‘Twombly’ and Parallel Conduct Claims in the Second Circuit

Even while the Supreme Court has clarified through Ashcroft v. Iqbal that the plausibility standard established in Bell Atlantic v. Twombly governs all civil pleadings subject to Rule 8(a)(2) of the Federal Rules of Civil Procedure, there remains uncertainty about how to apply that standard to antitrust parallel conduct claims, such as those alleged in Twombly itself. Nowhere could this uncertainty be more pronounced than within the U.S. Court of Appeals for the Second Circuit where both Iqbal and Twombly originated.

Parallel conduct cases involve allegations of conspiracy or agreement among competitors in violation of §1 of the Sherman Act based on inferences rather than direct evidence. Twombly recounted a history of skepticism toward these claims inasmuch as “parallel conduct or interdependence” is “consistent with conspiracy,” but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.

This hesitancy has meant that “[a]n antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict” and that “proof of a §1 conspiracy must include evidence tending to exclude the possibility of independent action.” In 1986, the Supreme Court announced that the “tending to exclude” requirement also applies to plaintiffs at the summary judgment stage.

Twombly presented the “antecedent question of what a plaintiff must plead in order to state a claim under §1 of the Sherman Act based on inferences rather than direct evidence.” This concern was raised by the Second Circuit in its 2007 opinion in LaFlamme v. Societe Air France, granting a Twombly dismissal even while relying on Starr’s interpretation of Twombly.

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‘Context’ Is Key

Starr concerned price-fixing allegations for digital music sold and distributed online. Defendants comprised 80 percent market share of the digital music market operated through joint ventures and licensing arrangements, allegedly used as vehicles for conspiratorial conduct. The complaint accused defendants of setting prices that were higher than independent labels and that were not reduced even as market costs diminished over time. Plaintiffs also alleged that defendants used most favored nations’ clauses and side agreements to execute and conceal anticompetitive conduct.

The district court granted the motion to dismiss on Twombly grounds, concluding that plaintiffs had not pled sufficient factual matter “rais[ing] a suggestion of a preceding agreement.” Determining that plaintiffs alleged ambiguous circumstances of conspiracy, none of which showed defendants to be acting against independent economic self-interest, the Court instructed that “Twombly... requires that they plead further facts tending to show conspiracy: ‘facts’ such as these that are just as consistent with independent action are insufficient as a matter of law.”

The Second Circuit reversed and held that the “tends to exclude” requirement does not apply at the motion to dismiss phase. It explained that the “enough factual matter” showing on a motion to dismiss is “considerably less” than what is needed for a plaintiff to show after discovery where it must be demonstrated that a defendant’s actions “tended to exclude independent self-interest conduct.” Rather, the Second Circuit posited, the “enough factual matter” must only demonstrate “a context that raises a suggestion of a preceding agreement.”

A concurring opinion, authored by Judge Jon O. Newman, emphasized the “context” concern even more explicitly by stating that the complaint was dismissed in Twombly because of “the context in which the defendants’ parallel conduct occurred.” According to Judge Newman, “the context in which the defendants’ alleged parallel conduct occurred, amplified by specific factual allegations making plausible an inference of agreement, suffices to render the allegation of a §1 violation sufficient to withstand a motion to dismiss.”

‘Factually Suggestive’

In the aftermath of Starr, the focus on a motion to dismiss is whether the pleaded facts demonstrate context of an agreement even absent showing a defendant’s conduct to be contrary to self-interest. LaFlamme offers the first example of a district court employing this approach.

In LaFlamme, plaintiffs alleged that international air carriers conspired to fix fuel surcharges on transatlantic passenger flights. Defendants belonged to a trade association and global alliances where they discussed and agreed upon rates and fares subject to antitrust immunity received from the United States Department of Transportation (DOT). The alleged agreement was a resolution adopted by the defendants as part of trade association activity but one that had...
not been approved of by the DOT. Defendants moved to dismiss under Twombly. After dismissing claims of direct conspiratorial behavior, the court analyzed the parallel conduct allegations in light of Starr.

Based on the majority and Judge Newman’s concurrence in Starr, LaFlamme emphasized that showing “context” on a motion to dismiss does not require alleging facts that tend to exclude “independent self-interested conduct as an explanation for defendants’ parallel behavior.”16 LaFlamme understood Starr to mean that Twombly instituted a different standard for motions to dismiss, which entails showing a “factually suggestive” context involving some sort of anomalous behavior on the part of the defendants.17 LaFlamme explained that Twombly identified the anomalous factual contexts that meet this standard. Excerpting footnote four in Twombly, LaFlamme wrote:

[The Twombly court catalogued various factual contexts which would create such an inference of conspiracy including: (i) parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by advance understanding among the parties; (ii) “conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement”; and (iii) “complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors and made for no other discernible reason.”19

While it was questionable whether defendants’ pricing decisions in LaFlamme were, in fact, parallel, the court dismissed the claims even assuming parallelism precisely because the behavior did not fall within the scenarios described in Twombly’s footnote four. The court found: “Unlike the examples enumerated in Twombly, defendants’ purportedly parallel behavior as alleged in the complaint is not of the type that ‘would probably not result from... independent responses to common stimuli’ nor does defendants’ imposition of surcharges comprise ‘complex and historically unprecedented changes in pricing structure...made for no other discernible reason.’”19

‘Twombly’s Footnote Four’

Although substantiating a plausible parallel conduct claim on a motion to dismiss may require less of a showing than that needed later in litigation, it is not clear that the scenarios in footnote four of Twombly absolve showing that a defendant’s conduct tends to exclude the possibility of independent self-interest. Indeed, the sources cited in footnote four do not appear to say as such.

For example, the first scenario in footnote four about parallel conduct “not result[ing] from chance, coincidence, independent responses to common stimuli or mere interdependence unaided by an advance understanding among the parties,” comes from Professors Areeda and Hovenkamp’s antitrust treatise. The quoted language is actually the definition the treatise ascribes to “unnatural parallelism,” for which “it will be necessary to infer from the circumstances that parallel action depends upon advance communication and understanding.”20

At one point, the treatise characterizes circumstances of unnatural parallelism as occurring when defendants must act against independent self-interest, stating: “[t]o restate this point in a formulation already explored in §1145 (2d), a conspiracy may be inferred if a defendant’s action would have been contrary to its independent self-interest in the absence of advance agreement.”21

Likewise, scenario two is taken from a section of a law review article about parallel conduct that considers ways to infer agreement.22 After reciting the facts of some well known cases, the article states that the language quoted by footnote four that “such conduct indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement.”23 In the very next sentence, the article makes clear that “[i]t is true that in each of these examples, the conduct may be characterized as contrary to the defendants’ independent economic interests.”24

Finally, Twombly footnote four identified a third scenario “agree[d]” to “by the parties in that [at] case” concerning “complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason” would support a plausible inference of conspiracy.25 This scenario certainly cannot be meant to refer to a “factually suggestive” context of conspiracy that does not concern the “tends to exclude” standard. The cited petitioner’s reply brief explicitly stated: “It is easy to point to circumstances that would ‘tend to exclude’ the possibility of unilateral action. Respondents propose one such example—‘complex and historically unprecedented changes in pricing.’”26

In short, whether or not the tends to exclude standard applies at the motion to dismiss phase, the sources cited in Twombly’s footnote four highlight that the footnote itself may not have been intended to address that point. Rather, it seems that footnote four simply identified “examples” of parallel conduct cases that have involved or could involve sufficient allegations of conspiracy without mentioning that these circumstances encompass conduct that was or would be against a defendant’s independent self-interest.

The Twombly standard for motions to dismiss remains what is written in the text of the opinion itself, that the complaint must contain “enough factual matter (taken as true) to suggest that an agreement was made” which entails alleging “enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”


2. Twombly, 550 U.S. at 554 (quoting 6 P. Areeda & H. Hovenkamp, Antitrust Law ¶1433a, p. 236 (2d ed. 2007)).


5. Twombly, 550 U.S. at 554-55.

6. Id. at 556.

7. 592 F.3d 314 (2d Cir. 2010).

8. No. 08 CV-1079 (KAM), 2010 WL 1292262 (EDNY April 5, 2010).


10. Id. at 445 (citing Matsushita, 475 U.S. at 588).

11. Starr, 592 F.3d at 321 and 325.

12. Id. at 325 (quoting 2 Areeda & Hovenkamp §307d1 (3d ed. 2007)).

13. Id. at 328 (Newman, J. Concurring) (emphasis in original).

14. Judge Newman justified the need for a concurrence that emphasized the context concern because of his “perplexity with Twombly being read to impede parallel conduct claims. He wrote: “I believe it would be a serious mistake to think that the court has categorically rejected the availability of an inference of an unlawful §1 agreement from parallel conduct.” Id. at 329.


16. LaFlamme at 11 (quoting Starr, 592 F.3d at 325). In making this point, LaFlamme itself was not technically accurate when stating that “a plaintiff need not allege facts that fully exclude independent self-interested conduct.” The relevant standard and the one that Starr declared inapplicable to motions to dismiss is one that tends to exclude independent self-interested conduct.

17. LaFlamme at 11.

18. Id.

19. Id. at 12 (citing Twombly, 550 U.S. 575 n.4).


21. Id. at 169.


23. Id. at 899.

24. Id.

25. Reply Brief for Petitioners in Bell Atlantic v. Twombly; at 12.