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## I. INTRODUCTION

Courts and commentators have long struggled with the proper treatment of parallel conduct by competitors in oligopoly markets.[1] In such markets it is possible to achieve supra-competitive pricing through recognized interdependence, rather than agreement.[2] Although interdependent pricing results in the same harm to competitors as an agreement to fix prices, it is clear that the latter is per se illegal and the former, lacking a viable remedy, is legal.[3] However, courts have disagreed about what is sufficient evidence of agreement, as opposed to mere interdependence, to submit an oligopoly pricing[4] case to a jury.[5] In *Bell Atlantic Corp. v. Twombly*,[6] the Supreme Court recently addressed the antecedent question of what are sufficient allegations of agreement to survive a motion to dismiss a Sherman Act § 1 claim[7] in an oligopoly market.

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1. *See infra* notes 5, 142–65 and accompanying text. An oligopoly market is one in which there are only a few sellers. Common examples are the baby food, cereal, tire, and airline industries.

2. Supra-competitive pricing is pricing above the level that would be expected in a competitive market. Interdependence can occur in an industry with sufficiently few competitors so that there is a shared recognition that non-competitive behavior will be met with reciprocity, rather than active competition. For a greater discussion of interdependence and the "oligopoly problem," see *infra* notes 142–65 and accompanying text.

3. *See infra* notes 148, 156–65 and accompanying text.

4. "Oligopoly pricing," as used in this Article, refers to an oligopoly market in which there is parallel pricing at supra-competitive levels.

5. *See* Nickolai G. Levin, *Nomos and Narrative of* Matsushita, 73 FORDHAM L. REV. 1627 (2005). *Compare* Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028 (8th Cir. 2000) *with In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002).

6. 127 S. Ct. 1955 (2007).

7. 15 U.S.C. § 1 (2000). Section 1 declares illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade." *Id.*

The Court concluded that simple allegations of parallel conduct with conclusory assertions of agreement could not survive a motion to dismiss.[8] Nonetheless, the opinion contained little clear guidance as to what would be sufficient, other than indicating that the claim alleged must be "plausible."[9] The decision's effect on oligopoly pricing cases in particular was (and remains) uncertain because the case involved non-price parallel conduct that the Court found could not plausibly be the result of agreement.[10]

The Court's discussion of general pleading standards also generated great confusion.[11] The opinion contained many seemingly conflicting statements[12] and its "retirement"[13] of the venerable language from *Conley v. Gibson*,[14] the grandfather of "notice pleading," that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief,"[15] arguably suggested an intent to dramatically change pleading practice.

*Twombly* is a confusing opinion replete with inconsistent statements. Although it is impossible to discuss the opinion without being critical of its lack of clarity, this Article is not merely a critique of the Court's decision. Rather, through a review of the decisions of lower courts in the first six months following *Twombly*, it analyzes the consequences of the Court's opinion and seeks to resolve some of the confusion that *Twombly* created. The Article demonstrates that

8. *Twombly*, 127 S. Ct. at 1966.

9. *See infra* note 77.

10. *Twombly*, 127 S. Ct. at 1971–73. In contrast, oligopoly pricing is "plausibly" the result of agreement.

11. *See, e.g.*, *id.* at 1988 (Stevens, J., dissenting); Anderson v. Sara Lee Corp., 508 F.3d 181, 188 n.7 (4th Cir. 2007); Weisbarth v. Geauga Park Dist., 499 F.3d 538, 541 (6th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3654 (U.S. June 16, 2008) (No. 07-1015); Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007), *cert. granted*, Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008); IFAST, Ltd. v. Alliance for Telecomms. Indus. Solutions, Inc., No. CCB-06-2088, 2007 WL 3224582, at *3 (D. Md. Sept. 27, 2007); Scott Dodson, *Pleading Standards After* Bell Atl. Corp. v. Twombly, 93 VA. L. REV. 121 (2007); Gordon Schnell, 'Twombly' *Pleading Standard: Good Idea, Bad Execution*, 238 N.Y. L.J. 4, col. 4 (Dec. 5, 2007); *The Supreme Court, 2006 Term, Leading Cases*, 121 HARV. L. REV. 305, 310 (2007).

12. *See infra* notes 84–110 and accompanying text.

13. *Twombly*, 127 S. Ct. at 1969.

14. 355 U.S. 41 (1957), *overruled in part by Twombly*, 127 S. Ct. 1955.

15. *Id.* at 45–46.

*Twombly* has had virtually no effect in routine cases.[16] In complex cases outside the antitrust arena, however, *Twombly* appears to have increased lower courts' discretion to require additional factual allegations when necessary.[17] In exercising that discretion, the lower courts have seemed to consider logical factors and to have exercised their discretion reasonably.[18] Ironically, in most antitrust cases, the Supreme Court decision has had no effect on pleading requirements.

In the specific context of oligopoly pricing cases, however, the *Twombly* decision appears to have had a great and regrettable effect. Lower courts have made private suits alleging price fixing in oligopoly markets near impossible to pursue absent a prior government suit.[19] It is unclear if this is the result the *Twombly* Court intended or the consequence of several flaws in the lower courts' decisions that are detailed below.[20] In either case, blame falls on the Supreme Court as any lower court errors result from the *Twombly* Court's failure to provide consistent reasoning and clear guidance.

Part II describes *Twombly*. Part III addresses the ambiguities contained in the Court's opinion and the effect the case has had on pleading practice in the lower courts. Special attention is given to the lower courts' treatment of oligopoly pricing cases, as those are the cases in which *Twombly* has seemed to have the greatest effect. The Article concludes that if private enforcement of price fixing violations is to remain viable, these lower courts' interpretations of *Twombly* must be corrected.

## II. *BELL ATLANTIC CORP. V. TWOMBLY*

### *A. Background*

For many years, American Telephone & Telegraph Company ("AT&T") monopolized the market for telephone service in the United States. In 1984, following a government suit, a consent decree established "regional service monopolies . . . ([called] Incumbent Local Exchange Carriers ("ILECs")),[21] and a separate

16. *See infra* notes 117–19 and accompanying text.

17. *See infra* notes 112–13, 119 and accompanying text.

18. *See infra* notes 119–31 and accompanying text.

19. *See infra* notes 183–215, 284–90 and accompanying text.

20. *See infra* notes 216–83 and accompanying text.

21. The ILECs were alternatively called "Baby Bells" or "Regional Bell Operating Companies." The original Baby Bells were Ameritech (bought by SBC in 1999), Bell Atlantic

competitive market for long-distance service from which the ILECs were excluded."[22] The regional service providers maintained their government-approved monopolies until Congress enacted the Telecommunications Act of 1996.[23] To encourage competition in both local and long distance telephone service, that Act permitted the ILECs to enter the long-distance market, but simultaneously imposed obligations on the ILECs designed to facilitate entry by Competitive Local Exchange Carriers ("CLECs") into the regional local service markets.[24] Specifically, the ILECs were required to provide CLECs "with access to the ILECs' network elements for 'just, reasonable, and non-discriminatory' rates," and to offer "telecommunications services at wholesale rates for resale to subscribers."[25]

### *B. The Complaint*

In *Twombly*, the plaintiffs, on behalf of a "putative class . . . of all 'subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present,'"[26] filed claims asserting violations of § 1 of the Sherman Act.[27] They alleged that four ILECs, controlling more than ninety percent of the local telephone services in the continental United States, conspired to prevent competitive entry into their local markets.[28] The plaintiffs alleged that the ILECs: (1) resisted "CLECs' attempts to compete" by "making unfair [access] agreements . . . providing inferior connections . . . overcharging, and billing in ways designed to sabotage the CLECs'

(acquired GTE in 2000 and became Verizon), BellSouth (bought by AT&T Inc. in 2006), NYNEX (bought by Bell Atlantic in 1996), Pacific Telesis (bought by SBC in 1997), Southwestern Bell (changed its name to SBC in 1995; acquired AT&T Corp. in 2005 and changed its name to AT&T Inc.), and US West (bought by Qwest in 2000). Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1961 (2007).

22. *Id*.

23. *Id*. The Telecommunications Act is found at Pub. L. No. 104–104, 110 Stat. 56 (1996).

24. *Twombly*, 127 S. Ct. at 1961.

25. Twombly v. Bell Atl. Corp., 425 F.3d 99, 102 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007) (quoting 47 U.S.C. § 251(c) (2000)).

26. 127 S. Ct. at 1962 (quoting Complaint ¶ 53).

27. 15 U.S.C. § 1 (2000).

28. *Twombly*, 127 S. Ct. at 1962 n.1. The four named defendants were BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. *Id*.

relations with their own customers" and (2) "refrain[ed] from competing against one another" despite '"attractive business opportunit[ies]' in contiguous markets where they possessed 'substantial competitive advantages.'"[29] The plaintiffs sought to have the court infer agreement on the first claim based on the ILECs' parallel conduct and "compelling common motiv[e]" to exclude the CLECs.[30] The plaintiffs reasoned that "'[h]ad any one [ILEC] not sought to prevent CLECs . . . from competing effectively . . . , the resulting greater competitive inroads into that [ILEC's] territory would have revealed the degree to which competitive entry by CLECs would have been successful in other territories.'"[31] The conclusion that the defendants conspired to refrain from competing against one another was based on the assumption that such conduct was contrary to each defendant's self-interest absent agreement, that is, that the defendants were forgoing a profitable market. In support of that assumption, the plaintiffs cited a statement by Richard Notebaert, the CEO of one of the defendants, that "competing in the territory of another ILEC 'might be a good way to turn a quick dollar but that doesn't make it right.'"[32]

### *C. The Lower Court Decisions*

The district court dismissed plaintiffs' amended complaint for failure to state a claim.[33] The court concluded that, stripped of its conclusory allegations of conspiracy, plaintiffs' complaint merely alleged consciously parallel conduct by the ILECs.[34] The court cited Supreme Court precedent establishing that consciously parallel conduct alone is not enough to prove conspiracy.[35] Because parallel action is to be expected in any market in which competitors have similar information and costs, the Court reasoned that certain so-called "plus factors" must be alleged to distinguish independent

29. *Id.* at 1962 (quoting Complaint, ¶¶ 40–41).

30. *Id.* (quoting Complaint, ¶ 50).

31. *Id.* (quoting Complaint, ¶¶ 40–41).

32. *Id.* (quoting Complaint, ¶¶ 40–41).

33. Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 189 (S.D.N.Y. 2003), *rev'd*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

34. *Id.* at 179–81.

35. *Id.* at 179.

(legal) from collusive (illegal) conduct.[36] The Court found the complaint failed to allege any such plus factors. It stated that an inference of agreement to thwart the CLECs was inappropriate as each individual defendant would independently be motivated to engage in the conduct alleged[37] and plaintiffs' allegations that the ILECs did everything in their power to make the CLECs unprofitable provided an explanation as to why the ILECs independently would choose not to compete as a CLEC in a neighboring ILEC's territory.[38]

The Second Circuit vacated and remanded,[39] finding that the district court applied the wrong legal standard.[40] Although acknowledging "a bare bones statement of conspiracy . . . under the antitrust laws without any supporting facts permits dismissal,"[41] the court emphasized that the federal rules do not impose a heightened pleading standard for antitrust cases.[42] Under Federal Rule of Civil Procedure 8, all that is required is fair notice so that the adverse party can "answer and prepare for trial."[43] The court held that in an antitrust action, any claim of conspiracy must be "plausible," but at the pleading stage, did not have to be supported by "plus factors."[44] In order for allegations of parallel anticompetitive conduct to fail to support a plausible conspiracy claim, "a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."[45] The court conceded that its

36. *Id*. at 179–81. The court identified the two most significant plus factors as "evidence that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire." *Id*. at 179 (citing Apex Oil v. DiMauro, 822 F.2d 246, 253–54 (2d Cir. 1987)).

37. *Id*. at 183–84.

38. *Id*. at 185–88.

39. Twombly v. Bell Atl. Corp., 425 F.3d 99, 108 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

40. *Id*. at 106.

41. *Id*. at 109 (citing Heart Disease Research Found. v. Gen. Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972)).

42. *Id*. at 108–09.

43. *Id*. at 116.

44. *Id*. at 114. The court nonetheless found that the plaintiffs appeared to be able to plead plus factors. The court noted that the plaintiffs alleged motive, that defendants conduct was contrary to their self-interest absent agreement and that defendants had frequent opportunities to meet and organize the alleged conspiracy. *Id*. at 118.

45. *Id*. at 114.

decision, by more often imposing the "colossal expense of undergoing discovery" on antitrust defendants, might result in "a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted."[46] However, the court reasoned that if the balance to be struck between the federal courts' liberal pleading rules and the realities of litigation needs recalibration, it is for Congress or the Supreme Court to make the adjustment.[47]

### *D. The Supreme Court Decision*

The Supreme Court, seemingly accepting the Second Circuit's invitation, granted certiorari.[48] Justice Souter, writing for the Court, framed the issue narrowly as "whether a § 1 complaint can survive a motion to dismiss when it alleges . . . parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action."[49] The Court, finding such a complaint must be dismissed, reversed the Court of Appeals.[50]

In a 7–2 decision, Justice Souter, writing for the Court, began his analysis with the basic principle that "conscious parallelism," without more, cannot establish agreement for purposes of § 1.[51] Such behavior, although consistent with conspiracy, is equally "in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."[52] The concern with "false positives"[53] is why the Court previously required a plaintiff to present conspiracy evidence that "tend[s] to rule out the possibility that the defendants were acting independently" to survive a summary judgment motion.[54]

46. *Id*. at 117.

47. *Id*.

48. Bell Atl. Corp. v. Twombly, 548 U.S. 903 (2006).

49. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1961 (2007).

50. *Id*. at 1963

51. *Id*. at 1964.

52. *Id*.

53. *Id*. False positives in § 1 lawsuits are cases where conspiracy is found when no agreement actually was present. The problems associated with false positives are discussed in RICHARD A. EPSTEIN, AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES, MOTIONS TO DISMISS ANTITRUST CASES: SEPARATING FACT FROM FANTASY 3–4 (2006).

54. *Twombly*, 127 S. Ct. at 1964 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)).

Before addressing the antecedent question of what must be pleaded in an antitrust conspiracy case to survive a motion to dismiss, Justice Souter reviewed general standards for motions under Federal Rule of Civil Procedure 8(a)(2).[55] In so doing, Justice Souter provided lower courts with citation support regardless of whether those courts grant or deny a motion to dismiss.[56] The Court said that a complaint need not contain detailed factual allegations and emphasized that heightened pleading standards are appropriate only under Federal Rule 9, which is limited to allegations of fraud, mistake, conditions of mind, or special damages,[57] and not under Federal Rule 8.[58] On the other hand, the Court said plaintiff's obligation "requires more than labels and conclusions" and must contain enough factual allegations "to raise a right to relief above the speculative level."[59]

Applying these general standards to the § 1 claim before the Court, Justice Souter concluded that the plaintiff must allege "enough factual matter (taken as true)" to provide "plausible grounds to infer an agreement."[60] Justice Souter explained that the "plausibility" standard "does not impose a probability requirement . . . it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[61] A "complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable," and recovery is unlikely.[62] However, the Court specifically rejected the *Conley* Court's formulation,[63] relied upon by the Second Circuit, 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."[64] That standard, the Court suggested, is literally satisfied by the most

55. *Id.* at 1964–65.
56. *See infra* note 116.
57. FED. R. CIV. P. 9.
58. *Twombly*, 127 S. Ct. at 1964, 1973 n.14.
59. *Id.* at 1965.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 1969.
64. Conley v. Gibson, 355 U.S. 41, 45–46 (1957), overruled in part by *Twombly*, 127 S. Ct. 1955.

conclusory allegations and ignores the realities of modern antitrust litigation.[65] Instead, the Court said, "'a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'"[66] The Court maintained that requiring "allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)'s threshold requirement that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"[67]

Applying the "plausibility" standard to the complaint, Justice Souter found the plaintiffs' allegations deficient. The Court dismissed the plaintiffs' stray allegations of agreement as mere "legal conclusions."[68] Rather, the Court read the complaint as relying on the allegations of parallel conduct.[69] The Court thought the ILECs' parallel actions to thwart the CLECs' attempts to compete did not plausibly suggest agreement because each individual ILEC had powerful economic incentives to frustrate the CLECs, regardless of the actions of the other ILECs.[70] There was no reason to infer that the defendants conspired among themselves "to do what was only natural [for them to do] anyway."[71] The Court also found that the allegations of a parallel refusal of ILECs to compete as CLECs in neighboring ILECs' territory did not plausibly suggest conspiracy. Justice Souter suggested that "a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same."[72] Justice Souter reasoned that the ILECs "surely knew the adage about him who lives by the sword."[73] Moreover, the complaint's allegations that CLECs faced nearly insurmountable

65. *Twombly*, 127 S. Ct. at 1966–67. As the Second Circuit explained, the colossal costs of discovery in antitrust cases may "lead defendants . . . to settle what would ultimately be shown to be meritless claims" and thereby encourage plaintiffs to bring other claims without merit. Twombly v. Bell Atl. Corp., 425 F.3d 99, 117 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

66. *Twombly*, 127 S. Ct. at 1967 (quoting Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17 (1983)).

67. *Id*. at 1966 (quoting FED. R. CIV. P. 8(a)(2)) (alteration in original).

68. *Id*. at 1970.

69. *Id*.

70. *Id*. at 1971.

71. *Id*.

72. *Id*. at 1972.

73. *Id*.

barriers to profitability, owing to the ILECs' flagrant resistance to their obligations under the 1996 Act, belied the plaintiffs' assertion that the ILECs were foregoing especially attractive business opportunities.[74] Thus, the Court reasoned, even assuming that they had the finances to expand, ILECs logically would choose to invest in more lucrative markets.[75]

## III. INTERPRETING *TWOMBLY*

*Twombly* clearly holds that an allegation of parallel conduct alone is not sufficient to state a claim under § 1 of the Sherman Act.[76] It also must be understood as requiring a claim to be plausible;[77] however, that plausibility requirement is a flexible test.[78] Little else about the opinion is self-evident. This uncertainty has proven to be the opinion's strength outside the antitrust area.[79] However, the opinion's ambiguities have led to problematic decisionmaking in antitrust cases involving oligopoly markets.[80]

### *A. Non-Antitrust Cases*

Courts and commentators decried the *Twombly* opinion as creating substantial confusion.[81] Indeed, it was not even clear if

74. *Id.* at 1972–73. Justice Souter found Qwest's CEO's statement to be taken out of context. Justice Souter believed the district court was entitled to take notice of the full contents of the published article referenced in the complaint. *Id.* at 1972 n.13. Later in the article quoted by the plaintiffs, CEO Notebaert said, "entering new markets as a CLEC would not be 'a sustainable economic model' because the CLEC pricing model is 'just . . . nuts.'" *Id.* at 1972 (quoting Jon Van, *Americtech Customers Off Limits: Notebaert*, CHI. TRIB. Oct. 31, 2002, Business Section, at 1). Another source in the complaint quoted Notebaert as saying that the regulatory environment was too unstable to "base a business plan" on the rights accorded CLECs under the Communications Act. *Id.* at 1972–73 (quoting Jon Van, *Lawmakers Seek Probe of Bells: Do Firms Agree Not to Compete?*, CHI. TRIB. Dec. 19, 2002, at 2).

75. *See id.* at 1973.

76. *Id.* at 1961.

77. As the Second Circuit pointed out in *Iqbal v. Hasty*, 490 F.3d 143, 156 (2d Cir. 2007), *cert. granted*, Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008), the *Twombly* Court "used the word 'plausibility' or an adjectival or adverbial form of the word fifteen times (not counting quotations)." *See also* Brown v. Kerkhoff, 504 F. Supp. 2d 464, 522 (S.D. Iowa 2007) ("Aside from noting the repeated use of the root word 'plausible,' little can be synthesized from these pronouncements in terms of a concise, clear, and usable test.").

78. *See infra* note 113.

79. *See infra* note 112 and accompanying text.

80. *See infra* notes 183–283 and accompanying text.

81. *See supra* note 11.

*Twombly* applied outside the antitrust context.[82] Courts also have questioned the decision's scope.[83]

Several signals support a broad reading of *Twombly*. First, *Twombly* expressly rejected the often-used *Conley* "no set of facts" formulation for determining when a complaint can be dismissed for failure to state a claim.[84] Instead, the plaintiff was required to plead enough facts suggesting the "entitle[ment] to relief."[85]

Second, the opinion, although disavowing application of a heightened pleading standard,[86] included much language suggesting that more than notice needs to be provided by the plaintiff's complaint. The Court found that mere "labels and conclusions" were insufficient to state a claim.[87] Rather, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face."[88] Rule 8(a)(2)'s "plain statement" must contain "enough heft" to show that the pleader is entitled to relief and the plaintiff is required to make factual allegations "plausibly suggesting (not merely consistent with)" unlawful activity.[89] Any less, the Court said, fails to

82. *See, e.g.*, Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1988 (2007) (Stevens, J., dissenting); Weisbarth v. Geauga Park Dist., 499 F.3d 538, 541 (6th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3654 (U.S. June 16, 2008) (No. 07-1015); IFAST, Ltd. v. Alliance for Telecomms. Ind. Solutions, Inc., No. CCB-06-2088, 2007 WL 3224582, at *3 (D. Md. Sept. 27, 2007). It is now clear that *Twombly* does apply outside the antitrust context. *See, e.g.*, Fin. Sec. Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1282 (11th Cir. 2007) (federal securities claim); Triad Consultants, Inc. v. Wiggins, No. 07-1007, 2007 WL 2733687, at *2 (10th Cir. Sept. 17, 2007) (claim under Computer Fraud And Abuse Act, 18 U.S.C. § 1030); Victaulic Co. v. Tieman, 499 F.3d 227, 234 (3d Cir. 2007) (enforceability of non-compete covenant and counterclaims for breach of contract, misappropriation of trade secrets, tortious interference and unfair competition); E.E.O.C. v. Concentra Health Servs., Inc., 496 F.3d 773, 777 (7th Cir. 2007) (Title VII retaliation action); Gregory v. Dillards, Inc., 494 F.3d 694, 710 (8th Cir. 2007), *vacated*, *reh'g en banc granted*, No. 05-3910, 2007 U.S. App. LEXIS 30544 (8th Cir. Sept. 20, 2007) (suit under 42 U.S.C. § 1981 and the Missouri Human Rights Act); Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92 (1st Cir. 2007) (securities fraud claim); *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007), *cert. granted*, Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008) (complaint alleging twenty-one causes of action, including statutory and constitutional tort claims). However, application of *Twombly* often does not affect the result in non-antitrust cases. *See infra* notes 114–16 and accompanying text.

83. Anderson v. Sara Lee Corp., 508 F.3d 181, 188 n.7 (4th Cir. 2007); *Weisbarth*, 499 F.3d at 541 (quoting *Iqbal*, 490 F3d. at 157–58); *Iqbal*, 490 F.3d at 155.

84. *Twombly*, 127 S. Ct. at 1969.

85. *Id.* at 1964–65 (quoting Conley v. Gibson, 355 U.S. 41, 46 (1957)).

86. *Id.* at 1973–74 n.14.

87. *Id.* at 1965.

88. *Id.* at 1974.

89. *Id.* at 1966.

cross the line "between the factually neutral and the factually suggestive."[90]

Third, the Court emphasized the costs of discovery and its effects on settlement.[91] The Court found that careful case management and the availability of summary judgment was not a sufficient remedy,[92] implicitly rejecting the view that "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."[93] Finally, the Court's introduction and application of its "plausibility standard" suggested that a complaint must do more than just state a claim.[94]

On the other hand, there are several reasons to read *Twombly* narrowly. First, although the Court "retired" *Conley*'s "no set of facts" formulation, it cited *Conley* approvingly for the proposition that gave rise to "notice pleading": Rule 8(a)(2) "requires only 'a short and plain statement of the claim' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[95] Moreover, the Court specified it was overruling the *literal* reading of *Conley*'s "no set of facts" standard.[96] The Court correctly explained that even the most conclusory allegations would satisfy a literal application of that formulation.[97]

Second, although the Court required more than just legal conclusions, it repeatedly indicated it was not imposing a heightened pleading standard[98] and expressly approved the use of Form 9.[99] According to that form, a negligence claim is sufficient if it alleges that on an identified date on an identified road, the "defendant negligently drove a motor vehicle," striking plaintiff.[100] It is not necessary to state the basis upon which the claim of negligent driving

90. *Id.* at 1966 n.5.

91. *Id.* at 1967.

92. *Id.*

93. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168–69 (1993).

94. *Twombly*, 127 S. Ct. at 1959, 1970–74.

95. *Id.* at 1964 (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)).

96. *Id.* at 1968–69.

97. *Id.* at 1968. For that matter, if the plaintiff filed a blank document, it could not be said that the plaintiff could prove "no set of facts" showing that he or she was entitled to relief.

98. *Id.* at 1973–74 n.14.

99. *Id.* at 1970 n.10. Form 9 became Form 11 in December of 2007.

100. FED. R. CIV. P. Form 11.

rests. Facts explaining how the defendant was negligent are not required.[101]

Third, the opinion contained much standard boilerplate supporting a denial of a motion to dismiss. It stated that a complaint "does not need detailed factual allegations;"[102] '"Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations;'"[103] and "a well-pleaded complaint may proceed even if it appears 'that a recovery is very remote and unlikely.'"[104]

Fourth, the indications of a heightened standard for stating a claim discussed above could be read as limited to the antitrust context. The Court's emphasis on the costs of antitrust discovery in particular suggests that it did not wish to encourage the use of motions to dismiss, as opposed to summary judgment, to eliminate non-meritorious claims in more routine litigation. Similarly, the use of a "plausibility standard" could be viewed as antitrust specific. Routine claims, such as most negligence actions, are almost always inherently plausible. Moreover, the Court has a prior history of considering the plausibility of antitrust claims,[105] in part, because false positives[106] can "chill the very conduct [active competition] the antitrust laws are designed to protect."[107] The Court also may have been less concerned with false negatives in private antitrust suits because government enforcement of the antitrust laws could remedy the worst violations. The Court's narrow framing of the issue for decision[108] also could support a reading that the decision primarily applies to antitrust litigation.

101. *See Twombly*, 127 S. Ct. at 1977; *In re* Holland, 374 B.R. 409, 439 (Bankr. D. Mass. 2007) (stating that the Court in *Twombly* took no notice of the lack of specific allegations of negligence, for example, driving too fast or running a stop sign).

102. *Twombly*, 127 S. Ct. at 1964.

103. *Id*. at 1965 (quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989)).

104. *Id*. (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

105. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593 (1986) (citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762–64 (1984)); Asahi Glass Co. v. Pentech Pharms, Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation).

106. A false positive is an improper finding of a violation.

107. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414 (2004) (quoting *Matsushita*, 475 U.S. at 594).

108. *Twombly*, 127 S. Ct. at 1961 ("The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications

Finally, evidence that the Court meant *Twombly* to be read narrowly is found in *Erickson v. Pardus*,[109] a case the Court issued just two weeks after *Twombly*. In *Erickson* the Court reversed a Court of Appeals decision affirming dismissal of a state inmate's Eighth Amendment claim. The Court criticized the Court of Appeals, finding that the plaintiff's complaint was too conclusory.[110] Citing *Twombly*, the Court stated that "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests'" and characterized the Court of Appeals decision as a "departure from the liberal pleading standards set forth by Rule 8(a)(2)."[111]

The Court's mixed signals, although easily criticized as confusing,[112] may have been the opinion's genius. By providing lower courts with citation support for granting or denying a motion to dismiss, the Court widened the trial courts' discretion in deciding such motions. Rather than a single standard that inevitably would allow too many frivolous cases to proceed or terminate too many meritorious claims, the Court's decision allows lower court judges, the persons in the best position to do so, to calibrate case-by-case the proper balance between pleading requirements and the costs of discovery. In short, rather than require literal application, the Court's "plausibility test" is a flexible standard.[113]

providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action.").

109. 127 S. Ct. 2197 (2007).

110. *Id.* at 2200.

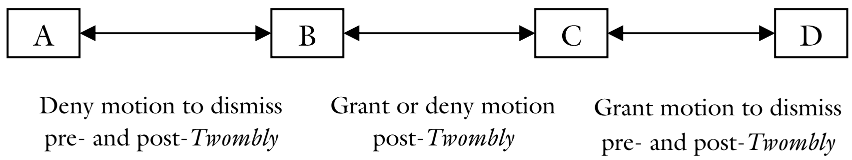
111. *Id. Erickson* involved a pro se complaint. Such complaints are held to a less stringent pleading standard than that applied to complaints filed by attorneys. *See id.*; McNeil v. United States, 508 U.S. 106, 113 (1993); Boag v. MacDougall, 454 U.S. 364, 365 (1982). Nonetheless, the Court appeared to view the Court of Appeals decision as a departure from normal pleading practice because it called the departure "even more pronounced" because the plaintiff was proceeding pro se. *Erickson*, 127 S. Ct. at 2200.

112. *See supra* note 11.

113. *See* Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 2931 (2008); *accord* Ryan v. Underwriters Labs., Inc., No. 1:06-CV-1770-JDT-TAB, 2007 WL 2316474, at *3 (S.D. Ind. Aug. 8, 2007).

The Court's marginal increase in discretion has not affected many cases. This is best illustrated graphically:

DIAGRAM 1: Effect of *Twombly* in Non-Antitrust Cases




Segment AB represents cases where the pleading alleges sufficient facts under *Twombly*. Segment CD corresponds to cases that either have alleged insufficient facts under traditional notice pleading or lack adequate legal support. Under both segments, *Twombly* does not affect the case result. Thus, the most common use of the *Twombly* is simply as part of the courts' updated boilerplate on standards of review on motions to dismiss, with little change in the courts' analysis.[114] Other courts explicitly say there is no need to

114. *See, e.g.*, Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 633 (7th Cir. 2007); Grate v. Huffman, No. 7:07-CV-00449, 2007 WL 3275151, at *1 (W.D. Va. Nov. 5, 2007); Walonoski v. Goodrich Pump & Engine Control Sys., Inc., No. 3:07-CV-00198(PCD), 2007 WL 3226181, at *2 (D. Conn. Oct. 30, 2007); Maturen v. Lowe's Home Ctrs., Inc., No. 06-CV-15126, 2007 WL 3173962, at *3 (E.D. Mich. Oct. 26, 2007); Brigando v. Walt Disney World Co., No. 06-1191(SRC), 2007 WL 3124702, at *1 (D.N.J. Oct. 23, 2007); Aldana v. RJ Reynolds Tobacco Co., No. 2:06-3366-CWH, 2007 WL 3020497, at *2 (D.S.C. Oct. 12, 2007); Ginsberg v. Gov't Props. Trust, Inc., No. 07 Civ. 365(CSH)(ECF), 2007 WL 2981683, at *17 (S.D.N.Y. Oct. 10, 2007); Gambill v. Duke Energy Corp., No. 1:06-CV-00724, 2007 WL 2902939, at *2 (S.D. Ohio Oct. 2, 2007); Johnson v. Geico Cas. Co., 516 F. Supp. 2d 351, 355 (D. Del. 2007); Warner Bros. Entm't Inc. v. Ideal World Direct, 516 F. Supp. 2d 261, 267 (S.D.N.Y. 2007); Performance Aftermarkets Parts Group, Ltd. v. TI Group Auto. Sys., LLC, No. H-05-4251, 2007 WL 2818269, at *1 (S.D. Tex. Sept. 25, 2007); Eastwood v. United States, No. 2:06-CV-164, 2007 WL 2815560, at *2 (E.D. Tenn. Sept. 25, 2007); Arnold Chevrolet LLC v. Tribune Co., No. 04-CV-3097(DRH)(WDW), 2007 WL 2743490, at *2–3 (E.D.N.Y. Sept. 17, 2007); Promotional Ins. Co. v. Shah, No. 07-1774, 2007 WL 2713243, at *1 (E.D. Pa. Sept. 17, 2007); Totalogistix, Inc. v. Marjack Co., No. 06-5117 (JAG), 2007 WL 2705152, at *1 (D.N.J. Sept. 14, 2007); Multimedia Patent Trust v. Microsoft Corp., No. 07-CV-0747-H(CAB), 2007 WL 2696675, at *7 (S.D. Cal. Sept. 10, 2007); Mazzaro De Abreu v. Bank of Am. Corp., 525 F. Supp. 2d 381, 387 (S.D.N.Y. 2007); Shirk v. Garrow, 505 F. Supp. 2d 169, 171–72 (D.D.C. 2007); Druyan v. Jagger, 508 F. Supp. 2d 228, 235 (S.D.N.Y. 2007); Whitesell Corp. v. Bamal Fasteners LLC, No. C-3:07-CV-099, 2007 WL 2407049, at *1–2 (S.D. Ohio Aug. 20, 2007); Frutera Real S.A. v. Fresh Quest, Inc., 2007-2 Trade Cases ¶ 75,818 (S.D. Fla. 2007); Dever v. Kelley, No. 3:06-CV-392, 2007 WL 2286279, at *1–2 (S.D. Ohio Aug. 6, 2007); Nicholson v. Tweedy, No. 06 CV 471 (RJD)(RML), 2007 WL 2262912, at *1 (E.D.N.Y. Aug. 3, 2007).

decide the impact of *Twombly* because the result would be the same under pre-*Twombly* and post-*Twombly* law,[115] or merely cite language from *Twombly* to support the decision they would have arrived at anyway.[116]

Segment BC (or, if drawn to scale, a segment a fraction of the size shown) signifies the cases where courts' discretion to recalibrate the balance between pleading requirements and the costs of discovery may affect the result. Common sense and language in *Twombly* dictate what factors courts consider when exercising discretion under the Court's flexible "plausibility standard." Not surprisingly, the most important consideration is the complexity of the case on the assumption that more complex cases involve more discovery. As Justice Stevens recognized,[117] *Twombly* was a decision primarily driven by a desire to protect defendants from the burdens of pretrial discovery. Unless the costs of discovery are likely to be high, there is little reason to require greater detail in a complaint that provides notice or to terminate the case before summary judgment.[118] Thus, courts are more likely to require greater detail in

115. *See, e.g.*, Anderson v. Sara Lee Corp., 508 F.3d 181, 188 n.7 (4th Cir. 2007); Weisbarth v. Geauga Park Dist., 499 F.3d 538, 542 (6th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3654 (U.S. June 16, 2008) (No. 07-1015); E.E.O.C. v. Concentra Health Servs., Inc., 496 F.3d 773, 782 (7th Cir. 2007); IFAST, Ltd. v. Alliance for Telecomm. Indep. Solutions, Inc., No. CCB-06-2088, 2007 WL 3224582, at *3 (D. Md. Sept. 27, 2007); *Eastwood*, 2007 WL 2815560, at *2 n.1; Massey Energy Co. v. Sup. Ct. of App. of W. Va., No. 2:06-0614, 2007 WL 2778239, at *3 n.4 (S.D. W. Va. Sept. 21, 2007); McGowan v. Cantrell, No. 1:05-CV-334, 2007 WL 2509704, at *4 (E.D. Tenn. Aug. 30, 2007); Dodd v. Woods Mem'l Hosp., No. 1:06-CV-56, 2007 WL 2463275, at *2 (E.D. Tenn. Aug. 28, 2007).

116. *See, e.g.*, Skaff v. Meridien N. Am. Beverly Hills, LLC, 506 F.3d 832, 841–42 (9th Cir. 2007) (denying motion to dismiss and citing *Twombly* for the proposition that heightened pleading is not required under Rule 8); McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1356–57 (Fed. Cir. 2007) (overruling motion to dismiss, relying upon *Twombly*'s citation of *Conley*'s notice pleading standard and approval of Form 9); Darrick Enters. v. Mitsubishi Motors Corp., No. 05-4359(NLH), 2007 WL 2893366, at *1 (D.N.J. Sept. 28, 2007) (denying most parts of the defendants' motion to dismiss and citing *Twombly* after defining the issue as "whether Plaintiffs' Complaint gives Defendants fair notice of their claims, and 'not whether [Plaintiffs] will ultimately prevail but whether [Plaintiffs are] entitled to offer evidence to support the claim.'").

117. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1989 (2007).

118. *See, e.g.*, Brown v. Kerkhoff, 504 F. Supp. 2d 464, 521 (S.D. Iowa 2007); *In re* Holland, 374 B.R. 409, 443 (Bankr. D. Mass. 2007).

putative class actions, and complex RICO or securities cases.[119] Routine cases typically are unaffected by *Twombly*.

A second factor, also affecting the likely cost of discovery, is the availability of an early summary judgment motion. For example, in *Johnson & Johnson v. Guidant Corp.*, the plaintiff alleged that the defendant breached a merger agreement by providing information to a third party.[120] The agreement forbade the defendant from soliciting a takeover proposal but allowed it to provide information to parties making unsolicited offers.[121] Despite the fact that the complaint did not allege that the third party's proposal was solicited, the court denied a motion to dismiss, reasoning, "If there is an inquiry or communication constituting a Takeover Proposal by Abbott [the third party], defendants will surely produce it and move for summary judgment in short order."[122] Also relevant to the probable discovery costs is the court's confidence in its ability to structure limited discovery.[123]

Two other factors courts consider when exercising their discretion under *Twombly* focus on whether or not a dismissal will terminate a meritorious claim. The first, which courts have obviously derived from *Twombly*, is the plausibility of the plaintiff's claim. At a minimum, the Court's flexible "plausibility standard" requires greater detail when something about the claim seems facially

119. *See, e.g.*, United States v. Int'l Longshoremen's Assoc., No. 05-CV-3212, 2007 WL 3196679 (E.D.N.Y. Nov. 1, 2007) (RICO); *In re* Parmalat Sec. Litig., 501 F. Supp. 2d 560, 593 (S.D.N.Y. 2007) (securities); Walker v. S.W.I.F.T. SCRL, 517 F. Supp. 2d 801 (E.D. Va. 2007) (putative class action); *In re* Bausch & Lomb, Inc. Contact Lens Solution Products Liab. Litig., No. 2:06-MN-77777-DCN, 2007 WL 3046682, at *5–7 (D.S.C. Oct. 11, 2007) (class action); *In re* Ins. Brokerage Antitrust Litig., Nos. 04-5184(GEB), 05-1079(GEB), 2007 WL 2892700 (D.N.J. Sept. 28, 2007) (class action RICO claims); Parrish v. Nat'l Football League Players Ass'n, No. C 07-00943WHA, 2007 WL 2601385 (N.D. Cal. Sept. 6, 2007) (putative class action); Cannon v. Gunnallen Fin., Inc., No. 3:06-0804, 2007 WL 2351313 (M.D. Tenn. Aug. 14, 2007) (securities). RICO and Securities actions often involve allegations of fraud and therefore, in part, are subject to heightened pleading under Rule 9, regardless of *Twombly*.

120. Johnson & Johnson v. Guidant Corp., 525 F. Supp. 2d 336, 342–44 (S.D.N.Y. 2007).

121. *Id*. at 342–43.

122. *Id*. at 357.

123. *See* Iqbal v. Hasty, 490 F.3d 143, 158 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 2931 (2008).

questionable or not literally plausible.[124] For example, in *Ryan v. Underwriters Laboratories, Inc.*[125] the plaintiff alleged that he was wrongfully terminated in response to his letter to the National Institute of Standards and Technology questioning the government's explanation for the collapses of the World Trade Center buildings on September 11, 2001. The court granted a motion to dismiss, finding that the complaint did not contain sufficient facts to explain why a private employer's dismissal following an employee's criticism of the government fell under the policy exception to the at-will employment doctrine.[126]

The second consideration related to the merits of the plaintiff's claim is whether the plaintiff has omitted specific facts that should be in the plaintiff's hands.[127] If a plaintiff omits a necessary fact that she should possess, a dismissal with leave to amend will not terminate the litigation unless the necessary fact cannot be truthfully alleged.[128] In the latter case, a dismissal with prejudice is appropriate. To illustrate, in *In re Bausch & Lomb, Inc.*, the defendant sold a contact lens solution that had a propensity to cause serious eye infections.[129] The CDC and FDA issued a joint statement warning wearers of soft contact lenses that they were at risk, and the defendant ceased

124. *See, e.g.*, Ryan v. Underwriters Labs., Inc., No. 1:06-CV-1770-JDT-TAB, 2007 WL 2316474 (S.D. Ind. Aug. 8, 2007); Jenkins v. County of Hennepin, No. 06-3625, 2007 WL 2287840 (D. Minn. Aug. 3, 2007).

125. *Ryan*, 2007 WL 2316474, at *1.

126. *Id.* at *9–11. Literal application of the plausibility standard has also been used to deny a motion to dismiss. In *Garmin Ltd. v. TomTom, Inc.*, No. 2:06-CV-338(LED), 2007 WL 2903843, at *1–2 (E.D. Tex. Oct. 3, 2007), the defendant in a patent infringement action counterclaimed for invalidation of the patent based on failure to disclose prior art. The defendant alleged that executives toured the plant of a company with existing technology and learned confidential information, but did not allege that the executives took part in the application process. *Id.* at *2. Nonetheless, the court denied a motion to dismiss finding it "plausible that the executives disseminated their knowledge to the applicant group before filing." *Id.*

127. *See, e.g.*, E.E.O.C. v. Concentra Health Servs., Inc., 496 F.3d 773, 782 (7th Cir. 2007); Walker v. S.W.I.F.T. SCRL, 517 F. Supp. 2d 801, 808–09 (E.D. Va. 2007); *In re* Bausch & Lomb, Inc. Contact Lens Solution Prods. Liab. Litig., No. 2:06-MN-77777-DCN, 2007 WL 3046682, at *7 (D.S.C. Oct. 11, 2007); Polzin v. Barna & Co., No.3:07-CV-127, 2007 WL 2710705, at *5 (E.D. Tenn. Sept. 14, 2007); Parrish v. Nat'l Football League Players Ass'n, No. C 07-00943-WHA, 2007 WL 2601385, at *5–6 (N.D. Cal. Sept. 6, 2007).

128. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1357, 611–13 ("Thus, the cases make it clear that leave to amend the complaint should be refused only if it appears to a certainty that the plaintiff cannot state a claim.").

129. *Bausch & Lomb*, 2007 WL 3046682, at *7.

shipping its product.[130] Plaintiffs' class action sought, *inter alia*, economic damages for contract breach but did not allege that any plaintiffs poured out the defendant's product following the government warnings.[131] Despite counsel's representations that such plaintiffs were in the class, the court dismissed that count of the complaint without prejudice, insisting that without such allegations, the complaint could not allege economic injury.[132] If the plaintiffs could not make such an allegation, the claim for economic damages would be properly dismissed with prejudice.

One might question whether the number of cases actually affected by *Twombly* justifies the added Rule 12(b)(6) motion to dismiss litigation spawned by the Court's opinion. However, in the first six months post-*Twombly*, lower courts in non-antitrust cases generally have reasonably exercised their discretion under the Court's "plausibility test." The factors they have considered logically relate to balancing the costs of discovery and the danger of dismissing meritorious claims. Hopefully, as precedent continues to develop, and it becomes even clearer that *Twombly* does not affect routine cases, the amount of additional pleading motions filed will decrease.

### *B. Antitrust Cases*

As with non-antitrust cases,[133] most antitrust cases have been unaffected by *Twombly*. Again, corresponding to segments AB and CD in Diagram 1,[134] courts find pleadings satisfactory even under *Twombly*,[135] or believe the allegations insufficient under any standard.[136]

130. *Id*.

131. *Id*. at *7.

132. *Id*.

133. *See supra* notes 114–18 and accompanying text.

134. *See* Diagram 1, *supra* p. 1071.

135. *See, e.g.*, Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297 (3d Cir. 2007); Omnicare, Inc. v. United Health Group, Inc., 524 F. Supp. 2d 1031 (N.D. Ill. 2007); Xerox Corp. v. Media Sciences Int'l, Inc., 511 F. Supp. 2d 372 (S.D.N.Y. 2007); Behrend v. Comcast Corp., 532 F. Supp. 2d 735 (E.D. Pa. 2007); Securitypoint Media, LLC v. Adason Group, LLC, No. 8-07-cv-444-T-24TGW, 2007 WL 2298024 (M.D. Fla. Aug. 7, 2007); *In re* Hypodermic Prods. Antitrust Litig., No. 05-CV-1602 (JLL/CCC), 2007 WL 1959225 (D.N.J. June 29, 2007).

136. *See, e.g.*, Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117 (2d Cir. 2007); Norris v. Hearst Trust, 500 F.3d 454 (5th Cir. 2007); *In re* Ditropan XL Antitrust

One might expect that the area of discretion, segment BC,[137] where *Twombly* can affect a case's outcome, would be greater for antitrust cases. Such cases are the paradigmatic example of complex litigation with burdensome discovery and are more likely to raise plausibility issues. In fact, however, outside the context of allegations of parallel conduct,[138] *Twombly* has not affected outcomes in this segment during its first six months.[139] Perhaps this is because a claim's plausibility has always been a consideration in antitrust cases.[140]

However, in oligopoly pricing cases, cases alleging high parallel prices in an industry dominated by just a few competitors, *Twombly* has had a dramatic effect.[141] Before addressing such cases and analyzing whether lower courts' decisions reflect a proper and desirable interpretation of *Twombly*, a digression on the oligopoly problem is helpful.

### *1. The oligopoly problem*

In an industry with few sellers, economic performance may deviate significantly from the competitive norm. Prices may be maintained at inflated levels and respond slowly to changes in costs and demand, output may be reduced, rivalry may be channeled into

Litig., No. M:06-CV-01761-JSW, 2007 WL 2978329 (N.D. Cal. Oct. 11, 2007); Justice v. Town of Cicero, No. 06 C 1108, 2007 WL 2973851 (N.D. Ill. Oct. 10, 2007); Spa Universaire v. Qwest Commc'ns Int'l., Inc., Nos. 02-cv-01977-RPM, 02-cv-01778-RPM, 2007 WL 2694918 (D. Colo. Sept. 10, 2007); Cargill Inc. v. Budine, No. CV-F-07-349-LJO-SMS, 2007 WL 2506451 (E.D. Cal. Aug. 30, 2007).

137. *See* Diagram 1, *supra* p. 1071.

138. *See, e.g.*, *In re* Elevator Antitrust Litig., 502 F.3d 47 (2d Cir. 2007); *In re* Travel Agent Comm'n Antitrust Litig., No. 1:03 CV 30000, 2007 WL 3171675 (N.D. Ohio Oct. 29, 2007); *In re* Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011 (N.D. Cal. 2007); Hackman v. Dickerson Realtors, Inc., 520 F. Supp. 2d 954 (N.D. Ill. 2007); Schafer v. State Farm Fire & Cas. Co., 507 F. Supp. 2d 587 (E.D. La. 2007).

139. In the first six months after *Twombly*, the only antitrust case not involving allegations of parallel conduct that may have been affected by the Supreme Court decision was *Nicsand, Inc. v. 3M Co.*, 507 F.3d 442, 450–51 (6th Cir. 2007). Even that case may be explained more by the court's cramped, if not improper, reading of exclusive dealing precedent than by changes to pleading law. *See id.* at 453.

140. *See supra* notes 102–04 and accompanying text.

141. *See*, *e.g.*, *In re Elevator Antitrust Litig.*, 502 F.3d 47; *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011; *In re Travel Agent Comm'n Antitrust Litig.*, 2007 WL 3171675.

socially unproductive forms, and technological change or other innovation may be inhibited.[142]

Such poor economic performance may be the result of explicit collusion. Where there are few sellers, it is easier for the market participants to agree on price and output decisions and to detect and respond to cheating.[143] When oligopoly pricing is the result of formal agreement, a court will hold the agreement per se illegal.[144]

However, formal agreement is not necessary for an oligopoly to demonstrate poor economic performance. Parallel prices at supra-competitive levels may result from recognized interdependence. Oligopoly firms know that their "price and output decisions will have a noticeable impact on the market and on its rivals."[145] A firm realizes that if it reduces prices to increase sales at the expense of its rivals, its competitors will notice the sales loss and take retaliatory action.[146] The result will be unchanged market share and reduced prices, which result in reduced profits throughout the market—a price war that every firm in the industry loses. Thus, as rational decisionmakers, the firm's managers, recognizing their company's shared interdependence with other firms, may forego active price

142. *See* IIA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 404d2, at 21–22 (2d ed. 2002); LAWRENCE SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 347 (1977).

143. RICHARD POSNER, ANTITRUST LAW, 66–68 (2d ed. 2001). "Cheating" refers to acting in a competitor's individual interest as opposed to the collective interest.

144. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). A per se rule allows a court to find certain agreements or practices illegal without elaborate inquiry as to the precise harm they have caused or the business justification for their use. The truncated analysis is justified by the belief that agreements or practices subject to per se treatment have such a pernicious effect on competition and lack any redeeming value that their unreasonableness may be presumed. *See, e.g.*, N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

145. VI AREEDA & HOVENKAMP, *supra* note 142, ¶ 1429a, at 206 (2d ed. 2003); *see also id.* ¶ 1425, at 167–85.

146. *Id.* ¶ 1429a, at 207; POSNER, *supra* note 143, at 56. As Judge Posner explains, if "there are three sellers of equal size, a 20 percent expansion of sales of one will cause the sales of each of the others to fall by an average of 10 percent—a sales loss that victims could hardly overlook." *Id.* By contrast, in a competitive market, there are so many sellers that a single firm "could double its output without any expectation that total supply would be so affected as to cause any price change; the effects of the firm's increased sales would be so diffused among its numerous competitors that they would not be aware of any change." VI AREEDA & HOVENKAMP, *supra* note 142, ¶ 1429a, at 206.

competition and maintain high parallel prices, even in the absence of formal agreement.[147]

The law consistently has held that consciously parallel prices alone are not enough to prove agreement.[148] Interpreted literally, the

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147. *See* VI AREEDA & HOVENKAMP, *supra* note 142, ¶ 1429a, at 207; FRANK SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 514 (2d ed. 1980). This is not to suggest that high prices are inevitable in an oligopoly market—far from it. As evidenced by the breakdown of legal international cartels such as OPEC, even when there is explicit collusion, individual firms have a major incentive to "cheat" on their agreement. At supra-competitive prices, small discounts can result in significant increases in output at still very profitable prices. *See* POSNER, *supra* note 143, at 67. Factors that increase the likelihood of a non-competitive result include product homogeneity, common knowledge of rivals' decisions, a small number of competitors, infinitely repeated pricing decisions, and identical cost structures. *See infra* note 154. These factors all affect the ease with which the parties can reach agreement and detect and punish deviations. For a game theory analysis of possible oligopoly market outcomes, see Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L.J. 719 (2004), and DOUGLAS BAIRD, ROBERT BERTNER & RANDAL PICKER, GAME THEORY AND THE LAW (1994).

Business school faculty now "routinely" counsel students to implement practices that would facilitate coordination should they become employed in oligopoly industries. Jonathan Baker, *Two Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULL. 143, 197 n.106 (Spring 1993). "Facilitating practices," such as most favored nation clauses, pre-announcement of price changes, meeting competition policies and information exchanges (either directly or through the press), make it easier to reach an interdependent result and can themselves be adopted interdependently. For an explanation of how such practices can help achieve a non-competitive result, see VI AREEDA & HOVENKAMP, *supra* note 142, ¶ 1435, at 251–68; Lee Goldman, *Oligopoly Policy and the* Ethyl Corp. *Case*, 65 OR. L. REV. 73, 75–76 (1986); George Hay, *Oligopoly, Shared Monopoly and Antitrust Law*, 67 CORNELL L. REV. 439, 454–55 (1982).

148. *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227–32 (1993); Williamson Oil Co. v. Phillip Morris USA, 346 F.3d 1287, 1298–99 (11th Cir. 2003); Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 50 (7th Cir. 1992); Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988). Courts, however, find agreement based on consciously parallel prices with certain "plus factors." *See, e.g.*, City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 570–71 (11th Cir. 1998); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1232 (3d Cir. 1993). The most commonly cited such plus factor is whether the defendant's conduct was contrary to its self-interest if acting alone. *See, e.g.*, Blomkest Fertilizer v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1033 (8th Cir. 2000); Apex Oil Co. v. DiMauro, 822 F.2d 246, 254 (2d Cir. 1987); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3rd Cir. 1977); Fears v. Wilhelmina Model Agency, Inc., 2004-1 Trade Cas. ¶ 74,351, at 4 (S.D.N.Y. 2004), *aff'd in part*, *vacated in part sub nom.* Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423 (2007). While the "plus factor" analysis is often useful in competitive markets to distinguish conspiratorial from independent conduct, it has limited utility in oligopoly markets. The fundamental problem, of course, is that plus factor analysis is designed to prove agreement, yet as explained above, agreement is not needed to have poor economic performance in an oligopoly. *See In re* Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004); POSNER, *supra* note 143, at 100.

law could not be otherwise. Even in a competitive market, one expects parallel prices and that rivals will be conscious of them. Courts typically equate interdependence/oligopoly pricing with conscious parallelism. As a result of this equivalence, and because consciously parallel prices alone are not enough to prove a § 1 agreement, oligopoly pricing is by itself insufficient to satisfy § 1's agreement requirement.[149]

Judge Posner, in his academic writings, has suggested that the law should not distinguish between interdependence and agreement.[150] Judge Posner reasons that oligopoly theorists overstate the incidence of successful interdependence.[151] He believes that in most markets more formal mechanisms for cooperation are required to achieve supra-competitive pricing. Thus, what appears to be interdependence is more likely unproven explicit agreement.[152] More fundamental, the effects of interdependence are identical to express collusion—higher prices and reduced output.[153] Thus, Judge Posner would rather focus on economic data than traditional concepts of agreement. In markets conducive to collusion that demonstrate poor economic performance, he would find a violation whether or not formal agreement had been proven.[154]

149. *See, e.g.*, *Brooke Group*, 509 U.S. at 227; *Blomkest*, 203 F.3d at 1032.

150. *See* POSNER, *supra* note 143, at 55–56.

151. *See id.* at 57–59. First, Judge Posner challenges oligopoly theory's assumption that a seller will be reluctant to initiate price reductions knowing that they will be matched by its rivals. *Id.* at 57. He argues that this assumes that the rivals' response will be immediate and ignores the possibility of significant interim profits. *Id.* Second, he asserts that oligopoly theory "overstates the impact of one oligopolist's price reduction on the sales of the others, and hence the incentive of the others to respond immediately." *Id.* He points out that the increase in output resulting from a price reduction does not come exclusively from the sales of the oligopolist's rivals. Rather, some of those sales are to new buyers. *Id.* at 57–58. Finally, Judge Posner questions the ability of oligopolists to establish a supra-competitive price in the first instance. *Id.* at 58–59.

152. *Id.* at 98; *accord* ROBERT BORK, THE ANTITRUST PARADOX 175, 181–91 (1978); Kenneth Elzinga, *New Developments on the Cartel Front*, 29 ANTITRUST BULL. 3, 25 (1984); Werden, *supra* note 147, at 762–63, 780.

153. *See* Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 22–23 (2004).

154. POSNER, *supra* note 143, at 69. Conditions favorable to collusion include: (1) high concentration; (2) the absence of small fringe sellers; (3) inelastic demand at competitive prices; (4) difficulty of entry; (5) an unconcentrated buyer market; (6) homogeneous products; (7) nondurable products; (8) firms sell at the same level in the chain of distribution; (9) little non-price competition; (10) high ratio of fixed to variable costs; (11) similar cost structures and production processes; (12) static or declining demand; (13) the ability to change prices quickly; (14) sealed bidding; (15) local markets; (16) history of cooperation; and (17) prior

The language of the Sherman Act, as interpreted by the Supreme Court, is certainly malleable enough to treat interdependent pricing as agreement.[155] Nonetheless, the problem with treating interdependence as agreement, a problem Judge Posner acknowledges,[156] is formulating a remedy. The obvious choice of remedy is to enjoin the defendants from considering the likely reactions of their rivals or agreeing through tacit coordination.[157] However, such an injunction is tantamount to requiring the defendants to price competitively or at where price equals marginal cost.[158]

antitrust record. *Id.* at 69–79. Indicators of poor performance include: (1) fixed relative market shares; (2) market-wide price discrimination; (3) exchanges of price information; (4) regional price variations; (5) identical bids; (6) sudden and parallel price, output, and capacity changes; (7) industry-wide resale price, maintenance; (8) declining market shares of the leaders; (9) smaller and less frequent price changes; (10) demand elastic at the market price; (11) excessively high profits; (12) market inversely correlated with the number of firms or the elasticity of demand; (13) base-point pricing; and (14) exclusionary practices. *Id.* at 79–93.

155. *See, e.g.*, *id.* at 94–96; John Lopatka, *Solving the Oligopoly Problem, Turner's Try*, 41 ANTITRUST BULL. 843, 853–54 (1996); Donald Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 664–65 (1962); Werden, *supra* note 147, at 777–78. Surely one can conceptualize interdependence as agreement. Assume sellers A and B originally price their product at one dollar and a price war ensues. After a period of dueling price cuts, prices fall to fifty cents. If seller A then sets price at $1.20, seller B knows it can either match that price and return to profitability or face a continued price war when A, losing sales, retracts its price increase. Even in the absence of verbal communication, A's price move to $1.20 can be viewed as an offer and B's price matching as an acceptance.

156. *See* POSNER, *supra* note 143, at 98–99.

157. The primary alternative remedy suggested by early commentators was to improve market structure through divestiture of the largest oligopoly companies. *See, e.g.*, CARL KAYSEN & DONALD TURNER, ANTITRUST POLICY 266–72 (1959); *Report of the White House Task Force on Antitrust Policy*, *reprinted in* 2 ANTITRUST L. & ECON. REV. 11, 30–33 (1969); Louis B. Schwartz, *New Approaches to the Control of Oligopoly*, 109 U. PA. L. REV. 31, 47 (1960). These proposals have been discredited and generally abandoned. *See, e.g.*, Goldman, *supra* note 147, at 93–97; Baker, *supra* note 147, at 173 n.56. *See* POSNER, *supra* note 143, at 101; Lopatka, *supra* note 155, at 904. For a discussion and rejection of other theoretical remedies, see VI AREEDA & HOVENKAMP, *supra* note 142, ¶ 1432d5, at 232–34.

158. In a perfectly competitive market, price should equal marginal cost, the cost of producing one additional unit. *See* FTC v. Indep. Fed'n of Dentists, 476 U.S. 447, 459 (1986); E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY, AND PROCEDURE: CASES, MATERIALS, PROBLEMS 52 (5th ed. 2003); LAWRENCE SULLIVAN & WARREN GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 32 (2000). If price exceeds marginal cost, the competitor can increase profits by producing additional units. If price were below marginal cost, the producer would be losing money on each sale. Therefore, profits will be maximized in a competitive market when price and marginal cost are the same.

Such an injunction is not workable for three reasons. First, it is unrealistic to require an oligopoly to conform to a model for perfect competition when few, if any, industries are perfectly competitive, if only because of location advantages, incomplete information, or other market imperfections. Second, a court constantly would have to review the reasonableness of the defendants' prices to measure compliance with the injunction. This would be equivalent to requiring rate regulation, which virtually all commentators deplore.[159] It is a task for which a court is particularly ill-equipped and one that the Supreme Court has specifically eschewed.[160] Third, and most fundamentally, an injunction that requires price to equal marginal cost virtually guarantees the defendant will be exposed to liability. If a defendant with market power were to set a price below

159. *See, e.g.*, LOUIS SCHWARTZ, JOHN FLYNN & HARRY FIRST, FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST 444 (6th ed. 1983); Mark Green & Ralph Nader, *Economic Regulation v. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871 (1973); William K. Jones, *Government Price Controls and Inflation: A Prognosis Based on the Impact of Controls in the Regulated Industries*, 65 CORNELL L. REV. 303, 316, 318–24 (1980); Richard Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 619, 643 (1969); Richard Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1231–35 (1969). Legal proceedings are not well adapted to the job of sifting complex economic data and arriving at a sound judgment as to price. The net result may be that price is too low to cover costs. A firm may thus be inclined to cut corners on quality. *See* Green & Nader, *supra*, at 877; Posner, *supra*, at 594. Further, there may be insufficient reserves to finance plant expansion, thus causing a distortion in the allocation of resources. *See* Posner, *supra*, at 604. More likely, the price set will be too high. That encourages inefficiency or economic waste, results in resource misallocation and officially sanctions undesirable behavior. *See* BORK, *supra* note 152, at 184. The prospect of a rate setting hearing can also reduce incentives for efficiency and innovation (because returns will be limited) and encourage over-investment in capital resources (because rates are often based on returns per investment). *See* Green & Nader, *supra*, at 877; Posner, *supra*, at 597, 599–600; Turner, *supra*, at 1232, 1235. These problems are further exacerbated if the industry members have different cost structures. *See* Jones, *supra*, at 319. Finally, whether the price is set too low or too high, there are enormous judicial and administrative resources being used, resources that can be better spent elsewhere. Indeed, recognition of the ineffectiveness of rate regulation has led to congressional deregulation of previously regulated industries. *See* Airline Deregulation Act of 1978, 49 U.S.C. § 1301 (1985); Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 (1982).

160. *See* United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927):

> The reasonable price fixed today may through economic and business changes become the unreasonable price of to-morrow [sic]. . . . [I]n the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.

marginal cost, it likely would be liable for predatory pricing.[161] If it set a price above marginal cost, it would have violated the injunction.[162] Given the imprecision of marginal cost analysis,[163] placing a defendant at such risk is indefensible.[164]

Thus, oligopoly markets are problematic because a collusive result can be reached without formal agreement. Although one can conceptualize interdependence as agreement, the law does not recognize it as such. However, as Justice Breyer stated when he sat on the First Circuit Court of Appeals, interdependence is legal "not

161. Most courts consider price below marginal cost or its surrogate, average variable cost, prima facie evidence of predatory pricing. *See* Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–23 (1993); Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1193 (9th Cir. 1984); Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1056 (6th Cir. 1984); III AREEDA & HOVENKAMP, *supra* note 142, ¶ 723, at 280–81.

162. If price was between marginal cost and average total cost, the defendant simultaneously might still be sued for predatory pricing. Many courts allow proof that prices above marginal or average variable cost, but below average total cost, are predatory. *See* Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884, 889–90 (5th Cir. 1984); *Arthur S. Langenderfer, Inc.*, 729 F.2d at 1056; III AREEDA & HOVENKAMP, *supra* note 142, ¶ 723, at 290–91.

163. *See* III AREEDA & HOVENKAMP, *supra* note 142, ¶ 724d, at 292–93; Goldman, *supra* note 147, at 84–86; William H. Melody, *The Marginal Utility of Marginal Analysis in Public Policy Formulation*, 8 J. ECON. ISSUES 287 (1974).

164. The remedy problem might be alleviated if liability required a showing that prices "greatly exceeded" competitive levels. Relief could then be limited to an injunction prohibiting such pricing. The defendant would not face virtually certain liability. It could legally price anywhere between marginal cost and the cutoff for "greatly excessive" pricing. Nonetheless, practical problems would remain. First, consensus would have to be reached concerning what constituted a greatly excessive price. Second, proving that such a price was reached would be litigation intensive, probably requiring classification and analysis of industry members' costs. Given the possibility, or rather, likelihood of changing demand and costs, enforcement of the injunction would strikingly resemble rate regulation. Third, and most fundamental, there is no basis for such a requirement in the language of § 1 of the Sherman Act.

One possible solution to these problems might be for the Federal Trade Commission ("FTC") to challenge oligopoly pricing as an unfair method of competition under section 5 of the FTC Act. 15 U.S.C. § 45(a)(1) (2008). Section 5 is limited to FTC enforcement and covers acts that violate the spirit or policy of the antitrust laws, even if not specifically within those laws' terms. *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922). The FTC might be trusted to pursue only the most extreme cases. Such an approach would be analogous to the European Union's treatment of monopoly pricing. The Treaty of Rome prohibits a dominant firm from imposing unfair prices, *see* Article 82(a) of the Treaty of Rome (1957), and the European Commission has held the language to preclude excessive monopoly pricing. *See* Michael Gal, *Monopoly Pricing as an Antitrust Offense in the U.S. and the EU: Two Systems of Belief About Monopoly?*, 49 ANTITRUST BULL. 343, 358–59 (2004). However, the difficulty and infrequency of successful prosecution under EC law of monopoly pricing, *see id.* at 367–76, may be reason enough to be less than sanguine about the FTC's ability to regulate oligopoly pricing.

because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy."[165]

*2. The relevance of* Twombly *to the oligopoly problem*

*Twombly* clearly indicates that allegations of parallel prices are insufficient to state a claim.[166] As suggested earlier, the law could not be different.[167] Parallel prices are to be expected in all industries, whether competitive, interdependent, or collusive. However, the opinion is ambiguous as to how to treat parallel pricing at supra-competitive levels or so-called interdependent pricing.

*Twombly* states that *Monsanto* and *Matsushita* "made it clear that neither parallel conduct nor conscious parallelism, taken alone, raise the necessary implication of conspiracy."[168] Those cases, as the Court acknowledged,[169] involved motions for summary judgment post-discovery, not motions to dismiss. Nonetheless, nowhere in the opinion does the Court say that a lesser standard is applicable to the pleading stage. Indeed, the Court implied that interdependence is not sufficient for agreement at the pleading stage when it found the ILECs' decision not to compete as CLECs did not suggest agreement because "a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing [that is, they were acting interdependently]."[170] Also revealing is the Court's citation, with seeming approval, of commentators' examples of parallel conduct allegations that would state a § 1 claim.[171]

165. Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cit. 1988); *accord* Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 50 (7th Cir. 1992). Indeed, this is the reason many commentators suggest that, absent a pro-competitive justification, practices that facilitate interdependent pricing should be illegal whether or not there is agreement. *See, e.g.*, VI AREEDA & HOVENKAMP, *supra* note 142, ¶ 1436a, at 268–70; POSNER, *supra* note 143, at 99; Goldman, *supra* note 147; Hay, *supra* note 147, at 480–81; Lopatka, *supra* note 155, at 906. Such a finding can reduce the incidence of the undesirable supra-competitive pricing and, unlike for oligopoly pricing alone, a remedy is easily defined: don't engage in the facilitating practice.

166. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966 (2007).

167. *See supra* notes 148–49 and accompanying text.

168. *Twombly*, 127 S. Ct. at 1968 n.7. The Court defines conscious parallelism as interdependent decision-making. *Id*. at 1964.

169. *Id*.

170. *Id*. at 1972.

171. *Id*. at 1965 n.4.

Noticeably absent from the commentators' examples is the case of supra-competitive pricing by oligopoly firms.[172] In fact, the two sources cited suggest that interdependent pricing should not be taken as agreement, albeit in the framework of establishing liability rather than surviving a motion to dismiss.[173] Finally, the Court's apparent weighing of evidence and facile dismissal of both the plaintiffs' allegations that the CLECs could be profitable and Notebaert's supporting statement[174] suggest that the Court's intent was to tighten pleading standards for § 1 cases based on assertions of parallel conduct.

On the other hand, *Twombly* can be interpreted as limited to allegations of parallel conduct where the facts alleged make agreement implausible.[175] The Court found that the conduct alleged would logically occur unilaterally, regardless of the actions of competitors.[176] The ILECs had an independent incentive to deter competitors and to avoid non-profitable markets and knew that their fellow ILECs had the same incentives. In this situation, there was no reason to enter into an agreement. By contrast, in the oligopoly pricing setting, allegations of agreement are plausible.[177] Competitors have an incentive to enter into a formal agreement to facilitate supra-competitive pricing and decrease the possibility of cheating.[178] Oligopoly pricing allegations also tend to support a finding of agreement by eliminating the possibility of completely independent behavior.[179] If you believe Judge Posner's and other commentators'

172. *See* VI AREEDA & HOVENKAMP, *supra* note 142, ¶ 1425, at 167–85; Michael D. Blechman, *Conscious Parallelism, Signaling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. SCH. L. REV. 881, 899 (1979).

173. *See* VI AREEDA & HOVENKAMP, *supra* note 142, ¶ 1425, at 167; Blechman, *supra* note 172, at 898.

174. *Twombly*, 127 S. Ct. at 1972–73 & n.13.

175. Plaintiffs traditionally have been required to present more evidence when antitrust claims are implausible. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593 (1986) (citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762–64 (1984)); *In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661 (7th Cir. 2002).

176. *Twombly*, 127 S. Ct. at 1971–73 & n.14.

177. *See In re* Flat Glass Antitrust Litig., 385 F.3d 350, 358 (3d Cir. 2004).

178. *See* VI AREEDA & HOVENKAMP, *supra* note 142, ¶ 1432, at 225.

179. *See In re* Linerboard Antitrust Litig., 504 F. Supp. 2d 38, 53 (E.D. Pa. 2007) (citing *In re Flat Glass Antitrust Litig.*, 385 F.3d at 361). By defining oligopoly pricing as parallel pricing at a supra-competitive level, no competitor would independently, as opposed to interdependently, maintain price at the oligopoly pricing level. At that level, unless

view of the likelihood of interdependence, such allegations are not merely plausible, but strongly suggest agreement.[180] Moreover, where oligopoly pricing is alleged, the costs of discovery deter the undesirable conduct that the law would like to make illegal but cannot due to the absence of an effective remedy.[181] Thus, the cost of discovery, the apparent driving force behind *Twombly*,[182] is of minimal, if any, concern.

### *3. Lower courts' treatment of oligopoly pricing post-*Twombly

In the first six months following the decision, lower courts generally have read *Twombly* broadly to require dismissal of oligopoly pricing cases for failure to state a claim. In a case from the airline industry, *In re Travel Agent Commission Antitrust Litigation*,[183] travel agents sued airlines claiming that they conspired to reduce and eliminate travel commissions between 1995 and 2002.[184] The complaint alleged that the defendants met at industry association meetings and trade shows, as part of joint business ventures, on the golf course, as well as at private meetings, and asserted that agreement was reached "at a time unknown."[185] The complaint detailed a pattern of commission reductions that were announced by the five major airline defendants within a week of each other.[186] The plaintiffs' allegation that the defendants' actions were against their self-interest if acting alone was supported by the testimony of a former executive vice president of one of the defendants.[187] Finally, the complaint also contained details about the industry's history of collusion.[188]

competitors' responses are considered, a competitor would be able to greatly increase its profits by slightly lowering price.

180. *See* POSNER, *supra* note 143 and accompanying text.

181. *See supra* notes 157–64 and accompanying text.

182. *See supra* note 117 and accompanying text.

183. No. 1:03 CV 30000, 2007 WL 3171675 (N.D. Ohio Oct. 29, 2007).

184. *Id.* at *3.

185. *Id.* at *8–9.

186. *Id.* at *3–4.

187. *Id.* at *10. The executive's statement, although eliminating the possibility of competitive conduct, also was consistent with, and in its entirety seemed to suggest, interdependent conduct. *Id.* at *10–11.

188. *Id.* at *11.

The court dismissed the complaint, holding that "*Twombly* requires more than averments of parallel conduct, and 'without some further factual enhancement [the complaint] stops short of the line between possibility and plausibility of entitlement to relief.'"[189] Citing pre-*Twombly* cases decided on summary judgment or directed verdict, the court said, "an opportunity to conspire does not satisfy Plaintiff's burden of proving a price-fixing agreement."[190] It dismissed the statement of the former executive as supporting interdependence, but not agreement.[191] Again citing summary judgment precedent, the court said that "to support an inference of conspiracy, 'evidence of action that is against self-interest must go beyond mere interdependence.'"[192] Finally, relying on yet another summary judgment case, the court dismissed the allegations of a history of collusion because it "does not tend to exclude the possibility that Defendants were engaged in lawful conduct."[193]

Allegations of an oligopoly market behaving poorly were even more powerful in *In re Graphics Processing Units Antitrust Litigation*.[194] Plaintiffs alleged that the two defendants controlled the entire graphic processing unit ("GPU") market[195] and that the market was characterized by upward pricing trends beginning in 2002, while most other consumer electronics experienced downward pricing trends.[196] According to the plaintiffs, the increase in prices occurred despite decreases in the price of the component parts of GPUs and excess industry capacity.[197] They further alleged that the defendants met secretly at trade conferences and agreed to coordinate the timing of the release of new products and fixed the price of competing products.[198] The complaint contained details of the industry meetings, the dates the new products were introduced,

189. *Id*. at *9 (quoting Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966 (2007)).

190. *Id*. (citing Petruzzi's IGA Supermarkets, Inc., 998 F.2d 1224, 1242 n.15 (3d Cir. 1993); Weit v. Cont'l Ill. Nat'l Bank, 641 F.2d 457, 468–69 (7th Cir. 1981)).

191. *Id*. at *11.

192. *Id*.

193. *Id*. (quotation omitted).

194. 527 F. Supp. 2d 1011 (N.D. Cal. 2007).

195. GPUs process and display computer graphics, including graphics for three-dimensional and video applications. *Id*. at 1013–14.

196. *Id*. at 1014.

197. *Id*.

198. *Id*.

and the announced prices at their introduction.[199] Finally, the plaintiffs alleged that releasing products simultaneously rather than rushing to release next generation products before its competitor was contrary to both expectations in a competitive technology market and prior practice.[200] Both defendants also were the subjects of a criminal investigation conducted by the Antitrust Division of the Justice Department.[201]

Despite an agreement being obviously plausible in a literal sense, the court granted the defendants' motion to dismiss.[202] The court said that the "Plaintiffs' allegations of parallel conduct could possibly be indicative of a conspiracy, but [fell] short of unusual, lockstep pricing behavior."[203] The court found that there were innocent explanations for the defendants' parallel conduct: price similarity of similar products was to be expected, and the timing of release of new products may have been dictated by the original equipment maker's (the buyers of the defendants' products) product cycle.[204] Alternatively, the court reasoned, a competitor might delay a product release to maximize revenue on older products, "with the delay lasting until [its] hands are forced by the competition."[205] The court also thought the defendants' behavior could be the result of conscious parallelism, which the court said was legal.[206] The court, relying on a summary judgment case, said that the opportunities to agree at the plethora of industry meetings attended by both

199. *Id*. at 1014–18.

200. *Id*. at 1014, 1017.

201. *Id*. at 1017–18.

202. The court left open the possibility of amendment if the plaintiffs could provide additional detail about prior practice to demonstrate "'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason.'" *Id*. at 1019–20, 1024 (quoting Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 n.4 (2007)). The plaintiffs added allegations regarding defendants' behavior *before* the alleged conspiracy began; pleaded more specific information regarding the economics of the GPU market and the timing of defendants' product releases during the period that the conspiracy had allegedly occurred; and claimed that after defendants learned of the criminal investigation by the Antitrust Division, they started to release products at different times and at different prices. *Id*. at 1011. The court found the amended complaint sufficient to withstand a motion to dismiss. *Id*.

203. *Id*. at 1022.

204. *Id*.

205. *Id*. at 1023 (citing *In re* Citric Acid Litig., 191 F.3d 1090, 1098 (9th Cir. 1999)).

206. *Id*. at 1023 n.6. The Court did not provide a citation for its statement that conscious parallelism is legal, but relied on a summary judgment case for its description of conscious parallelism as interdependent pricing in an oligopoly market. *Id*.

defendants were not a basis from which to infer conspiracy.[207] Finally, the Court dismissed the Justice Department investigation as meaningless, saying that the scope of the investigation was pure speculation and the Justice Department ultimately might decide not to prosecute.[208]

The sole Court of Appeals decision to decide an oligopoly pricing case in the first six months post-*Twombly*, *In re Elevator Antitrust Litigation*,[209] produced a similar result. In that case, plaintiffs alleged that the defendants conspired to fix prices and eliminate competition in the global market for the sale and servicing of elevators beginning as early as 2000 and continuing to the present.[210] The complaint asserted that the top four defendant sellers controlled approximately seventy-five percent of the elevator industry in the United States, an industry with high barriers to entry; the defendants' executives had ample opportunity to meet at industry, trade association and social functions; and defendants issued standard price lists and contracts for maintenance and repairs of elevators, which included similar, if not identical, language and terms.[211] Still, the Second Circuit affirmed the district court's dismissal without leave to amend.[212] The court found the allegations of agreement too conclusory and viewed the similarities in contractual language, pricing, and equipment design, while consistent with conspiracy, as equally explainable as the result of legitimate conduct.[213] The court reasoned:

> Similar contract terms can reflect similar bargaining power and commercial goals (not to mention boilerplate); similar contract language can reflect the copying of documents that may not be secret; similar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy; and similar equipment design can reflect the state of the art.[214]

207. *Id*. at 1023 (citing *In re Citric Acid Litig*., 191 F.3d at 1098).

208. *Id*. at 1024.

209. 502 F.3d 47 (2d Cir. 2007).

210. Complaint, ¶¶ 41, 61, *In re* Elevator Antitrust Litig., 2005 WL 3736019 (S.D.N.Y. July 19, 2005).

211. *Id*., ¶¶ 46–47, 49.

212. *In re Elevator Antitrust Litig*., 502 F.3d at 47.

213. *Id*. at 50–51.

214. *Id*. at 51.

The court viewed the detailed collusion in Europe as carrying no weight absent more than conclusory allegations of a linkage between the foreign conduct and the United States market.[215]

*4. The flaws of the post-*Twombly *oligopoly pricing cases*

Whether or not these lower court decisions dismissing oligopoly pricing cases represent a reasonable interpretation of *Twombly*, they suffer from several common flaws that were made possible by *Twombly*'s lack of clarity: (1) these decisions apply summary judgment case law on a motion to dismiss; (2) the summary judgment standard they apply is an improper interpretation of Supreme Court precedent; and (3) they analyze individual allegations rather than the allegations as a whole. The consequence is not merely to insulate interdependent pricing, but to drastically diminish the ability of private attorney generals—civil case plaintiffs—to enforce the laws against actual price fixing.

*a. Reliance upon summary judgment case law. In re Travel Agent Commission Antitrust Litigation*,[216] *In re Graphics Processing Units*

215. *Id*. at 52. Two oligopoly pricing cases post-*Twombly* denied a motion to dismiss. In one, the complaint contained very specific allegations of communications between defendants to fix prices. *See In re* Rubber Chemicals Antitrust Litig., 504 F. Supp. 2d 777, 790 (N.D. Cal. 2007). However, in the other case the court found the complaint sufficient to withstand a motion to dismiss despite the defendants' contention that their allegedly parallel conduct was "natural" given the market conditions. *See In re* OSB Antitrust Litig., No. 06-826, 2007 WL 2253419, at *4 (E.D. Pa. Aug. 3, 2007). That decision might support the narrow reading of *Twombly*, that allegations of interdependent, as opposed to independent, conduct are sufficient to state a § 1 claim. The complaint contained many of the same allegations as in the above-described cases. *See supra* notes 183–212 and accompanying text. The complaint alleged that the nine defendants together controlled ninety-five percent of the market; the market leader announced mill shutdowns to reduce capacity despite increasing demand; the remaining defendants followed suit; prices were fixed through the use of a twice-weekly published price list by an industry periodical; and the result of this conduct was mammoth increases in prices. *In re OSB Antitrust*, 2007 WL 2253419, at *3. Plaintiff also included conclusory allegations of price fixing and price fixing discussions at industry meetings and a description of prior price fixing by these defendants in a related industry. *Id*. at *5; *In re* OSB Antitrust Litig., No. 06-CV-00826, 2006 WL 4025236, ¶ 103 (E.D. Pa. Dec. 12, 2006). Nonetheless, the complaint contained one additional allegation that seems to provide greater support for an inference of agreement. Plaintiffs alleged the defendants bought the product from competitors despite being able to manufacture it themselves at lower cost. *See In re* OSB Antitrust, 2007 WL 2253419, at *3. Purchases from competitors, combined with the parallel reductions in capacity, are suspicious, *see, e.g.*, *In re* Linerboard Antitrust Litig., 504 F. Supp. 2d 38, 42 (E.D. Pa. 2007), and provide a level of cooperation that supports a pre-existing understanding, if not a formal agreement.

216. No. 1:03-CV-3000, 2007 WL 3171675 (N.D. Ohio 2007).

*Antitrust Litigation*,[217] and *In re Elevator Antitrust Litigation*[218] rely on summary judgment case law to dismiss the significance of opportunities to agree or a prior history of collusion. Moreover, they appear to require allegations that tend to exclude the possibility of independent action,[219] which is the standard the Supreme Court established for summary judgment in *Monsanto Co. v. Spray-Rite Service Corp.*[220] and *Matsushita Electric Industrial Corp. v. Zenith Radio, Corp.*[221] The courts err by assuming that the standard for a motion to dismiss is, or should be, the same as the standard for a summary judgment. That assumption is contrary to the purposes of pleadings, discovery and summary judgment, Supreme Court precedent, and sound policy.

A primary purpose of discovery is to develop information. Accordingly, to demand the same level of facts pre- and post-discovery makes no sense. This is especially true in price fixing cases. Agreements to fix prices are per se illegal and, therefore, evidence of agreement is not likely to be public. The Court, specifically recognizing this asymmetry of information, has said, "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly."[222]

Unlike on summary judgment, if an oligopoly pricing case is prematurely dismissed, the error cost may not be merely allowing interdependence or unproven collusion to go uncontested, but permitting explicit price fixing that could be proven to go unpunished. On summary judgment, evidence of a prior history of collusion merely suggests that if the defendants reached agreement before, they may have done it again. No reasonable jury could find for the plaintiff on such evidence. At the pleading stage, in oligopoly pricing cases, the same suggestion makes agreement "plausible" and,

217. 527 F. Supp. 2d 1011 (N.D. Cal 2007).

218. 502 F.3d 47 (2d Cir. 2007).

219. *See id.* at 50–51; *In re Travel Agent Comm'n*, 2007 WL 3171675, at *11; *In re Graphics Processing Units*, 527 F. Supp. 2d at 1020.

220. 465 U.S. 752 (1984).

221. 475 U.S. 574 (1986).

222. Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746 (1976) (quoting Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962)).

given the information asymmetry, creates a "reasonably founded hope that the [discovery] process will reveal relevant information."[223]

Under the federal rules, the purpose of the pleadings is to provide notice.[224] Summary judgment is designed to eliminate claims lacking merit.[225] Indeed, the Court has suggested that a more rigorous summary judgment standard is appropriate, given the liberal notice pleading rules.[226] By implication, this means that the two standards cannot be the same. The Court has held as much, albeit in the Title VII context.[227]

The error costs of a false positive in antitrust cases also recommend application of different standards. If a motion to dismiss is mistakenly denied, the defendant faces only the costs of discovery, and perhaps not even that. It is possible that a 12(e) motion for a more definite statement can make evident the complaint's lack of merit,[228] or that the defendant can submit affidavits or other documents to obtain an early summary judgment.[229] If a motion for summary judgment is wrongly denied, the defendant faces the costs of trial and a possible judgment for treble damages and attorneys' fees.[230]

*b. The improper summary judgment standard*. The lower courts that apply a summary judgment standard on a motion to dismiss compound their error by misapplying the Supreme Court's standard. The two Supreme Court decisions that developed the summary judgment standard for agreement in antitrust cases are *Monsanto Co. v. Spray-Rite Service Corp.*[231] and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[232]

(1) The Supreme Court cases. In *Monsanto*,[233] a discounting distributor brought suit against a manufacturer for terminating its

223. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007). The same can be said about opportunities to agree.

224. *Id*. at 1964 (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)); Swierkiewicz v. Sorema, 534 U.S. 506, 513 (2002).

225. *Swierkiewicz*, 534 U.S. at 514.

226. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

227. *See Swierkiewicz*, 534 U.S. at 506.

228. *See* FED. R. CIV. P. 12(e), 56.

229. *See* FED. R. CIV. P. 56.

230. *See* 15 U.S.C. § 15 (2008).

231. 465 U.S. 752 (1984).

232. 475 U.S. 574 (1986).

233. 465 U.S. 752.

distributorship. The plaintiff alleged that its termination, following complaints from rival distributors about the plaintiff's price-cutting, constituted a conspiracy to fix resale prices in violation of § 1 of the Sherman Act.[234] The court of appeals affirmed a jury decision for the plaintiff, finding that "proof of termination following competitor complaints is sufficient to support an inference of concerted action."[235] Although affirming the judgment, the Supreme Court rejected this standard of proof.[236] The Court agreed with the petitioner manufacturer that complaints about price-cutters are "natural" and "unavoidable."[237] Therefore, to permit the inference of concerted action based upon such complaints alone would rob the manufacturer of its right to choose with whom to deal and would unfairly subject it to treble damage liability for exercise of its independent business judgment.[238] The Court instead held that to submit a case to a jury in distributor-termination litigation "there must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently."[239]

This language was repeated in *Matsushita*.[240] In that case, American manufacturers of television sets sued their Japanese counterparts. They alleged that twenty-one Japanese manufacturers conspired to fix low predatory prices in the United States and subsidized those prices by fixing high prices on sets sold in Japan.[241] The Court began by eliminating the possibility of recovery for cartelization of the Japanese market, recognizing that American antitrust laws do not regulate competitive conditions in foreign economies.[242] Thus, the issue for the Court became whether the

234. *Id.* at 757–59. The plaintiff also alleged that the manufacturer's adoption of compensation programs and shipping policies and encouragement of distributors to boycott the plaintiff were in furtherance of the alleged conspiracy. *Id.* at 757.

235. Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1238 (1982), *aff'd*, 465 U.S. 752 (1984).

236. *Monsanto*, 465 U.S. at 759.

237. *Id.* at 763.

238. *Id.* at 761–64.

239. *Id.* at 764.

240. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

241. *Id.* at 578.

242. *Id.* at 582 (citing United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945)); I PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 236d (1978)).

plaintiffs submitted sufficient evidence of a conspiracy to predatory price in the United States to submit the case to the jury. The Court, citing *Monsanto*, stated that "antitrust law limits the range of permissible inferences from ambiguous evidence in a section 1 case. . . . [C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."[243] Rather "to survive a motion for summary judgment . . . a plaintiff . . . must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."[244] Given the implausibility of a two-decade predatory pricing conspiracy where "the prospects of attaining monopoly power" appeared slight,[245] the Court concluded that the plaintiff's evidence did not meet its burden.[246]

(2) Lower courts' improper application of the "tends to exclude" language. The lower court decisions post-*Twombly* have found that allegations do not tend to exclude the possibility of independent action if conduct can be explained by independent business reasons. Thus, in *In re Graphics Processing Units Antitrust Litigation*,[247] the district court dismissed allegations that shortly after trade shows the defendants delayed the release of new products or released products at approximately the same time and price as explainable by OEM product cycles and specifications.[248] Similarly, in *In re Elevator Litigation*,[249] the district court viewed similarities in contractual language, pricing, and equipment design as explainable by similar bargaining power, copying of documents, competition, and the state of the art in design.[250] Requiring dismissal when challenged business conduct can be explained by independent business reasons has support in some courts of appeals' summary judgment decisions.[251] Nonetheless, as explained below, those

243. *Id*. at 588 (citing *Monsanto*, 465 U.S. 752).

244. *Id*. (citing *Monsanto*, 465 U.S. at 764).

245. *Id*. at 590.

246. *Id*. at 587–91.

247. 527 F. Supp. 2d 1011 (N.D. Ca. 2007).

248. *Id*. at 1021–23.

249. 502 F.3d 47 (2d Cir. 2007).

250. *Id*. at 51.

251. *See In re* Baby Food Litig., 166 F.3d 112, 127 (3d Cir. 1999); *In re* Citric Acid Litig., 191 F.3d 1090, 1094–95 (9th Cir. 1999). Some courts also will grant summary judgment when the inferences of agreement and interdependence are in equipoise. *See*

decisions are not a proper interpretation of summary judgment standards.[252] Courts have repeatedly held that there is a "genuine" issue of fact precluding summary judgment if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[253] To the extent a lower court's summary judgment test requires a plaintiff to do more than present evidence showing a genuine issue of material fact,[254] it is plainly inconsistent with Rule 56. Moreover, in deciding whether a reasonable jury could decide for the nonmoving party, a court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.[255] Courts are specifically admonished not to "weigh the evidence" or try to "determine the truth of the matter."[256] Those courts granting summary judgment when circumstantial evidence is as consistent with conspiracy as with independent action[257] violate these basic principles. To the extent courts require a plaintiff to exclude the possibility of independent conduct,[258] those courts not only do not consider the evidence in the light most favorable to the plaintiff, but they stand the "reasonable jury" standard on its head. To survive summary judgment in those courts, a plaintiff must prove that all reasonable juries would decide

Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1301 (11th Cir. 2003); Blomkest Fertilizer, Inc. v. Potash Corp., 203 F.3d 1028, 1032 (8th Cir. 2000).

252. *See infra* notes 247–75 and accompanying text. *See also In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 655–56 (7th Cir. 2002); *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 439 (9th Cir. 1990).

253. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); *see also* Rodgers v. Monumental Life Ins. Co., 289 F.3d 442, 448 (6th Cir. 2002); Logan v. Commercial Union Ins. Co., 96 F.3d 971, 978 (7th Cir. 1996); MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437, 1440 (10th Cir. 1996); Yerdon v. Henry, 91 F.3d 370, 374–75 (2d Cir. 1996).

254. *See, e.g.*, *In re Citric Acid Litig.*, 191 F.3d at 1094–95.

255. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); *Rodgers*, 289 F.3d at 448; *In re Baby Food Litig.*, 166 F.3d at 124; *Logan*, 96 F.3d at 978; *MacDonald*, 94 F.3d at 1440; *Yerdon*, 91 F.3d at 375; *see also* Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987) ("[W]hile some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible, it is evident that the question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at a trial.").

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

257. *See, e.g.*, Williamson Oil Co. v. Phillip Morris USA, 346 F.3d 1287, 1300–01 (11th Cir. 2003); Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028, 1032 (8th Cir. 2000); *In re Citric Acid Litig.*, 191 F.3d at 1095 (discussing Richards v. Neilsen Freight Lines, 810 F.2d 898, 903–04 (9th Cir. 1987)).

258. *See, e.g.*, *Williamson Oil Co.*, 346 F.3d at 1300; *Blomkest*, 203 F.3d at 1036; *In re Citric Acid Litig.*, 191 F.3d at 1096; *In re Baby Food Litig.*, 166 F.3d at 124.

in its favor or that the plaintiff itself is entitled to summary judgment. In effect, these courts take the issue of agreement, a fact question for the jury, and turn it into a question of law.

(3) *Monsanto* and *Matsushita* properly understood. Rather than follow, as opposed to merely give lip service to,[259] the traditional summary judgment principles, lower courts rejecting oligopoly pricing cases rely upon statements from *Monsanto*[260] and *Matsushita*.[261] Understood in context, however, these two cases do not support those courts' position.

The Court in *Monsanto* recognized that in virtually every case in which a discounting distributor is terminated complaints from competing distributors would have preceded the termination.[262] Therefore, proof of termination following complaints had no tendency to prove that the termination was the result of conspiracy. Moreover, to allow a jury to find agreement based upon termination following complaints alone would rob the manufacturer of its right to independently choose to terminate a distributor with which it was unhappy.[263] Given that a manufacturer may have a pro-competitive reason to terminate a distributor in a vertical restraint case such as *Monsanto*, the Court demanded that a plaintiff's evidence "tend[ ] to exclude the possibility . . . [of] acting independently," that is, have some tendency to distinguish independent action from conspiracy.[264] Accordingly, the case stands for nothing more than the proposition that evidence that will exist in every case, whether or not there is agreement, cannot support an inference of agreement, especially when the effect of such an inference would be to discourage potentially beneficial conduct.

The mistake lower courts and several commentators[265] make is to require evidence that has more than a "tendency" to exclude

259. *See, e.g.*, *In re Baby Food Litig.*, 166 F.3d at 124. It is not uncommon for courts to recite summary judgment principles in "catechistic" fashion and then ignore them. *See* Arthur Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1092 (2003).

260. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

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

262. *Monsanto*, 465 U.S. at 763.

263. *See id.* at 764.

264. *Id.*

265. *See, e.g.*, Roger Blair & Jill Herndon, *Inferring Collusion from Economic Evidence*, 15 ANTITRUST 17, 19 (Summer 2001); David Meyer, *The Seventh Circuit's High Fructose Corn*

independent conduct. By requiring plaintiffs to negate defendants' independent business justifications,[266] the courts read the "tends to" requirement out of *Monsanto*'s often-quoted instruction. This not only ignores the rule against weighing evidence on a motion for summary judgment,[267] but effectively limits plaintiffs to proving agreement solely based on direct evidence.[268] Circumstantial evidence, by definition, allows for more than one possible inference.[269]

*Matsushita* also cannot support the decisions dismissing oligopoly cases whenever there is a rational justification for the defendants' conduct. In *Matsushita*, the Court was reluctant to find agreement based on ambiguous evidence for two reasons: (1) the Court found the allegations of a conspiracy to engage in predatory pricing for more than two decades highly implausible[270] and therefore imposed a higher burden of proof upon the plaintiff;[271] and (2) the Court believed that an improper finding of illegality would discourage competitive pricing—just the type of behavior that the antitrust laws were designed to further.[272] As an allegation of price fixing in an oligopoly is almost always plausible and an erroneous finding of illegality generally would not discourage pro-competitive conduct, *Matsushita* does not require that there be a heavy burden of proof on plaintiffs trying to avoid summary judgment in oligopoly pricing cases. Indeed, in *Eastman Kodak Co. v. Image Technical Services, Inc.*,[273] the Court specified that *Matsushita* "did not

*Syrup Decision—Sweet for Plaintiffs, Sticky for Defendants*, 17 ANTITRUST 67, 69–72 (Fall 2002).

266. *See supra* notes 247–58 and accompanying text.

267. *See supra* note 254 and accompanying text.

268. *See In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 906 F.2d 432, 439 (9th Cir. 1990) (stating that "such an interpretation of *Matsushita* would seem to be tantamount to requiring direct evidence of conspiracy").

269. *See id.*; s*ee also* Daniel P. Collins, Note, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491, 500 n.53 (1988).

270. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588–92 (1986). The Court noted that there was "a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* at 589. Given that consensus, the Court concluded that plaintiffs' allegations that twenty-one defendants would agree to sell products below cost for over two decades, without any guarantee of capturing market share or likelihood of recouping losses, were spurious. *See id.* at 597–98.

271. *Id.* at 587.

272. *Id.* at 593–94.

273. 504 U.S. 451 (1992).

introduce a special burden on plaintiffs facing summary judgment in antitrust cases" or entitle a defendant to summary judgment whenever it "enunciates [an] economic theory supporting its behavior."[274] Rather, "*Matsushita* demand[ed] only that the nonmoving party's inferences be reasonable in order to reach the jury. . . . If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor. . . ."[275] Obviously, if *Matsushita* and *Monsanto* don't support entry of summary judgment when the defendant can provide an innocent explanation for its behavior, they definitely do not mandate dismissal on a 12(b)(6) motion.

(4) Policy benefits of the "reasonable jury" standard in oligopoly pricing cases. The benefits of applying the "reasonable jury" standard to determine if the issue of agreement should be submitted to a jury are not limited to consistency with traditional summary judgment principles and the proper interpretation of *Monsanto* and *Matsushita*. Rather, the reasonable jury standard will eliminate some of the worst types of violations. In price fixing cases, to avoid per se treatment, the defendants will either try to justify their behavior as pro-competitive or deny that there was an agreement to fix prices. As a practical matter, it is difficult to argue both credibly. Thus, in cases where agreement is the issue, the conduct involved generally can be presumed unjustifiable and unambiguously anti-competitive. Under-deterrence in such cases, as exists under the improper summary judgment standard, carries an

274. *Id*. at 468.

275. *Id*. at 468–69; *see also In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 906 F.2d 432, 439 (9th Cir. 1990) ("Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct. . . . [S]uch an interpretation of *Matsushita* would seem to be tantamount to requiring direct evidence of conspiracy. This cannot be what the Court meant in *Matsushita*. Since direct evidence will rarely be available, such a reading would seriously undercut the effectiveness of the antitrust laws."). *Matsushita*, however, does explain why a lenient attitude toward submission of plaintiffs' evidence to the jury in oligopoly pricing cases should not significantly affect the finding of agreement in non-oligopoly markets. *Matsushita* teaches that the less plausible the allegations of conspiracy, the more evidence required for submission of the case to a jury. The "implausibility of a scheme [also] will reduce the range of inferences that may permissibly be drawn from ambiguous evidence." Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987). If the market is not conducive to collusion or appears to be performing competitively, as will often be the case in non-oligopoly markets, more will be required of the plaintiff before the case is submitted to the jury.

especially harmful error cost. To the extent courts apply a more lenient standard for submission of an oligopoly pricing case to the jury, oligopolists also will be more reluctant to enter into price fixing agreements in the first place. Thus, price fixing in cases in which no evidence of agreement would be found, also can be deterred.

Admittedly, the more lenient "reasonable jury" standard will have its own error costs. Some juries will find the defendants guilty of conspiracy when, in fact, they only acted interdependently. There also will be the costs of trial in those cases which would not survive summary judgment under the majority approach but do not result in any finding of liability. Nonetheless, these costs are not significant. If, as suggested earlier,[276] interdependence is legal not because it is desirable, but merely because remedy is not feasible, the former error cost is not a cost at all, but a benefit. In this context, remedy is definable. Damages can be assessed for the overcharge (measured as in any other price fixing case) and defendants can be instructed either not to have excessive prices[277] or to refrain from the additional conduct that formed the basis of a finding of agreement.[278] The cost of trials that do not result in liability probably should not be considered an error cost of the proper summary judgment standard as much as an expense of having a right to trial by jury.[279] After all, this cost could be completely avoided if every case were decided by the judge on summary judgment. In any event, given the uncertainty of trial and the fact that damages are based upon the amount of the overcharge, plaintiffs most likely will bring price fixing claims only when prices are substantially supra-competitive. In such cases, a jury is more likely to find liability, and even if they do not, the costs of trial would be an additional deterrent to oligopolists who desire to adopt truly excessive prices.[280] In short, even if courts were to apply

276. *See supra* note 164.

277. Unless prices were clearly excessive, plaintiffs are unlikely to sue given the costs of suit, the uncertainty of prevailing, and minimal possible damages. Thus, defendants would not face the twin risks of predatory pricing liability or violating a court injunction as under Judge Posner's proposal to find all tacit agreement illegal. *See supra* notes 162–65 and accompanying text.

278. If the conduct that gave rise to the finding of agreement is pro-competitive, a higher burden should be placed on the plaintiff to convince a court that a reasonable jury could find a conspiracy to fix prices. *See supra* text accompanying notes 263, 272.

279. *See* U.S. CONST. amend. VII; *see also* Miller, *supra* note 259, at 1092–93.

280. One potential problem with the liberal application of the "reasonable jury" standard is that some courts might allow cases to go to the jury in non-oligopoly pricing cases based

the same standard on motions to dismiss as on summary judgment, the proper standard would be the reasonable jury standard. Plaintiffs should not be required to exclude all innocent explanations for the defendants' conduct.

*c. Compartmentalizing allegations.* If applying summary judgment standards on a motion to dismiss and following those courts that apply the wrong summary judgment standard was not error enough, lower courts dismissing oligopoly cases for failure to state a claim make the plaintiff's burden nearly impossible by evaluating the plaintiff's allegations individually, rather than as a whole. Absent direct evidence of agreement, the smoking-gun-of-illegal-conspiracy, a single piece of evidence is unlikely to support a finding of agreement by itself. "Thus it is essential to consider all of the evidence proffered to determine whether it is sufficient to withstand a motion [to dismiss.]"[281] As Judge Posner stated in the context of summary judgment motions:

> [One] trap to be avoided . . . is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment. It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise [there would never be a] need . . . for a trial."[282]

For example, an identification is not very good if it is solely based on the perpetrator being six feet tall. Too many people are six feet tall. Similarly, it is not a very good identification to identify a suspect based solely on the perpetrator weighing over 300 pounds, or having red hair, or wearing glasses, or having a mustache. Yet an identification based on the combination of all these factors is a fairly

upon the same threshold of evidence as found sufficient in oligopoly pricing cases. This could result in erroneous findings of liability when the defendants' conduct was truly independent (not just interdependent). That would be a very real cost. However, that possibility is not an error cost of using the proper standard as much as an error cost of improper interpretation of Supreme Court precedent. As suggested earlier, in non-oligopoly markets and markets performing competitively, courts, following the teachings of *Matsushita*, should impose upon plaintiffs a much heavier burden of proof to establish that a reasonable jury could find agreement. *See supra* note 275.

281. *See* Cosmetic Gallery, Inc. v. Schoeneman Corp., 495 F.3d 46, 52 (3d Cir. 2007).

282. *In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 655 (7th Cir. 2002).

good identification. It is precisely for this reason the Supreme Court has admonished that "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."[283] The lower courts dismissing oligopoly pricing cases have failed to heed this advice.

### *5. The consequences of the lower courts' interpretation of* Twombly

Given the lower courts' application of *Twombly*, few private plaintiffs are going to survive a motion to dismiss in cases alleging price fixing in oligopoly markets, unless they are riding on the coattails of a prior government antitrust suit. Direct evidence of agreement is unlikely to be available pre-discovery. Circumstantial evidence, by definition, generally will have some innocent explanation. This is not to say agreement can never be proved. Evidence of reducing output and buying from competitors,[284] submitting identical sealed bids,[285] or engaging in sudden and simultaneous complex action unexplained by external events[286] can support a finding of agreement. However, few competitors are likely to be foolish enough to engage in such "smoking gun" conduct.[287] Thus, the lower court cases dismissing oligopoly pricing cases effectively insulate price fixing agreements, not merely interdependent conduct, from private enforcement.[288]

Eliminating private suits alleging price fixing in oligopoly markets may have been the *Twombly* Court's intent. The Court has

283. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962).

284. *See In re* Linerboard Antitrust Litig, 504 F. Supp.2d 38 (E.D. Pa. 2007); *In re* OSB Antitrust Litig., No. 06-826, 2007 WL 2253419 (E.D. Pa. Aug. 3, 2007).

285. *See* VI AREEDA & HOVENKAMP, *supra* note 142, ¶ 1425a, at 168.

286. *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 n.4 (2007); VI AREEDA & HOVENKAMP, *supra* note 142, ¶ 1425c, at 170.

287. The other bases for finding an agreement suggested by the sources cited by the Supreme Court, *Twombly*, 127 S. Ct. at 1965 n.4, such as furnishing competitors detailed information about one's operations or letters explaining a price cut, *see* Blechman, *supra* note 172, at 899, are likely to require access to the defendants' files.

288. In non-oligopoly markets, markets with too many competitors to explain non-competitive behavior as the result of interdependence, agreement should be easier to prove. In those markets, conduct against the defendants' self-interest will distinguish agreement from independent conduct.

been restricting enforcement of the antitrust laws generally[289] and may have reasoned that government suits remedy the majority of price fixing cases. Given government enforcement, the Court may have concluded that the error costs of a dismissal cannot outweigh the discovery expenses of a wrongful continuation of litigation. Although government resources are limited, the government is likely to target the worst violations. Thus, it is impossible to say that the Court's balance of costs and benefits is wrong. However, such reasoning clearly would be inconsistent with congressional intent to encourage private antitrust enforcement.[290] There also is no excuse for the Court's inability to support its decision with clear reasoning.

## IV. CONCLUSION

Despite the confusing and muddled opinion in *Twombly*, it has not greatly affected pleading practice outside the oligopoly pricing context. Pleading requirements in routine cases appear to be completely unchanged. In complex cases, lower court judges have an increased discretion to demand additional facts. However, they generally have exercised that discretion reasonably by considering the complexity of the case, the availability of an early summary judgment, the ability of the court to structure pre-trial proceedings, the accessibility of more facts before discovery, and the plausibility of the plaintiff's claim.

The Court's lack of clarity, however, has contributed to problematic decisionmaking by lower courts in oligopoly pricing cases. Courts have applied summary judgment standards to the motion to dismiss, have followed case law for summary judgment standards that misconstrues Supreme Court precedent and is inconsistent with the Federal Rules and sound policy, and have improperly compartmentalized plaintiffs' allegations. The result has been to make private suits for price fixing in oligopoly markets

289. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (resale price maintenance); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007) (predatory bidding); Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc. 546 U.S. 164 (2006) (price discrimination).

290. *See* Radovich v. Nat'l Football League, 352 U.S. 445, 454 (1957) ("Congress itself has placed the private antitrust litigant in a most favorable position. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."); *accord* Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982).

virtually unwinnable. This result, although not clearly inconsistent with *Twombly*, is not compelled by it.[291]

Oligopoly pricing costs consumers billions of dollars and results in significant misallocation of resources.[292] The government cannot pursue every potential defendant and reliance on it to do so is plainly inconsistent with Congressional intent to create private attorneys general.[293] It is far better to view the lower courts' interpretation of *Twombly* as improper and to limit *Twombly* to situations where the plaintiffs' allegations are literally implausible. It would have been better still if the Supreme Court made this intention clear in *Twombly*. Hopefully, the Supreme Court will correct the lower courts' errors in the near future.

291. *See supra* notes 265–90 and accompanying text.

292. Fines for prosecution of cases involving the vitamin industry alone exceeded $850 million. *See In re* Vitamins Antitrust Litig., 320 F. Supp. 2d 1, 4 (D.D.C. 2004). Private civil settlements exceeded an additional billion dollars. *See In re* Vitamins Antitrust Class Action, No. 99-197, 1999 WL 1335318, at *1 (D.D.C. 1999).

293. *See supra* note 290.