

PLEADING AN ANTITRUST CONSPIRACY IN A POST-*TWOMBLY* WORLD

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I. INTRODUCTION

Bell Atlantic Corp. v. Twombly is one of the most important cases to ever be decided interpreting the Federal Rules of Civil Procedure.² At its core, *Twombly* clarified what Federal Rule of Civil Procedure 8(a)(2) means when it asks for a “short and plain statement of the claim showing that the pleader is entitled to relief” and how a complaint survives a motion to dismiss for failure to state a claim upon which relief can be granted brought under Rule 12(b)(6). The Court’s new interpretation of these rules—described in detail below—abrogated its prior decision in *Conley v. Gibson*,³ which merely required the plaintiff to provide fair notice of the claim to the defendant.

Twombly’s significance is undeniable. According to Westlaw, as of July 31, 2015, it has been cited in a breathtaking 118,866 judicial opinions. But despite its near universal relevance, *Twombly* is of special import in antitrust cases—and, more specifically, conspiracy cases under Section 1 of the Sherman Act.⁴ *Twombly* itself was a Section 1 conspiracy case alleging an agreement between telephone companies to thwart competition by preventing upstart companies from expanding in the market and by agreeing not to compete with one another.⁵ The Court’s holding in *Twombly* was grounded largely in antitrust principles—so much so that it led some lower courts to initially conclude that the rule in *Twombly* applied *only* in conspiracy cases.⁶ The Supreme Court clarified *Twombly*’s broader application two years later in *Ashcroft v. Iqbal*—notably, over the dissent of Justice Souter, *Twombly*’s author.⁷

This article highlights principal decisions, circuit by circuit, discussing the standards for pleading an antitrust conspiracy under *Twombly*. Although some familiarity with *Twombly* is assumed, Section II contains a refresher of *Twombly*’s facts and holding. The heart of the article, Section III, discusses the various approaches the circuit courts have taken with regard to *Twombly*. Specifically, this section is broken down into conspiracies that are pleaded based on direct evidence (Section III.A) and—much more significantly—conspiracies that are pleaded based on circumstantial evidence (Section III.B). Given

1 The views expressed by the authors in this article are their own and not those of any of their clients or of Crowell & Moring LLP.

2 550 U.S. 544 (2007).

3 355 U.S. 41 (1957).

4 15 U.S.C. § 1.

5 550 U.S. at 550.

6 See, e.g., *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008) (“In sum, *Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim.”). This confusion was understandable. The opinion in *Twombly* expressly says, “We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.” 550 U.S. at 553 (emphasis added).

7 556 U.S. 662 (2009).

that the majority of antitrust conspiracies are pleaded with circumstantial evidence, the latter category is of distinct consequence. In this section, we strive to provide a survey of the most important cases from each circuit to assist practitioners trying to navigate this murky intersection between antitrust law and civil procedure. Finally, Section IV contains our concluding remarks on the subject and ties together the key areas of divergence that have emerged from this body of case law.

II. A BRIEF *TWOMBLY* CRASH COURSE

Although most readers of this article have almost certainly studied *Twombly* at one point, this section provides a review of *Twombly*'s facts and holding.

A. The Facts

Following the 1984 divestiture of AT&T's local telephone business, a system of regional local monopolies known as—among other things—Incumbent Local Exchange Carriers (ILECs) or “Baby Bells” was established.⁸ For a time, the ILECs maintained their regional monopolies for local telephone service but were excluded from the competitive market for long-distance services.⁹ This changed when the Telecommunications Act of 1996 (“the 1996 Act”) was passed. Among other things, the 1996 Act was meant to engender competition and “facilitate market entry” into the local telephone service markets.¹⁰ It attempted to accomplish this goal by requiring each ILEC to share its network with competitors—known as Competitive Local Exchange Carriers (CLECs).¹¹ To compensate the ILECs for this, the 1996 Act provided a path for the ILECs to enter the competitive long-distance market.¹²

In 2002, William Twombly and Lawrence Marcus filed a class-action complaint against a group of ILECs under Section 1 of the Sherman Act.¹³ The complaint alleged that the ILECs conspired to restrain trade in two ways: (1) by “engaging in parallel conduct” to thwart the upstart CLECs’ growth; and (2) by refraining from competing against each other.¹⁴ More specifically, as to the first alleged restraint of trade, the plaintiffs claimed that the ILECs suppressed competition by making unfair agreements with the CLECs to access ILEC networks, providing the CLECs with inferior connections to the ILEC networks, overcharging the CLECs, and billing the CLECs in a manner intended to sabotage their customer relationships.¹⁵ As to the second alleged restraint of trade, the plaintiffs alleged that the ILECs failed to pursue “attractive business opportunities” in each other’s markets. In support, the plaintiffs referred to a public statement made by the CEO of one ILEC noting that competing in another ILEC’s territory “might be a good way to turn a quick dollar but

8 *Twombly*, 550 U.S. at 549.

9 *Id.*

10 *Id.* (quoting *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999)).

11 *Id.* at 549–50.

12 *Id.* at 549.

13 *Id.* at 550.

14 *Id.* at 551.

15 *Id.* at 550–51.

that doesn't make it right."¹⁶ In summary, the complaint alleged that because there was no "meaningful competition" between the ILECs in each other's markets and because of the "parallel course of conduct that each engaged in to prevent competition from CLECs within their respective" markets, the defendants had entered into a conspiracy to restrain trade.¹⁷

A district judge in the Southern District of New York dismissed the complaint under Rule 12(b)(6) for failing to state a claim.¹⁸ The district court held that consciously parallel conduct, without more, did not state a claim under Section 1.¹⁹ The court also noted that the alleged behavior of the ILECs in resisting emerging competition was "fully explained" by each ILEC's economic self-interest in defending its territory.²⁰ The Second Circuit reversed. It held that the district court applied the incorrect standard for evaluating a motion to dismiss.²¹ The reversal was guided by the Second Circuit's view that a plaintiff need not plead "plus factors" in a complaint to support a conspiracy premised on parallel conduct.²² While the court noted that on summary judgment a plaintiff is required to come forward with such plus factors, at the pleading stage, "we are concerned only with whether the defendants have 'fair notice' of the claim, and the conspiracy that is alleged as part of the claim, against them."²³ The Supreme Court granted certiorari to review the Second Circuit's decision.

B. The Holding

The Court reversed the Second Circuit's ruling. It began by noting that "[t]his case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act."²⁴ The Court proceeded to discuss what Rule 8 requires a complaint to contain to survive a motion to dismiss. In a now oft-quoted portion interpreting Rules 8 and 12, the Court wrote, "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."²⁵ Under these general principles, the Court held that to successfully plead a Section 1 claim, a complaint must contain "enough factual matter (taken as true) to suggest that an agreement [to restrain trade] was made."²⁶ This standard, according to the Court, did not "impose a probability requirement at the pleading stage"; rather, the

16 *Id.* at 551 (internal quotation marks omitted).

17 *Id.*

18 *Id.* at 552.

19 *Id.*

20 *Id.*

21 *Id.* at 553.

22 *Id.*

23 *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 116 (2d Cir. 2005).

24 *Twombly*, 550 U.S. at 554-55.

25 *Id.* at 555-56 (citations and internal quotation marks omitted).

26 *Id.* at 556.

allegations must “plausibly suggest[]” that an agreement was made and not be “merely consistent with” an agreement.²⁷ In the context of agreements pleaded on the basis of parallel conduct, the Court forcefully stated that “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.”²⁸ Instead, the Court held that the allegations of parallel conduct “need[] some setting” or “further factual enhancement” to cross the line from possible to plausible.²⁹ The Court noted in a footnote, however, that it was not applying any heightened pleading standard or attempting to broaden the scope of Federal Rule of Civil Procedure 9 to antitrust cases or otherwise.³⁰

In reaching this conclusion, the Court abrogated its prior holding in *Conley v. Gibson*. In particular, the Court took issue with the language in *Conley* stating that, “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.”³¹ In *Twombly*, the Court discussed a history of misinterpreting this phrase as literal, which according to the Court would allow any conclusory statement of a claim to survive a motion to dismiss so long as the complaint left open any possibility of recovery.³² The Court was unwilling to accept this interpretation of *Conley*. Consequently, it held that this language from *Conley* was “best forgotten as an incomplete, negative gloss on an accepted pleading standard” and “earned its retirement.”³³

The Court then proceeded to apply these principles to the allegations in the plaintiffs’ complaint. At the very outset, the Court noted that this was a conspiracy pleaded on parallel conduct and not on allegations of direct agreement among the ILECs.³⁴ It acknowledged that there were a few “stray” references to a direct agreement, but dismissed these allegations as mere legal conclusions that need not be accepted as true by the Court.³⁵ Instead, the “nub” of the complaint as read by the Court was that the ILECs’ “parallel behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves” pleaded the requisite agreement.³⁶ The Court disagreed that the alleged parallel behavior sufficed to plead a plausible antitrust conspiracy.

First, the Court noted that the structure of the 1996 Act provided the ILECs with a powerful economic incentive to resist competition in their markets. Resisting competition, in the Court’s words, constituted “routine market conduct,” and was

27 *Id.* at 556-57.

28 *Id.*

29 *Id.* at 557.

30 *Id.* at 569 n.14

31 355 U.S. 41, 45-46 (1957) (emphasis added).

32 *Twombly*, 550 U.S. at 561.

33 *Id.* at 563.

34 *Id.* at 564.

35 *Id.* & n.9. For example, allegations that the ILECs engaged in a contract, combination or conspiracy and agreed not to compete with one another were mere the legal conclusions referenced by the Court. *Id.*

36 *Id.* at 565.

fully consistent with a “natural, unilateral reaction” to preserving market dominance.³⁷ This principle held particularly true under the 1996 Act, which imposed cumbersome requirements on the ILECs—most notably, forcing them to share their *infrastructure* and subsidize their own competition.³⁸ The Court was unwilling to infer an agreement among the defendants from “do[ing] what was only natural” in such circumstances.³⁹

Second, the Court was similarly unwilling to infer a conspiracy under the plaintiffs’ second theory. This was because the Court found an “obvious alternative explanation” for the failure of the ILECs to compete with one another: monopoly was the “norm” in telecommunications and the ILECs “were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword.”⁴⁰ Significantly, any ILEC that attempted to become a CLEC “faced nearly insurmountable barriers to profitability.”⁴¹ It therefore made no economic or practical sense for the ILECs to become CLECs in other contiguous markets.

In a nutshell, the Court was unwilling to infer a conspiracy where the plaintiffs had not “nudged their claims across the line from conceivable to plausible.”⁴² Two years after *Twombly*, in *Iqbal*, the Court reiterated that *Twombly* set the standard for “evaluating whether a complaint is sufficient to survive a motion to dismiss” in all cases—not just antitrust conspiracy cases.⁴³

III. PLEADING A SECTION 1 ANTITRUST CONSPIRACY POST-TWOMBLY

A claim under Section 1 of the Sherman Act has three elements: (1) a contract, combination, or conspiracy; (2) an unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.⁴⁴ Section 1 claims may involve a wide variety of restraints of trade, including those to fix prices, engage in a group boycott, allocate customers or markets, rig bids, and more.⁴⁵ This article focuses on only the first element, which was the element at issue in *Twombly*, and the element most frequently litigated in conspiracy cases. A “contract, combination, or conspiracy” may be proven by direct evidence of agreement or through circumstantial evidence permitting the inference of an agreement. As then-Judge Sotomayor wrote, “in the absence of direct ‘smoking gun’ evidence, a horizontal price-fixing agreement may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors such as defendants’ use of facilitating practices.”⁴⁶

37 *Id.* at 566.

38 *Id.*

39 *Id.*

40 *Id.* at 567–68.

41 *Id.*

42 *Id.* at 570.

43 556 U.S. 662, 669 (2009).

44 *Denny’s Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993).

45 *See DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (“[A]most any agreement between independent actors that restrains competition is potentially subject to examination for ‘reasonableness’ under section 1.”).

46 *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (Sotomayor, J.).

As stated in the Introduction, this section is broken down into two broader subsections: (1) pleading a conspiracy after *Twombly* based on direct evidence; and (2) pleading a conspiracy after *Twombly* based on circumstantial evidence. The difference is critical. Indeed, the Court *began* its analysis in *Twombly* by drawing this very distinction: “the complaint leaves no doubt that the plaintiffs rest their § 1 claim on *descriptions of parallel conduct* and not on any *independent allegation of actual agreement*.”⁴⁷ In this section, we first address what the standard is for the fortunate plaintiff who is able to plead a conspiracy based on an “independent allegation of actual agreement.” We then survey the circuit courts of appeal to discuss what a plaintiff in each circuit must allege to render a claim based on circumstantial evidence “plausible” under *Twombly*. As will be explored in depth, this varies—sometimes significantly—by circuit.

A. Direct Evidence

At the outset, “direct evidence” must be defined: “Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.”⁴⁸ Stated differently, direct evidence must “show an explicit understanding between the [alleged conspirators] to collude.”⁴⁹ Some courts have gone so far as to say that if there is any ambiguity in the evidence, the evidence is not “direct”; rather, true direct evidence is “tantamount to an acknowledgment of guilt.”⁵⁰ Perhaps most simply put, direct evidence is essentially a “smoking gun.”⁵¹ Examples of such evidence may come in the form of documents, meetings, and participant testimony.⁵² Given this narrow definition and the sophistication of modern businesses, it is not controversial to state that true direct evidence is a rarity.⁵³

Given the paucity of cases turning on direct evidence of conspiracy, there has not been much occasion for courts to consider the pleading standard for such cases under *Twombly*. Nevertheless, a few courts have opined on the issue. The Third Circuit led the pack, holding that “[i]f a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question whether an agreement has been adequately pled.”⁵⁴ But it is not enough to merely plead that the

47 550 U.S. at 564 (emphasis added).

48 *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999).

49 *Golden Bridge Tech., Inc. v. Motorola Inc.*, 547 F.3d 266, 272 (5th Cir. 2008).

50 *Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 318 (6th Cir. 2014) (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002) (Posner, J.)).

51 *Todd*, 275 F.3d at 198.

52 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1410a, at 69 (3d ed. 2010); see also *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 n.23 (3d Cir. 2010) (providing as an example of direct evidence of agreement “a document or conversation explicitly manifesting the existence of the agreement in question”).

53 *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990) (noting that “direct evidence will rarely be available”); *Milgram v. Loew’s, Inc.*, 192 F.2d 579, 583 (3d Cir. 1951) (“[I]t is rare indeed for a conspiracy to be proved by direct evidence.”); *Battle v. Lubrizol Corp.*, 673 F.2d 984, 992 (8th Cir. 1982) (“However, we think that it is most unlikely that antitrust plaintiffs, like any other plaintiffs alleging conspiracy, will have direct evidence.”).

54 *W. Penn. Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99–100 (3d Cir. 2010); accord *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 323–24 (“Allegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate.”).

defendants reached an agreement, which would constitute a mere legal conclusion: “After *Twombly*, if a plaintiff expects to rely exclusively on direct evidence of conspiracy, its complaint must plead ‘enough fact to raise a reasonable expectation that discovery will reveal’ this direct evidence.”⁵⁵ The Second Circuit appears to have agreed with the Third Circuit’s conclusion that direct allegations of agreement, such as a “recorded phone call in which two competitors agreed to fix prices,” will suffice to allege the agreement element.⁵⁶ Other district courts have also followed suit with these cases.⁵⁷ In short, there does not appear to be much disagreement on the issue: if a complaint pleads true direct evidence of conspiracy with sufficient factual support, this will suffice to plead the “agreement” element on a Section 1 claim.⁵⁸

An interesting issue arises concerning whether the rigors of *Twombly*’s “plausibility” requirement even apply in direct-evidence cases. On the one hand, the Fourth Circuit has noted that “*Twombly*’s requirements with respect to allegations of illegal parallel conduct are inapplicable where, as here, the concerted conduct is not a matter of inference or dispute.”⁵⁹ On the other hand, one district court judge expressly rejected the argument that the *Twombly* plausibility standard did not apply to their allegations of direct evidence.⁶⁰ That judge held that direct evidence must meet *Twombly*’s plausibility standard.⁶¹

There is a potentially useful parallel to be drawn here between the standard on summary judgment and the standard on a motion to dismiss that may shed some light on the direction in which the law is heading. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Supreme Court placed certain limits on the inferences that district courts may draw from ambiguous conduct in an antitrust case on summary judgment.⁶² But since then, several circuits have held “those limits on inferences do not apply to a plaintiff’s direct evidence of an unlawful agreement under § 1.”⁶³ And the Second Circuit joined “at least three” of its sister circuits in noting that “summary judgment is generally not appropriate where a plaintiff has produced direct, as opposed to circumstantial,

55 *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 324. In *Twombly*, the Supreme Court held that an allegation that the defendants engaged in a “contract, combination or conspiracy”—while directly alleging agreement—was a mere legal conclusion that did not suffice to directly plead an agreement. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565–65 & n.9 (2007).

56 *Mayor & City Council of Balt., Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013).

57 *E.g., Suture Exp., Inc. v. Cardinal Health 200, LLC*, 963 F. Supp. 2d 1212, 1223–24 (D. Kan. 2013) (“[B]ut allegations of direct evidence, that are adequately detailed, are sufficient alone.”). Disclosure: Crowell & Moring LLP was counsel for one of the defendants in this case.

58 It is worth noting that courts often reject a plaintiff’s characterization of its allegations as “direct evidence” and will proceed to analyze the allegations as “circumstantial” evidence. *See, e.g., Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225–30 (3d Cir. 2011); *Corr Wireless Commc’ns, L.L.C. v. AT & T, Inc.*, 893 F. Supp. 2d 789, 805 (N.D. Miss. 2012). Disclosure: Crowell & Moring LLP was counsel for one of the defendants in *Corr Wireless*.

59 *Robertson v. Sea Pines Real Estate Cos., Inc.*, 679 F.3d 278, 290 (4th Cir. 2012).

60 *LaFlamme v. Societe Air France*, 702 F. Supp. 2d 136 (E.D.N.Y. 2010).

61 *Id.*

62 475 U.S. 574, 587–88 (1986).

63 *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 219–20 (3d Cir. 2008).

evidence of an agreement to fix prices.”⁶⁴ It is likely that over time, courts will further explore the issue of whether a true “plausibility” analysis is required in direct-evidence cases at the pleading stage.

B. Circumstantial Evidence

As discussed, direct evidence of a conspiracy is exceedingly difficult to come by. For that reason, “[d]irect evidence of conspiracy is not a sine qua non. . . . Circumstantial evidence can establish an antitrust conspiracy.”⁶⁵ Courts have creatively riffed on the notion that circumstantial evidence will often be the only way to prove an antitrust conspiracy.⁶⁶

If direct evidence has been narrowly defined to be “tantamount to an acknowledgment of guilt,” circumstantial evidence has been described as “everything else *including* ambiguous statements.”⁶⁷ In order to prove a conspiracy, this nebulous and large body of potential circumstantial evidence—whatever form it may take—must show a “unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.”⁶⁸ As discussed above, at the motion to dismiss stage, *Twombly* requires that a plaintiff allege parallel conduct in addition to “some setting suggesting the agreement necessary to make out a § 1 claim”—a “further circumstance pointing toward a meeting of the minds.”⁶⁹ This standard raises a bevy of issues such as the weight afforded to conflicting inferences, what allegations must be accepted as true, the extent that allegations of “plus factors” are required, the level of factual specificity required, and more. Many circuit courts have written detailed opinions analyzing these issues in the context of a Section 1 claim after *Twombly*. They have not been completely uniform in answering the questions that inhere in conspiracies pleaded based on circumstantial evidence. Below, we address what we view as the most important opinions from circuits that have ruled on the issue.

1. First Circuit

The First Circuit had occasion to address the standard for pleading an antitrust conspiracy in *Evergreen Partnering Group, Inc. v. Pactiv Corp.*, a group boycott case.⁷⁰ Relying on *Twombly*, the district court dismissed Evergreen’s complaint and held that Evergreen had failed to plausibly allege that the Defendants had entered into an agreement to boycott it.

64 *In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51, 63–64 (2d Cir. 2012).

65 *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010); *see also U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13 (1973) (noting that “circumstantial evidence is the lifeblood of antitrust law”).

66 *See, e.g., Esco Corp. v. U.S.*, 340 F.2d 1000, 1007 (9th Cir. 1965) (“A knowing wink can mean more than words.”); *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1059 (5th Cir. 1985) (“It has been said that a conspiracy need not be hatched in the dark of the night by men in conical hats.”); *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010) (“Plaintiffs need not allege the existence of collusive communications in ‘smoke-filled rooms’ in order to state a § 1 Sherman Act claim.”).

67 *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002) (emphasis in original).

68 *Am. Tobacco Co. v. U.S.*, 328 U.S. 781, 810 (1946).

69 550 U.S. 544, 557 (2007).

70 720 F.3d 33 (1st Cir. 2013). Disclosure: At his prior firm, Jordan Ludwig was counsel for Evergreen in this appeal.

Specifically, the district court held that “as in *Twombly*, there are legitimate business reasons that can as easily explain defendants’ refusal to deal with Evergreen or to compete with one another for market share *as can* any insinuation of a conspiratorial agreement.”⁷¹

The First Circuit reversed the district court’s dismissal. It noted early in its analysis that the distinction between alleging “merely” parallel conduct and alleging a “plausible agreement” has “elicited considerable confusion among the lower courts as to how much of a ‘setting’ is required to sufficiently contextualize an agreement in the absence of direct evidence.”⁷² The court identified the “slow influx” of what it perceived as “unreasonably high pleading requirements at the earliest stages of antitrust litigation”—due, in its view, to citations to case law at the summary judgment and trial stages of litigation.⁷³ After summarizing the state of the law, the court concluded that under *Twombly* a plaintiff may not rest its complaint exclusively on parallel conduct alone; rather, it must allege the “general contours” of when an agreement was made and support those allegations with a “context that tends to make said agreement plausible.”⁷⁴ Explaining further, the First Circuit specified that a plaintiff *need not* allege plus factors at the pleading stage—although such allegations may assist a court in evaluating the plausibility of an agreement.⁷⁵ The court expressed sympathy to antitrust plaintiffs, stating that plus-factor evidence has become “increasingly complex[]” and would “not likely be available” at the pleading stage.⁷⁶ Notably, the First Circuit also held that on a motion to dismiss, the plaintiff’s allegations “need not make any unlawful agreement more likely than independent action nor need they rule out the possibility of independent action” because, in the court’s view, this would “frustrate the purpose of antitrust legislation and the policies informing it.”⁷⁷

Based on these principles, the First Circuit vacated the district court’s dismissal of Evergreen’s complaint. The court found that Evergreen’s allegations of agreement went “much further” than the allegations in *Twombly* and provided the necessary context to infer a plausible conspiracy.⁷⁸ The court enumerated a number of allegations that it believed differentiated Evergreen’s complaint from the complaint in *Twombly*.⁷⁹ In view of these allegations, the First Circuit concluded that the district court “improperly applied a heightened pleading standard” and “improperly occupied a factfinder role when it both chose among plausible alternative theories interpreting defendants’ conduct and adopted as true allegations made by defendants in weighing the plausibility of theories put forward by the parties.”⁸⁰ The court also took issue with the fact that the district court evaluated defendants’ proffered “legitimate business reasons” against the complaint’s

71 *Id.* at 42 (quoting *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 865 F. Supp. 2d 133, 140 (D. Mass. 2012)).

72 *Id.* at 43–44.

73 *Id.* at 44.

74 *Id.* at 46.

75 *Id.* at 46–47.

76 *Id.* at 47.

77 *Id.*

78 *Id.*

79 *See id.* at 48–49.

80 *Id.* at 50.

conflicting allegations.⁸¹ In summary, the First Circuit held that the district court had erred in acting as a factfinder, demanding detailed allegations, and weighing inferences in the defendants' favor.⁸²

2. Second Circuit

The Second Circuit has considered *Twombly* on several occasions. First, shortly after *Twombly* was decided, the Second Circuit affirmed the dismissal of the complaint in *In re Elevator Antitrust Litigation*.⁸³ The court noted that “[c]onsiderable uncertainty” surrounds the breadth of the Supreme Court’s recent decision in *Twombly*.⁸⁴ But this case did not contain any detailed analysis of *Twombly*. In the court’s own words, “we need not draw fine lines here.”⁸⁵ The court made short shrift of the plaintiffs’ claims, disregarding the conclusory allegations of agreement and rejecting the argument that parallel conduct allowed a conspiracy to be inferred.⁸⁶

The Second Circuit gave *Twombly* a far more fulsome analysis in two subsequent cases: *Starr v. Sony BMG Music Entertainment*,⁸⁷ a price-fixing case, and *Anderson News, L.L.C. v. American Media, Inc.*, a group boycott case.⁸⁸ Because the two cases set forth similar (and, in our view, consistent) principles, and because both reverse the district court’s dismissal of the plaintiff’s complaint under Rule 12(b)(6), we discuss only *Anderson News* because it is more recent, more detailed, and builds on the opinion in *Starr*.

Anderson News involved an alleged conspiracy by the plaintiff’s suppliers and business competitors to boycott the plaintiff and drive it out of business. In particular, Anderson—a wholesaler of single-copy magazines—complained that following its announcement of an upstream distribution surcharge, magazine publishers, distributors, and one of Anderson’s competitors conspired to cut off Anderson’s supply and drive it out of business.⁸⁹ The district court held that under *Twombly*, the conspiracy alleged by Anderson was facially implausible and dismissed the complaint.⁹⁰

The Second Circuit reversed the dismissal. The court’s analysis began by providing a detailed explication of *Twombly*’s mandates. Off the bat, the court wrote that it would not hold a plaintiff to summary judgment or trial standards on a motion to dismiss: “to present a plausible claim at the pleading stage, the plaintiff need not show that its

81 *Id.*

82 Recently, the district court dismissed Evergreen’s case on summary judgment. *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, No. 11-10807, 2015 WL 4205293 (D. Mass. July 10, 2015). Evergreen filed a notice of appeal.

83 502 F.3d 47 (2d Cir. 2007).

84 *Id.* at 50 (quoting *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007)).

85 *Id.*

86 *Id.* at 50-51.

87 592 F.3d 314 (2d Cir. 2010).

88 680 F.3d 162 (2d Cir. 2012).

89 *Id.* at 168-72.

90 *Id.* at 167.

allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages.”⁹¹ Second, the court noted that circumstantial allegations of conspiracy are often subject to divergent interpretations. But the court explained that district courts may not choose between these conflicting inferences on a Rule 12(b)(6) motion, even if it finds the defendant’s version of the events more plausible.⁹² Finally, the court emphasized that district courts must accept the factual allegations in the complaint as true—again, even if the veracity of the allegations seems doubtful.⁹³

According to the Second Circuit, the district court went astray in applying *Twombly*. Most notably, it held that the district court had improperly “cho[se] among plausible alternatives,” which it was not permitted to do on a motion to dismiss—rather, “[t]he question at the pleading stage is not whether there is a plausible alternative to the plaintiff’s theory; the question is whether there are sufficient factual allegations to make the complaint’s claim plausible.”⁹⁴ Second, the court stated that the district court had “essentially” made factual findings at the pleading stage.⁹⁵ Unlike the district court, the Second Circuit found Anderson’s complaint “vastly different from the complaint at issue in *Twombly*.”⁹⁶ Of note to the court was the fact that Anderson had alleged that all of the defendants ceased dealing with it in lockstep and included certain dates and individuals (from the defendant companies) who had met in the two-week period prior to defendants’ cancellation of Anderson.⁹⁷ The court also found persuasive Anderson’s allegations of certain statements the defendants had made to Anderson and a similarly situated wholesaler.⁹⁸

Because Anderson’s allegations were plausible, “the district court could not properly make an interpretive finding on a Rule 12(b)(6) motion.”⁹⁹ In sum, it appears that the Second Circuit is also of the view that district courts may not weigh competing plausible inferences and may not render factual findings on a motion to dismiss.¹⁰⁰

91 *Id.* at 184.

92 *Id.* at 185.

93 *Id.* One principle that we add from Starr not mentioned in *Anderson News* is that the Second Circuit has rejected the notion that *Twombly* requires that “a plaintiff identify the specific time, place, or person related to each conspiracy allegation” where the claim rests on parallel conduct. 592 F.3d 314, 325 (2d Cir. 2010).

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

95 *Id.* at 190.

96 *Id.* at 186-87.

97 *Id.* at 187.

98 *Id.* at 187-88.

99 *Id.*

100 In fact, the First Circuit relied heavily on *Anderson News* in deciding *Evergreen*. See *Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 720 F.3d 33, 45-46 (1st Cir. 2013). Finally, the district court recently dismissed Anderson’s case on summary judgment. *Anderson News, L.L.C. v. Am. Media, Inc.*, No. 09 Civ. 2227 PAC, 2015 WL 4991868 (S.D.N.Y. Aug. 20, 2015). Anderson has filed a notice of appeal.

3. Third Circuit

The Third Circuit has given in-depth consideration to pleading antitrust conspiracy based on circumstantial evidence on two occasions. The first was in *In re Insurance Brokerage Antitrust Litigation*—an alleged customer-allocation scheme among the defendant insurers.¹⁰¹

In *In re Insurance Brokerage Antitrust Litigation*, after summarizing Section 1's requirements and *Twombly*'s holding, the Third Circuit quickly raised an important issue—the relationship between the pleading standard and the summary judgment standard in antitrust cases. In answering that question, the court wrote, “We think *Twombly* aligns the pleading standard with the summary judgment standard in at least one important way: Plaintiffs relying on circumstantial evidence of an agreement must make a showing at both stages (with well-pled allegations and evidence of record, respectively) of ‘something more than merely parallel behavior,’ something ‘plausibly suggest[ive of] (not merely consistent with) agreement.’”¹⁰² The court went on to note that if obvious alternative explanations existed for the facts alleged, the allegations of conspiracy are not plausible.¹⁰³ In this sense, the court was limiting the range of permissible inferences that a district court can draw from ambiguous evidence—much like on summary judgment and at trial.¹⁰⁴ As far as plus-factor evidence was concerned, the Third Circuit held that plaintiffs relying on circumstantial evidence of conspiracy must allege facts that, if true, would establish at least one “plus factor.”¹⁰⁵ The court summarized its reading of *Twombly* as follows: “In sum, *Twombly* makes clear that a claim of conspiracy predicated on parallel conduct should be dismissed if ‘common economic experience,’ or the facts alleged in the complaint itself, show that independent self-interest is an ‘obvious alternative explanation’ for defendants’ common behavior.”¹⁰⁶ Based on this standard, the Third Circuit affirmed the district court’s dismissal of the plaintiffs’ antitrust claims except those involving bid rigging.¹⁰⁷

The Third Circuit differs from the First and Second Circuits in that the pleading standard is more closely aligned with the summary judgment standard. A plaintiff must allege facts supporting plus-factor evidence and must dispel obvious alternative explanations for the defendants’ conduct.

101 618 F.3d 300 (3d Cir. 2010). The Third Circuit again addressed *Twombly* in detail in *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212 (3d Cir. 2011). This opinion, however, relies very heavily on *In re Insurance Brokerage Litigation*, and a detailed discussion of *Burtch* would be cumulative. Consequently, we do not discuss that decision here.

102 618 F.3d at 322 (citations omitted); see also *Superior Offshore Int’l, Inc. v. Bristow Grp., Inc.*, 490 F. App’x 492, 499 (3d Cir. 2012) (same).

103 *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d at 322–23.

104 *Id.* at 361.

105 *Id.* at 323.

106 *Id.* at 326.

107 *Id.* at 336–37, 361–62. Because of the opinion’s factual complexity, we find it beyond the scope of this article to address those facts here.

4. Fourth Circuit

The Fourth Circuit’s most significant consideration of *Twombly* in a circumstantial pleaded conspiracy case comes in the unpublished decision of *Loren Data Corp. v. GXS, Inc.*¹⁰⁸ In that case, Loren Data alleged that GXS engaged in a concerted refusal to deal with it in the electronic data interchange industry.¹⁰⁹ The district court dismissed Loren Data’s complaint, holding that Loren Data had failed to allege specific facts to support a Section 1 conspiracy.¹¹⁰

The Fourth Circuit affirmed the district court’s dismissal. The court first reviewed *Twombly*’s principles and the general law under Section 1—that is, “when concerted conduct is a matter of inference, a plaintiff must include evidence that places the parallel conduct in ‘context that raises a suggestion of a preceding agreement’ as ‘distinct from identical, independent action.’”¹¹¹ It concluded that Loren Data had failed to provide any allegations suggesting circumstantial evidence of a conspiracy. Citing to the Supreme Court’s decision in *Matsushita*, the Fourth Circuit stated that the “reviewing court must ‘take account of the absence of a plausible motive to enter into the alleged . . . conspiracy.’”¹¹² The court went on to hold that if the alleged conspirators did not have a rational, economic motive to conspire, and their conduct was consistent with equally plausible lawful explanations, the court could not infer a conspiracy.¹¹³ For this reason, the court concluded, the complaint’s allegations “must tend to exclude the possibility that the alleged co-conspirators acted independently, and the alleged conspiracy must make practical, economic sense.”¹¹⁴ Under this standard, the Fourth Circuit concluded that Loren Data’s allegations contradicted any inference of conspiracy. In particular, the Fourth Circuit found that the allegations “reflect[ed] GXS’s unilateral business judgment as to the parameters under which it was willing to deal with Loren Data” and the conspiracy as alleged “simply ma[de] no practical economic sense.”¹¹⁵

In sum, assuming published decisions in the Fourth Circuit follow *Loren Data*, a plaintiff in the Fourth Circuit must plead a plausible economic motive to conspire and the allegations must tend to exclude the possibility that the conduct was unilateral—similar to summary judgment standards.

108 501 F. App’x 275 (4th Cir. 2012). The Fourth Circuit also considered *Twombly* in *Robertson v. Sea Pines Real Estate Companies*, but that case, which is cited above, rested on direct evidence. See 679 F.3d 278, 289 (4th Cir. 2012) (“Circumstantial evidence sufficient to ‘suggest[] a preceding agreement,’ is thus superfluous in light of the direct evidence in the by-laws of the agreement itself.” (citation omitted)).

109 *Loren Data*, 501 F. App’x at 277.

110 *Id.* at 278.

111 *Id.* at 281 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

112 *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986)).

113 *Id.* at 280–281.

114 *Id.* at 281.

115 *Id.*

5. Fifth Circuit

The Fifth Circuit has not issued a detailed opinion on *Twombly* in the context of pleading an antitrust conspiracy. Nevertheless, the Fifth Circuit was faced with a *Twombly* issue in an antitrust conspiracy in *Marucci Sports, L.L.C. v. National Collegiate Athletic Association*, which provides some—but not detailed—guidance.¹¹⁶ In *Marucci Sports*, the plaintiff alleged that the NCAA and the National Federation of State High School Associations (“NFHS”) conspired to design the standard for non-wood baseball bats—known as the BBCOR standard—to favor incumbent competitors and exclude new market entrants such as Marucci.¹¹⁷ After several of Marucci’s bats failed compliance testing on multiple occasions, it sued under Section 1, and the district court dismissed its case on Rule 12 motion to dismiss.¹¹⁸

The Fifth Circuit stated outright that “[a]ntitrust claims do not necessitate a higher pleading standard and a plaintiff need only plead enough facts to state a claim to relief that is plausible on its face.”¹¹⁹ Nevertheless, the court affirmed the district court’s dismissal. In the court’s view, the plaintiff needed to plead facts showing that the alleged concerted action resulted from an agreement to unreasonably restrain trade.¹²⁰ While Marucci alleged that the NCAA and NFHS had engaged in a conspiracy to enforce the BBCOR standard to exclude new market entrants and favor the incumbent manufacturers, the Fifth Circuit dismissed these allegations as insufficient.¹²¹ The court noted that the complaint had failed to allege any “specific facts” demonstrating the intent to engage in a conspiracy.¹²² Without these specific facts, the Fifth Circuit was unwilling to differentiate Marucci’s case from *Twombly*, and found that the “various conclusory allegations . . . support one of many inferential possibilities.”¹²³ *Marucci Sports* provides some guidance, but not a detailed blueprint for district courts and practitioners evaluating an antitrust conspiracy.¹²⁴

6. Sixth Circuit

The Sixth Circuit has perhaps given more detailed consideration to the *Twombly* standard than any other; it has written detailed opinions on *Twombly* in the antitrust context on four occasions. These opinions have arguably resulted in an intracircuit split of authority. Rather than discussing each of these cases in detail, we instead summarize the most important rules that each announced.

116 751 F.3d 368 (5th Cir. 2014).

117 *Id.* at 372.

118 *Id.* at 372-73.

119 *Id.* at 373 (citations and internal quotation marks omitted).

120 *Id.* at 375.

121 *Id.*

122 *Id.* (emphasis in original).

123 *Id.*

124 A more extensive *Twombly* analysis in the Fifth Circuit is found in the case of *Lormand v. US Uniwired, Inc.*, 565 F.3d 228 (5th Cir. 2009)—a securities fraud case. In *Lormand*, the Fifth Circuit held, among other things, that when evaluating the element of loss causation in a securities fraud case, “we are not authorized or required to determine whether the plaintiff’s plausible inference of loss causation is equally or more plausible than other competing inferences.” *Id.* at 266.

The Sixth Circuit first confronted *Twombly* in a Section 1 case in *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield*, a group boycott case.¹²⁵ Most significantly, the court in *Total Benefits* held that a plaintiff cannot offer “bare allegations” of agreement without any reference to the “who, what, where, when, how or why” of the alleged conspiracy.¹²⁶ The Sixth Circuit faulted the plaintiff for failing to allege when each defendant joined the conspiracy, where or how each defendant joined the conspiracy, and for what purpose they joined the conspiracy.¹²⁷ Similarly, the court criticized the plaintiff for failing to identify the individuals who allegedly made certain statements that facilitated the alleged boycott and for not explaining where or when the conspiracy occurred during the alleged conspiracy period.¹²⁸ For these reasons, the Sixth Circuit affirmed the dismissal of the plaintiff’s complaint.

The court revisited *Twombly* the following year in *In re Travel Agent Commission Antitrust Litigation*, a case brought by a putative class of travel agents who alleged that the defendant airlines conspired to reduce, cap, and eliminate the payment of commissions to plaintiffs.¹²⁹ According to the Sixth Circuit, which affirmed the dismissal of the plaintiffs’ complaint, “The *Twombly* decision provides an additional safeguard against the risk of ‘false inferences from identical behavior’ at an earlier stage of the trial sequence—the pleading stage.”¹³⁰ Of greatest note, relying on *Matsushita*, the court wrote that “the plausibility of plaintiffs’ conspiracy claim is inversely correlated to the magnitude of defendants’ economic self-interest.”¹³¹ Based on this principle and certain allegations and evidence, the Sixth Circuit concluded that “it is just as likely that American’s 2001 commission cap was an effort to reduce its internal commission costs, with the ancillary hope that its competitors would follow its lead” as the alleged conspiracy.¹³² Finally, the court found that the plaintiff’s allegations lacked the necessary detail to “nudge” the claim from conceivable to plausible.¹³³ For instance, the plaintiffs failed to allege any “specific meetings” involving the remaining defendants other than trade association meetings, which the Sixth Circuit held was insufficient under *Twombly*.¹³⁴ Despite an impassioned dissent from Judge Merritt—who wrote that “district courts across the country have dismissed a large majority of Sherman Act claims on the pleadings misinterpreting the standards from *Twombly* and *Iqbal*, thereby slowly eviscerating antitrust enforcement under the Sherman Act¹³⁵—two judges voted to affirm the district court’s dismissal.

125 552 F.3d 430 (6th Cir. 2008).

126 *Id.* at 437.

127 *Id.* at 436.

128 *Id.*

129 583 F.3d 896 (6th Cir. 2009).

130 *Id.* at 904.

131 *Id.* at 909.

132 *Id.* at 910.

133 *Id.*

134 *Id.* at 910–11.

135 *Id.* at 914 (Merritt, J., dissenting).

One year later, in *Watson Carpet & Floor Covering, Inc. v. Mohawk Industries, Inc.*, the Sixth Circuit again considered the *Twombly* standard in another group boycott case.¹³⁶ But unlike in the prior two cases, this time, the Sixth Circuit reversed the district court’s dismissal in an opinion arguably premised on a different interpretation of *Twombly*. Most importantly here, the Sixth Circuit was unwilling to adopt the inference-weighting approach used in prior cases. The district court found that the defendant had offered “an eminently plausible reason for the refusal to deal”—namely that the plaintiff had previously sued the defendant.¹³⁷ On review, however, the Sixth Circuit rejected this line of reasoning. It wrote, “Often, defendants’ conduct has several plausible explanations. Ferreting out the most likely reason for the defendants’ actions is not appropriate at the pleading stage. In this case, the plausibility of Watson Carpet’s litigiousness as a reason for the refusals to sell carpet does not render all other reasons implausible.”¹³⁸ In sum, unlike in *In re Travel Agent Commission Antitrust Litigation*, this panel of judges was unwilling to weigh—or “ferret out”—the various inferences that arose from the defendant’s conduct.

Finally, the Sixth Circuit’s most recent *Twombly* opinion was *Erie County, Ohio v. Morton Salt, Inc.*¹³⁹ Even though the Sixth Circuit ultimately affirmed dismissal of the plaintiff’s complaint, it criticized the district court for “not clearly distinguish[ing] between the antitrust standards applicable on summary judgment and those that apply to a motion to dismiss.”¹⁴⁰ The appellate court clarified two important points. First, it noted that “at the pleading stage, the plaintiff is not required to allege facts showing that an unlawful agreement is more likely than lawful parallel conduct.”¹⁴¹ In the court’s view, all that a plaintiff must plead are facts sufficient to “raise a plausible inference of an unlawful agreement to restrain trade.”¹⁴² Second, the court held that, “in order to state a Section One claim, a plaintiff need not allege a fact pattern that ‘tends to exclude the possibility’ of lawful, independent conduct.”¹⁴³ The court noted that this language was drawn from summary judgment and trial decisions and that in *Twombly*, the Supreme Court “nowhere held that the same standard applies on a motion to dismiss.”¹⁴⁴ And in the panel’s view, “[i]f a plaintiff were required to allege facts excluding the possibility of lawful conduct, almost no private plaintiff’s complaint could state a Section One claim” because “a plaintiff is very unlikely to have factual information that would exclude the possibility of non-conspiratorial explanations *before* discovery.”¹⁴⁵ Despite this seemingly more expansive pleading standard, the Sixth Circuit affirmed the dismissal of the plaintiff’s complaint. It first found that allegations of suspicious bidding patterns

136 648 F.3d 452 (6th Cir. 2011).

137 *Id.* at 458.

138 *Id.*

139 702 F.3d 860 (6th Cir. 2012).

140 *Id.* at 868.

141 *Id.*

142 *Id.* at 869.

143 *Id.*

144 *Id.*

145 *Id.*

mirrored the “failure-to-compete claim that *Twombly* rejected.”¹⁴⁶ It then rejected the plaintiff’s sham-bidding claim in view of a unique “Buy Ohio” law; according to the court, the plaintiff’s sham-bidding theory “makes sense only in a market subject to the lockout interpretation of the Buy Ohio law.”¹⁴⁷

As these four cases demonstrate, there appears to be some disagreement within the Sixth Circuit regarding what a plaintiff is required to plead under *Twombly* and how far a district court may go in ruling on a motion to dismiss.

7. Seventh Circuit

The Seventh Circuit considered the *Twombly* pleading standing in the context of an antitrust conspiracy in *In re Text Messaging Antitrust Litigation*—an opinion written by Judge Posner.¹⁴⁸ *Text Messaging* was an interlocutory appeal from the denial of the defendants’ motion to dismiss in a series of cases alleging a conspiracy to fix the prices of text messaging services. In deciding to accept the interlocutory appeal, Judge Posner wrote that, “Pleading standards in federal litigation are in ferment after *Twombly* and *Iqbal*, and therefore an appeal seeking a clarifying decision that might head off protracted litigation is within the scope of section 1292(b).”¹⁴⁹ The Seventh Circuit affirmed the district court’s denial of the defendants’ motion to dismiss and provided its explanation of the *Twombly* pleading standard.

The court endeavored to explain the difference between “plausibility,” “probability,” and “possibility,” as used in *Twombly*. In the court’s view, these terms were all “a little unclear” because they all overlap.¹⁵⁰ Judge Posner wrote, “Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as ‘preponderance of the evidence’ connote.”¹⁵¹

Under this standard, the Seventh Circuit concluded that the plaintiffs had alleged a plausible conspiracy. Of note to the court was the fact that the plaintiffs had alleged a mix of parallel behaviors, details of the industry structure, and certain industry practices (such as the exchange of price information at trade association meetings), that all “facilitate collusion.”¹⁵² The court similarly found persuasive allegations that the defendants allegedly changed their pricing structures and increased their prices simultaneously in the face of falling costs—behavior that the court found “anomalous” under economic principles.¹⁵³ Finally, the court regarded all of these allegations as circumstantial evidence,

146 *Id.* at 870.

147 *Id.* at 872.

148 630 F.3d 622 (7th Cir. 2010).

149 *Id.* at 627.

150 *Id.* at 629.

151 *Id.*

152 *Id.* at 627–28.

153 *Id.* at 628.

and noted its limited role on a motion to dismiss in evaluating such evidence: “We need not decide whether the circumstantial evidence that we have summarized is sufficient to *compel* an inference of conspiracy; the case is just at the complaint stage and the test for whether to dismiss a case at that stage turns on the complaint’s ‘plausibility.’”¹⁵⁴ And, in fact, when confronted with a greater record on summary judgment, the Seventh Circuit recently affirmed the dismissal of this case.¹⁵⁵

8. Eighth Circuit

The Eighth Circuit has not issued a highly detailed opinion analyzing *Twombly* in the antitrust sphere but has just recently issued two opinions touching on the subject. First, in *Robbins v. Becker*, the court affirmed the dismissal of a complaint alleging a Section 1 conspiracy as one of many claims, but this opinion contains only a cursory analysis of *Twombly*.¹⁵⁶ Just over two weeks later, the court issued a significantly more in-depth opinion in *Insulate SB, Inc. v. Advanced Finishing Systems, Inc.*¹⁵⁷ This opinion affirmed the dismissal of a Section 1 case alleging that a manufacturer and its distributors violated Section 1 through “agreements in restraint of trade” to “reduce competition.”¹⁵⁸ More specifically, the plaintiff complained that the manufacturer’s alleged threats in two letters not to deal with any of its distributors that carried a competitor’s product violated Section 1.¹⁵⁹ The Eighth Circuit was not persuaded.

In reviewing the legal standard, the court wrote, “Given the unusually high cost of discovery in antitrust cases, the limited success of judicial supervision in checking discovery abuse, and the threat that discovery expense will push cost-conscious defendants to settle even anemic cases, the federal courts have been reasonably aggressive in weeding out meritless antitrust claims at the pleading stage.”¹⁶⁰ With this lens, the court proceeded to first analyze the alleged “written” exclusive agreements. The court concluded that the complaint merely “contain[ed] several conclusory references to a contract” but “the alleged facts do not suggest [the manufacturer] entered into explicit exclusivity agreements with any distributors.”¹⁶¹ The court rejected the notion that the manufacturer’s unilateral announcement that it would not sell to distributors who also sold a competitor’s products—an announcement made after it signed the distribution agreements—could “transform a prior innocuous distributor agreement into a contract for exclusive dealing” to support an inference of an agreement not to compete.¹⁶² Second, the court considered the plaintiff’s claim that the manufacturer’s letters and the distributors’ compliance with those letters’ suggestions could circumstantially evidence a conspiracy. It rejected the plaintiff’s “vague references to concerted action” among

154 *Id.* at 629.

155 *In re Text Messaging Antitrust Litig.*, 782 F.3d 867 (7th Cir. 2015).

156 No. 14-1435, 2015 WL 4508749 (8th Cir. July 27, 2015).

157 No. 14-2451, 2015 WL 4760287 (8th Cir. Aug. 13, 2015).

158 *Id.* at *2.

159 *Id.*

160 *Id.* at *3 (citations and internal quotation marks omitted).

161 *Id.* at *4.

162 *Id.*

certain distributors for failing to “provide any factual allegations beyond the bare conclusion that there was a conspiracy.”¹⁶³ The court found lacking allegations such as “when the agreements occurred” and “which of the distributors named as defendants—if any—are among the ‘key distributors’ who were party to the agreements.”¹⁶⁴ In sum, the Eighth Circuit concluded that repeated allegations that an “unnamed set of distributors generally conspired to restrain trade,” did not provide the “‘factual enhancement’ necessary to move [the] complaint forward.”¹⁶⁵

Neither *Robbins* nor *Insulate* make it entirely clear where the Eighth Circuit lands on the post-*Twombly* spectrum. It bears noting that in another context, the Eighth Circuit “refuse[d] . . . to incorporate some general and formal level of evidentiary proof into the ‘plausibility’ requirement of *Iqbal* and *Twombly*.”¹⁶⁶ Given some of the language in *Insulate*, it is possible that the Eighth Circuit will demand a higher degree of factual specificity from antitrust plaintiffs.

9. Ninth Circuit

The Ninth Circuit has issued a series of rulings—two within the past few months—that when read in conjunction, help define the pleading standard in the Ninth Circuit. The first of these cases is *Kendall v. Visa U.S.A., Inc.*, a Section 1 case decided shortly after *Twombly* that alleged a conspiracy to set the fees charged to merchants for the payment of credit card sales.¹⁶⁷ In *Kendall*, the Ninth Circuit made clear that after *Twombly*, a plaintiff must plead “not just ultimate facts (such as a conspiracy), but evidentiary facts.”¹⁶⁸ According to the court, “[a] bare allegation of a conspiracy is almost impossible to defend against.”¹⁶⁹ Although the court does not spend much time analyzing *Twombly*, it affirmed the dismissal of the plaintiff’s complaint because the plaintiff had failed to allege any such evidentiary facts. Notably, the court wrote, “the complaint does not answer the basic questions: who, did what, to whom (or with whom), where, and when?”¹⁷⁰ At bottom, the court found that the plaintiffs had alleged no more than parallel conduct, which is insufficient under *Twombly*.¹⁷¹

Very recently, the Ninth Circuit had occasion to again consider the *Twombly* standard in *name.space, Inc. v. Internet Corp. for Assigned Names and Numbers*.¹⁷² And again, it did not thoroughly analyze the appropriate standard for pleading an antitrust conspiracy. But, in reliance on *Kendall*, *Matsushita*, and other Ninth Circuit case law interpreting *Twombly*, the court affirmed the Rule 12(b)(6) dismissal of the plaintiff’s complaint. Most importantly here, the Ninth Circuit held that “ICANN’s decision-making was fully

163 *Id.* at *6.

164 *Id.*

165 *Id.* at *7 (quoting *Twombly*, 550 U.S. at 557).

166 *Whitney v. Guys, Inc.*, 700 F.3d 1118, 1128 (8th Cir. 2012).

167 518 F.3d 1042 (9th Cir. 2008).

168 *Id.* at 1047.

169 *Id.*

170 *Id.* at 1048.

171 *Id.*

172 No. 13-55553, 2015 WL 4591897 (9th Cir. July 31, 2015).

consistent” with rational and lawful business behavior.¹⁷³ Specifically, the court cited its prior decision in a civil RICO case standing for the proposition that “courts *must* consider obvious alternative explanations for a defendant’s behavior when analyzing plausibility.”¹⁷⁴ Under these principles, the Ninth Circuit was unwilling to “infer an illegal agreement with outside interests simply because ICANN’s rational business decisions favor the status quo rather than name.space’s untested alternative business model.”¹⁷⁵

Most recently, the Ninth Circuit affirmed the district court’s Rule 12(b)(6) dismissal in *In re Musical Instruments and Equipment Antitrust Litigation*.¹⁷⁶ This case alleged a “hub-and-spoke” conspiracy between a musical-instrument retailer and several musical-instrument manufacturers.¹⁷⁷ After addressing the law behind such conspiracies, the court noted that it was principally concerned with the alleged horizontal agreements between the manufacturers—that is, the “rim” of the conspiracy.¹⁷⁸

The Ninth Circuit began its plausibility analysis by noting that parallel conduct, “such as competitors adopting similar policies around the same time in response to similar market conditions[] may constitute circumstantial evidence of anticompetitive behavior.”¹⁷⁹ But, the court noted, “*Twombly* takes into account the economic reality that mere parallel conduct is as consistent with agreement among competitors as it is with independent conduct in an interdependent market.”¹⁸⁰ Explaining further, the court wrote, “In an interdependent market, companies base their actions in part on the anticipated reactions of their competitors. And because of this mutual awareness, two firms may arrive at identical decisions independently, as they are cognizant of—and reacting to—similar market pressures.”¹⁸¹ According to the court, certain plus factors—that is, “economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action”—can place allegations of parallel conduct in a context suggesting agreement.¹⁸²

173 *Id.* at *4.

174 *Id.* (citing *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014)) (emphasis added). Before *Eclectic Properties*, the Ninth Circuit had held similarly in a prior securities case explaining *Twombly* and *Iqbal*: “When faced with two possible explanations, only one of which can be true and only one which results in liability, plaintiffs cannot offer allegations that are ‘merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, on order to render plaintiffs’ allegations plausible within the meaning of *Iqbal* and *Twombly*.” *In re Century Aluminum Co. Securities Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013).

175 *Id.* at *5.

176 No. 12-56674, 2015 WL 5010644 (9th Cir. Aug. 25, 2015). Disclosure: Crowell & Moring LLP was counsel for one of the defendants in this litigation.

177 *Id.* at *4.

178 *Id.* at *3-*4.

179 *Id.* at *5.

180 *Id.*

181 *Id.*

182 *Id.*

The plaintiffs attempted to allege six different plus factors: (1) a common motive to conspire; (2) actions against self-interest; (3) simultaneous adoption of a policy; (4) an FTC investigation and decree; (5) participation in a trade association; and (6) rising retail prices as the number of units sold declined.¹⁸³ Relying on *Twombly*, the court rejected each in turn. For instance, it held that a common motive to collude “does not suggest an agreement” because “alleging ‘common motive to conspire’ simply restates that a market is interdependent (*i.e.*, that the profitability of a firm’s decisions regarding pricing depends on competitors’ reactions).”¹⁸⁴ Likewise, in considering the important “action against self-interest” plus factor, the court wrote that, “[a]n action that would seem against self-interest in a competitive market may just as well reflect market interdependence giving rise to conscious parallelism.”¹⁸⁵ In the court’s view, while “[m]ore extreme action against self-interest, however, may suggest prior agreement—for example, where individual action would be so perilous in the absence of advance agreement,” the plaintiff’s complaint did not rise to this standard.¹⁸⁶ The court’s analysis of the remaining alleged plus factors is similar.¹⁸⁷ In summary, it concluded that while the plaintiffs provided a “context” for their allegations, this context did not “plausibly suggest [the defendants] entered into illegal horizontal agreements.”¹⁸⁸

Based on its rulings in *Kendall*, *name.space*, and *In re Musical Instruments*, it appears that the Ninth Circuit requires a plaintiff to plead the “who, what, where, and when” of the alleged conspiracy and must allege facts that tend to exclude the possibility of independent action.¹⁸⁹ As the Ninth Circuit noted in its first detailed explication of *Twombly*, the Supreme Court “made clear in *Twombly* that it was concerned that lenient pleading standards facilitated abusive antitrust litigation.”¹⁹⁰ All indications thus far—in antitrust and other complex business cases—seem to indicate that the Ninth Circuit has taken a rigid view of *Twombly* and elevated the pleading bar for plaintiffs.¹⁹¹

10. Tenth Circuit

The Tenth Circuit does not appear to have addressed *Twombly* in the context of pleading an antitrust conspiracy. In one case, the court quickly affirmed the dismissal of the plaintiff’s “conspiracy” claim—the plaintiff’s complaint did not even mention Section 1—but there is no real analysis of that claim other than noting “there is simply nothing more

183 *Id.* at *6.

184 *Id.*

185 *Id.*

186 *Id.*

187 *See id.* at *7-8.

188 *Id.* at *8.

189 *See also PharmaRX Pharm., Inc. v. GE Healthcare, Inc.*, 596 F. App’x 580, 581 (9th Cir. 2015) (relying on *Kendall* and affirming dismissal of the plaintiff’s antitrust complaint where the plaintiff failed to plead “who, did what, to whom (or with whom), where, and when” and where the conduct just as easily suggested “rational, legal business behavior by the defendants”).

190 *Starr v. Baca*, 652 F.3d 1202, 1213 (9th Cir. 2011).

191 *But see Stetson v. West Pub. Corp.*, 457 F. App’x 705 (9th Cir. 2011) (reversing dismissal of complaint where the complaint “sets forth detailed facts about the dealings” between the defendants).

than conclusory allegations that a civil conspiracy exists, and this is not enough to satisfy the requirement of ‘concerted action.’”¹⁹² The Tenth Circuit has, however, given detailed consideration to *Twombly* and *Iqbal* in other contexts. For example, in a § 1983 opinion, the court suggested that in “complex cases against multiple defendants,” the *Twombly* standard “may have greater bite.”¹⁹³ Antitrust conspiracy cases, too, are frequently complex and are against multiple defendants. It remains to be seen whether the Tenth Circuit will import this apparent sliding-scale analysis to the antitrust domain.

11. Eleventh Circuit

The Eleventh Circuit was confronted with *Twombly* in a Section 1 case in *Jacobs v. Tempur-Pedic International, Inc.*¹⁹⁴ The plaintiffs in *Jacobs* alleged that Tempur-Pedic engaged in two restraints of trade: enforcing vertical resale price maintenance agreements and engaging in horizontal price fixing with its distributors.¹⁹⁵ The district court dismissed the complaint for failing to state a claim, and the Eleventh Circuit affirmed. After summarizing *Twombly* and *Iqbal*, the court wrote, “after determining whether the complaint’s averments are more than bare legal conclusions, we examine the complaint for a sufficient quantum of allegations to plausibly suggest that TPX agreed with its distributors to restrain trade in violation of the Sherman Act.”¹⁹⁶ The court concluded that *Jacobs* had failed to set forth this “sufficient quantum of allegations” for either Section 1 theory. Here, we address only the discussion of the alleged horizontal price-fixing conspiracy.¹⁹⁷

The plaintiffs alleged that in employing a dual distribution system where it would sell its mattresses through authorized distributors and its own website, Tempur-Pedic had engaged in a horizontal price-fixing conspiracy with its distributors.¹⁹⁸ The court noted that there were two possible inferences to be drawn from this allegation—one that favored *Jacobs* and one that favored Tempur-Pedic.

The court adopted the inference that favored Tempur-Pedic. Significantly, it reasoned that “*Jacobs* had the burden to present allegations showing why it is more plausible that [*Tempur-Pedic*] and its distributors—assuming they are rational actors acting in their economic self-interest—would enter into an illegal price-fixing agreement (with the attendant costs of defending against the resulting investigation) to reach the same result realized by purely rational profit-maximizing behavior.”¹⁹⁹ Stated differently, the Eleventh Circuit concluded that it was the plaintiff’s obligation to allege facts showing why the inference favorable to it was more plausible than the inference favorable to the defendants.

192 *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1298 (10th Cir. 2008).

193 *Robbins v. Okla.*, 519 F.3d 1242, 1249 (10th Cir. 2008); see also *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210 (10th Cir. 2011) (equal protection case).

194 626 F.3d 1327 (11th Cir. 2010).

195 *Id.* at 1331.

196 *Id.* at 1333.

197 This is not to say that the court’s discussion of relevant market, market power, and harm to competition are not important; rather, they are just not as pertinent to this article, whose focus is on pleading an agreement or conspiracy.

198 *Id.* at 1340.

199 *Id.*

In the court’s own words it “juxtaposed” the two inferences and found the complaint implausible in light of the defendant’s conflicting inference.²⁰⁰ And the court went further, holding that even if the inference of tacit collusion was the more plausible inference, Jacobs would have had to allege that “TPX and its authorized distributors somehow signaled each other on how and when to maintain or adjust prices”—in other words, how the conspiracy operated.²⁰¹ The court provided the example of an allegation of “dates on which distributors moved prices together, or the amounts by which the prices moved.”²⁰² For those reasons, the court affirmed the dismissal of the horizontal conspiracy.

In sum, under *Jacobs*, an antitrust plaintiff in the Eleventh Circuit hoping to rely on circumstantial evidence will likely need to carefully plead facts demonstrating why the inferences it is asking the reviewing court to make are more plausible than other conflicting inferences. Additionally, the plaintiff will likely need to include more detailed factual allegations showing the formation and operation of the conspiracy than it might in other circuits.

12. D.C. Circuit

The D.C. Circuit just recently first considered *Twombly* in an antitrust conspiracy case. While the case—*Osborn v. Visa Inc.*²⁰³—does not provide a highly detailed analysis of *Twombly*, it provides at least some perspective on pleading a conspiracy in this important circuit. Previously, the circuit’s most in-depth *Twombly* analysis appears to have occurred in *Aktieselskabet AF 21*, a trademark case.²⁰⁴ But this case—which preceded *Iqbal* and held that *Twombly* “was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim”—is arguably no longer good law.²⁰⁵

Osborn involved an alleged conspiracy over the pricing of non-bank ATM access fees.²⁰⁶ Among other reasons for dismissing the complaint, the district court concluded that the plaintiffs had failed to allege an agreement in restraint of trade. The D.C. Circuit reversed the dismissal because it found that the plaintiffs had alleged a horizontal agreement that “suffices at the pleadings stage.”²⁰⁷ In particular, the court found allegations that “a group of retail banks fixed an element of access fee pricing through bankcard association rules” as the “sort of concerted action necessary to make out a Section 1 claim.”²⁰⁸ The court rejected the defendants’ argument that the plaintiffs had pleaded “mere membership” in an association—finding instead that the plaintiffs had alleged the “member banks *used* the

200 *Id.* at 1343.

201 *Id.*

202 *Id.*

203 No. 14-7004, 2015 WL 4619874 (D.C. Cir. Aug. 4, 2015).

204 *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 11 (D.C. Cir. 2008).

205 *Id.* at 17. A subsequent D.C. Circuit case, which does not contain any in-depth analysis of *Twombly* or *Iqbal* suggests that the previous construction of *Twombly* advanced in *Aktieselskabet AF 21* may now be invalidated. *Tooley v. Napolitano*, 586 F.3d 1006, 1007 (D.C. Cir. 2009).

206 2015 WL 4619874 at *1.

207 *Id.* at *7.

208 *Id.* at *8.

bankcard associations to adopt and enforce a *supracompetitive* pricing regime for ATM access fees,” which was “enough to satisfy the plausibility standard.”²⁰⁹ Again, although *Osborn* does not provide a wealth of guidance, it is at least something for lower courts and litigants in the D.C. Circuit to consider in pleading and attacking a complaint.

IV. CONCLUDING THOUGHTS

As we believe is evident from the above, the standards for pleading an antitrust conspiracy under *Twombly* continue to be refined. With regards to direct evidence, there does not appear to be any division of authority just yet. But that may be because there have simply not been enough cases that have considered the issue. The same cannot be said of cases pleaded on circumstantial evidence. Almost every circuit has given *Twombly* detailed consideration, and while they overlap in the main, there are differences at the margin, particularly those listed below.

First, and most importantly, is the treatment of conduct susceptible to multiple inferences. The First, Second, and Sixth Circuits have mandated that district courts are not to weigh inferences on a motion to dismiss. Instead, the only relevant inquiry is whether the plaintiff’s allegations create a plausible inference in their own right— independent of the degree of plausibility or probability of any inferences that the defendants suggest. By contrast, the Third, Fourth, Sixth (again), Ninth, and Eleventh Circuits have permitted the weighing of inferences in one manner or another. In other words, these circuits have permitted district courts to look to whether an inference of unilateral conduct is more plausible than conspiratorial conduct or whether the plaintiff’s allegations tend to exclude the possibility of independent conduct. The Supreme Court has so far rejected petitions for certiorari in many of these cases.²¹⁰

Second, some circuits have disagreed on the level of detail required to render a complaint plausible. On the one hand, the Sixth and Ninth Circuits have held that a plaintiff must plead the “who, what, where, when, why, and how” of the alleged conspiracy. Other circuits—such as the First and Second Circuits—do not appear to require that level of detail. This split likely comes from *Twombly* itself. While *Twombly* states that it was not applying any heightened pleading standard,²¹¹ it also criticized the plaintiff for failing to mention any “specific time, place, or person involved in the alleged conspiracies.”²¹² Until and unless the Supreme Court grants certiorari on this issue, it may just be that some circuits require more specific facts in a pleading than others.

Finally, a split has begun to emerge concerning whether a plaintiff must allege “plus-factor” evidence in a complaint. There is a sharp division here between the First and the Third Circuits. The former concluded that while allegations of plus-factor evidence may enhance the plausibility of a conspiracy, they are not necessary. On the other hand,

209 *Id.*

210 *E.g., Curtis Circulation Co. v. Anderson News, L.L.C.*, 133 S. Ct. 846 (2013) (denying certiorari); *Loren Data Corp. v. GXS, Inc.*, 133 S. Ct. 2835 (2013) (denying certiorari); *Tam Travel, Inc. v. Am. Airlines*, 131 S. Ct. 896 (2011) (denying certiorari); *Cellco P’Ship v. Morris*, 131 S. Ct. 2165 (2011) (denying certiorari).

211 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007).

212 *Id.* at 565 n.10.

the Third Circuit requires that plaintiffs allege at least one plus factor that will support a finding of conspiracy. As the other circuits begin to weigh in on the issue, this may be something that will eventually catch the attention of the Supreme Court.

In summary, what a plaintiff must allege to plead a “plausible” antitrust conspiracy remains in flux. The issue will undoubtedly continue to arise, and the divisions between the circuits may very well deepen. If that is the case, the Supreme Court may have cause to revisit the issue again and clarify what exactly is needed to plead an agreement under the Sherman Act.