facts not alleged in the complaint could render the complaint sufficient.⁵⁷ Under the *Conley* standard, it was rare that courts granted a Rule 12(b)(6) motion on antitrust claims unless the

limitations); *Affinity LLC v. GfK Mediamark Research & Intelligence, LLC*, No. 12 Civ. 1728(RJS), 2013 WL 1189317, at *5-6 (S.D.N.Y. Mar. 25, 2013) (dangerous probability of recoupment in a predatory pricing case); *Shamrock Mktg., Inc. v. Bridgestone Bandag, LLC*, 775 F. Supp. 2d 972, 980-81 (W.D. Ky. 2011) (existence of a tying arrangement as the result of economic coercion); *Colonial Med. Group, Inc. v. Catholic Healthcare West*, No. C-09-2192 MMC, 2010 WL 2108123, at *5 (N.D. Cal. May 25, 2010) (foreclosure of competition in an exclusive dealing case); see *In re Urethane Antitrust Litig.*, 663 F. Supp. 2d 1067, 1075-77 (D. Kan. 2009) (time period of conspiracy).

49. *Total Benefits Planning Agency v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008).

50. *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 445 (6th Cir. 2012); *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 905-06 (6th Cir. 2009); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 932 (N.D. Ill. 2009); *Hinds County, Miss. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 512-13 (S.D.N.Y. 2009); *In re TFT-LCD Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184 (N.D. Cal. 2009); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 904 (N.D. Calif. 2008).

51. *Carrier Corp.*, 673 F.3d at 445.

52. See *Foam Supplies, Inc. v. Dow Chem. Co.*, No. 4:05CV1772 CDP, 2007 WL 4210354, at *4 (E.D. Mo. Nov. 27, 2007).

53. *Twombly*, 550 U.S. at 546.

54. *Tamburo*, 601 F.3d at 700; *In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435, 447 (S.D.N.Y. 2008).

55. 355 U.S. 41 (1957).

56. *Id.* at 45-46; *accord Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976) (reversing dismissal in antitrust case).

57. See *Robbins v. Oklahoma*, 519 F.3d 1242, 1246 (10th Cir. 2008).

complaint on its face alleged facts that showed there was no violation.⁵⁸ *Twombly* found the *Conley* “no set of facts” rule a “best forgotten as an incomplete, negative gloss on an accepted pleading standard” and required going forward that complaints contain sufficient factual allegations to make the claims plausible.⁵⁹

In deciding *Twombly*, the Court warned of the high costs and frequent abuses associated with antitrust discovery, stating that “[i]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.”⁶⁰ To this end, the *Twombly* Court specifically noted that “a district court must retain the power to insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed.”⁶¹ Post-*Twombly*, some courts have held that even limited discovery for the purposes of enabling the plaintiff to plead a factual allegation is categorically prohibited.⁶² Ironically, the *Conley* standard was justified in antitrust cases on precisely the opposite grounds: that the facts underlying antitrust claims were typically concealed and not known to the plaintiffs absent discovery, so that antitrust complaints should be dismissed only sparingly before the plaintiff has the opportunity to develop its case through discovery.⁶³ Judge Posner sees the problem as one of asymmetric discovery burdens, which leads to the potential for extortionate litigation.⁶⁴ In Posner’s reading, *Twombly* attempts to ameliorate this problem by requiring the plaintiff to conduct more extensive precomplaint investigation and so create a greater symmetry between the plaintiff’s and defendant’s litigation costs in

58. There are exceptions where antitrust complaints were dismissed under the *Conley* standard. See, e.g., *In re Canadian Import Antitrust Litig.*, 470 F.3d 785 (8th Cir. 2006); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006); *Texas Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503 (5th Cir. 2005); *Day v. Taylor*, 400 F.3d 1272 (11th Cir. 2005); *Big Bear Lodging Ass’n v. Snow Summit, Inc.*, 182 F.3d 1096 (9th Cir. 1999); *TV Commc’ns Network v. Turner Network Television*, 964 F.2d 1022 (10th Cir. 1992).

59. 550 U.S. at 546.

60. *Id.* at 558.

61. *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)); see *Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 802-03 (7th Cir. 2008) (holding that *Twombly* “teaches that a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case.”); *CBC Cos. v. Equifax, Inc.*, 561 F.3d 569, 571 (6th Cir. 2009); *Michigan Division-Monument Builders of N.A. v. Michigan Cemetery Ass’n*, 524 F.3d 726 (6th Cir. 2008).

62. *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011) (holding that “*Iqbal* specifically directs that no discovery may be conducted in cases such as this, even when the information needed to establish a claim of discriminatory pricing is solely within the purview of the defendant or a third party, as it is here”); but see *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 312 (N.D. Cal. 2007) (allowing limited discovery).

63. *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976) (“And in antitrust cases, where ‘the proof is largely in the hands of the alleged conspirators,’ dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.”) (quoting *Poller v. Columbia Broad.*, 368 U.S. 464, 473 (1962); accord *George Haug Co., Inc. v. Rolls Royce Motor Cars Inc.*, 148 F.3d 136, 139 (2d Cir. 1998).

64. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010) (Posner, J., dissenting part).

order to reduce the potential for extortionate discovery. While this rationale may work for some types of cases, it is unlikely to work in many antitrust cases, where the burden of discovery on the defendant will overwhelm almost any conceivable costs to the plaintiff of precomplaint investigation. The better view, at least in antitrust cases, is that plausibility is simply a gating requirement to provide the court with a means of eliminating complaints that may be simply extortionate.

Lower courts have elaborated on the *Twombly* requirement that the complaint must contain sufficient factual allegations to make the claim plausible. The Second Circuit, for example, has held that *Twombly* requires that the complaint “must allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively and plausibly suggest that conclusion.”⁶⁵ The Third Circuit holds that “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁶⁶ The Seventh Circuit says that the plaintiff “must give enough details about the subject-matter of the case to present a story that holds together”⁶⁷ and that the “required level of factual specificity rises with the complexity of the claim.”⁶⁸ The Ninth Circuit requires that the allegations must be both “sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it” and “sufficiently plausible” such that “it is not unfair to require the opposing party to be subjected to the expense of discovery.”⁶⁹ The Tenth Circuit noted that plausibility in this context

65. *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 121 (2d Cir. 2007); *see Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007) (finding *Twombly*’s plausibility standard “obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*”).

66. *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n.27 (3d Cir. 2010); quoted in *Ethypharm S.A. France v. Abbott Labs.*, 707 F.3d 223, 231 n.14 (3d Cir. 2013); *see Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011) (requiring “plaintiff to plead sufficient factual matter to show that the claim is facially plausible, thus enabling the court to draw the reasonable inference that the defendant is liable for misconduct alleged.”) (internal quotations omitted); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 314 (3d Cir. 2010) (“To comply with this general pleading standard, the complaint, construed . . . in the light most favorable to the plaintiff, must contain enough factual matter (taken as true) to suggest’ the required elements of the claims asserted.”) (internal quotations and citations omitted); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (“In other words, a complaint must do more than allege the plaintiff’s entitlement to relief. A complaint has to ‘show’ such an entitlement with its facts.”); *see also Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (requiring plaintiff to allege “enough facts to raise a reasonable expectation that discovery will reveal evidence of” the claims alleged in the complaint); *In re Fasteners Antitrust Litig.*, No. 08-md-1912, 2011 WL 3563989, at *2 (E.D. Pa. Aug. 12, 2011) (“A complaint that merely alleges entitlement to relief, without alleging facts that show entitlement, must be dismissed.”).

67. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010).

68. *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011).

69. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011); quoted in *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, No. C-07-5944-SC, 2013 WL 4505701, at *2 (N.D. Cal. Aug. 21, 2013).

“must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs ‘have not nudged their claims across the line from conceivable to plausible.’”⁷⁰ Several courts have noted that antitrust claims generally require some amplification in order to make them plausible.⁷¹

Whether a complaint alleges sufficient facts to state a claim on which relief can be granted is a question of law.⁷² On appeal, the disposition of a Rule 12(b)(6) motion is reviewed de novo,⁷³ taking as true the factual allegations in the complaint but giving no effect to legal conclusions couched as factual allegations.⁷⁴ The court of appeals may affirm the district court’s dismissal for failure to state a claim on any basis supported in the record and need not be restricted to the reasoning of the lower

70. *Robbins v. Oklahoma*, 519 F.3d 1242, 1246 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570).

71. *See, e.g., Swanson*, 614 F.3d at 405 (“A more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff’s mind at least, the dots should be connected.”); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 & nn. 3-4 (2d Cir. 2007); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 05-MD-1720 (JG)(JO), 2008 WL 5082872, at *4 (E.D.N.Y. Nov. 25, 2008).

72. *Agnew v. National Collegiate Athletic Ass’n*, 683 F.3d 328, 334 (7th Cir. 2012); *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012); *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 69 (2d Cir. 1996).

73. *E.g., AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1109 (9th Cir. 2012); *Agnew*, 683 F.3d at 334; *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 283 (4th Cir. 2012); *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 444 (6th Cir. 2012); *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 220 (3d Cir. 2011); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus.*, 648 F.3d 452, 456 (6th Cir. 2011); *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011); *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 97 (3d Cir. 2010); *Howard Hess Dental Labs, Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 246 (3d Cir. 2010); *Wampler v. Southwestern Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010); *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 321 (2d Cir. 2010); *William O. Gilley Enters., Inc. v. Atlantic Richfield Co.*, 561 F.3d 1004, 1007 (9th Cir. 2009); *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 902 (6th Cir. 2009); *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1191 (10th Cir. 2009); *CBC Cos. v. Equifax, Inc.*, 561 F.3d 569, 571 (6th Cir. 2009); *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008); *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 121 (2d Cir. 2007); *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 307 (4th Cir. 2007).

74. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 564 (2007) (disregarding factual allegations that are “merely legal conclusions”); *accord Robertson*, 679 F.3d at 284; *Starr*, 592 F.3d at 317 n.1; *Jebaco, Inc. v. Harrah’s Operating Co.*, 587 F.3d 314, 320 (5th Cir. 2009); *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 903 (6th Cir. 2009); *Port Dock*, 507 F.3d at 121.

court.⁷⁵ A district court's decision to dismiss a complaint with prejudice is reviewed for abuse of discretion.⁷⁶

75. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1297 (10th Cir. 2008); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 745-46 (9th Cir. 2006); *Daniel v. American Bd. of Emergency Med.*, 428 F.3d 408, 421 (2d Cir. 2005); *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 72 (1st Cir. 2005); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001).

76. *Agnew*, 683 F.3d at 347; *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1018 (9th Cir. 2011); *Anderson v. Ayling*, 396 F.3d 265, 271 (3d Cir. 2005); *Technical Chem. Co. v. IG-LO Prods. Corp.*, 812 F.2d 222, 225 (5th Cir. 1987).

More on Summary Judgment

1. Deciding Summary Judgment Motions

IN RE CATHODE RAY TUBE (CRT) ANTITRUST LITIG.,
No. 1917, 2017 WL 5972721, at *1-*2 (N.D. Cal. Feb. 27, 2017)
(EXCERPT)

JON S. TIGAR, United States District Judge

...

II. LEGAL STANDARD

Summary judgment is proper when a “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “A party asserting that a fact cannot be or is genuinely disputed must support the assertion by” citing to depositions, documents, affidavits, or other materials. Fed. R. Civ. P. 56(c)(1)(a). A party also may show that such materials “do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1)(B). An issue is “genuine” only if there is sufficient evidence for a reasonable fact-finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is “material” if the fact may affect the outcome of the case. *Id.* at 248. “In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party.” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

Where the party moving for summary judgment would bear the burden of proof at trial, that party bears the initial burden of producing evidence that would entitle it to a directed verdict if uncontroverted at trial. *See C.A.R. Transp. Brokerage Co. v. Darden Rests, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). Where the party moving for summary judgment would not bear the burden of proof at trial, that party bears the initial burden of either producing evidence that negates an essential element of the non-moving party’s claim, or showing that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. If the moving party satisfies its initial burden of production, then the non-moving party must produce admissible evidence to show that a genuine issue of material fact exists. *See Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). The non-moving party must “identify with reasonable particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). Indeed, it is not the duty of the district court “to scour the record in search of a genuine issue of triable fact.” *Id.* “A mere scintilla of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the non-moving party must introduce some significant probative evidence tending to support the complaint.” *Summers v. Teichert & Son, Inc.*,

127 F.3d 1150, 1152 (9th Cir. 1997) (citation and internal quotations omitted). If the non-moving party fails to make this showing, the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

“In antitrust cases, these general standards are applied even more stringently and summary judgments granted more sparingly.” *Beltz Travel Serv., Inc. v. Int’l Air Transp. Ass’n*, 620 F.2d 1360, 1364 (9th Cir. 1980). As a general matter, “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 The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.” *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698–99 (1962) (alterations omitted). Nonetheless, “conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Rather, to defeat a motion for summary judgment, “a plaintiff seeking damages for a violation of § 1 must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently.” *Id.* (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)).

IN RE FLAT GLASS ANTITRUST LITIG. (II)
MDL No. 1942, 2014 WL 4384534 (W.D. PA. SEPT. 4, 2014)
(EXCERPT)

DONETTA W. AMBROSE, Senior District Judge.

. . .

A. Standard of Review

Summary judgment may only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In considering a motion for summary judgment, this Court must examine the facts in a light most favorable to the party opposing the motion. *International Raw Materials, Ltd. v. Stauffer Chemical Co.*, 898 F.2d 946, 949 (3d Cir.1990). The burden is on the moving party to demonstrate that the evidence creates no genuine issue of material fact. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.1987). The dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. *Id.* Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. *Celotex*, 477 U.S. at 322.

Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. *Id.* at 324. Summary judgment must therefore be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *White v. Westinghouse Electric Co.*, 862 F.2d 56, 59 (3d Cir. 1988), quoting, *Celotex*, 477 U.S. at 322.

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**IN RE DAIRY FARMERS OF AMERICA, INC., CHEESE ANTITRUST LITIG.
MASTER FILE NO. 9 CR 3690, 2014 WL 4083938 (N.D. ILL. AUG. 18, 2014)
(EXCERPT)**

ROBERT M. DOW, JR., United States District Judge

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II. Legal Standard

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In considering such a motion, the court must "draw[] all reasonable inferences in favor of" the nonmovant. *Jones v. City of Elkhart*, 737 F.3d 1107, 1112 (7th Cir. 2013). To avoid summary judgment, the opposing party must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine dispute of material fact "exists only if there is enough evidence upon which a reasonable jury could return a verdict in" the nonmovant's favor. *Swetlik v. Crawford*, 738 F.3d 818, 826 (7th Cir. 2013). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In other words, the "mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505.

On a claim alleging a Sherman Act violation, “at the summary judgment stage a § 1 plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The Supreme Court has said that “antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); see also *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011). (“Even on summary judgment, district courts are not required to draw every requested inference; they must only draw reasonable ones that are supported by the record.”). The Seventh Circuit has said that courts are first to assess whether Plaintiffs’ “evidence of agreement is ambiguous—that is, whether it is equally consistent with the Defendants’ permissible independent interests as it is with improper activity.” *Omnicare*, 629 F.3d at 707. Second, “[i]f we conclude that the evidence could support the conclusion that Defendants were acting independently, we then look for any evidence that tends to exclude the possibility that Defendants were pursuing independent interests.” *Id.* A plaintiff need not present evidence excluding all possibility that defendants were acting independently, but “there must be some evidence which, if believed, would support a finding of concerted behavior.” *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 934-35 (7th Cir. 2000).

A plaintiff may prove its price-fixing case through direct or circumstantial evidence. The latter can include “economic evidence suggesting that the defendants were not in fact competing” as well as “noneconomic evidence suggesting that they were not competing because they had agreed not to compete.” *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002). However, it is insufficient to show behavior that is merely parallel. “A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant’s commercial efforts stays in neutral territory.” *Bell Atl. Corp.*, 550 U.S. at 557, 127 S. Ct. 1955; see also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) (noting that this type of conduct has been called “conscious parallelism,” which is “not in itself unlawful.”) Although this standard does not mean an antitrust plaintiff “must overcome a heightened burden to defeat summary judgment,” it does mean “that ‘conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.’” *Omnicare*, 629 F.3d at 707 (quoting *Matsushita*, 475 U.S. at 588, 106 S. Ct. 1348); see also *In re Text Messaging Antitrust Litigation*, ___ F. Supp. 2d ___, ___, 2014 WL 2106727, at *8 (N.D. Ill. May 19, 2014).

NOTES

1. The summary judgment rules that apply in *TFT-LCD*, *Flat Glass*, and *Dairy Farmers* are all the same—there is no difference among the circuits—but the articulations differ depending on which rules will be important in deciding the summary judgment motion. *TFT-LCD* presents the standard burden-shifting approach. The court denied the defendant’s motion for summary judgment on the grounds that the defendants’ expert testimony was insufficient to make a prima facie showing that the indirect-purchaser plaintiffs were claiming damages in connection with purchases that did not contain the price-fixed product.¹ *Flat Glass* focuses a bit more on what materials a court can consider in deciding a motion for summary judgment and the need to permit adequate discovery before deciding the motion. The court denied the defendants’ motion for summary judgment, finding that the defendants’ contention that plaintiffs could not recover under the “umbrella theory” of damages did not go to claim for which summary judgment would be appropriate but rather to a method for calculating damages, for which a motion in limine should have been brought.² *Dairy Farmers* emphasizes the *Monsanto/Matsushi* rules limiting the inferences that can be drawn from circumstantial evidence in deciding whether the evidence establishes a genuine issue on the element of conspiracy. The court concluded that the evidence did not create a genuine issue and granted summary judgment on the conspiracy count.

2. Standard of review on appeal

IN RE PUBLICATION PAPER ANTITRUST LITIG.
690 F.3D 51 (2D CIR. 2012)
(EXCERPT)

Before: CALABRESI, RAGGI, and CARNEY, Circuit Judges.

SUSAN L. CARNEY, Circuit Judge:

. . .

¹ The plaintiff alleged that 100 percent of their purchases contained price-fixed inputs sold by the defendants. The defendants claimed that at 15 percent of these purchases contained inputs sold by third-party nonconspirators and hence the plaintiffs should not be allowed to claim damages for those purchases. To discharge their burden on summary judgment, the defendants would have to adduce enough evidence to sustain a jury verdict in their favor. If they did, this would shift the burden to the plaintiffs to adduce evidence that would be sufficient to create a genuine issue on the question for the jury. If the defendants failed, then burden would not shift to the plaintiffs and the plaintiffs could stand on their allegations. The court decided that the defendants’ expert testimony was insufficient, even if uncontradicted, to support a jury finding in their favor and hence the court denied the motion for partial summary judgment.

2. Summary judgment goes to whether the moving party is entitled to a judgment as a matter of law on a claim. It is not appropriate for narrowing the facts or theories of liability or recovery on a claim that itself is not the subject of the summary judgment motion.

A. Standard of Review

We review de novo a district court's grant of summary judgment. *MBIA Inc. v. Fed. Ins. Co.*, 652 F.3d 152, 158 (2d Cir. 2011). We will affirm only if, after construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor, *id.*, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a).

Our Court has observed that "[b]y avoiding wasteful trials and preventing lengthy litigation that may have a chilling effect on pro-competitive market forces, summary judgment serves a vital function in the area of antitrust law." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1998). Nevertheless, summary judgment is not a substitute for trial. *Apex [Oil Co. v. DiMauro]*, 822 F.2d 246, 252 (2d Cir. 1987)]. Thus, when the evidence admits of competing permissible inferences with regard to whether a plaintiff is entitled to relief, "the question of what weight should be assigned to [those] inferences remains within the province of the fact-finder at a trial." *Id.* at 253.

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**IN RE CHOCOLATE CONFECTIONARY ANTITRUST LITIG.
801 F.3d 383 (3d Cir. 2015)
(EXCERPT)**

Before: FISHER, HARDIMAN and ROTH, Circuit Judges.

FISHER, Circuit Judge:

...

Returning to our standard of review, the summary judgment standard in antitrust cases is generally no different from the standard in other cases. [*In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004).] Here as elsewhere, summary judgment is appropriate when the evidence "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We also review the record as a whole and in the light most favorable to the nonmovant, drawing reasonable inferences in its favor. *See Flat Glass*, 385 F.3d at 357.

There is, however, "an important distinction" in antitrust cases. *Id.* "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* Therefore, unless the plaintiff "present[s] evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently," summary judgment is appropriate. *Id.* (quoting *Monsanto*, 465 U.S. at 764). The purpose of this standard is to avoid mistaken inferences that could impose liability for lawful conduct and, consequently,

“chill the very conduct the antitrust laws are designed to protect.” *Id.* at 594; *accord Flat Glass*, 385 F.3d at 357.

Under *Matsushita*, the range of acceptable inferences that may be drawn from ambiguous or circumstantial evidence “‘var[ies] with the plausibility of the plaintiffs’ theory and the dangers associated with such inferences.’” *Flat Glass*, 385 F.3d at 357 (quoting *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993)). If the plaintiff’s theory “makes no economic sense” and if drawing inferences in its favor would deter procompetitive conduct, the plaintiff must produce “more persuasive evidence” to support its claim. *Id.* (internal quotation marks omitted).⁸

Importantly, even when armed with a plausible economic theory, a plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of a conspiracy sufficient to survive summary judgment. *Matsushita*, 475 U.S. at 597 n. 21 (“We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy.”); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998). At the same time, “defendants are [not] entitled to summary judgment merely by showing that there is a plausible explanation for their conduct; rather the focus must remain on the evidence proffered by the plaintiff and whether that evidence tends to exclude the possibility that the defendants were acting independently.” *Rossi*, 156 F.3d at 467 (internal quotation marks and brackets omitted).⁹

8. We illustrated the point well in *Flat Glass* by comparing the theories involved in *Matsushita* and *Petruzzi’s*, see 385 F.3d at 358, and we summarize that discussion here. In *Matsushita*, the Supreme Court criticized the alleged multi-firm, predatory pricing scheme as inherently “speculative,” so the Court refused to draw an inference of a conspiracy from ambiguous evidence. See 475 U.S. at 588–91, 597–98. In *Petruzzi’s*, by contrast, we drew more liberal inferences in the plaintiff’s favor because the plaintiff’s theory—that the defendants conspired not to compete with each other on existing customer accounts—made “perfect economic sense.” 998 F.2d at 1232. The only way for the defendants in *Petruzzi’s* to increase profits in this manner was by agreement. Moreover, this conduct of refusing to compete was obviously not procompetitive. *Id.*

9. The “strictures of *Matsushita* d[o] not apply” when plaintiffs use direct evidence to prove a conspiracy because “no inferences are required from direct evidence to establish a fact,” thus negating any concern about the reasonableness of the inferences drawn from that evidence. *Petruzzi’s*, 998 F.2d at 1233. Nor are these concerns implicated when there is “strong circumstantial evidence” because such evidence is “sufficiently unambiguous.” *Id.* (internal quotation marks omitted).

A NOTE ON SUMMARY JUDGMENT MOTIONS IN ANTITRUST CASES

Rule 56(c) of the Federal Rules of Civil Procedure provides that, upon an appropriate motion, summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”¹ In *Celotex Corp. v. Catrett*,² one of the leading cases on summary judgment, the Supreme Court explained that Rule 56(c) “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”³ When ruling on a motion for summary judgment, the court must determine whether there exists a genuine issue for trial, that is, whether there is sufficient evidence for a jury to return a verdict in favor of the non-moving party.⁴ In making this determination, the court must not weigh evidence or assess credibility, since those are functions for the jury.⁵ Moreover, the facts must be viewed in the light most favorable to the non-moving party, who must also be given the benefit of all reasonable inferences that can be drawn from the facts.⁶ Substantive antitrust law, however, may limit the inferences that can be drawn from certain facts.⁷ In all instances, any inference drawn by the court must be reasonable⁸ and economically plausible.⁹ In many cases, both the plaintiffs and defendants will move for summary judgment. The standard remains the same for each motion, and the existence of cross-motions does not mean that one of the motions should be granted.¹⁰

1. FED. R. CIV. P. 56(c); *see* *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-23, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986).

2. 477 U.S. 317 (1986).

3. *Id.* at 322.

4. *Celotex*, 477 U.S. at 321.

5. *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 704-05 (7th Cir. 2011).

6. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see Omnicare*, 629 F.3d at 704 (“Even on summary judgment, district courts are not required to draw every requested inference; they must only draw reasonable ones that are supported by the record.”).

7. *See. e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (holding that, as a matter of law, no permissible inference of conspiracy can be drawn from evidence that is equally consistent with unilateral conduct).

8. *Omnicare*, 629 F.3d at 704.

9. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 468-69 (1992); *Matsushita*, 475 U.S. at 587; *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 73 (3d Cir. 2010).

10. *Diaz Aviation Corp. v. Airport Aviation Servs., Inc.*, Civil No. 09-1583(CVR), 2011 WL 5335519, at *2 & n.2 (D.P.R. Nov. 7, 2011).

Although for much of the history of antitrust law summary judgment was disfavored and rarely granted,¹¹ in modern jurisprudence it is regarded as an important device to “to isolate and dispose of factually unsupported claims or defenses”¹² and an “essential tool in the area of antitrust law because it helps avoid wasteful and lengthy litigation that may have a chilling effect on procompetitive market forces.”¹³ Today, there is no heightened standard for summary judgment in complex antitrust cases¹⁴ and grants of summary judgment in antitrust cases are common.¹⁵ Still, some circuits continue to emphasize caution in the dismissal of antitrust cases through summary judgment.¹⁶

A motion for summary judgment is one of the most important tools in antitrust litigation. In the first instance, summary judgment tests whether, after an appropriate opportunity for the parties to pursue discovery, the plaintiff has a claim that can go to

11. *See* *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962).

12. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 324 (1986).

13. *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 495 (2d Cir. 2004); *see In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 61 (2d Cir. 2012); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d Cir. 2002) (holding that “summary judgment is particularly favored [in antitrust cases] because of the concern that protracted litigation will chill pro-competitive market forces.”); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 95 (2d Cir. 1998) (“By avoiding wasteful trials and preventing lengthy litigation that may have a chilling effect on pro-competitive market forces, summary judgment serves a vital function in the area of antitrust law.”); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 475 (7th Cir. 1988) (“[T]he very nature of antitrust litigation encourages summary disposition of such cases when permissible.”); *cf. Eastern Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass’n, Inc.*, 2004 WL 110844 (1st Cir. Jan. 20, 2004) (“The time of judges and lawyers is a scarce resource; the sooner a hopeless claim is sent on its way, the more time is available for plausible causes.”); *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997) (“The resolution of evidentiary questions on summary judgment conserves the resources of the parties, the court, and the jury.”).

14. *See, e.g., In re Wholesale Grocery Prods Antitrust Litig.*, 752 F.3d 728, 732 (8th Cir. 2014) (noting that “the Supreme Court would find an error of law in the imposition of a heightened standard for summary judgment in a complex antitrust case”); *HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 546-47 (8th Cir. 2007); *Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 682, 685 (8th Cir. 1993).

15. *See, e.g., Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1322 (4th Cir. 1995) (“[B]ecause of the unusual entanglement of legal and factual issues frequently presented in antitrust cases, the task of sorting them out may be particularly well-suited for Rule 56 utilization.”); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1412 (7th Cir. 1989) (“The Supreme Court has emphasized, however, that summary judgment may be especially appropriate in an antitrust case because of the chill antitrust litigation can have on legitimate price competition.”) (citing *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594-95 (1986)); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir. 1988) (“The Supreme Court has emphasized, however, that summary judgment may be especially appropriate in an antitrust case because of the chill antitrust litigation can have on legitimate price competition.”).

16. *See, e.g., In re Southeastern Milk Antitrust Litig.*, 739 F.3d 262, 270 (6th Cir. 2014) (noting that “[i]n this circuit, courts are generally reluctant to use summary judgment dispositions in antitrust actions due to the critical ‘role that intent and motive have in antitrust claims and the difficulty of proving conspiracy by means other than factual inference’”) (quoting *Expert Masonry, Inc. v. Boone County, Kentucky*, 440 F.3d 336, 341 (6th Cir. 2006)).

the trier of fact—a jury or the trial judge, as the case may be—that is, whether there exists a genuine issue of material fact for the trier of fact to decide at trial or whether, in the absence of any genuine issue of material fact, one of the parties is entitled to judgment as a matter of law. As a practical matter, a motion for summary judgment also serves as a vehicle to make the opposing party reveal much of the legal structure and supporting evidence of its case. During discovery, the usual practice is for a party to reveal as little as possible about the evidence that it will use in its case, and discovery does not require a party to identify its legal theory or supporting case law. Of course, at the same time, the moving party in its effort to prevail will reveal its case. The upshot is that the issues will be much better joined at trial in the event that there are issues of fact that require resolution.

Unless a different time is set by local rule or by court order, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.¹⁷ Any party may make a motion for summary judgment¹⁸ and, although rare, the court may initiate a summary judgment proceeding on its own in the absence of a motion.¹⁹ It is fairly common for a motion for summary judgment by one party to be countered by a cross-motion for summary judgment by the other party. Most circuits permit district courts in their discretion to entertain successive motions for summary judgment,²⁰ although for reasons of judicial efficiency district courts typically do not allow successive motions in the absence of an expanded factual record or new evidence. The denial of a motion for summary judgment at one stage of the trial does not preclude a later reconsideration and a grant of summary judgment at a later stage in the trial,²¹ although again this rarely if ever occurs in practice.

Summary judgment may be granted in full, adjudicating the merits of the entire case or of a particular claim. Summary judgment may also be granted in part, adjudicating the issue of liability while leaving open the issue of relief²² or deciding particular questions of fact, which will be binding on the remainder of the trial court proceeding.²³ A motion for summary judgment, however, goes to whether there is a genuine issue of material fact with respect to a *claim*; a motion for summary

17. FED. R. CIV. P. 56(b).

18. *See* FED. R. CIV. P. 56(a) (governing motions by a party seeking to recover on a claim); FED. R. CIV. P. 56(b) (governing motions by a party against whom a claim is brought).

19. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (stating that “district courts are widely acknowledged to possess the power to enter summary judgments sua sponte”).

20. *See Hoffman v. Tonnemacher*, 593 F.3d 908, 911 (9th Cir. 2010); *Narducci v. Moore*, 572 F.3d 313, 324 (7th Cir. 2009); *Lexicon, Inc. v. Safeco Ins. Co. of Am., Inc.*, 436 F.3d 662, 670 n.6 (6th Cir. 2006); *Sira v. Morton*, 380 F.3d 57, 68 (2d Cir. 2004); *Fenney v. Dakota, Minn. & E. R.R. Co.*, 327 F.3d 707, 718 (8th Cir. 2003); *Enlow v. Tishomingo County*, 962 F.2d 501, 506-07 (5th Cir. 1992).

21. *Hoffman*, 593 F.3d at 911.

22. FED. R. CIV. P. 56(c) (“A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.”).

23. FED. R. CIV. P. 56(d).

judgment cannot be used in isolation to establish or challenge a fact or an element of a claim, since a judgment may not be entered as to a fact or an element of a claim.

Rule 56(c) raises six distinct questions: (1) What is a material fact? (2) What is a genuine issue of material fact? (3) What constitutes the record in a summary judgment proceeding? (4) How much discovery is required before summary judgment can be considered? (5) What are the allocations of the burdens of proof in establishing a genuine issue of material fact? (6) Assuming that there are no genuine issues of material fact, when is a movant entitled to judgment as a matter of law?

A *material fact* is one that might affect the outcome of the suit.²⁴ The governing substantive law determines which facts are material.²⁵ The governing law, in turn, is determined by the law invoked in the pleadings in the case. Factual disputes that are irrelevant to the outcome of the action will not be counted. Significantly, the evidentiary standard at trial plays no role in determining what facts are material. As the *Anderson* Court stated, “[a]ny proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.”²⁶

An issue of material fact is *genuine* if, under the applicable evidentiary standard, a reasonable trier of fact could find for the nonmoving party on the issue, so that the issue cannot be decided absent trial.²⁷ To help courts determine whether there exist genuine issues of material fact exists in a case, the local rules in many districts the party moving for summary judgment to submit a statement of the material facts that it contends are not genuinely in dispute in the form of short numbered paragraphs supported by specific references to the factual record and the opposing party submit a statement showing which of the moving party’s factual assertions it disputes.²⁸ Significantly, these local rules typically provide that each numbered paragraph in the statement of material facts will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.²⁹ As a special case, if the

24. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

25. *Id.*

26. *Id.*

27. *Id.*; see *Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869, 873-74 (11th Cir. 1998); *Thompson Everett, Inc. v. National Cable Adver., L.P.*, 57 F.3d 1317, 1322 (4th Cir. 1995) (“While it is axiomatic that Rule 56 must be used carefully so as not improperly to foreclose trial on genuinely disputed, material facts, the mere existence of some disputed facts does not require that a case go to trial. The disputed facts must be material to an issue necessary for the proper resolution of the case, and the quality and quantity of the evidence offered to create a question of fact must be adequate to support a [judgment in favor of the nonmoving party].”). For a case undertaking a detailed analysis of the evidence in reviewing a summary judgment, see *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 861-65 (D.C. Cir. 2008) (finding no genuine issue and affirming summary judgment for defendant).

28. See, e.g., S.D.N.Y. Loc. Civ. R. 56.1.

29. *Id.* 56.1(c); see *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 312-15 (2d Cir. 2008).

moving party makes a prima facie showing that it is entitled to summary judgment and the non-moving party fails to address claim in its opposition papers, the claim is deemed abandoned and summary judgment is proper for the moving party.³⁰

The *record* in a summary judgment proceedings consists of the pleadings, the discovery and disclosure materials on file, and any affidavits or other materials the parties submit that would be admissible at trial.³¹ Rule 56(e)(1) requires in particular that supporting or opposing affidavits must be made on personal knowledge and set forth facts that would be admissible in evidence.³² Inadmissible hearsay testimony that would not be admissible at the trial may not be properly included in a Rule 56(e) affidavit.³³ The personal knowledge requirement of Rule 56(e) echoes a similar requirement in Rule 602 of the Federal Rules of Evidence and, as just as there are exceptions in the Federal Rules of Evidence to allow testimony not based on personal knowledge, courts today allow all types of admissible evidence into the summary judgment record. The general rule today is that courts can include, and can only consider, admissible evidence in the summary judgment record.³⁴ Courts may also take judicial notice of facts that would be admissible under Rule 201 of the Federal Rules of Evidence.³⁵

The inclusion of expert affidavits is ubiquitous on both sides in antitrust summary judgment proceedings. The admissibility of expert testimony is governed by the same rule at the summary judgment stage as it is at trial,³⁶ although some courts have taken the view that difficult *Daubert* questions, especially when the supporting facts are complex, should be left for trial and that the challenged testimony should be admitted for the limited purpose of deciding the summary judgment motion.³⁷ Even

30. See *A N D Carting, LLC v. Finocchio Bros., Inc.*, No. 3:07-cv-164 (CFD), 2010 WL 3489980, at *2 n.5 (D. Conn. Aug. 31, 2010).

31. FED. R. CIV. P. 56(c); see *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 309 (2d Cir. 2008).

32. Fed. R. Civ. P. 56(e)(1).

33. See, e.g., *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 309 (2d Cir. 2008).

34. See, e.g., *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002); *Sports Unlimited, Inc. v. Lankford Enterprises, Inc.*, 275 F.3d 996, 999 (10th Cir. 2002); *Nora Beverages, Inc. v. Perrier Group of America, Inc.*, 269 F.3d 114, 123 (2d Cir. 2001); *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997); *Duluth News-Tribune v. Mesabi Publishing Co.*, 84 F.3d 1093, 1098 (8th Cir. 1996); *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994); *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1339 n.3 (3d Cir. 1987).

35. *Gerlinger v. Amazon.Com, Inc.*, 311 F. Supp. 2d 838, 843 (N.D. Cal. 2004), *aff'd*, 526 F.3d 1253 (9th Cir. 2008).

36. See, e.g., *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997); *First United Financial Corp. v. United States Fidelity & Guaranty Co.*, 96 F.3d 135, 136-37 (5th Cir. 1996) (*per curiam*); *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 175-76 (5th Cir. 1990).

37. See, e.g., *Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184, 188 (1st Cir. 1997); *Alcan Aluminum Corp. v. BASF Corp.*, 133 F. Supp. 2d 482, 493 (N.D. Tex. 2001); *Granos Nacionales, S.A. v. N. Cent. Commodities*, No. A2-96-145, 1998 WL 1776579, at *4 (D.N.D. Sept. 21, 1998). See generally *The Sedona Conference Working Group on the Role of Economics in*

under the latter view, however, courts have rejected unsupported assertions in an expert's affidavit as sufficient to create a genuine issue of material fact.³⁸ When an expert's opinion is not supported by sufficient facts, or when the record contradicts or renders the opinion unreasonable, it cannot support a jury's verdict and hence cannot be a basis for deciding summary judgment.³⁹

The district court should permit the opposing party an opportunity to develop specific facts showing that there is a genuine issue for trial, and summary judgment be denied where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.⁴⁰ Rule 56(f) provides that where the opposing party shows by affidavit specific reasons why it cannot present facts essential to justify its opposition, the court may deny the motion; order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or issue any other just order.⁴¹ A Rule 56(f) affidavit in support of a motion for additional discovery should explain (1) the nature of the uncompleted discovery, that is, what facts are sought and how they are to be obtained; (2) how those facts are reasonably expected to create a genuine issue of material fact; (3) when the affiant learned of the issue and what efforts the affiant has made to obtain those facts; and (4) why those efforts were unsuccessful. Unless the opposing party files a proper Rule 56(f) affidavit, it is generally not an abuse of discretion for the district court to grant summary judgment on the basis of the record before it.⁴² Moreover, the district court may deny a Rule 56(f) motion for additional discovery if the Rule 56(f) affidavit fails to set forth specific and adequate reasons for the need for further discovery,⁴³ including identifying the facts the opposing party seeks to obtain through discovery.⁴⁴ Although the opposing party has no right to absolute

Antitrust, *The Sedona Conference Commentary on the Role of Economics in Antitrust Law* 43-62 (February 2006) (examining the role of economic evidence in summary judgment proceedings and proposing best practice principles).

38. *See, e.g.*, *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008).

39. *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (finding expert opinion insufficient to support jury's verdict); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995); *Morgenstern v. Wilson*, 29 F.3d 1291, 1296-97 (8th Cir. 1994) (finding that expert testimony failed to overcome the overwhelming evidence regarding the geographic market); *Ramallo Bros. Printing, Inc. v. El Dia, Inc.*, 392 F. Supp. 2d 118, 133 (D.P.R. 2005) (finding plaintiff expert's opinion insufficient to support allegation on market definition); *Menasha Corp. v. News America Marketing In-Store, Inc.*, 238 F. Supp. 2d 1024, 1030-31 (N.D. Ill. 2003) (finding plaintiff expert's opinion insufficient to support allegation on market definition).

40. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

41. FED. R. CIV. P. 56(f).

42. *Nitro Distrib., Inc. v. Alitcor, Inc.*, 565 F.3d 417, 430 (8th Cir. 2009); *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1124-25 (10th Cir. 2008); *American Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 237 (4th Cir. 2004).

43. *American Needle Inc. v. National Football League*, 538 F.3d 736, 740 (7th Cir. 2008).

44. *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 863 (6th Cir. 2005).

right to discovery, it can at least prevent the immediate grant of a summary judgment motion by a proper Rule 56(f) motion, provided that it can demonstrate with specificity that the material to be discovered would be relevant, dispositive, and nonduplicative and that it did not already have an adequate opportunity to take this discovery. The district court's denial of a Rule 56(f) motion is reviewed for abuse of discretion.⁴⁵

Any party may move for summary judgment. The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits which it submits demonstrate the absence of a genuine issue of material fact.⁴⁶ There is no rule against successive motions for summary judgment by a party, although the court has the power to regulate the schedule as well as reject consideration of frivolous or repetitive motions.⁴⁷

Typically, the moving party will be the defendant. Where the moving party would not bear the burden of persuasion at trial, the moving party may either: (1) demonstrate that the non-moving party's evidence is insufficient to establish one or more essential elements of the non-moving party's claim; or (2) submit affirmative evidence that negates an essential element of the nonmoving party's claim.⁴⁸ The burden then shifts to the opposing party to submit affirmative evidence sufficient to create at least a genuine issue of material fact on *each* of the elements of the opposing party's prima facie case put in issue by the motion for summary judgment.⁴⁹ To defeat a summary judgment motion, the opposing party must do "more than simply show that there is some metaphysical doubt as to the material facts."⁵⁰ The opposing party does not demonstrate the existence of a genuine issue of fact merely by making assertions that are conclusory, conjectural, or based on speculation.⁵¹ Rather, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial."⁵² "[T]here is no issue for trial unless there is

45. *American Needle*, 538 F.3d at 740-41.

46. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

47. *See, e.g.*, *Hoffman v. Tonnemacher*, 593 F.3d 908, 910-11 (9th Cir. 2010); *Narducci v. Moore*, 572 F.3d 313, 324 (7th Cir. 2009); *Lexicon, Inc. v. Safeco Ins. Co. of Am., Inc.*, 436 F.3d 662, 670 n.6 (6th Cir. 2006); *Sira v. Morton*, 380 F.3d 57, 68 (2d Cir. 2004); *Fenney v. Dakota, Minn. & E. R.R. Co.*, 327 F.3d 707, 718 (8th Cir. 2003); *Enlow v. Tishomingo County*, 962 F.2d 501, 506-07 (5th Cir. 1992).

48. *Celotex*, 477 U.S. at 317, 330.

49. *See, e.g.*, *M&M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 163 (4th Cir. 1993) (*en banc*) (citing *Celotex*).

50. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *accord* *Niagara Mohawk Power Corp. v. Jones Chem. Inc.*, 315 F.3d 171, 175 (2d Cir. 2003) ("The 'mere existence of a scintilla of evidence' supporting the non-movant's case is also insufficient to defeat summary judgment.") (quoting *Anderson*, 477 U.S. at 252).

51. *See* *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 309 (2d Cir. 2008).

52. Fed. R. Civ. P. 56(e); *accord* *Matsushita Elec.*, 475 U.S. at 587.

sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.”⁵³ In evaluating the record, the “evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor.”⁵⁴ Even so, in antitrust cases those inferences “must be reasonable in light of competing inferences of acceptable conduct.”⁵⁵ In determining whether a genuine issue of material fact exists on a particular issue, the court is entitled to rely upon the Rule 56 evidence specifically called to its attention by the parties.⁵⁶

Plaintiffs sometimes move for summary judgment in antitrust cases, frequently as a cross-motion in response to a defendant’s summary judgment motion. In a motion for summary judgment on a claim where the moving party would bear the burden of persuasion at trial, the moving party must submit affirmative evidence that makes a prima facie showing on each and every element of its prima facie case or defense, so that in the absence of any contravention the moving party would be entitled to judgment as a matter of law.⁵⁷ Once the moving party has satisfied this initial burden, the burden shifts to the opposing party. The party opposing summary judgment may not rest on its pleadings but must present “significant probative evidence” demonstrating that a genuine dispute of material fact exists and that the moving party is not entitled to judgment as a matter of law.⁵⁸ In particular, the opposing party may defeat a motion for summary judgment by either: (1) demonstrating that the moving party’s evidence, even if uncontested, is insufficient to establish one or more essential elements of the moving party’s prima facie case; or (2) submitting affirmative evidence sufficient to create a genuine issue of material fact on one or more essential elements of the moving party’s prima facie case.⁵⁹

In deciding a motion for summary judgment, the court must review the record “taken as a whole.”⁶⁰ The court must resolve all ambiguities and draw all justifiable factual inferences in favor of the party against whom summary judgment is sought,⁶¹

53. *Anderson*, 477 U.S. at 248.

54. *Anderson*, 477 U.S. at 255; *see Matsushita Elec.*, 475 U.S. at 587.

55. *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1998) (citing *Matsushita*, 475 U.S. at 588 (1986)); *accord PepsiCo*, 315 F.3d at 105; *see Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 495 (2d Cir. 2004); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1412-13 (7th Cir. 1989) (“For this reason, an antitrust plaintiff opposing a motion for summary judgment must present evidence that tends to exclude the possibility that the defendant’s conduct was as consistent with competition as with illegal conduct.”).

56. *American Pan Co. v. Lockwood Mfg., Inc.*, No. C-3-06-197, 2008 WL 471685, at *5 (S.D. Ohio Feb. 15, 2008).

57. *Celotex*, 477 U.S. at 331.

58. *Anderson*, 477 U.S. at 249.

59. *Celotex*, 477 U.S. at 324; *see Anderson*, 477 U.S. at 256-57; *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288-90 (1968).

60. *Matsushita*, 475 U.S. at 587 (1986); *accord Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *see Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 704-05 (7th Cir. 2011).

61. *Anderson*, 477 U.S. at 255.

without weighing the evidence, assessing its probative value, or resolving any factual disputes.⁶² Determinations of the weight to accord evidence or of the credibility of witnesses are within the sole province of the jury and as such are improper on a motion for summary judgment.⁶³ The Supreme Court has noted that summary judgment is appropriate where the antitrust claim “simply makes no economic sense,”⁶⁴ or “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.”⁶⁵

The district court’s summary judgment decisions are reviewed de novo on appeal, employing the same standards as the district court.⁶⁶ Like the district court, the court of appeals must consider the evidence in the light most favorable to the opposing party.⁶⁷ The court of appeals may affirm the district court on any basis supported by the record.⁶⁸ The appellate court will consider only the record that was before the

62. *See, e.g., Omnicare*, 629 F.3d at 704; *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996).

63. *See, e.g., Omnicare*, 629 F.3d at 704; *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir. 2002); *Humetrix, Inc., v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001); *Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 235 F.3d 1184, 1192 (9th Cir. 2000); *Carlo v. Keller Ladders, Inc.*, 211 F.3d 465, 468 (8th Cir. 2000); *Heating & Air Specialists, Inc. v. Jones*, 180 F.3d 923, 936 n.8 (8th Cir. 1999); *Newport Ltd. v. Sears, Roebuck & Co.*, 6 F.3d 1058 (5th Cir. 1993).

64. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 467 (1992).

65. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

66. *See, e.g., In re Wholesale Grocery Prods Antitrust Litig.*, 752 F.3d 728, 732 (8th Cir. 2014); *In re Southeastern Milk Antitrust Litig.*, 739 F.3d 262, 270 (6th Cir. 2014); *In re Western States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 729 (9th Cir. 2013); *In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 61 (2d Cir. 2012); *In re K-Dur Antitrust Litig.*, 686 F.3d 197, 208 (3d Cir. 2012); *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1059 (9th Cir. 2012); *City of New York v. Group Health Inc.*, 649 F.3d 151, 155 (2d Cir. 2011); *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 705 (7th Cir. 2011); *Fair Isaac Corp. v. Experian Info. Solutions, Inc.*, 650 F.3d 1139, 1144 (8th Cir. 2011); *White v. R.M. Packer Co.*, 635 F.3d 571, 575 (1st Cir. 2011); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 73 (3d Cir. 2010); *Howard Hess Dental Labs. Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 246 (3d Cir. 2010); *Benson v. St. Joseph Regional Health Ctr.*, 575 F.3d 542, 548 (5th Cir. 2009); *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 996 (9th Cir. 2010); *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 309 (2d Cir. 2008); *American Needle Inc. v. National Football League*, 538 F.3d 736, 741 (7th Cir. 2008); *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 862 (D.C. Cir. 2008); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 386 (8th Cir. 2007) (*Craftsmen II*); *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 930 (6th Cir. 2005); *Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1303 (11th Cir. 2003); *Tops Mkts., Inc. v. Quality Mkts, Inc.*, 142 F.3d 90, 95 (2d Cir. 1998).

67. *Allied Orthopedic*, 592 F.3d at 996; *American Needle*, 538 F.3d at 741; *Spirit Airlines*, 431 F.3d at 930.

68. *See, e.g., In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 748 (9th Cir. 2012) (“In the absence of genuine issues of material fact, we may affirm the district court’s summary judgment ‘on any ground supported by the record, regardless of whether the district court relied upon, rejected, or even considered that ground . . . if ‘the movant is entitled to judgment as a matter of law.’”) (internal citations omitted); *Omnicare*, 629 F.3d at 723; *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1088 (10th Cir. 2006); *Gregory v. Fort Bridger Rendezvous Ass’n*, 448 F.3d 1195, 1206 (10th Cir. 2006); *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 16 (1st Cir.

district court, and the summary judgment record cannot be supplemented on appeal.⁶⁹ Evidentiary rulings in connection with the summary judgment record are reviewed for abuse of discretion.⁷⁰ Similarly, a district court's striking of a motion for summary judgment for failure to comply with the terms of a case management order is reviewed for abuse of discretion.⁷¹ Summary judgment appeals almost always occur when the district court grants summary judgment in a way that completely resolves the case one way or another in its entirety for a party, since at that point a final appealable judgment may be entered with regard to that party. Generally, denials of summary judgment are interlocutory decisions that cannot be appealed as a matter of right and are seldom certified for interlocutory appeal. However, there is appellate jurisdiction to hear an appeal of a denial of a motion for summary judgment when it is presented in tandem with an appeal of a grant of summary judgment to an opposing party⁷² or when an interlocutory appeal is certified.⁷³

2004); *Bell v. Fur Breeders Agricultural Co-op.*, 348 F.3d 1224, 1230 (10th Cir. 2003); *ACT, Inc. v. Sylvan Learning Sys., Inc.*, 296 F.3d 657, 662 n.3 (8th Cir. 2002); *Ozark Heartland Electronics, Inc. v. Radio Shack*, 278 F.3d 759, 763 (8th Cir. 2002); *VKK Corp. v. National Football League*, 244 F.3d 114, 118 (2d Cir. 2001); *Bridges v. MacLean-Stevens Studios, Inc.*, 201 F.3d 6, 9 (1st Cir. 2000); *Dedication & Everlasting Love to Animals v. Humane Soc'y*, 50 F.3d 710, 712 (9th Cir. 1995); *USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276, 1279 (9th Cir. 1994), *on remand from* 495 U.S. 328 (1990).

69. *USA Petroleum*, 13 F.3d at 1279.

70. *See, e.g., Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1323 (11th Cir. 2003); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1239 (3d Cir. 1993).

71. *See, e.g., Shell Co. (Puerto Rico) Ltd. v. Los Frailes Serv. Station, Inc.*, 605 F.3d 10, 24 (1st Cir. 2010).

72. *See, e.g., Watson Carpet & Floor Covering, Inc. v. Mohawk Indus.*, 648 F.3d 452, 459 (6th Cir. 2011).

73. *See, e.g., E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1030 (9th Cir. 2007).

Partial Judgments

JUDGMENTS

INTRODUCTION

Rule 54(a) defines a judgment to include “a decree and any order from which an appeal lies.”¹ Generally, a decision is final and appealable when it conclusively “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”²

Notably, although denominated a “judgment,” a partial summary judgment is not a judgment within the meaning of Rule 54(a) and is not immediately appealable under Section 1291.³ More generally, there is a distinction between a court’s “decision” and a “judgment” within the meaning of Rule 54(a). A decision consists of the court’s findings of fact and conclusions of law, while a judgment is the instrument that gives legal effect to a decision that concludes the litigation on the merits. Only judgments are appealable under Section 1291.

Normally, judgments are entered only when there is a decision that conclusively ends the litigation. Rule 54(b) of the Federal Rules of Civil Procedure creates an important exception. Rule 54(b) provides that when an action involves multiple parties or multiple claims, the court may direct entry of a final judgment as to one or more, but fewer than all, parties or claims, provided, standing alone, the judgment (1) would be appealable under Section 1291, that is, when there is an “ultimate disposition of an individual claim entered in the course of a multiple claims action,”⁴ and (2) the court “expressly determines that there is no just reason for delay.”⁵

A final judgment entered under Rule 54(b) for a party is immediately appealable as of right under Section 1291, even if some claims remain pending in the district court with respect to that party.⁶ The decision whether to enter a Rule 54(b) partial final judgment should be made in light of considerations of judicial economy, the general policy against piecemeal appeals, and the equities involved.⁷ Timing may also be an

1. FED. R. CIV. P. 54(a).

2. *Catlin v. United States*, 324 U.S. 229, 233 (1945); *accord* *Parr v. United States*, 351 U.S. 513, 518 (1956); *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 604-05 (2009); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988); *see* *Swint v. Chambers County Comm’n*, 514 U.S. 35, 42 (1995) (holding that a “final decisio[n]” is typically one “by which a district court disassociates itself from a case.”); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (federal appellate jurisdiction generally requires a conclusive decision by the district court that ends the litigation on the merits).

3. 18 U.S.C. § 1291.

4. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980).

5. FED. R. CIV. P. 54(b); *see* *Curtiss-Wright*, 446 U.S. at 7-8; *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956).

6. *See, e.g., Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 494-95 (2d Cir. 2004) (finding appellate jurisdiction existed over Rule 54(b) partial final judgment dismissing all antitrust claims against defendants but leaving state law tort and breach of contract claims pending in district court).

7. *See, e.g., Curtiss Wright*, 446 U.S. at 8; *O’Bert ex rel. Estate of O’Bert v. Vargo*, 331 F.3d 29, 40-41 (2d Cir. 2003).

important consideration: the shorter the period of time between when the Rule 54(b) judgment would be entered if the motion is granted and the time when the entire case would end and be appealable in the normal course, the less the hardship on the moving party from a denial of the motion and the more the policy against piecemeal appeals dominates.⁸ A Rule 54(b) certification is reviewable for abuse of discretion.⁹ Unlike the usual situation where an appeal deprives the district of jurisdiction, the district court retains jurisdiction during an appeal of a Rule 54(b) final partial judgment over all claims not included in the judgment.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 54. Judgment; Costs

(a) *Definition; Form.* “Judgment” as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master’s report, or a record of prior proceedings.

(b) *Judgment on Multiple Claims or Involving Multiple Parties.* When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.

(c) *Demand for Judgment; Relief to Be Granted.* A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) *Costs; Attorney’s Fees.* [omitted]

8. See *Bd. of Regents of Univ. of Nebraska v. BASF Corp.*, No. 4:04CV3356, 2008 WL 4585428, at *1 (D. Neb. Oct. 14, 2008) (denying motion where there was no evidence that denying motion would visit undue hardship or injustice upon any party).

9. *Curtiss Wright*, 446 U.S. at 10; *Sears*, 351 U.S. at 437.

United States District Court
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

MDL No. 1917

Case No. C-07-5944 JST

This Order Relates To:

**ORDER GRANTING MOTION FOR
RULE 54(B) CERTIFICATION**

*P.C. Richard & Son Long Island Corp.,
et al. v. Hitachi, Ltd., et al.*, No. 12-cv-
02648;

Re: ECF No. 4793

*P.C. Richard & Son Long Island Corp.,
et al. v. Technicolor SA, et al.*, No. 13-cv-
05725.

Now before the Court is Plaintiff MARTA Cooperative of America, Inc.’s (“MARTA”) Motion for Rule 54(b) Certification of Final Judgment as to MARTA. ECF No. 4793. For the reasons discussed below, the Court will GRANT the motion.

I. BACKGROUND

On August 4, 2016, the Court granted Defendants’ Motion for Summary Judgment With Respect To MARTA, concluding that MARTA lacked standing to pursue its federal antitrust claim. ECF No. 4742. A number of Defendants’ summary judgment motions remain pending as to the two other plaintiffs: P.C. Richard & Son Long Island Corporation and ABC Appliance, Inc. ECF Nos. 2976, 2981, 2984, 3001, 3008, 3032, and 3040. On August 23, 2016, MARTA filed the instant motion requesting that the Court enter an order of final judgment as to MARTA under Federal Rule of Civil Procedure 54(b). ECF No. 4793. MARTA argues that this Court’s August 4 Order is a final judgment and that there is no just reason to delay an appeal. *Id.* at 2.

II. LEGAL STANDARD

In relevant part, Rule 54(b) provides: “when multiple parties are involved [in an action],

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Northern District of California

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the court may direct entry of a final judgment as to one or more, but fewer than all . . . parties only if the court expressly determines that there is no just reason for delay.”

The U.S. Supreme Court has interpreted Rule 54(b) to require a district court facing a Rule 54(b) motion, first, to determine whether the motion concerns a final judgment. Curtiss–Wright Corp. v. General Elec. Co., 446 U.S. 1, 7–8 (1980). A judgment is final for the purposes of Rule 54(b) when it “terminates the litigation between the parties . . . and leaves nothing to be done but to enforce by execution what has been determined.” Parr v. United States, 351 U.S. 513, 518 (1956). After a district court has determined whether a judgment is final, it must determine whether, in its discretion, any “just reason for delay” exists. The court does so by balancing judicial administrative interests and the equities involved. Curtiss–Wright, 446 U.S. at 8-10. In particular, a court should “consider such factors as whether the claims under review [a]re separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.” Id. at 8.

III. DISCUSSION

A. Finality of Judgment

The parties agree that the Court’s August 4 order, ECF No. 4742, is a final judgment for purpose of Rule 54(b). ECF No. 4793 at 5; ECF No. 4811 at 1. In ruling that MARTA lacked standing to pursue its antitrust claim, the Court’s order “terminate[d] the litigation between” MARTA and Defendants. Parr, 351 U.S. at 518; see also United States v. Real Prop. & Improvements Located at 2366 San Pablo Ave., No. 13-CV-02027-JST, 2014 WL 4793655, at *2 (N.D. Cal. Sept. 25, 2014) (“San Pablo Ave.”) (ruling that an “order granting the United States’ motion to strike the City of Berkeley for lack of standing” constituted a final judgment). The Court’s grant of summary judgment against MARTA “leaves nothing to be done but to enforce by execution what has been determined.” Parr, 351 U.S. at 518. Therefore, the Court finds that it is faced with a final judgment for the purposes of Rule 54(b).

B. No Just Reason for Delay

Next, the Court must determine whether, in its discretion, any “just reason for delay”

1 exists. Curtiss–Wright, 446 U.S. at 8. The two main inquiries are (1) whether Rule 54(b)
 2 certification would serve “judicial administrative interests” and (2) “the equities involved.” Id.
 3 “The function of the district court” in conducting this analysis “is to act as a ‘dispatcher.’” Id.
 4 (quoting Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435 (1956)). In doing so, the district
 5 court must “determine the appropriate time when each final decision in a multiple claims action is
 6 ready for appeal.” Id. Here, the Court finds no just reason for delay of entry of final judgment
 7 against MARTA.

8 1. Judicial Administrative Interests

9 “Consideration of [judicial administrative interests] is necessary to assure that application
 10 of [Rule 54(b)] effectively preserves the historic federal policy against piecemeal appeals.” Id.
 11 (internal quotations omitted). Relevant factors include “whether the claims under review [a]re
 12 separable from the others remaining to be adjudicated and whether the nature of the claims already
 13 determined was such that no appellate court would have to decide the same issues more than once
 14 even if there were subsequent appeals.” Id. Here, judicial administrative interests weigh in favor
 15 of granting MARTA’s motion.

16 Most importantly, the Court’s decision on standing is distinct from the merits issues that
 17 remain pending in Defendants’ additional motions for summary judgment against the other
 18 Plaintiffs. Curtiss–Wright, 446 U.S. at 8-9 (finding it significant that the “claims already
 19 adjudicated . . . were severable from the claims which had been determined in terms of both the
 20 factual and the legal issues involved”); see also San Pablo Ave., 2014 WL 4793655, at *2 (ruling
 21 that “[n]o judicial administrative interests prevent entry of final judgment” because “any appeal
 22 the City brings now would concern the issue of standing—a discrete question separate from the
 23 merits”). This means that there is little risk of duplicative appeals. Curtiss–Wright, 446 U.S. at 6.
 24 And as MARTA notes, there is currently some tension between the Court’s order on standing and
 25 the decision of Judge Illston in the similar LCD litigation. ECF No. 4793 at 8; see In re TFT-LCD
 26 (Flat Panel) Antitrust Litig., No. 1827, 2014 WL 4386740, at *1 (N.D. Cal. Sept. 4, 2014).
 27 Clarification of this standing issue by the Ninth Circuit would serve judicial administrative
 28 interests.

1 Defendants' contrary argument that "the Court should not enter final judgment as to
2 MARTA" "[u]til MARTA's damages claim can be determined" makes little sense. ECF No. 4811
3 at 2. MARTA's damages claim *has* been determined – because it lacks standing, MARTA cannot
4 recover any damages. In other words, Defendants' pending motions for summary judgment bear
5 only on the damages of the remaining Plaintiffs. As a result, the two cases Defendants cite are
6 inapposite. *Id.* at 2 (citing Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 570 F.3d 856,
7 857 (7th Cir. 2009) and Trustees of Chicago Truck Drivers v. Cent. Transp., Inc., 935 F.2d 114,
8 116 (7th Cir. 1991)). In both cases, damages issues that related to the plaintiff seeking Rule 54(b)
9 certification remained pending at the time the supposedly final judgment was issued. For
10 example, in Kerr-McGee, the Seventh Circuit determined that the relevant judgment was not final
11 because the "the district judge recognized that one question affecting damages was unresolved and
12 announced his willingness to tackle it after the [defendants] filed an appropriate motion." 570
13 F.3d at 857. Not so here. MARTA's claim to damages was extinguished when the Court ruled it
14 lacked standing on August 4. Thus, the fact that Rule 54(b) does not "allow appeal when damages
15 have been partially but not completely determined, or when the district court will revisit the
16 issues" is irrelevant to MARTA's motion. Trustees of Chicago Truck Drivers, 935 F.2d at 116.

17 Moreover, MARTA agreed to stipulate that "any orders the Court issues with respect to
18 the[] seven pending summary judgment motions would be expressly deemed to apply in
19 MARTA's case should MARTA's Rule 54(b) appeal on standing be favorably resolved." ECF
20 No. 4839 at 2 n.1.¹ This, too, weighs in favor of MARTA's motion. In sum, no judicial
21 administrative interests prevent entry of final judgment here.²

22 2. Equities

23
24 ¹ MARTA did reserve the right to appeal those decisions. ECF No. 4839 at 4 n.3.

25 ² Both parties also make timing-related arguments. MARTA asserts that, if allowed to
26 appeal now, MARTA could obtain a favorable standing decision from the Ninth Circuit in time to
27 join the other Plaintiffs at trial. *Id.* at 7-8. On the other hand, Defendants suggest that MARTA
28 may be able to participate in trial even if it waited to seek Rule 54(b) certification until after the
Court decides the remaining summary judgment motions. ECF No. 4811 at 3. Because of the
speculative nature of these arguments, the Court assigns them little weight.

1 The equities also weigh in favor of granting MARTA's motion for Rule 54(b) certification.
2 Waiting to appeal the Court's standing decision until after the resolution of the motions for
3 summary judgment, or until after trial, would likely result in a substantial delay for MARTA.
4 Further, denying the Rule 54(b) certification motion could expose MARTA to precedent set
5 during a trial of their co-Plaintiffs' claims, even though MARTA would not be able to participate
6 in those trials. Notably, Defendants "do not oppose the[se] equities that MARTA identifies."
7 ECF No. 4811 at 2.

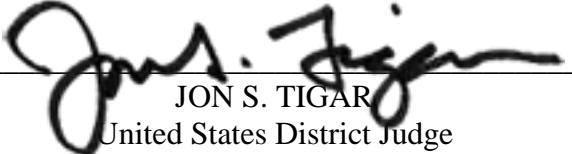
8 Defendants argue that Rule 54(b) certification would "create the inequitable situation
9 where the Defendants are forced to litigate an appeal without knowing their damages exposure as
10 to MARTA's claim." Id. But there is a good chance that the motions for summary judgment will
11 be resolved long before the standing appeal advances very far. Because those summary judgment
12 decisions would apply to MARTA, Defendants should have no problem "setting their litigation
13 strategies, as well as [] gauging the value of any potential settlements." Id. Accordingly, the
14 equities point in favor of granting MARTA's Rule 54(b) motion.

15 CONCLUSION

16 For the foregoing reasons, the Court hereby GRANTS MARTA's motion for entry of final
17 judgment pursuant to Rule 54(b), and ENTERS final judgment against MARTA.

18 IT IS SO ORDERED.

19 Dated: October 5, 2016

20 
21 _____
22 JON S. TIGAR
23 United States District Judge
24
25
26
27
28

Unaccepted Invitations to Collude

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	<u>COMPLAINT</u>
)	
v.)	(15 U.S.C. §2)
)	
AMERICAN AIRLINES, INC; and)	Civil No. CA 3 83-0325D
)	
ROBERT L. CRANDALL,)	Filed: February 23, 198
)	
Defendants.)	
_____)	

COMPLAINT

The United States of America, plaintiff, by its attorneys acting under the direction of the Attorney General of the United States, brings this civil action against the above-named defendants and complains and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the defendants by the United States of America under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. §4), commonly known as the Sherman Act, in order to prevent and restrain violations, as hereinafter alleged, by the defendants of Section 2 of the Sherman Act, as amended (15 U.S.C. §2).

2. Each defendant transacts business and is found in the Northern District of Texas.

II.

DEFENDANTS

3. American Airlines, Inc. (hereinafter referred to as ("American")) is made a defendant herein. American, a wholly-owned subsidiary of AMR Corp., is a corporation organized and existing under the laws of the State of Delaware, with its principal business office in Fort Worth, Texas.

4. Robert L. Crandall is made a defendant herein. Robert L. Crandall, at the time of the offense charged, was, and presently remains, President and Chief Executive Officer of American, doing business in the Northern District of Texas.

III.

DEFINITIONS

5. As used herein, the term:

- (a) "scheduled airline passenger service" means the provision, at regular times and over regular routes, of air transportation to individuals traveling between an origin city and a destination city;

- (b) "city-pair" means the set of two cities consisting of the origin city and the destination city between which scheduled airline passenger service is the relevant product; and
- (c) "slot" means one arrival or landing operation by an air carrier at a specified airport for a specified hour.

IV.

TRADE AND COMMERCE

6. In February of 1982, American and Braniff Airways, Inc. (hereinafter "Braniff"), a wholly-owned subsidiary of Braniff International Corporation, a corporation incorporated in the State of Nevada, were engaged in the provision of scheduled airline passenger service in competition with one another in numerous city-pairs. Many of the city-pairs served by both carriers involved the airline transportation of passengers from one state to another.

7. City-pairs for scheduled airline passenger service can be served either by a nonstop airplane operation between the origin and the destination or by an airplane operation requiring a stop, or stops, at an intermediate point, or points. When a stop or connection at an intermediate point is required, the passenger may either remain on the original

aircraft and await its departure to his destination ("through service"); deplane and then board a different flight served by the original carrier ("online service"); or deplane and then board a different flight served by a different carrier ("interline service").

8. In 1981 and 1982, American and Braniff served many of the same city-pairs to and from the Dallas/Fort Worth Regional Airport (hereinafter "DFW") with nonstop airplane operations. In addition, both served many of the same city-pairs for which a connection at DFW was necessary.

9. Many major airline passenger carriers, including American and Braniff, structure the supply of their services around major airports in network configurations or complexes called "hubs." The term derives from the fact that the routes of an airline maintaining a hub operation resemble the hub and spokes of a wheel, with a major airport, such as DFW, as the hub and the routes to other cities radiating outward like spokes.

10. By "hubbing," the carrier can gather passengers from many points and concentrate them at the hub location at a number of times during the day. The carrier can then arrange connections for those passengers to many other locations. Thus, hubbing allows a carrier to serve many city-pairs which might not independently support nonstop service.

11. DFW is one of the largest airports in the United States. By February of 1982, both American and Braniff had established and maintained extensive hubbing operations centered at DFW.

12. Both Braniff's and American's DFW hubs consisted of "feeder" routes, many of which operate between DFW and cities in Texas, Oklahoma or Louisiana, and "trunk" routes to cities generally located a further distance from DFW. Generally, "feeder" routes are short-haul routes that provide "feed" traffic to long-haul "trunk" routes and vice versa. This feed traffic permitted American and Braniff to offer and operate long-haul trunk flights at higher load-factors than either carrier could have attained had they only provided service originating or terminating at DFW without the benefit of feed traffic.

13. The existence of Braniff's and American's hubs at DFW thus provided them with larger traffic (and therefore larger revenue) bases upon which to draw in providing airline services between Dallas/Fort Worth and other cities than carriers which did not have hubs at DFW.

14. Prior to February of 1982, and continuing through the date of this complaint, air traffic control capacity has been limited as a result of the August 3, 1981 strike by the Professional Air Traffic Controllers Organization. The Federal Aviation Administration (hereinafter "FAA"), through a series of regulations known generally as Special Federal Aviation

Regulations (hereinafter "SFARs") No. 44 et seq., formalized its imposition of restrictions on the number of allowable carrier landings per hour, i.e. slots, at approximately twenty-two of the nation's larger airports, including DFW. SFAR 44-1, dated September 2, 1981, reduced the number of slots at DFW during certain hours by an average of forty percent. Prior to February of 1982 and continuing through the date of this complaint, DFW has been a slot-constrained airport.

15. The SFARs also formalized procedures for the allocation of additional slots as they have become available. Initially, additional slots were allocated by the FAA on a "first-come, first-serve" basis. After February 18, 1982, FAA regulations provided for the allocation of additional slots by lottery and also provided for the exchange of slots by trade and sale. The limited availability of slots, however, acts as a significant barrier to entry for any carrier seeking to enter or expand service in any significant number of city-pairs where the origin, destination or connecting airport is slot-constrained.

16. The amount of commerce generated in 1981 in the city-pairs in which American and Braniff operated either nonstop service to or from DFW or service requiring a connection at DFW is estimated to have exceeded \$434 million.

V.

OFFENSE CHARGED

17. On or about February 1, 1982, the defendants American and Robert L. Crandall, acting with specific intent, unlawfully attempted joint and collusive monopolization, between American and Braniff, of scheduled airline passenger service in a number of the city-pairs served by the DFW hub that account for a substantial amount of commerce, as described in section IV of this complaint, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

18. The aforesaid unlawful attempt to monopolize consisted of an attempt by defendant Robert L. Crandall, acting as President and Chief Executive Officer of American and on its behalf, to cause Howard Putnam, who at the time of the offense charged was President and Chief Executive Officer of Braniff, to raise the prices charged by Braniff by means of a direct oral request to Mr. Putnam that Braniff do so coupled with Mr. Crandall's assurance that American would do the same.

19. At the time of the defendants' attempt to monopolize, American and Braniff were actively competing for passengers on the basis of price in many city-pairs served by the DFW hub as described in section IV of this complaint.

20. In effectuating the aforesaid attempt to monopolize, the defendant, Robert L. Crandall, attempted to eliminate

competition and thereby monopolize the aforesaid trade and commerce during a telephone conversation with Howard Putnam in which Mr. Crandall proposed that both carriers raise their fares by twenty percent. Throughout the discussion, Mr. Crandall was present in his office at the former headquarters of American in Grand Prairie, Texas; Mr. Putnam was present at the headquarters of Braniff located on the property of the Dallas/Fort Worth Regional Airport in Texas. During the conversation with Howard Putnam, defendant Robert L. Crandall uttered the following words, or words to the following effect:

Crandall: I think it's dumb as hell for Christ's sake, all right, to sit here and pound the shit out of each other and neither one of us making a fucking dime.

Putnam: Well --

Crandall: I mean, you know, goddamn, what the fuck is the point of it?

Putnam: Nobody asked American to serve Harlingen. Nobody asked American to serve Kansas City, and there were low fares in there, you know, before. So --

Crandall: You better believe it, Howard. But, you, you, you know, the complex is here -- ain't gonna change a goddamn thing, all right. We can, we can both live here and there ain't no room for Delta. But there's, ah, no reason that I can see, all right, to put both companies out of business.

Putnam: But if you're going to overlay every route of American's on top of over, on top of every route that Braniff has -- I can't just sit here and allow you to bury us without giving our best effort.

Crandall: Oh sure, but Eastern and Delta do the same thing in Atlanta and have for years.

Putnam: Do you have a suggestion for me?

Crandall: Yes. I have a suggestion for you. Raise your goddamn fares twenty percent. I'll raise mine the next morning.

Putnam: Robert, we --

Crandall: You'll make more money and I will too.

Putnam: We can't talk about pricing.

Crandall: Oh bullshit, Howard. We can talk about any goddamn thing we want to talk about.

VI.

EFFECTS

21. The aforesaid attempt to monopolize had, among others, the following effects:

- (a) a dangerous probability of successful joint and collusive monopolization by American and Braniff of scheduled airline passenger service in a number of the city-pairs served by the DFW hub that account for a substantial amount of commerce, as described in section IV of this complaint, was brought about, and was specifically intended to be brought about, as the direct result of action taken by the defendants; and

- (b) a substantial step was undertaken by the defendants to unlawfully obtain monopoly power and restrain trade in the aforesaid trade and commerce.

VII.

PRAYER

WHEREFORE, the plaintiff prays:

1. That the Court adjudge and decree that the defendants have attempted to monopolize the aforesaid trade and commerce, in violation of Section 2 of the Sherman Act;

2. That defendant Robert L. Crandall be enjoined and restrained, for a period of twenty-four (24) months, from serving as President, Chief Executive Officer or in any other position having pricing responsibility or authority, within American Airlines, Inc., or within any other company which provides scheduled airline passenger service;

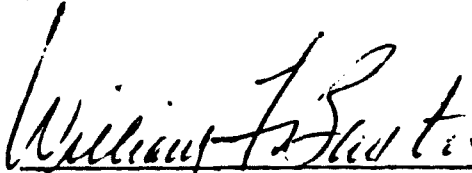
3. That defendant American Airlines, Inc. be enjoined and restrained, for a period of twenty-four (24) months, from employing Robert L. Crandall as President, Chief Executive Officer or in any other position having pricing responsibility or authority or responsibility for the supervision of any person with pricing responsibility or authority;

4. That defendant American Airlines, Inc. be enjoined and restrained, for a period of ten (10) years

from discussing or communicating with any other company which provides scheduled airline passenger service any matter relating to the pricing of such service;

5. That the plaintiff have such other and further relief as the Court may deem just and proper; and

6. That the plaintiff recover the costs of this action.


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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright
Terrell McSweeney

_____)
)
In the Matter of)
)
Jacob J. Alifraghis,)
an individual,)
also d/b/a InstantUPCCodes.com.)
)
)
)
_____)

DOCKET NO. C-4483

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Jacob J. Alifraghis, also doing business as InstantUPCCodes.com (hereinafter sometimes referred to as “Respondent”), has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. Jacob J. Alifraghis, also d/b/a InstantUPCCodes.com (“Instant”), is one of the largest sellers of barcodes in the United States. On multiple occasions, Mr. Alifraghis invited two of his closest competitors, Nationwide Barcode (“Nationwide”) and Competitor A, to join with Instant in a collusive scheme to raise and fix prices for barcodes. The collusive plan included invitations to match the higher prices of another barcode seller, Competitor B. By inviting collusion, Mr. Alifraghis endangered competition and violated Section 5 of the FTC Act.

PRELIMINARY ALLEGATIONS

2. Respondent Jacob J. Alifraghis is an individual living in Florida and doing business in Florida as InstantUPCCodes.com, with a mailing address of 2803 Gulf To Bay Blvd, #165, Clearwater, FL, 33759. Mr. Alifraghis' written communications to his competitors, as set forth below, were by email or through websites that permit individuals to transmit written messages.
3. The primary business of Instant is selling barcodes over the internet.
4. Nationwide is managed by an individual by the name of Philip Bernard Peretz. Nationwide operates a website that permits individuals to transmit written messages to Mr. Peretz.

JURISDICTION

5. The business practices of Respondent Jacob J. Alifraghis, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

LINE OF COMMERCE

6. A barcode is a unique 12-digit number that allows a retailer to track sales of products within its inventory system. Universal product codes ("UPCs") are the predominant form of barcodes used in the United States. UPC barcodes are issued by GS1 (formerly the Uniform Commercial Council), a nonprofit group that sets standards for international commerce. In order to avoid GS1 membership fees or minimum purchase requirements, many small businesses purchase UPC barcodes on the online secondary market.
7. Instant, Nationwide, and Competitor A are three of the largest sellers of barcodes in the United States. Instant's closest competitors, and the principal competitive constraints upon Instant's pricing power, are Nationwide and Competitor A. Competition between and among Instant, Nationwide, and Competitor A has driven down the prices for barcodes charged by each of these sellers.

INVITATIONS TO COLLUDE

8. Prior to August 4, 2013, the principal of Instant, Mr. Alifraghis, had never communicated with the principals of Nationwide and Competitor A.
9. On August 4, 2013, Mr. Alifraghis transmitted a long message to Nationwide and Mr. Peretz through Nationwide's website. Mr. Alifraghis sent the same message to Competitor A. This message contained an explicit invitation to raise and fix prices of barcodes. Mr. Alifraghis proposed that both Nationwide and Competitor A match the

higher prices of Competitor B. The email stressed that all three firms had to act in concert or the plan would not succeed. Mr. Alifraghis proposed that the parties raise their prices within 48 hours:

Hello Phil, Our company name is InstantUPCCodes.com, as you may be aware, we are one of your competitors within the same direct industry that you are in. The reason for this email is because of the constant price changing from multiple vendors within this industry. The 3 main problems are US, YOU and [Competitor A].

However, there is a specific problem with YOU and [Competitor A] in general and it only hurts YOUR business. I want to explain this situation in its entirety so that you understand exactly where I'm coming from and why all 3 of us are only digging our own graves in our own industry.

When I got in this business (exactly one year ago), the prices per package were 2-3x the amount per amount of UPC codes ordered. I made a promise to myself to never go lower than any of the competition even though I didn't have a large customer base like my competitors. I would always match the prices of YOU and [Competitor A] specifically. Recently [Competitor A] was out of business until he came back and slammed his prices down again. So you know what I did? I went and matched his prices. The problem is that his prices were lower than yours which I knew you would lower yours once again, it was only a matter of time.

Here's the deal Phil, I'm your friend, not your enemy. My sales are doing excellent from the huge client base that we've built and our profits rise steadily every month. The problem is that there are only so many customers that need UPC codes in the first place and when we sell them for pennies, they won't be coming back in the future for as much repeat business, because they stocked up on a huge bulk package and they are set for the next few years. While our business might be booming now, it will only get worse in the future if we keep going at this pace.

I can even assure you right now, that I will never lower my prices under yours, I will only match your prices. This problem has to stop between the 3 of us constantly lowering our prices. Here's what I'd like to do:

All 3 of us- US, YOU and [Competitor A] need to match the price that [Competitor B] has. The reason why they won't lower their price is because they would kill their sales from their existing customer database. I am also going to send this email to [Competitor A] regarding this as well. I'd say that 48 hours would be an acceptable amount of time to get these price changes completed for all 3 of us. The thing is though, we all need to agree to do this or it won't work. If [Competitor A] or you decide not to go through with the price change to match [Competitor B] pricing, then it won't work, we need all 3 of us to do this.

Reply and let me know if you are willing to do this or not. In the mean time I will contact [Competitor A] with the same message and ask him if he's okay with doing this. If this is acceptable by everyone, I will coordinate a date when the change must be completed so that everyone's on board.

If you do not decide you want to match the prices of [Competitor B], I will match your prices upon receiving your reply or within 48 hours, whichever comes first, this will make [Competitor A] obviously change his prices as well and we will all be at a lower price.

If you, or [Competitor A] cannot make it in this industry at the same matched price as my company, then you need to fix your sites, work on advertising, seo etc... I make profit, when you and [Competitor A] have lower prices that my company. We need to all work together on this to bring the prices back up to where they should be. Have you seen the prices on eBay? I mean this is ridiculous.

We all need to work together on keeping the prices where they should be. We also need to have identical UPC packages or this will not work either. I will forward this message to [Competitor A] now. Let me know if you are interested in doing this or not. Even though I am your competitor, you need to realize sometimes we have to work together shape up an industry.

10. The next day, on August 5, Mr. Peretz forwarded Mr. Alifraghis' message (*see* paragraph 9 above) to Competitor A, asking for Competitor A's thoughts on the proposal to raise and fix prices:

Good morning folks,

I received this last night[. . .]
would love to get your thoughts on this.

Best Regards,
Phil

11. On August 6, Mr. Peretz emailed Mr. Alifraghis and Competitor A. He stated that rather than raise price within the next 48 hours as proposed by Mr. Alifraghis, he would prefer to wait until Sunday, August 11, to raise his rates. Mr. Peretz added a second condition: he wanted Instant to raise its prices first:

We are open to what you suggest [. . .] and are willing to pull the trigger on this at midnight Sunday, August 11th.

Since I am in the Pacific Time zone, this will give me the chance to see what you have done BEFORE I go live with my updated prices.

I am not going to change my quantity breakdowns, but will meet those prices (I might stay higher in a few areas where it makes sense to me) but for all intent and purpose, the prices will be the same or higher. I will base these on [Competitor B's] prices as you suggest.

* * *

I will be ready to make this switch on Sunday Midnight and will look to you to lead the charge.

I also look forward to increasing our revenues.

12. Competitor A did not respond to the email from Mr. Alifraghis (*see* paragraph 9 above), and did not respond to the emails from Mr. Peretz (*see* paragraphs 10 and 11 above). Mr. Peretz had a telephone conversation with a representative of Competitor A.
13. On August 7, Mr. Peretz sent an email to Mr. Alifraghis and Competitor A trying to overcome what he perceived as an impasse in the planning to coordinate an increase in prices. Mr. Peretz explained that a lack of trust was leading all three of the firms to make less money:

It seems that we have hit an impasse.

After some conversation with [Competitor A], the issue of trust came up. It seems that none of us really trust one another and the issue of “price fixing” with someone who is nameless becomes a sticking point. We will not be doing this.

We do agree that prices need to rise, but [Competitor A] is fairly satisfied with destroying the market with his 10,000 barcodes for 1,000. He blames you [. . .] I blame him.

Like I said [. . .] none of us trust one another [. . .] we first need to resolve this 3-way issue of ethics.

In the meantime [. . .] we will all be making less money.

14. Mr. Alifraghis feared that Competitor A was not ready and willing to cooperate with the proposal to raise prices. On August 9, Mr. Alifraghis transmitted another message to Mr. Peretz via Nationwide's website, urging his competitors to see the benefits to all the companies of collusive pricing:

I personally think that [Competitor B's] prices are TOO low, but he is the highest priced out of all of us and it['s for a good reason, not only does he want higher revenues from his established customers, but he wants to keep the pricing higher for a reason.

All of our pricing should be something like this:

1 UPC - \$39
5 UPC's - \$ 159
10 UPC's - \$219
and so on[. . .]

The best part is that the above pricing is not even the top tier of how high it could be. Not only would this improve the quantity of overall but also the amount of revenue per sale.

* * *

If you want to make money now and in the future, we all need to raise our pricing.

* * *

I sincerely believe that [N]ationwide is an asset to this industry based on his dedication. I also commend [N]ationwide since I can sincerely see that he understands this logic. Since I know that [N]ationwide is willing to move forward with these price changes, I can see that he clearly understands the reasoning behind what [I]'m saying. Therefore this message is directly aimed at [Competitor A].

[Competitor A], if you cannot truly grasp my reasoning behind why everything [I]'ve said so far is logical and you are not willing to change your prices [. . .] then I understand that is a decision you can choose to make. However, since I believe you are incorrect about this decision, I do not have to continue business at the pace you decide to move.

I believe competition is good for every industry as things only improve within time. The problem is, your decisions have an effect on not only you, but also for me and others in the business. I am a man of my word and I reached out to you which means I take this business very seriously. You may not and that may be your problem but it doesn't have to be mine. I'm not in business to make pennies and [I]'m not a charity. I'm in business because [I]'m here for profit, not bad decisions.

This is what I will leave you with [. . .] You need to make a responsible and logical decision by changing your prices. . . . This is the final and last straw for me to play these games like this. If you decide you don't want to keep the

longevity of the business, I can easily put up 3-6 more sites and push everyone lower.

* * *

I respect everyone in this business and industry even though you are my competitors.

Mr. Peretz forwarded this August 9 message from Instant to Competitor A.

15. On August 11, Mr. Peretz emailed Mr. Alifraghis and Competitor A asking each of them to confirm their “intentions” with regard to the price-fixing scheme under discussion.
16. Mr. Alifraghis responded with another message transmitted through Nationwide’s website. Mr. Alifraghis’ message stated that Instant would increase prices only after receiving assurances from Competitor A:

When I thought we were ALL on board, I was willing to change my prices first so that you could see my intentions were obviously real which is why I contacted you both about this.

We’ll see what he says about changing ALL of his prices to match [Competitor B]. If he agrees to change ALL of his prices, I will still change mine first so that everyone can see my intentions are as good as my word.

You or [Competitor A] may not know me or trust me or even want to know me or trust me, but I can assure you that I’m a man of my word. If I make a promise, I will stick to it. From what I see, [Competitor A] doesn’t seem to take this business as seriously as everyone else, who knows maybe he will come around.

Until [Competitor A] agrees to change all of his prices, I will not change mine first. I know that YOU are on board with the price changes, but like I said it won’t work if just me and you change our prices. We’ll just be handing free sales to [Competitor A]. I am not interested in handing my sales to anyone, I am interested in bringing the prices back up where they need to be.

I don’t mind being the first to change my prices, but everyone needs to be in agreement.

17. On August 11, the price increase discussed by the barcode competitors in multiple email messages failed to materialize. Two days later, on August 13, Mr. Peretz wrote again to Instant and Competitor A. Mr. Peretz implored his competitors to continue their dialogue and to take the opportunity presented to raise prices. Mr. Peretz advised his competitors -- incorrectly -- that their joint actions would not constitute illegal collusion on price:

This is a dialog [. . .] a dialog is a very good thing and it seems, regardless of how I feel about each of you and how you feel about each other or me, this is an opportunity to increase profitability. All it takes is conversation and a leap of faith.

This is the opportunity that we have all wanted [. . .] to be able to increase our prices and to make some money.

I am higher than you fellows...the sign of good intent would be to meet my prices, then [. . .] over the next several months, increase our prices to where they should be. As we each observe where the other is at, we adjust our prices accordingly.

This is, however, a slippery slope, and could be misconstrued as collusion, which is illegal.

It is not illegal, however, for one of us to raise our prices and then have others follow.

Our discussion has NOT been price fixing, merely a courtesy that we will meet each other's prices [. . .] even if we have to raise them to do this.

18. When Mr. Peretz did not hear back from his competitors, he threatened to lower his prices to punish his rivals for not entering into a price-fixing conspiracy. Mr. Peretz's August 19 email to Instant and Competitor A stated:

Gentlemen,
Have we given up on this conversation?

This is the busiest time of year... and I am considering meeting and/or beating your prices. Would like to see what your thoughts are before I screw up our industry even more.

19. Mr. Alifraghis replied to Nationwide later that evening renewing his plea for Nationwide to obtain Competitor A's cooperation in the plan to raise prices. Mr. Alifraghis also threatened to lower prices to punish its rivals if they did not agree to set higher prices:

Nationwide, This is the problem [. . .] you are not accepting responsibility for YOUR own actions. You brought us here to this moment. YOU brought us here, if you would have stopped lowering your prices, YOU wouldn't be here in this situation. I can care less if you match my prices, that would be a smart move for you at this point. But if you go lower, I will continue to bring the entire industry to ground zero.

You going lower than me will do nothing for you, because I'll be right there or if [Competitor A] goes lower I'll still be right there matching both of you. You're still going to have the same problems.

* * *

I'll change my prices and put everyone out of business tomorrow. I'll put the prices so low, there will be no profits PERIOD.

* * *

I messaged you both to bring the prices up, not go down. [Competitor A] is your problem[. . .] [G]et him to agree to matching [Competitor B's] prices and I'll change mine before everyone [. . .] like I said.

* * *

If you both don't wanna raise your prices [. . .] just keep going lower and lower and lower. I don't mind, go either direction you decide I'll be right there matching the prices. . . . I'll surprise the both of you with the lowest prices you've ever seen. You are pushing me to put everyone out of business.

20. Mr. Peretz and Mr. Alifraghis continued to exchange communications about price levels into January 2014. On October 21, 2013, Mr. Alifraghis contacted Nationwide and complained that its prices were too low. Mr. Peretz responded by claiming that Instant was priced lower than Nationwide. On January 6, Mr. Alifraghis contacted Nationwide and complained that Competitor A and Competitor B had lowered their prices. Nationwide responded by stating that, "If you want to be colleagues, certainly we can," but that Mr. Alifraghis had shown a lack of respect for Nationwide's business.
21. The FTC served a subpoena on Nationwide in January 2014. In January 2014, Mr. Alifraghis became aware that the FTC was trying to serve him a subpoena as well.

VIOLATION CHARGED

22. As set forth in Paragraphs 8 through 21 above, Respondent invited his competitors to collude with Instant to raise prices for barcodes in violation of Section 5 of the Federal Trade Commission Act, as amended.

23. The acts, policies and practices of Respondent, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. Such acts, policies and practices of Respondent will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of August, 2014, issues its complaint against Respondent.

By the Commission.

Donald S. Clark
Secretary

SEAL: